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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

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### KENTUCKY.

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(xv)†

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THE  
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**SMALLEY v. VOGT. (No. 5251.)**

(Court of Civil Appeals of Texas. San Antonio.  
April 1, 1914. On Motion for Re-  
hearing April 29, 1914.)

**1. FRAUD (§ 41\*)—ACTIONS FOR DAMAGES FOR DEFICIENT ACREAGE—PETITION.**

A petition alleging that defendant, in a sale of land to plaintiff, represented that the tract contained 624 acres; that plaintiff refused to accept it unless it was surveyed; that defendant had it surveyed by the county surveyor; that he and the surveyor represented to plaintiff that it contained 624 acres; that plaintiff paid therefor at an agreed rate per acre; that he had no reason to suspect there was a shortage until he later had it surveyed; that he relied upon the representations of defendant and his agent, the surveyor; that he had a very limited education, and did not know how to calculate the number of acres by the field notes; that, by the fraud of defendant and the surveyor, he was induced to make the trade and lulled into a sense of security as to the acreage; and that there was no other surveyor in the county at the time of the sale—sufficiently alleged defendant's fraud and an excuse for plaintiff's failure to discover the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.\*]

**2. LIMITATION OF ACTIONS (§§ 96, 100\*)—COMPUTATION OF PERIOD—DISCOVERY OF FRAUD.**

In cases of fraud or mistake, when the means of discovery are at hand, diligence must be exercised to discover the fraud or mistake, but the statute does not run until there is some circumstance or fact to arouse suspicion.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 337, 475, 476, 480-493; Dec. Dig. §§ 96, 100.\*]

On Motion for Rehearing.

**3. FRAUD (§ 59\*)—DEFICIENT ACREAGE—MEASURE OF DAMAGES.**

The measure of damages for a vendor's misrepresentation as to the number of acres in a tract of land sold at an agreed price per acre was the amount paid by the purchaser for the number of acres which he failed to get, regardless of the increased value of the other land.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

Appeal from District Court, Calhoun County; John M. Green Judge.

Action by F. J. Smalley against Gus Vogt. From a judgment dismissing the cause, plaintiff appeals. Reversed and remanded.

Wilson & Hamilton, of Port Lavaca, for appellant. W. D. Love, of Uvalde, for appellee.

FLY, C. J. [1] Appellant sued to recover of appellee the sum of \$1,200, alleged to be due by reason of a deficit of 80 acres of land in a tract sold by appellee to him. He alleged that it was represented to him by appellee that the tract contained 624 acres of land, but that appellant refused to accept the tract as containing that number of acres unless appellee had the same surveyed, and appellee secured the services of the county surveyor, and, after the same had been surveyed, both appellee and the surveyor represented to appellant that the tract contained 624 acres of land, and he paid for the same at the agreed rate of \$15 an acre; that he had no reason to suspect that there was a shortage in the land until he had it surveyed in 1913; that he relied upon the representations of appellee and his agent, the surveyor, and believed them to be fair and upright men; that he has very limited education, and did not know how to calculate the number of acres by the field notes; that by the fraud of appellee and his agent he was induced to make the trade, and "he was lulled into a sense of security as to the amount of the land and believed that it contained 624 acres, and he (the plaintiff herein) relied on defendant, Gus Vogt, and his agent, the surveyor." He fully and elaborately alleged his faith and confidence in the representations of appellee and the surveyor, and that there was no other surveyor in Calhoun county at that time. Exceptions were sustained to the petition, and the cause dismissed.

The fraud of appellee was sufficiently set forth in the petition, and the facts which go to excuse appellant in failing to discover the fraud were full and clear enough to carry the case to a jury. The facts show that appellant acted as most, if not all, men would have acted under the circumstances. The business of the world is built upon confidence in the honor and integrity of those with whom we deal. No man, after a tract of

land is surveyed by the seller, has a resurvey of it, when there is nothing to arouse suspicion, and experience teaches us that few men calculate the amount of land by the field notes in their deeds, and the vast majority could not calculate the acreage if they so desired. The allegations present a case of fraud, and do not show laches upon the part of appellant in discovering the fraud. The allegations make a case for a jury, and it should be tried on its merits.

The rule as to laches is clearly set forth by Associate Justice Reese of the First Court of Civil Appeals in *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970. The court said: "It is true that with the means at hand, if he had felt called upon to investigate, he could have discovered the mistake, but there was absolutely nothing to arouse in his mind the slightest suspicion with regard thereto. He had been put in possession by the vendor's agent, from whom he had bought, of the identical ground sold to him, after the delivery of the deed; had been advised that this was the identical land conveyed by his deed; had the lines and corners pointed out; and, under the eyes of the agent and with his knowledge, had erected his fence and planted his trees. Under these circumstances, was he guilty, under the law as laid down in the decisions cited, of such laches as to start the statute to running, in failing to get the plat and his deed and with proper assistance verifying the description in the deed to be sure that there was no mistake? A very cautious and suspicious man might have done so, but the man of ordinary prudence, in looking after his business affairs, would have done as Cherry did under the circumstances."

[2] In cases of fraud or mistake, when the means of discovery are at hand, diligence must be exercised to discover such fraud or mistake; but, in order to start the running of the statute, there must be some circumstance or fact to arouse suspicion. Appellant, in this case, had asked for a survey, and he relied upon his vendor and the surveyor, the agent of the vendor, to make an accurate survey and give him a true and faithful report thereof. The survey was made, and both appellee and his agent reported that the land contained 624 acres. The field notes they gave him, and which were embodied in the deed, called for the meanders of "Chocolate Bayou," without giving the courses and distances contained in such meanders, and no one could accurately calculate the quantity of land contained within such field notes. Nothing but an actual survey of the land could have revealed to appellant the shortage in the acreage. No reasonably prudent man would have made such survey, but would have relied upon the survey and representations of appellee and his surveyor as to the quantity of land. The deed conveys 624 acres of land, and not that

quantity more or less, but appellee and his agent, outside of that recital, assured appellant that there were 624 acres of land. He could not calculate the quantity from the field notes; he was compelled to rely on the representations of two men, in whom he had absolute confidence and trust, and they failed him. The land had been bought by the acre, and the misrepresentations as to the number of acres caused a loss to appellant of \$1,200, if his allegations be true. He should be given the opportunity to prove that they are true.

The cross-assignments are overruled.

The judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

Appellee insists that, under the rules promulgated by the Supreme Court, none of the assignments of error should be considered. Rules were adopted presumably for the protection of the trial and appellate courts; and, while it is a violation of the rules to fail to refer to the page of the transcript where the matter complained of is found, this court, and not appellee, is inconvenienced by it. We believe in a reasonable enforcement of the rules, although it seems to be a hazardous proceeding, in view of the action of the Supreme Court in granting writs of error in several instances where the rules have been flagrantly violated and assignments of error have not been considered because of such infractions. If fundamental error can be predicated on rejected assignments of error which require a scrutiny of the facts, this court is in no position to enforce rules. In the case of *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628, there was but one assignment of error, which in no wise complied with rule or statute, and this court refused to go into the statement of facts to discover errors not indicated in any manner. The Supreme Court granted a writ because a fundamental error had been discovered in the facts. This in the face of the declaration in *Houston Oil Co. v. Kimball*, 103 Tex. 95, 122 S. W. 533, 124 S. W. 85, that fundamental error does not mean an error "which can be ascertained by looking into the record and considering the evidence." Another writ has just been granted in which this court attempted an enforcement of rule 62a (149 S. W. x). *Peden Iron & Steel Co. v. Jaimes* (Civ. App.) 162 S. W. 965. The assignments in this case were all directed to one point, the action of the court in sustaining exceptions to the petition. It was not necessary to name a certain assignment that was sustained. It was sufficient to hold, as we did, that the petition alleged a case that should, if sustained by facts, have been submitted to the jury.

[3] The measure of damages in this case is the amount paid by appellant for the land

which he failed to get. The value of the deficit was \$1,200, and to that sum he is entitled, regardless of the increased value of the other land.

The motion is overruled.

McALLEN et al. v. CRAFTS et al. (No. 5248.)  
(Court of Civil Appeals of Texas. San Antonio.  
March 25, 1914. Rehearing Denied  
April 29, 1914.)

1. ABATEMENT AND REVIVAL (§ 61\*)—DEATH OF PARTY—STATUTORY PROVISIONS.

Rev. St. 1911, art. 1886, providing that if a cause of action survives a suit shall not abate by reason of plaintiff's death, but that the executor, administrator, or heir may appear, and, upon a suggestion of such death, be made plaintiff, and article 1887, providing that, if no such appearance and suggestion be made at the first term *scire facias* shall be issued upon defendant's application for the executor, administrator, or heir to appear and prosecute the suit, failing to do which, the suit may be discontinued, applies only to cases in which there is only one plaintiff.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 314-319; Dec. Dig. § 61.\*]

2. ABATEMENT AND REVIVAL (§ 75\*)—PROCEEDINGS TO REVIEW—SUGGESTION OF DEATH.

Under Rev. St. 1911, art. 1890, providing that where there are two or more plaintiffs and one or more of them die, if the cause of action survive to the survivors, the suit shall not abate by reason of such death, but that, upon suggestion of such death being entered upon the record, the suit, at the instance of either party, shall proceed in the name of the survivors, the suggestion of death and its entry upon the record are conditions upon which any action is permitted by the court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 441, 445-465, 467-482; Dec. Dig. § 75.\*]

3. ABATEMENT AND REVIVAL (§ 61\*)—DEATH OF PARTY—DISMISSAL.

Under Rev. St. 1911, art. 1890, it was improper for the court to dismiss a suit instituted by three plaintiffs, one of whom died pending the suit, without giving the survivors any opportunity to appear and prosecute the suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 314-319; Dec. Dig. § 61.\*]

4. DISMISSAL AND NONSUIT (§ 81\*)—REINSTATEMENT—NOTICE OF APPLICATION.

Where a final judgment was rendered dismissing a cause for want of prosecution, and the term at which it was rendered had ended, the court had no authority to render a judgment denying or granting a motion to reinstate it without reasonable notice of the motion to all of the defendants.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182-192; Dec. Dig. § 81.\*]

5. APPEAL AND ERROR (§ 927\*)—RECITALS IN JUDGMENT.

On appeal from a judgment sustaining exceptions to a motion to reinstate a cause dismissed for want of prosecution, it could not be presumed that all of the defendants were given notice of the motion, where the judgment recited that certain defendants were not served with notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Action by John McAllen and others against Rafaela L. Crafts and others. From a judgment sustaining exceptions to a motion to reinstate the cause after a dismissal for want of prosecution, plaintiffs appeal. Reversed and remanded, with instructions.

See, also, 139 S. W. 41.

J. D. Childs, of San Antonio, and Graham, Jones, West & Dancy, of Brownsville, for appellants. Jno. C. Scott, of Corpus Christi, for appellees.

FLY, C. J. This is an appeal from a judgment sustaining exceptions to a motion for a reinstatement of this cause which had been dismissed at a preceding term of the court for want of prosecution. There were three plaintiffs in the suit, John McAllen, James B. McAllen, and John Young, and about two months prior to the term of court at which the cause was dismissed John McAllen died and no executor or administrator for his estate had been appointed.

[1-3] Articles 1886 and 1887, Revised Statutes, are not applicable to any case except one in which there is only one plaintiff, and they are referred to merely because appellants attempt to apply them to their case. Article 1890 alone applies to cases in which there are two or more plaintiffs or defendants. In article 1890 it is provided: "Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiffs and against the surviving defendants, the suit shall not abate by reason of such death, but, upon suggestion of such death being entered upon the record, the suit shall, at the instance of either party, proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be." We cannot ignore the provision as to the suggestion of death and its entry upon the record, for that is the condition upon which any action is permitted by the court. No such suggestion was made in this case, but the court dismissed a suit instituted by three plaintiffs, one of whom had died after institution of the suit, without giving the survivors any opportunity whatever to appear and prosecute the suit. That action was not justified by the statute.

It is insisted by appellees that there was no final judgment because no notice was given to any of the defendants except Kleiber, and therefore this appeal should be dismissed. If that contention be true, appellants would have the right to appear before the trial court in order to have the judgment made final, and we fail to see what appellees would gain by the dismissal. If the other defendants were not notified, the court should not have sustained demurrers to the petition for reinstatement, but should have

postponed the hearing until notice was given.

[4, 5] There had been a final judgment rendered dismissing the cause, and the term at which it was rendered had ended, and it was absolutely necessary that the defendants should be given reasonable notice of the motion to set aside the judgment and reinstate the cause. *De Witt v. Monroe*, 20 Tex. 289; *Coffee v. Black*, 50 Tex. 117. The motion to reinstate was made as against all of the defendants, and it was fundamental error to entertain the motion before all the parties were notified. We might have presumed that all of them were notified but failed to answer, but we cannot indulge in that presumption, because it is recited in the judgment that Kleiber came, "but defendants Rafaela L. Crafts, John W. Hoert (executor of Welcome A. Crafts, deceased), Pilar Leal, Anastachio Leal, Faustino Villareal, and Eli Elstuar, were not served with notice of said application to set aside judgment and they came not." In order to properly consider the motion to reinstate the cause, all of the defendants should have been notified. The court had no right or authority to render a judgment denying or granting a motion to reinstate.

The judgment will be reversed, and the cause remanded, with instructions to the district court to have the defendants notified of the filing of the motion to reinstate, and upon a hearing of the same apply the law as herein indicated and reinstate the cause.

WOODS et al. v. BALL et al. (No. 5257.)  
(Court of Civil Appeals of Texas. San Antonio. April 8, 1914.)

1. COUNTIES (§ 2\*)—CREATION OF NEW COUNTIES—CONSTITUTIONAL PROVISIONS.

Acts 33d Leg. (1st called Sess.) c. 35, creating Dunn county out of a portion of Duval county held in violation of Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to approach nearer than 12 miles of the county seat of a county from which it may be, in whole or in part, taken.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 2.\*]

2. CONSTITUTIONAL LAW (§ 70\*)—DETERMINATION OF VALIDITY—JUDICIAL AUTHORITY.

The Legislature is not the ultimate arbiter of the constitutionality of its acts, but such authority is lodged in the judicial branch of the government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

3. COUNTIES (§ 12\*)—CREATION OF NEW COUNTIES.

Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to come within less than 12 miles of the county seat of the county from which it may be taken, does not mean that the distance from the new county to the county seat of the mother county shall not be measured in a straight line, and, if any part of the line of the new county is nearer than 12 miles of the county seat, the act is unconstitutional.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 7-9; Dec. Dig. § 12.\*]

Appeal from District Court, Duval County; W. B. Hopkins, Judge.

Injunction suit by John Ball and others against S. H. Woods and others. From an order granting the injunction, defendants appeal. Affirmed.

Hicks, Hicks & Teagarden, of San Antonio, for appellants. Terrell, Walthall & Terrell, of San Antonio, and G. C. Robinson and Dougherty & Dougherty, all of Beeville, for appellees.

FLY, C. J. T. M. Dubose and John Ball, appellees herein, representing themselves as "resident citizens, qualified voters, and owners of real and personal property in that portion of Duval county placed within the county of Dunn under the terms of an act hereinafter mentioned," applied for an injunction against S. H. Woods, county judge of Duval county, E. Carrillo, A. Parr, J. W. Shaw, and J. M. Corkill, commissioners of said county, and the commissioners' court of Duval county, alleging that, during the first called session of the Thirty-Third Legislature (chapter 35), an act was passed to create Dunn county out of a portion of Duval county; that appellants were preparing to divide the county into precincts, and to call an election of officers in said Dunn county, and to locate the county seat; that the act of the Legislature is in contravention of that part of section 1 of article 9 of the Constitution of the state of Texas as follows: "No new county shall be created so as to approach nearer than twelve (12) miles of the county seat of a county from which it may, in whole or in part, be taken;" that it is also in contravention of section 36 of article 3 of said Constitution, as follows: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing: \* \* \* Locating or changing county seat, \* \* \* creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts." It was further alleged "that a point on the north line of Dunn county is eleven and forty-three hundredths (11.43) miles from the county seat, being the unincorporated town of San Diego;" that the courthouse in San Diego is 11.986 miles from a point on the north line of Dunn county, being less than 12 miles from said line. A plat and field notes showing the distances between San Diego and the north line of Dunn county was attached to and made a part of the petition, as well as the field notes of the north line of said county. It was admitted in the answer that the allegations in the petition as to the distances of the north line of Dunn county from the county seat and from the courthouse, as to the plat, survey, and field notes, and as to other material facts, were true, and they were so found by the district

judge, and he also found "that only about six (6) miles along the nearest boundary line between Duval and Dunn counties, as shown by the maps attached to plaintiff's petition, is it less than twelve (12) miles to the nearest point in San Diego, the county seat of Duval county, and an arc with a twelve-mile radius drawn from such point would cut into Dunn county six miles long and one-half ( $\frac{1}{2}$ ) mile wide at its greatest depth." The court held that the act creating Dunn county was violative of section 1, subd. 2, of article 9, and section 56 of article 3 of the state Constitution, and an injunction was granted against appellant to restrain them and their successors in office from dividing Dunn county into precincts, and from holding an election therein; and that the territory sought to be put in the county called Dunn by the Legislature be restored to Duval county.

[1] It is with reluctance that this court entertains an attack upon the constitutionality of a statute enacted by the Legislature of the state, but it is a proposition well established by the American courts that the Legislature is not the ultimate arbiter of the constitutionality of its acts, but such authority is lodged in the judicial branch of the government. The right of judicial censorship over statutes has been often assailed, and not to a greater extent than by the strenuous ex-President of the United States, who has founded a new party, founded, at least in part, upon antagonism to what he denounces as "judicial nullification," and who, as a balm for ills, real or imaginary, would submit the constitutionality of the laws of the Legislature, as well as the decisions of courts, to the plebiscite, who are counseled by him to study the history of France, which gives untrammelled power to the legislative branch of its government; the only right reserved in the French Constitution against usurpation of power and tyranny by the Legislature being the right of revolution. The American conception of government is of a different kind from that of the Frenchman, and we doubt that a citizen of our republic can gain any helpful knowledge of popular government by a study of the French system. Ours is a government in which its attributes and powers have been confided to certain distinct branches, each of which is a check upon the other, with the judicial system as the ultimate resort whenever an attempt is made by any branch of the government to exceed its powers or interfere with the charter of our rights, the organic law of the land. The power intrusted to, or assumed by, the judiciary of passing upon the constitutionality of the acts of other branches of the government has been acquiesced in so long as to become a necessary part of the American system. The power intrusted to the courts has at times, doubtless, been abused, but the remedy is

not in revolution or the adoption of imperfect and undemocratic methods of other governments that have lagged far behind the American government in the progress towards the establishment of popular institutions.

A law cannot be held to be constitutional merely because the Legislature passed it. No one is willing to attribute such infallibility to a Legislature, and the courts should never hesitate to protect from assault the rights secured by the supreme law of the land. As said by Justice Harlan, in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819: "The idea that any Legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

These prefatory words have been written, not because of any doubt of the courts having full right and authority to pass upon acts of the Legislature, but in view of the contention of appellees that, "the Legislature having passed the act, it cannot be inquired into." No man, nor set of men, in America has been clothed with power to do things which cannot be inquired into by some agency of the people, and infallibility of word or action is a status that is conceded to no branch of the government.

[2] It is also insisted that the presumption will prevail that the Legislature acted upon sufficient facts when the law was enacted. Such presumption might prevail in the absence of evidence, but it cannot be expected that this court will indulge in presumption or surmise in the face of the proof that the Legislature, if it had the facts, acted directly against them. We must conclude that the Legislature was not in possession of the facts, or it would not have acted in defiance of the Constitution of the state. But, if the Legislature had the facts, and acted in defiance of them, and created a county "so as to approach nearer than 12 miles of the county seat" of the county from which it was taken. It is vain and useless to talk of infallibility of the Legislature or presumptions in favor of its acts in the face of stern, unrelenting facts that brand the act creating the new county as violative of a plain constitutional

provision. The Constitution does not say  $11\frac{1}{2}$  miles, nor near 12 miles, but that "no new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may, in whole or in part, be taken." If we can hold that such new county can approach 70 feet or 2,640 feet less than 12 miles, we could, with equal propriety, hold that it could approach within 11 or even 10 miles of the county seat. We must enforce the Constitution as we find it, and neither add to nor take away from its words.

[3] Nor can we accede to the proposition that the Constitution meant that the distance from the newly created county to the county seat of the mother county should not be measured in a straight line, but in a tortuous, winding one, so as to cover the shortcomings of the Legislature. The Constitution suggests the "straight and narrow path," and this court will endeavor to walk therein.

There is no Texas decision bearing directly upon the question involved in this case, but similar constitutional provisions have been construed in other states, and the weight of authority strongly sustains the conclusion of this court, in holding that no law creating a new county out of an established one can be valid, unless the nearest approach of the lines of the new county are not within the distance limit prescribed by the Constitution. A review of some of these decisions, to which our attention has been called, will be of interest, and perhaps render more satisfactory the opinion of this court.

In Kentucky the Constitution provides that no county should be established whose boundary line should pass within ten miles of the county seat of the county sought to be divided. The facts in the case of Zimmerman v. Brooks, 118 Ky. 85, 80 S. W. 443, showed that the county of Beckham was created out of portions of three counties, and the boundary line of the new county ran within less than ten miles of the county seat of Carter county, and the creation of said new county also left Carter county with less than the constitutional area. There was a review, by the Kentucky court, of numerous cases, and it was held that parol evidence could be heard as to whether the constitutional area had been lessened by the act, or a boundary line established within less than ten miles of the county seat of one of the parent counties. The court held: "The Legislature, in the creation of new counties, is simply an agency, with well-defined restrictions upon its powers. If it acts in a case where it has no power to act, its act, like that of any other agent beyond the scope of its power, is void. The county whose rights are affected may complain, and so may any taxpayer who is prejudiced, for the taxpayers have a right to insist upon their constitutional protection against the increased burdens which the formation of the new county will entail." The

court, after stating the different constitutional provisions to be complied with in establishing new counties, among the number being that the boundary line of the new county must not pass within less than ten miles of the county seat of any county from which a portion of the territory is taken, held: "If any of these conditions are wanting, the act is in violation of the Constitution, and void."

In the case of Gotcher v. Burrows, 9 Humph. (Tenn.) 585, it was held, in regard to a similar constitutional provision to that in the Texas Constitution: Such a provision is absolutely prohibitory of the power of a Legislature, either in the establishment of a new county, or in taking from one county a portion of its territory and attaching it to another, or in changing the lines of adjoining counties, to approach the courthouse of a county whose territory is taken nearer than the prescribed distance; and, if this prohibition is violated, the court of chancery will restore the old county to its constitutional limits. That enunciation of the law is sustained in Union County v. Knox, 90 Tenn. 254, 18 S. W. 254; McMillan v. Hannah, 106 Tenn. 689, 61 S. W. 1020; Armstrong v. State, 29 Okl. 161, 116 Pac. 772, Ann. Cas. 1913A, 565; Kline v. State, 146 Ala. 1, 41 South. 952; and State v. Ellis, 42 La. Ann. 1104, 8 South. 305.

There was no attempt to vary the calls made by the Legislature, but by a mathematical calculation it appears that the north line of Dunn county is less than 12 miles from the county seat of Duval county. The Legislature is held to a knowledge, as are the courts, of the boundaries of the different counties, and, looking at the boundaries of the new county in the light of the beginning point, the call for the first line northwest about  $37\frac{1}{2}$  miles to the east boundary line of Webb county forms the basis for arriving at the conclusion that the northeast corner of Dunn county and the southeast corner of Duval county on the west boundary line of Jim Wells county where it intersects the north line of Los Ancuas grant is a little over 12 miles from San Diego, and that a line about  $37\frac{1}{2}$  miles long, run northwest, would at certain points necessarily pass within less than 12 miles of San Diego. That it did so is admitted by appellants. Not only was the nearest point of the town of San Diego less than 12 miles from the line of Dunn county, but the courthouse was also less than 12 miles, and, while it may not be necessary to decide whether, in measuring the distance, the line should be run to the courthouse or the outer edge of the town nearest to the line of the new county, that matter has been settled by the Supreme Court in the case of Ralls v. Parrish, 105 Tex. 258, 147 S. W. 564, in which it was held, in connection with the removal of a county seat within the 5-mile radius of the geographical center of the county, that, where

any portion of an unincorporated county seat was situated within the 5 miles, it required two-thirds of the voters to move it, under the provisions of article 811, Revised Statutes of 1895.

The Kentucky case cited, as well as others therein named, have held that, where the power of the Legislature is limited by the Constitution of the state, parol evidence will be received to show that the constitutional restriction has been disregarded by the Legislature. In those cases it was held that the property owner in the territory affected could sue to prevent the organization of the county, and that right is recognized in Texas. *Oden v. Barbee*, 103 Tex. 449, 129 S. W. 602.

Every reasonable presumption should be indulged in support of an act of the Legislature, but presumption cannot exist in the face of fact, and, as the Legislature calls for a line running northwest from the beginning corner to a point on a certain line, that line must necessarily be a straight line, and we cannot presume that the Legislature intended for the line to be run straight until it reached a point where the 12-mile limit was reached, then to curve away from the county seat of the parent county so as to maintain the 12 miles distance, and then curve back into the line called for. The same rules will be applied to a legislative survey as to any other, and it would be preposterous to curve a line in a grant called for as straight. The legislative call is for a line running for  $37\frac{1}{2}$  miles in a certain course, to a certain point, and there is no place for a presumption of a curve in the line. We cannot therefore sustain the proposition of appellants "that it should be presumed that the Legislature intended in its calls for that boundary line that, instead of being a straight line throughout its distance, it should run in a straight line from the beginning point, or northeast corner, until it reached a point 12 miles from the county seat of Duval county, then should curve in an arc 12 miles from the county seat of Duval county, where it would intersect the straight line drawn from the beginning corner to the point on the east boundary line of Webb county called for." That would be drawing too heavily on the law of presumptions to be honored by this court.

The Constitution does not provide that no new county shall be created that approaches nearer than 12 miles along a whole boundary line, but provides that it shall not approach within that distance at any point, and, although Dunn county is less than 12 miles from San Diego, for only 6 miles along its northern border, that is sufficient to bring it within the purview of the Constitution.

We need not discuss the constitutionality of the act under the other provision of the Constitution hereinbefore quoted.

The judgment is affirmed.

## HOLBROOK v. THORNTON.

(Court of Civil Appeals of Texas. Texarkana.  
March 26, 1914.)

APPEAL AND ERROR (§ 1012\*)—REVIEW—FINDINGS OF FACT.

A finding by the trial judge on the weight of the evidence will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by W. B. Thornton against J. C. Holbrook. Judgment for plaintiff, and defendant appeals. Affirmed.

Meador & Davis and M. M. Parks, all of Dallas, for appellant. J. Hart Willis and Spence, Knight, Baker & Harris, all of Dallas, for appellee.

WILLSON, C. J. By their promissory note, in form joint and several, dated January 1, 1912, one George W. Poynter and appellant undertook, 90 days after the date thereof, to pay to appellee or his order \$200 and interest thereon at the rate of 10 per cent. per annum from the date of the note. In the note was a stipulation binding the makers thereof, if it was not paid when due, "to pay all costs necessary for collection, including 10 per cent. attorney's fees." It did not so appear on the face of the note, but the fact was that appellant executed it as a surety merely. Poynter died the latter part of September, 1912, leaving the note wholly unpaid. Afterwards appellee, alleging that Poynter's estate was notoriously insolvent, brought suit against appellant alone, and obtained a judgment against him for the sum of \$256.93, as the amount (principal, interest and attorney's fees) due on the note. In his answer appellant alleged, as a reason why a recovery as sought should not be had against him, that appellee, without his consent, after the note matured, "for a valuable consideration [quoting] extended the time for payment of the said note for a definite period."

The testimony relied on to support this contention was a letter written by appellee to one McCurry on September 24, 1912. In this letter, after expressing sorrow over the death of Poynter, appellee said: "I have a note against him, signed by J. C. Holbrook. \* \* \* The note is due, and is for \$200, drawing interest since January 12th. George (meaning Poynter) said he would pay this off the 15th of next month. I did not need the money, and told him it would be all right." Whether the statement in the letter, if undisputed, would be sufficient to support the contention appellant makes or not, need not be determined; for it was disputed. Appellee testified that as a matter of fact he never agreed with Poynter to extend the time for the payment of the note. "I never did," he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testified, "give George one day of extension of time."

The cause was tried by the court without a jury. Whether appellee, when he made the statement quoted above from his testimony in the record, told the truth or not, was for the trial court to determine. We cannot say his determination of it against appellant's contention was unauthorized, and therefore must affirm the judgment.

### HOLMGREEN v. PERKINS et al.

(Court of Civil Appeals of Texas. San Antonio. Feb. 25, 1914. On Motion for Rehearing, April 22, 1914.)

#### 1. INTOXICATING LIQUORS (§ 30\*)—LOCAL OPTION ELECTIONS—MUNICIPALITY SUBDIVISIONS.

Rev. St. 1911, art. 5715, provides for the holding of local option elections in commissioners' precincts, but provides that, where a school district, city, or town may be composed in part of two or more subdivisions of the county, the right to order and hold an election in such district, city, or town shall not be denied, provided, further, that no city or town shall be divided in holding a local option election for any of the other subdivisions named therein, nor shall any school district which has adopted local option be divided in a subsequent election held for any other of such subdivision covering a part of the territory of such school district. Article 5728 declares that, where prohibition has been carried in any justice's precinct, no election shall be thereafter ordered in any town or city of such precinct until after prohibition had been defeated in a subsequent election ordered and held for such entire precinct. *Held*, that such provisions did not prohibit the holding of a local option election in a commissioner's precinct comprising part of a justice's precinct or any other local option district once established.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 37; Dec. Dig. § 30.\*]

#### 2. INTOXICATING LIQUORS (§ 81\*)—LOCAL OPTION ELECTIONS—CREATION OF NEW COUNTIES—EFFECT.

Const. art. 9, § 1, empowers the Legislature to create new counties out of the territory of existing counties, and article 16, § 20, requires the enactment of a law authorizing the qualified voters of any county to determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. *Held* that, since it is only after a new county is created that the article allowing the holding of local option elections applies to it, where a part of a justice's precinct was taken from a county in which local option was in force, and included in a new county, such change terminated the local option law in so far as it affected the territory carved out of the old county; and hence, after the new county had been organized, and a commissioners' precinct created from a portion of the former justice's precinct so incorporated into the new county, a new local option election was properly held in such commissioners' precinct.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 81.\*]

Appeal from District Court, Jim Wells County; W. B. Hopkins, Judge.

Action by A. F. Holmgreen against W. R. Perkins and others. Judgment for defendants, and plaintiff appeals. Affirmed. Rehearing denied.

John A. Pope and Jas. M. Taylor, both of Corpus Christi, for appellant. I. A. Patton and J. E. Leslie, both of Alice, and Dougherty & Dougherty, of Beeville, for appellees.

**MOURSUND, J.** In 1877 an election was held in justice's precinct No. 3 of Nueces county to determine whether or not the sale of intoxicating liquors should be prohibited in said precinct. A majority voted "for prohibition," and the result was duly declared, and prohibition went into effect; all steps having been taken in accordance with the requirements of law. The Thirty-Second Legislature created Jim Wells county from a part of Nueces county; the part taken including a large part of said justice's precinct No. 3. Jim Wells county was divided into commissioners' precincts in accordance with the directions of the law creating it. Commissioners' precinct No. 1 is carved from that portion of said justice's precinct No. 3 of Nueces county contained in the new county, but does not embrace all of that portion of said justice's precinct No. 3 contained in such new county. In October, 1912, an election was held in such commissioners' precinct No. 1 to determine whether the sale of intoxicating liquors should be prohibited therein, at which election prohibition was carried, and the necessary steps taken and orders adopted to put the law in force. This is a suit brought by appellant against the county judge and county commissioners of Jim Wells county to contest said election.

The trial court concluded that, as said justices' precinct No. 8 had been divided into two portions, one situated in Nueces county, and the other in Jim Wells county, no election could be held in the territory originally composing said precinct, the Legislature having provided no method or means whereby said election could be ordered and held, and that consequently the original local option that existed by virtue of said election of 1877 became of no force or effect, and was repealed. He therefore held the election in commissioners' precinct No. 1 of Jim Wells county to be legal, and entered judgment against contestant.

Appellant's contentions, briefly stated, are as follows: (1) That the election in commissioners' precinct No. 1 was void because not held in the entire territory in which prohibition had been adopted in justice's precinct No. 3 of Nueces county by the election held in 1877. (2) That it was void because not held in all the territory out of said justice's precinct No. 3 embraced within the newly created county of Jim Wells.

The Court of Criminal Appeals, in the case of *Marcaro Sandaval v. State*, 162 S. W. 1148, opinion delivered January 14, 1914, held the election in said commissioners' precinct No. 1 of Jim Wells county valid; the court saying: "It is true that, if no other election had been held in said justice precinct, while it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was a part of Nueces county, and no election had been held in that part of said justice precinct which was cut off and made a part of Jim Wells county, after the latter county was properly organized, prosecutions under the law as put in force in 1877 in said justice precinct would still be in force, and a prosecution could be had in Jim Wells county, if the sale was made in that part of the justice precinct which had been made a part of Jim Wells county. Still we cannot believe the Legislature intended that Jim Wells county, after its organization, could not thereafter, in any of its proper subdivisions, hold an election and put the law in force as it existed at the time of said election, even though the territory embraced therein should be only part of the territory embraced originally in said justice precinct or any other part of the territory cut off from Nueces county. In other words, we are of the opinion that, when the Legislature created Jim Wells county, and it was properly organized, it could then hold a prohibition election in any of its territory authorized by law, and if prohibition carried, and the penalty at the time was different from what it had theretofore been in that part of the original county, such election and law, with the increased penalty, would then go into effect, even though such territory embraced only a part of the same territory where the original election had been held, and that the law by such latter election then put in force would control and supersede such law as theretofore was put in force while the territory was part of the other county."

The effect of this holding is: (1) That by the creation of the new county two districts were formed in which local option remains in force under an election held in the two at a time when they constituted a justice's precinct. (2) That the commissioners' court could legally take part of one of these two districts and make a commissioners' precinct out of it, and hold a local option election therein. (3) That local option law adopted in such commissioners' precinct supersedes the other law in the territory embraced therein. (4) That the old local option law remains in force in that part of the district situated in Jim Wells county not embraced in the commissioners' precinct. It would necessarily follow that a justice's precinct or school district may be carved out of the remaining portion of original justice's precinct No. 3 of Nueces county situated in Jim Wells county, and not embraced in commissioners' precinct No. 1, and local option elections may be held in such other districts.

The election in commissioners' precinct No. 1, had it resulted against prohibition, would not have destroyed the local option existing therein, if it was carried over from Nueces county. See *Ex parte Pollard*, 51 Tex. Cr. R. 488, 103 S. W. 878, and cases cited therein; *Elliott v. State*, 44 Tex. Cr. R. 575, 72 S. W.

837; *Griffin v. Tucker*, 102 Tex. 420, 118 S. W. 635.

The Court of Criminal Appeals, in the *Randall Case*, 50 Tex. Cr. R. 519, 98 S. W. 870, held that no election could be ordered for a commissioners' precinct composed partly of a justice's precinct in which prohibition was already in force; and a reading of the opinion in the *Mills* (46 Tex. Cr. R. 224, 79 S. W. 557) and *Elliott Cases* (44 Tex. Cr. R. 575, 72 S. W. 837) leads us to conclude that prior to the decision in the *Sandaval Case* that court had always adhered to the view that, when prohibition had been adopted in a subdivision, no additional law could be voted therein, except by an election for the whole county. But, according to the *Sandaval Case*, the court has now held that, where local option is in force in a large territory, and subdivisions known to the law are created therein, the law does not prohibit the piling up of prohibition laws upon portions thereof by holding elections in smaller subdivisions contained therein. This holding appears to be justified by the decision of the Supreme Court in the case of *Griffin v. Tucker*, supra, in which the *Randall Case* was disapproved, and the rule announced that the general power given in article 5715 (Statutes 1911) to hold elections in commissioners' precincts, not being qualified by statute to prevent its exercise in precincts in which there were minor subdivisions having local option in force, authorized the holding of elections in a commissioners' precinct composed of two justice's precincts in one of which local option was in effect. The following qualifying clauses are contained in article 5715: "Provided, that where a school district, city or town, may be composed in part of two or more subdivisions of the county, named hereinbefore, the right to order and hold an election in such school district, city or town, shall not be denied; and provided, further, that no city or town shall be divided in holding a local option election for any of the other subdivisions named herein; nor shall any school district which has adopted local option be divided in a subsequent election held for any other of such subdivision covering a part of the territory of such school district."

Article 5726 contains the following proviso: "Nor in any case where prohibition has carried in any justice's precinct shall an election \* \* \* be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct."

[1] These qualifications do not prohibit the holding of an election in a commissioners' precinct composing part of a justice's precinct or any other local option district once established; so it seems, under the ruling of the Supreme Court, such an election as is being considered in this case may be held under the general power given in article 5715.

The Supreme Court did not concede any importance to the fact that in the election considered by it an additional local option law was made effective in territory already under the law, and the fact that such is the effect of the election now being considered by us is therefore entitled to no weight, unless we find that the Constitution or statutes contain provisions which apply to the latter case, and not to the former. The Supreme Court held that the language, "determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits," used in article 16, § 20, of the Constitution, should not be given the effect given in the *Randall Case*, because to do so would enable a smaller precinct, by holding an election, to prevent the larger precinct, for two years, from holding an election, as contemplated by the first part of said article 16, § 20. The size of the subdivision cannot control, because local option might be adopted in a very large justice's precinct, and a very small portion of such precinct be in a commissioners' precinct smaller than such justice's precinct, yet the commissioners' precinct could hold an election, under the reasoning of the court in said case. To hold otherwise would be to deprive the commissioners' precinct of its right to an election; but no such reason can be urged in favor of permitting elections by which the law is again enacted by adopting it in a small precinct situated entirely within a larger one. By refusing to permit such an election, no one would be deprived of any rights. But, under the decision of the Supreme Court, we feel constrained to hold "that the right of each subdivision is given in the same language," and that therefore a subdivision may hold an election even though contained entirely in a larger one, despite the fact that those opposing prohibition have nothing to gain, and those favoring it have nothing to lose. We therefore hold that, if that part of justice's precinct No. 3 of Nueces county embraced within the boundaries of Jim Wells county became a part of the new county as territory in which local option remained in force, such fact would not render invalid the election contested in this suit.

[2] However, we do not agree with the Court of Criminal Appeals in its conclusion that local option was carried into the new county. We think the trial court was correct in holding the election valid because prohibition was not carried into the new county with the territory taken from the old. Article 9, § 1, of the Constitution empowers the Legislature to create new counties out of the territory of existing counties. Article 16, § 20, requires the Legislature to enact a law whereby the qualified voters of any county, etc., may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. The law was enacted. It vests the power of calling such elections in the commissioners' court of the county in

which local option is sought to be put into effect. When a commissioners' court of a county has legally ordered and held an election, local option remains in force in the territory in which such election was held until it is voted out by the qualified voters of the same territory. Under the Constitution, no one else can determine such question for said voters. But we do not think such construction of article 16, § 20, applies until the remainder of the same article applies. It is only after a county is created that the article allowing the holding of local option elections therein applies to such county. It was not intended that the qualified voters of one county could ever make a local law for all or a part of another county. If local option is carried into a new county by virtue of an election held in the old county, a subdivision of a new county may have a local law which the people living in that subdivision did not vote upon themselves, and would not have voted upon themselves had the matter been left to their decision. They would have a law, not adopted by themselves, but jointly by them and the qualified voters of another county. It cannot for a moment be contended that the creation of the county did not affect in any manner the status of justice's precinct No. 3 of Nueces county, and that local option could not be repealed in any part thereof without holding an election in all of it, because, were we to so hold, we would, in effect, hold that a part of the citizens of our state could be deprived of their right to repeal the law. *Ex parte Fields*, 86 S. W. 1022. No provision is made for the holding of an election in such precinct No. 3. It would have to be held in two counties, and no power is given to either to order or hold the same. Nor do we think the Legislature could give such power in view of article 16, § 20, of the Constitution.

We cannot avoid the proposition that the status of the precinct is affected by the creation of the new county. Then the question arises whether it is only to the extent of dividing it into two local option subdivisions, in which local option will be in force until voted out by the qualified voters thereof, or whether the part in the new county is free from the local law. Either holding does away with the rule that the law can only be voted off as it was voted on. We think, however, that said rule does not apply until the conditions exist which authorize its application, namely: That a county is created, and the law adopted therein, under orders by the commissioners' court of said county, and by vote of the qualified voters of the territory in which the election is held.

The power to create a new county implies the power to destroy the old to the extent that its territory is taken for the new county, and such destruction carries with it the local option law adopted therein while it was a part of the old county. We conclude that the local option law was not in force in

Jim Wells county at the time the election in question was ordered, and that therefore said election is valid. In support of this conclusion, we cite the following authorities, none of which are more than merely persuasive: *Clark v. Goss*, 12 Tex. 397, 62 Am. Dec. 531; *Wright v. Adams*, 45 Tex. 138; *State v. Cook*, 78 Tex. 415, 14 S. W. 996; *Galveston v. Posnansky*, 62 Tex. 126, 50 Am. Rep. 517; *People v. Morell*, 21 Wend. (N. Y.) 575; *State v. Donovan*, 61 Wash. 209, 112 Pac. 260.

The judgment is affirmed.

#### On Motion for Rehearing.

We overrule the motion for rehearing because fully convinced that the election is valid on the ground that local option was not carried into the new county with the territory taken from Nueces county. As to the conclusion that, under the holding of our Supreme Court in the *Griffin v. Tucker* Case, an election may be held in a small precinct entirely contained in a larger one in which local option obtains, we have great doubt. We would not so construe the law as an original proposition, and doubt whether the expressions contained in the opinion in said case justify us in assuming that the Supreme Court would so hold. Giving the statute a construction which would not impute to the Legislature the intention to permit the piling up of useless and expensive elections, we think it should be held that an election, cannot be held in a small precinct entirely contained in a large precinct in which local option is in force. Statutes, when the terms used are ambiguous, should be construed so as to avoid absurdity, hardship, or injustice, and to favor public convenience. *Sutherland on Statutory Construction*, § 324. Surely the permitting of elections which there would be little or no inducement for either side to attend would be something which should not lightly be imputed to the Legislature. We therefore base our affirmance upon the ground that the election was held in territory in which there was at the time no local option law in force.

The motion for rehearing is overruled.

#### GALVESTON-HOUSTON ELECTRIC RY. CO. et al. v. STAUTZ.

(Court of Civil Appeals of Texas. San Antonio. April 15, 1914.)

##### 1. EVIDENCE (§ 29\*)—JUDICIAL NOTICE.

Sp. Laws 1909, pp. 601-611, will not be considered by the courts, in the absence of proof of its existence; there being no provision therein making it a public act and requiring the courts to take judicial notice of it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 36, 37, 39, 43-46, 48; Dec. Dig. § 23.\*]

##### 2. TRIAL (§ 194\*)—INSTRUCTIONS—JURY QUESTION.

In an action for damages for injury to plaintiff's sailboat by defendants' failure to lift

a bridge, which they were operating under a contract with the owner, to a sufficient height to permit the vessel to pass, it was error to charge, as a matter of law, that a failure to lift the bridge to a perpendicular position was negligence; that being a jury question.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

##### 3. NAVIGABLE WATERS (§ 20\*)—OBSTRUCTION BY BRIDGE—ACTIONS—EVIDENCE.

In an action for injury to plaintiff's sailboat by defendants' failure to lift sufficiently high a lift bridge maintained by defendants over a part of Galveston Bay, the state of the wind and tide at the time, as well as the character of the vessel, should be considered in determining the questions of negligence and contributory negligence.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

##### 4. EVIDENCE (§ 423\*)—PAROL EVIDENCE—MODIFYING WRITING.

Evidence contradicting a written agreement with respect to whether the liability thereunder was joint or several was properly excluded.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 423.\*]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by Henry Stautz against the Galveston-Houston Electric Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Terry, Cavin & Mills, W. T. Armstrong, and John G. Gregg, all of Galveston, for appellants. Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellee.

FLY, O. J. This is a suit for damages, instituted by appellee against the Galveston-Houston Electric Railway Company, to recover damages alleged to have accrued by reason of the failure of said company to raise the lift bridge on the Galveston Causeway, a structure across Galveston Bay that connects Galveston Island with the mainland. By an amended petition the Gulf, Colorado & Santa Fé Railway Company and the Galveston, Harrisburg & San Antonio Railway Company were also made defendants. A trial by jury resulted in a verdict and judgment for appellee in the sum of \$500.

The causeway from Galveston Island to the mainland has in it a bridge which can be lifted to a perpendicular position so as to leave an open space of 100 feet for the passage of boats. Appellee was the owner of a sailboat, and was desirous of passing through the causeway, and, when he got in 150 or 200 yards of the lift bridge, he blew his horn, and those in charge lifted the bridge until it stood at an angle of about 45 degrees, leaving about 50 feet of the passage-way open. Appellee endeavored to pass through the opening, but failed to do so, and ran his boat into a pier, and damaged it so that it sank in a few moments. Appellee escaped in a small boat.

There was a contract made between Gal-

veston county and appellants, whereby a certain part of the causeway was leased to them for a number of years, in consideration of which lease they agreed, among other things, that they would be liable for all damages from a failure to repair and maintain the causeway and bridge, as well as for all damages to persons. The duty of operating the lift bridge was placed by the contract on the steam and electric railways. The contract was approved by the Railroad Commission of Texas, and in the argument of appellee's counsel it is claimed that it was approved by the Legislature of the state.

[1] No evidence of the legislative approval appears in the statement of facts, but this court is referred to the Special Laws of 1909, pp. 601-611. That act should not be considered in the absence of proof of its existence, there being no provision in the act making it a public one and requiring the courts to take judicial notice of it. *Holmes v. Anderson*, 59 Tex. 481; *City of Paris v. Tucker*, 101 Tex. 99, 104 S. W. 1046. We shall, however, consider the contract as though it had been approved and confirmed by the Legislature, and thereby give it the effect of a public statute. We do this in view of another trial of this cause, when it would be proved, and the claim made that it rendered the act of appellants in not raising the bridge to a perpendicular position negligence per se, and would again justify the court in instructing the jury to that effect.

[2] The duty of lifting the bridge to a perpendicular position whenever those in charge of any vessel, large or small, desired to pass through the opening in the causeway, is not hinted at anywhere in the contract, and, in the absence of any such duty being enjoined upon appellants, it was error to instruct the jury that a failure to lift the bridge to a perpendicular position so as to open the passway for the full 100 feet, etc. As said in the case of *Railway v. Hill*, 71 Tex. 451, 9 S. W. 351: "We have been cited to no case where it has been held competent for the court to charge upon any particular combination of facts as constituting negligence, save when so declared by law." This declaration of the law is sustained by an unbroken line of decisions from *Railway v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, decided in 1876, down to the present time. The provision of law justifying a charge that certain acts constitute negligence must absolutely command or prohibit the doing of the acts, and it cannot be justified on the ground that the defendant has failed to perform certain duties which arise from his relation to the law or the public. For instance, a railroad company is authorized by law to own locomotives and to operate them over its tracks, but a court would not be justified in instructing a jury that it was negligence to operate its trains at a high and dangerous rate of speed, in the absence of a law to that effect.

The mere fact that appellants were authorized to build the lift bridge and to operate it did not compel them, as a matter of law, to lift the bridge to a perpendicular whenever a vessel was passing through. It was a question of fact as to whether it was negligence in appellants to lift the bridge only halfway up for appellee to pass through the causeway. Neither of the parties has deemed it necessary to cite authorities on this subject.

[3] If, under the circumstances attending the passage of the boat through the causeway, it was negligence to lift the bridge only halfway up, and such failure to so lift the bridge was the direct and proximate cause of the disaster, appellee should recover. And, of course, in passing upon the question of negligence of appellants, or the contributory negligence of appellee, the state of the wind and tide and the character of the vessel should be considered by the jury.

The admissions of appellants to the effect that the causeway was opened for traffic some two weeks before the accident, and that the Galveston-Houston Electric Company had, during that time, been operating cars on a regular schedule every hour, precluded the raising of any question as to whether the causeway was still in the hands of an independent contractor.

[4] The contract made the different railway companies jointly liable for damages at the lift bridge. Evidence contradicting the agreement was properly excluded. The authorities cited by appellants have no applicability to the state of facts developed in this case.

For the error indicated herein, the judgment is reversed, and the cause remanded.

## CARTHAGE ICE & LIGHT CO. v. ROBERTS et al.

(Court of Civil Appeals of Texas. Texarkana. March 18, 1914. Rehearing Denied April 9, 1914.)

### 1. MASTER AND SERVANT (§ 82\*)—LIENS—PERFECTION.

Where plaintiff contracted to perform personal services at a yearly wage, and at the expiration of the first year agreed that payment of the balance due him should be deferred, that agreement did not preclude him from acquiring a laborer's lien for services performed during the second period of service.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 128-134; Dec. Dig. § 82.\*]

### 2. APPEAL AND ERROR (§ 909\*)—PRESUMPTIONS.

In an action to perfect a laborer's lien on property which the court found the defendant had taken by legal process, and upon which plaintiff alleged defendant was asserting some lien, it cannot be presumed on appeal that defendant had acquired possession by valid process or had any valid lien, the trial court having found for the full amount of plaintiff's claim, although the time for payment of a part had been extended, and plaintiff's allegations as to

defendant's assertion of a lien having been traversed by defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3875; Dec. Dig. § 909.\*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by L. H. Roberts against the Carthage Ice & Light Company and another and the Security Trust Company. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

The appellee L. H. Roberts brought the suit to recover \$853.88 as the balance due for manual labor and services performed by him for R. E. Trabue, doing business under the name and style of the Carthage Ice & Light Company, and to enforce a laborer's lien upon particular machinery of the plant. The petition alleged, as determined by the trial amendment, that plaintiff Roberts contracted to work for R. E. Trabue in his ice and light plant in the capacity of a machinist to repair and keep in good order the engine, boilers, pulleys, and apparatus used in connection with the machinery for manufacturing ice and generating light, and for such labor was to be paid \$900 per year, payable at the end of the year from date of employment. The plaintiff performed the duties of his employment, it is alleged, from July 1, 1911, to February 15, 1913, and was paid therefor by R. E. Trabue by store account, except for the sum sued for. The Security Trust Company, a corporation, was made a defendant in the suit, upon the allegation that it was asserting some kind of a claim or lien, of a character unknown to plaintiff, on the property. It is unnecessary to mention the other defendants, as they do not appeal. The defendant Security Trust Company answered by demurrer and special exceptions, and besides a general denial specially averred that appellee was not within the class of laborers entitled to a lien under the statutes, and that his lien was invalid because not in fact filed and fixed within 30 days after the indebtedness had accrued, and estopped by waiver of claim for any lien. The case was tried by the court without a jury, and judgment was entered for the appellee for the amount of his account and foreclosure of laborer's lien on the particular machinery described. The Security Trust Company appeals, and seeks to have the judgment revised on the errors assigned.

The Carthage Ice & Light Company is neither a corporation nor a joint-stock company nor a partnership, but is a plant owned entirely by R. E. Trabue, and merely operated under such name by R. E. Trabue. The evidence warrants the findings of fact that appellee Roberts performed work upon machinery and apparatus in connection therewith as a laborer, as alleged, in the ice and light plant owned exclusively by R. E. Trabue, and under express employment and

agreement of the amount to be paid by R. E. Trabue, from July 1, 1911, to February 15, 1913, at which latter date Roberts' employment was terminated. On February 15, 1913, there was due and owing and unpaid by R. E. Trabue to Roberts, for his labor performed during the preceding 11½ months the sum of \$853.88, and there is no question made in the evidence in respect to the validity of this amount or its correctness. On February 28, 1913, which was the true date, the statutory affidavit was filed by Roberts with R. E. Trabue and the county clerk in support of his claim for the purpose of fixing the statutory lien. The instant suit was filed by Roberts on March 28, 1913. The finding of the court that the Security Trust Company took the property out of the possession of R. E. Trabue "by legal process" is without any evidence in the record to support it. The further findings of the trial court in the record which are here approved can be looked to, if necessary.

Baker, Botts, Parker & Garwood, Jno. T. Garrison, and W. A. Parish, all of Houston, for appellant. Brooke & Woolworth, of Carthage, for appellees.

LEVY, J. (after stating the facts as above).

[1] The first and second assignments of error presented by the appellant, Security Trust Company, can be here considered together as presenting the same question. The contention under the assignments is in effect that the court erred as a matter of law in enforcing a laborer's lien on the particular property as against the title and claim to the same made by the Security Trust Company, because it appears under the pleading and proof the services, the value of which was sued for by Roberts as performed by him from July 1, 1911, to July 1, 1912, were accrued and payable under the terms of employment on July 1, 1912, and the maturity of the demand was postponed by contract between Roberts and his employer, Trabue, until July 1, 1913. The appellee Roberts' petition, amended by a trial amendment, alleged that he labored in the ice and light plant, at the duties required of him as a machinist, under hire and employment of R. E. Trabue, the owner of the plant, from July 1, 1911, to February 15, 1913, at the agreed pay of \$900 per annum, payable at the expiration of a year, and that on February 15, 1913, the day his employment was terminated, R. E. Trabue was due and owing him \$853.88, all credits and offsets being fully allowed. Appellee further alleges that as to the services performed from July 1, 1911, to July 1, 1912, for which payment was due by the terms of employment on July 1, 1912, he and R. E. Trabue agreed to extend the period of demand and payment until February, 1913. The court makes the finding, and same is warranted by the evidence,

that after proper credits and offsets were allowed R. E. Trabue, he was owing the plaintiff Roberts, on February 15, 1913, the sum of \$853.88 for services. If the petition and the facts found by the court should properly be construed to mean, and we think they reasonably did mean, that appellee Roberts was asserting a demand, as unpaid, for his services from July 1, 1912, until February 15, 1913, as well as the balance unpaid from July 1, 1911, to July 1, 1912, then there is not shown any agreed extension of due date of the whole demand. There would appear an agreed extension of due date only so far as the demand of the year from July 1, 1911, to July 1, 1912, remaining unpaid by Trabue, is concerned. And interpreting the finding of the court that there was due on February 15, 1913, the aggregate sum of \$853.88, as meaning—which we think must be done—that no part of the sum due from July 1, 1912, to February 15, 1913, had been paid or entitled to credit or offset, there appears due and owing by R. E. Trabue to Roberts 7½ months' pay under the second year, aggregating \$562.50, leaving only \$291.38 of the \$853.88 as due in the first year. Consequently, if appellant is entitled to make the question presented by the assignments, it could only, under the pleading and facts, be made by it so far as the amount due for services from July 1, 1911, to July 1, 1912, is involved. And the assignments only attack the right to a laborer's lien at all, and do not question the extent of the recovery as to amount for which the property is subjected to the lien.

[2] But it is not believed, as the record is made here, that appellant is in a legal position towards the property to make any contention in respect to the invalidity, if it be so, of a laborer's lien, even to the extent of the amount agreed to be extended for one year. If the appellant, Security Trust Company, is the owner, or has any lien, claim, or interest in the property on which appellee asserts a laborer's lien, it does not so appear by any finding of the trial court, or by pleadings, or by any evidence in the statement of facts. It does appear in a finding by the court that the Security Trust Company took possession of the property through legal process on February 15, 1913. But this is the extent of the finding. The "legal process" does not appear in the record, or as offered in evidence in support of a claim by appellant; and we cannot assume, as against the court's judgment, that he found the legal process was valid or not dismissed at the time of the trial, or that appellant had a claim or title through it, for the court's judgment involves a contrary finding. And while appellee alleges that appellant is asserting some character of claim or lien unknown to plaintiff, we cannot, as against appellant's general denial of all facts alleged by plaintiff, look to that and presume some valid claim in ap-

pellant to the property. It was essentially a matter of proof by appellant if superiority of claim or interest to appellee is to be predicated by appellant. The assignments are overruled.

R. E. Trabue does not appeal; and, the Ice & Light Company being purely a fiction without legal entity, it cannot be properly held that there is any other appellant before this court than the Security Trust Company.

The third assignment cannot be considered, as not being in the motion for new trial; and, if it should be considered, the same is overruled for the reason given under the previous assignments.

The judgment is affirmed.

### CASTLEBERRY v. BUSSEY et ux.

(Court of Civil Appeals of Texas. Texarkana. March 25, 1914. Rehearing Denied April 9, 1914.)

#### 1. APPEAL AND ERROR (§ 547\*)—RECORD—MATTERS PRESENTED FOR REVIEW.

Where, in trespass to try title, the case was submitted upon special issues, and the court also made and filed findings of fact, the findings of the jury and of the court were conclusive on appeal, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.\*]

#### 2. COMPROMISE AND SETTLEMENT (§ 17\*)—OPERATION AND EFFECT.

Where, in a suit for the title and possession of land involving a controversy as to whether defendant was an innocent purchaser for value, one of the heirs of the deceased defendant, with authority from the other heirs, entered into an agreement with plaintiff for the settlement of the controversy, and all of the heirs acquiesced therein, took the benefits thereof, and went into possession of the land which they thereby acquired, they were estopped by such agreement, whether or not the agreed judgment settling the action was valid.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 66-74; Dec. Dig. § 17.\*]

#### 3. JUDGMENT (§ 651\*)—CONCLUSIVENESS—PERSONS INCLUDED—CONSENT JUDGMENT.

Where the heirs of a deceased defendant, in an action involving the title to land, entered into an agreement settling the controversy, and the administrator merely formally agreed to a judgment pursuant thereto, the heirs were bound by the judgment, even though the administrator had no power to enter an agreed judgment; there being no necessity for administration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1163; Dec. Dig. § 651.\*]

#### 4. DEPOSITIONS (§ 99\*)—ADMISSIBILITY IN EVIDENCE—ADMISSIBILITY IN OTHER SUITS.

A deposition taken in a suit was not admissible in evidence in a suit other than the one in which it was taken.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288-296; Dec. Dig. § 99.\*]

#### 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The erroneous admission of evidence was not ground for reversal, where any finding of fact or conclusion of law based thereon was

only incidental and entirely immaterial to the legal rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.\*]

Appeal from District Court, Shelby County; W. C. Buford, Judge.

Action by W. A. Castleberry against J. B. Bussey and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

J. M. Sanders and J. P. Anderson, both of Center, and Oliver J. Todd, of Beaumont, for appellant. D. M. Short & Son and Davis, Davis & Davis, all of Center, for appellees.

LEVY, J. This is an action by appellant against Mrs. F. R. Bussey and her husband, J. B. Bussey, in trespass to try title to a certain described tract of 1,500 acres of land out of the B. H. Simpson original survey located in Shelby county. The defendants answered by denial, plea of not guilty, and the statutes of limitation of three and five years, and ten years, under written memoranda specifying the boundaries. There was a judgment in favor of the defendants.

[1] The case was submitted to the jury upon special issues. In addition to the special facts found by the jury, the court made and filed findings of fact and conclusions of law. There being no statement of facts brought up with the record, the findings of fact made by the jury and the findings made and filed by the court must be taken as the facts of the case. It is needless to copy all the findings here, and the same may be looked to if necessary. We conclude that the real issues involved in the controversy are few, and undertake to state only the findings of the jury and of the court deemed pertinent and conclusive of the rights of the parties.

The principal contention under the many assignments is that, under the findings of the jury and the evidence, the plaintiff was entitled, as a matter of law, to a judgment for the land sued for, and the decision of this question determines the appeal. It appears that on July 9, 1841, a patent to a league and labor of land was issued in the name of B. H. Simpson. As found by the jury, B. H. Simpson conveyed his interest in the land to James J. Cravens. The date of the conveyance is not given, but the court finds that James J. Cravens entered into possession of the land about May, 1841, and that date, or thereabout, may reasonably be the date of the conveyance. James J. Cravens died in 1860, leaving a wife and one child, named William J. Cravens. The wife died within a few days after the death of the husband, and the child died in a few days after the death of the mother. James J. Cravens left a large community estate in lands, and the inheritance in respect thereto, by reason of the death of the wife and child, was cast upon collateral kindred, consisting of two broth-

ers and one sister of Mrs. Cravens, and one brother and one sister of James J. Cravens. J. A. and L. C. Cunningham and Sarah A. Castleberry, mother of the appellant, were the brothers and sister of Mrs. Mary A. Cravens, and Wm. Cravens and Mary Choate were the brother and sister of James J. Cravens. The plaintiff derails title through the patent to B. H. Simpson and conveyance by Simpson to James J. Cravens, and in virtue of his own heirship and conveyances to him from the other heirs of the Cravenses, and plaintiff would be entitled to recover on this prima facie title in him, unless defeated by the other findings of fact. The court finds that on March 22, 1838, Matthew Brinson had a regular survey made of 1,700 acres under the Soose Rohus certificate; the same being a valid certificate and the property of Brinson. Under and by virtue of this location, Brinson continued to reside upon the land, cultivating several hundred acres, until his death in 1861. It is further found by the court that, after Matthew Brinson had located and appropriated the 1,700 acres under and by virtue of the Rohus certificate, B. H. Simpson made application for and received from the board of land commissioners of the republic of Texas a certificate for a league and labor of land. But, as found by the jury, B. H. Simpson, prior to October 16, 1841, the date not given, sold this certificate to J. A. and L. C. Cunningham. J. A. and L. C. Cunningham, after purchase of the certificate, then located this certificate on land the field notes of which covered and included the 1,700 acres located and appropriated by Matthew Brinson, thereby creating a conflict to the extent of 1,700 acres between their location and Brinson's under the Rohus certificate, and it was under this existing condition that on July 9, 1841, a patent was issued in the name of B. H. Simpson, the field notes of which cover the 1,700 acres under the Brinson location. After the issuance of the patent, and on October 16, 1841, B. H. Simpson filed suit against A. McLemore, a brother-in-law and the tenant of Brinson, for the recovery of the 1,700 acres in conflict with the Simpson survey, and Matthew Brinson intervened and made himself a party to the suit, and asserted ownership by virtue of his location. Upon verdict of a jury, the court finds, judgment in that suit was rendered in favor of Matthew Brinson, establishing "ownership of the 1,700 acres in Matthew Brinson." And, on appeal of the case to the Supreme Court, the judgment was affirmed. And the jury made the finding that J. A. and L. C. Cunningham, after they purchased the certificate and located the land, never made conveyance to James J. Cravens of the land in controversy. In 1841, under deed from B. H. Simpson, James J. Cravens with his wife began residing upon a part of the land in conflict, at a point about 600 yards north of the residence of Brinson, claiming that the Simp-

son survey was in conflict with the Rohus survey. On May 12, 1843, Matthew Brinson filed suit in the district court of Shelby county against James J. Cravens for the title and possession of the 1,700 acres within the boundaries of the Rohus certificate. The suit remained on the docket of the court undisposed of until April 17, 1857, on which date it was legally transferred to the district court of Panola county, where it remained until June 8, 1872, when a final agreed judgment disposing of the controversy was entered. At the time the agreed judgment was entered A. McLemore, independent executor under the probated will of Matthew Brinson, was the plaintiff in the case in the place of Matthew Brinson, deceased, and D. S. Cornaham, administrator of the estate of James J. Cravens, was the party defendant in the place of James J. Cravens, deceased. The court finds that no necessity existed for the appointment of an administrator of the estate of James J. Cravens, and by this is understood that the estate owed no debts. The agreed judgment in the case was, as found both by the court and the jury, but a formal act based upon and carrying into effect a written agreement respecting a settlement of the controversy, in fact, entered into between William Cravens, acting under and by authority of all the heirs of each, James J. Cravens, Mary, his wife, and William J. Cravens, the boy, and A. McLemore, independent executor of Matthew Brinson. The jury made the express finding that William Cravens had authority to act for all the heirs of William J. Cravens, deceased, at the time he made the written agreement the judgment was based on and carried into effect, and that all the heirs had actual notice of the agreement, and agreed to and received the benefits arising from the agreement, and recognized the rights accorded thereunder to each and all the parties interested. The court made the finding that the agreed judgment was, in fact, based upon and carried into effect a written agreement, of the date of the judgment, between William Cravens and A. McLemore, independent executor under the probated will of Matthew Brinson, deceased, plaintiff in the suit. His further finding in respect to the agreement of June 6, 1872, is as follows: "The matters in difference between the respective parties in interest were legally adjusted and settled, by a valid agreement, through authorized representatives, by the terms of which the persons representing the Cravenses acquired in a lawful way 800 acres of the said conflict, while Brinson retained the balance of the 1,700 acres, after deducting the 800 acres in the conflict, and, in exchange for the 800 acres which Cravens acquired, Brinson acquired from Cravens 600 acres which was not within the conflict, but a part of the Simpson survey (and which, with the 900 acres, constitutes the 1,500 acres mentioned in this suit), and Brinson's representatives were required

to float the Rohus certificate off of said location, which requirement was complied with, and the cloud created by the conflict between the Simpson and Rohus location upon the title to that portion of the conflict which James J. Cravens in his lifetime occupied as a home, and which his brother William Cravens after his death occupied as a home and claimed as his own property, was thereby removed, each party being placed in actual possession of the respective portions of said land at the time the agreement was made, and the rights of each thereunder were respected during the lifetime of the parties thereto, until the bringing of this suit on January 12, 1912, more than 20 years after all the parties to said agreement had died." On February 22, 1879, A. McLemore, independent executor of Matthew Brinson, conveyed the 1,500 acres in suit to M. H. Cozart for a valuable consideration, and on March 12, 1881, Cozart conveyed for a valuable consideration the same land to defendants in this suit. The defendants have been paying taxes regularly on the land since that purchase under the claim thus acquired, without interference or molestation from any one.

[2, 3] It is believed that, under these facts found by the jury and the court, the court properly entered judgment for the defendants. Claiming the land in controversy, as plaintiff is, only under the rights which James J. Cravens asserted in his lifetime, he must depend for recovery in right of such legal rights as Cravens had and that would pass to his heirs. If force be given, as it must, to the finding of the court that, in the suit by B. H. Simpson, the patentee, against A. McLemore, Matthew Brinson intervened and set up his right of prior location and appropriation of the land, and was affirmatively decreed the ownership against Simpson of the 1,700 acres, there was then legally vested title to the land in Brinson as against Simpson. But, Simpson having conveyed the land to James J. Cravens, who was not a party to the suit, such judgment would not conclude any rights of Cravens. So the principal controversy between Cravens and Brinson in the suit filed by Brinson against Cravens was the superiority of title between them, and the rights of Cravens in the suit would depend upon the question of whether or not he was an innocent purchaser for value, in view of the facts that might or might not show at the time of the conveyance to him that he had knowledge of the pendency of the litigation and of the prior location of his certificate by Brinson, and whether or not he knew Simpson and sold his certificate before location to J. A. and L. C. Cunningham. So, considering the legal situation in regard to the controversy involved in the suit between Brinson and Cravens, the written agreement between the heirs of Cravens in settling the controversy in 1872 can be considered. The agreement, being in writing, and made by one of the heirs, with the actual notice and



by the authority of all the heirs, and all the heirs acquiescing and taking the benefits and going into possession, would sufficiently afford ground for estoppel against plaintiff's claiming the land. The court's finding that the agreement in writing was a "valid agreement" and the terms sufficient to legally adjust and settle the difference between the parties is reasonably to be interpreted as showing a written agreement capable of being legally and specifically enforced between the parties. And, being capable of specific performance, the instrument itself would be sufficient, coupled with the acts of the parties in respect thereto, to base estoppel upon. The defendants offered the instrument in evidence, as appears in the questions propounded to the jury. So, even if it could be said as an abstract question, that an administrator has not power to enter an agreed judgment, such question would not be pertinent to the rights of the parties here, for the written agreement, outside the formal judgment, is offered and can be made, as it is, the basis of estoppel. But, properly construing the facts found by the jury and the court, it does not fairly appear that the administrator himself was the one that made the agreement the judgment was based on and carried into formal effect. The heirs made the agreement, and the administrator, so far as the judgment entry goes, merely formally agreed thereto. And, in such circumstances, if the heirs appeared in the suit by a written agreement and consented to a judgment on such written agreement and carrying it into effect, as they did, there appears no legal reason why they should not be estopped from denying the legal effect of the agreed judgment instigated and produced by them. There appears no disability to the heirs at the time, and there were no creditors interested in the estate, as is the effect of the court's finding. These material facts are decisive of the case. Many of the other findings made by the jury are entirely immaterial to any issue in the case.

[4, 5] The first and second assignments predicate error upon matters presented by bill of exception. The bill recites that defendants offered in evidence, as direct evidence of the facts therein stated, a deposition taken in said cause, filed in 1841, of Simpson v. McLemore, in which Simpson testified that, prior to the filing of said suit, he had sold all of his interest in the land to, and that he had been induced to bring the suit by, James J. Cravens, and that Cravens had agreed to hold witness harmless of all costs. It was error to admit the deposition. Bank v. Mulkey, 94 Tex. 395, 60 S. W. 753. But the error would not afford ground to reverse the case, as any finding of fact in respect to such evidence would not be material in this case, and is not considered in this appeal. And, even if the trial court did make a con-

clusion of law having application to such evidence, such conclusion of law was only incidental, and was not the only conclusion of law that he based his judgment upon, and was entirely immaterial to any real legal rights of the parties herein. Appellant was estopped by the written agreement of his ancestors, and that is the only and conclusive defense in the suit.

By the ruling above we have disposed of all the assignments that could be reviewed without a statement of facts.

The judgment is affirmed.

## AMERICAN NAT. INS. CO. v. GALLIMORE. (No. 1300.)

(Court of Civil Appeals of Texas. Texarkana.  
April 9, 1914.)

### 1. INSURANCE (§ 365\*)—LIFE INSURANCE—LAPSE.

Where a life policy provided for reinstatement upon payment of back premiums, but that the insurer should not be liable for death occurring within five weeks from reinstatement, the beneficiary cannot recover, where the insured died within five weeks after the payment of the back premiums; there being no showing of any waiver of conditions by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 932, 933; Dec. Dig. § 365.\*]

### 2. INSURANCE (§ 536\*)—LIFE INSURANCE—PROOFS OF DEATH.

Where a life policy required proofs of death as a condition precedent to recovery, there can be no recovery, where no proofs were made, and there was no waiver of the condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1323; Dec. Dig. § 536.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by William H. Gallimore against the American National Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. H. Clark and M. L. Robertson, both of Dallas, for appellant. Joseph Utay, of Dallas, for appellee.

HODGES, J. In this suit the appellee seeks to recover of the appellant the sum of \$213.60, claimed as the amount due on a policy of insurance. He also asks for 12 per cent. of the above amount as damages, and \$50 as attorney's fees. On June 13, 1913, the appellee filed what he terms his "first supplemental petition," but which is in reality an amended original petition. In this pleading he alleges, among other things, as follows: "That on the 6th day of July, 1908, plaintiff was the husband of one Mary Gallimore; that on the same day defendant, in consideration of the payment by said Mary Gallimore to the defendant of the sum of 15 cents, and the further sum of 15 cents to be paid weekly through her natural life, executed and delivered to said Mary Gallimore its policy of insurance in writing, whereby it insured the

life of the said Mary Gallimore in the sum of \$216 for the benefit of plaintiff, and thereby promised to pay and became liable to pay the said sum upon the death of Mary Gallimore. Plaintiff further represents that said Mary Gallimore died on or about the 12th day of May, 1912, and that up to the time of her death all premiums accrued and due upon said policy were paid, save and except the sum of 90 cents, which premiums had been tendered to the defendant on or about the 10th day of May, 1912, and refused by said defendant; that all conditions and provisions of said policy were complied with; that within a reasonable time after the death of the insured, the defendant was given notice of the death of insured, and plaintiff duly demanded from the defendant the amount as contracted for in said policy of insurance, less 90 cents, the amount of premiums then due." Then follow other allegations, not necessary to be considered in disposing of the questions presented in this appeal.

The answer of the appellant consisted of a general demurrer, what are termed "special exceptions," and general and special denials. In substance, the defense was the failure to pay the stipulated premiums according to the terms of the policy and to present proofs of death before suit was instituted. It is further alleged that, by reason of the failure to pay the premiums according to its terms, the policy had lapsed, and was not in force at the time of the death of the insured. The paragraphs of the answer referred to as "special exceptions" have none of the essentials necessary to constitute that character of pleading. They point out no part of the contents of the petition as objectionable, but, on the contrary, refer to issues of fact, and therefore cannot be treated as exceptions.

[1] A verdict and judgment were rendered in favor of the plaintiff for the amount of the policy, damages, and attorney's fees.

Complaint is made of the following charge of the court: "You are further instructed that, if you find and believe from the evidence that plaintiff paid to the defendant or its agent or employé the sum of \$2 on April 15, 1912, and that said agent accepted said money, and that, as such agent, he was authorized to receive money and that he did, in fact, receive such money, then such act was the act of the defendant, and you will find for the plaintiff." At the time the policy of insurance was issued, the insured was furnished with a book called a "premium receipt book," in which the premiums made at various times were entered. This book was offered in evidence by the appellee, and showed that premiums had been paid and entered up to and including January 22, 1912. Appellee also offered in evidence two receipts; one dated March 18, 1912, and the other April 15, 1912. Each of those receipts was as follows: "Received from Wm. Gallimore

\$2.00, being the arrears on Policy No. — which the applicant desires the company to revive. Under no circumstances will the company be liable under said policy in case of death until the policy has been revived on the books of the company and the money credited in the premium receipt book belonging to said policy. [Signed] L. C. Awalt, Agent." The following language was indorsed on the end of the receipt: "If the company accepts the revival application the amount paid will be credited in the premium book belonging with the policy; otherwise the money will be returned." These were the only evidences of any payments made on the premiums due upon the policy. The policy contains, among other provisions, the following:

"4th. This policy shall be void if there is in force upon the life of the insured an industrial policy previously issued by this company, unless the policy first issued is indorsed by the president or secretary authorizing this policy to be in force at the same time; or if any of the representations upon which this policy is issued are not correct; or if the said weekly premium is not paid according to the terms of this contract. If for any cause this policy become void, all premiums paid hereon will be forfeited to the company, except as in the privileges and concessions herein provided for.

"Grace in Payment of Premiums.—Should the insured die while the premiums on this policy are in arrears for a term not exceeding four weeks, the company will pay the benefits provided herein, subject to the conditions of this contract.

"Reinstatement.—The insured out of benefit may be reinstated upon payment of back premiums in full and upon passing a satisfactory medical examination (but such examination may be waived by the company if it desires to do so); but the insured will not be entitled to any benefits under this policy unless in sound health and free from any diseases at the time of such reinstatement; and in case death should occur from any cause whatever within five weeks from the date of such reinstatement, the company shall not be liable to any extent whatever on account of such death."

The testimony offered by the appellant was to the effect that this policy was lapsed on the books of the company on the 21st day of February, 1912, for the nonpayment of the premiums. This testimony was not disputed. One of the appellant's agents admitted that he had received some money from Gallimore after the policy was lapsed, but stated that this money was insufficient in amount to pay the arrearage then due, and was received with the understanding between him and Gallimore that it should be applied on the premiums when a sufficient amount had been paid over. The receipts referred to show that the policy had lapsed. There was no testimony that it had been revived, or that

a certificate of good health had been presented, or that the company had waived the requirements provided for in the policy. The insured died on May 12th, less than five weeks after the April payment referred to in the charge. According to the terms of the policy, there was no liability if death occurred within that time, even if the policy had been officially revived. The court therefore erred in assuming, as a matter of law, that the payment of \$2 on April 15th restored the insured to good standing in the company.

The appellee, in stating his cause of action, admitted an arrearage of 90 cents, which, according to the terms of the policy, was sufficient to avoid it and forfeit all prior payments. He alleges nothing which tends to excuse the nonpayment of those premiums, or to indicate that a forfeiture was waived. He could not, in the face of this admitted arrearage, recover upon proof tending to show that no arrearage, in fact, existed.

[2] Again, there was no proof of death, as required by the provisions of the policy, nor is there any allegation that such proof was waived. Under the provisions of the policy, that proof was necessary as a condition precedent to a recovery unless waived. *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120; *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024. If a waiver is relied on, it must be alleged. *Hollifield v. Landrum*, 31 Tex. Civ. App. 187, 71 S. W. 979; *St. Paul Fire & Marine Ins. Co. v. Hodge*, 30 Tex. Civ. App. 257, 70 S. W. 574, 71 S. W. 386; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; 4 *Coolley's Briefs on Ins.* p. 3556, and cases cited in notes.

We not only think the charge quoted should not have been given, but that the verdict and judgment are clearly without evidence to sustain them. We are inclined to believe, however, that, under proper pleadings, the appellee may be able to show a right of recovery, and for that reason the judgment will be reversed, and the cause remanded instead of judgment being here rendered for the appellant.

Reversed and remanded.

### BAKER v. HENEY.

(Court of Civil Appeals of Texas. San Antonio. March 18, 1914. Supplemental Opinion, April 1, 1914.)

#### 1. BOUNDARIES (§ 3\*)—DESCRIPTION—RELATIVE IMPORTANCE OF CONFLICTING EVIDENCE.

Where a description of a survey called for well-established surrounding surveys on all sides, such calls controlled the courses and distances, and the mere fact that by running courses and distances there was an excess was immaterial.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

#### 2. BOUNDARIES (§ 3\*)—DESCRIPTION—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS.

In locating land, recourse will be had: First, to natural objects; second, to artificial objects; and, third, to courses and distances.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

#### 3. BOUNDARIES (§ 6\*)—LOCATION OF SURVEY—REVERSING CALLS.

In determining the boundary of a survey, the calls may be reversed only when the survey was actually made.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57; Dec. Dig. § 6.\*]

#### 4. PRINCIPAL AND AGENT (§ 34\*)—TERMINATION—REVOCATION BY PRINCIPAL—AGENCY COUPLED WITH INTEREST.

A power of attorney, which merely empowered the agent to sell land and turn over the proceeds, the agent having no interest in the land, was not a power coupled with an interest, and hence was revocable.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 55; Dec. Dig. § 34.\*]

#### 5. VENDOR AND PURCHASER (§ 342\*)—LIABILITY OF COTENANT—SALE AND CONVEYANCES.

Where a tenant in common contracts to convey a designated portion of an undivided tract of land, and is unable to do so by reason of such portion falling to another in partition, the remedy of the purchaser is a suit for damages.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1018, 1019; Dec. Dig. § 342.\*]

#### 6. COMPROMISE AND SETTLEMENT (§ 6\*)—CONSTRUCTION OF AGREEMENT.

Where plaintiff and defendant, two claimants for a tract of land, entered into a compromise agreement, whereby they agreed to sell the disputed tract and divide the proceeds, plaintiff could recover under the agreement, though it was afterwards determined that the tract belonged to defendant.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 35-50; Dec. Dig. § 6.\*]

Appeal from District Court, Aransas County; F. G. Chambliss, Judge.

Action by Francis J. Heney against Mary J. Baker. From a judgment for plaintiff, defendant appeals. Affirmed in part, and reversed and rendered in part. On motion, former opinion modified, so as to affirm in full.

W. D. Love, of Uvalde, for appellant. Robt. W. Stayton, of Corpus Christi, and John B. Eddins and Wm. H. Russell, both of Rockport, for appellee.

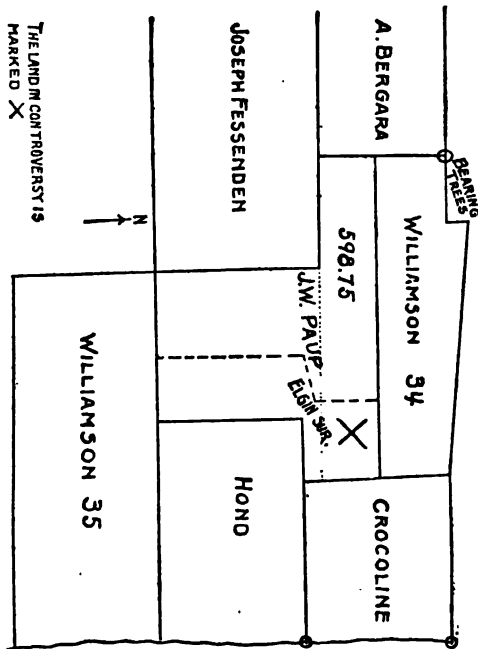
CARL, J. Appellee, Francis J. Heney, brought this suit in trespass to try title, against appellant, Mary J. Baker, for about 70 acres of land, a part of the Travis Henderson subdivision of the John W. Paup survey in Aransas county. This Henderson subdivision is alleged to contain 598.74 acres, and Heney had become the owner of an undivided one-third, and Henderson had sold the other two-thirds to Sartain & Montgomery. Heney and Sartain & Montgomery had partitioned, Heney getting the eastern portion which conflicts with the John E. Elgin

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

survey No. 4. S. F. 6919. Appellant answered by general demurrer, plea of not guilty, and specially pleaded title in herself under the Elgin patent. She also alleged a compromise agreement between herself and Travis Henderson relative to the land in controversy, and impleaded him, asking for different forms of relief in her alternative prayer. The trial was before the court, and judgment was in favor of appellee, Heney, for the land and in favor of defendant, Henderson, and Mary J. Baker appeals.

Two matters claim our attention: (1) Does the John W. Paup survey conflict with the Elgin survey? (2) And in the event the Paup survey conflicts with the Elgin survey, did the compromise settlement between Travis Henderson and Mary J. Baker settle such conflicting claims, and, if so, is the appellee bound thereby?

Appellant contends that the survey of the Paup land was an office survey, and that the lines were not actually run out, and that by reversing the calls and starting from the west side instead of the east side, there would be a vacancy to make room for the Elgin survey. The surrounding surveys are as follows:



[1] The A. Bergara survey has a marked corner, and appellant contends that we should reverse the calls and take the east line of the Bergara survey as the starting point. Thus by course and distance we would stop the north line of the Paup at about the west line of the Elgin. This would leave about 666.5 varas between the Paup and Crocoline surveys which would accommodate the Elgin junior survey. But the Paup survey calls for the southeast corner of the Wil-

lamson survey No. 34 as the beginning point, on the west boundary line of the Crocoline. Thence with this (Crocoline) survey to its southwest corner; thence west to northwest corner of the Hond survey; thence south with Hond to north boundary line of Thomas T. Williamson survey No. 35; thence west with said Williamson survey to a point on the Fessenden survey; thence to northeast corner of Fessenden; thence west 1,039.93 varas to Bergara survey; thence north to Williamson survey No. 34; thence east with said survey 2,533.74 varas to the place of beginning. The Crocoline, Hond, and Williamson No. 35 are bay front surveys, and well established. So are the Bergara and Fessenden surveys and Williamson No. 34. All the surveys on the east meander the bay. The Bergara, Fessenden, and two Williamson surveys were made at the same time the Paup survey was made. The Crocoline calls for "thence, leaving the bay due west 1228½ varas to southwest corner; thence north 1634½/10 varas to the northwest corner." The northwest corner of the Crocoline is where it intersects the south line of the Carper survey, and Percival, the surveyor, says that he there found some old cuttings, and that this point is accepted as the northwest corner of the Crocoline. The southwest corner of the Carper survey is marked by a stake and mound in the prairie. The Crocoline survey was patented in 1858, and calls for the southeast corner of the Carper as its northeast corner, which is identified by two bearing trees still on the ground. The Bergara survey on the west is located by an established corner. The established marked lines of other surveys may as well be the subject of calls as any other object. *Bolton v. Lann*, 16 Tex. 96-110; *Ridgell v. Atherton*, 107 S. W. 129; *Johns v. Schutz*, 47 Tex. 578; *Buford v. Gray*, 51 Tex. 331-335; *Booth v. Strippelmann*, 26 Tex. 436. And likewise a survey may be located by surrounding surveys. *Longoria v. Shaeffer*, 77 Tex. 547, 14 S. W. 160. Nor does it make any difference that there is an excess in one survey where there is a common marked corner. *Bunton v. Cardwell*, 53 Tex. 408.

[2] In locating land recourse will be had: First, to natural objects; second, to artificial objects; and, third, to course and distance. *Bolton v. Lann*, 16 Tex. 96; *Ridgell v. Atherton*, 107 S. W. 129. Thus it will be seen that of the three, course and distance is of the least importance.

Since the surveys called for by the Paup are established surveys, and have marked and recognized corners, we conclude that there was no land to be covered by the Elgin survey. The mere fact that by running course and distance would leave an excess would not alter the case; for we have seen that natural and artificial objects both are superior to calls for course and distance.

And since course and distance must yield, the excess, if any, would belong to the Paup survey. At any rate, not to the Elgin, because there was no vacancy there to be patented.

[3] Appellant contends that an actual survey of the Paup tract was never made, and yet maintains that by reversing calls and starting from the Bergara, which is well established and marked, east to proper distance, it would leave an excess so as to accommodate the Elgin survey. Counsel overlook the fact that in order to reverse calls a survey must actually be made. *Ayers v. Lancaster*, 64 Tex. 305. The calls in the Paup survey start from the east side or Crocoline survey, and it is desired to reverse the calls and start from the Bergara on the west so as to leave the Elgin tract subject to patent. That calls of a survey actually made may be reversed there is no doubt; but appellant says this Paup survey was never made. How then can we reverse the calls? And if we did so, we do not see that it would alter the situation, because the Bergara survey is fixed and the Paup calls for the Crocoline as its east boundary line, an established line, which would control the call for distance. Here we have both natural and artificial objects, either of which is of superior importance to course and distance.

Travis Henderson bought this land February 24, 1891, and sold an undivided one-third interest in it to John H. Traylor February 15, 1894. Traylor sold to Heney September 19, 1895. Travis Henderson sold his remaining two-thirds interest to Sartain & Montgomery, March 17, 1910, while the joint power of attorney executed by Travis Henderson and Miss Mary J. Baker, authorizing J. M. Hoopes to sell this 71.7 acres for the purpose of settlement, was dated February 5, 1910. That power of attorney to Hoopes runs in part as follows: "Know all men by these presents: That whereas, Travis Henderson, of Lamar county, Texas, claims title to certain lands hereinafter described, by purchase from the heirs of J. W. Paup, and whereas Miss Mary J. Baker, a feme sole, of Cleveland, Ohio, claims title to the same land, by purchase direct from the state of Texas; and whereas said parties are anxious to settle their respective claims to said [land] without the delay and expense incident to litigation; and whereas, there is yet due the state of Texas, from said Miss Mary J. Baker, about \$2.00 per acre on said land; and whereas, she is willing to pay the balance due on said land together with the taxes due thereon, and is also willing to accept as her part from the proceeds of the sale of said lands the sum of \$15.00 per acre, less the sum which may be due as above mentioned; and whereas, the said Henderson is willing to accept for his interest in said land the sum of \$15.00 per acre." Then follows a description of the 71.7 acres of land

in controversy by metes and bounds, and it is recited that there was pending a controversy as to the ownership between Henderson and Miss Baker, and that this arrangement was made to avoid and settle litigation. It directs how the proceeds shall be divided, \$15 per acre to Miss Baker, and \$15 to Henderson, Miss Baker to pay about \$2 per acre to the state.

[4] This is not a power of attorney coupled with an interest, because the power and the interest are not centered in the same person. Hoopes, the attorney in fact, has no interest whatsoever in the property which he is called upon to sell. Where the right or authority to do the act is connected with or flows from an interest in the subject on which the power is to be exercised, the power is said to be "coupled with an interest," but where it is disconnected from any interest of the donee in the subject-matter, it is a naked power. *Tinsley v. Dowell*, 87 Tex. 23, 26 S. W. 946; *Daugherty v. Moon*, 59 Tex. 397; *Griffith v. Maxfield*, 66 Ark. 513, 51 S. W. 832. The power of attorney was not coupled with an interest, and, as such, could be revoked. But, as a contract of compromise and settlement, it has a peculiar quality which we do not think can be ignored or set aside *ex parte*.

[5] It will be seen that this is not a contract to convey the land, or any part of it, to either party, and would give Miss Baker no right to sue for the land or an interest therein. On the contrary, it contemplates a sale for the purpose of dividing the proceeds. Henderson could not bind his cotenant, or tenant in common, Heney. Where a tenant in common contracts to convey a designated portion of an undivided tract of land and is unable to do so by reason of such portion falling to another in the partition, the remedy of the purchaser is a suit for damages. *Dorn v. Dunham*, 24 Tex. 377; *Rutherford et al. v. Stamper et al.*, 60 Tex. 447.

[6] Under the compromise agreement between Mary J. Baker and Travis Henderson, the land was to be sold at not less than \$30 per acre, and the proceeds divided, \$15 per acre to each. But, out of her part, Miss Baker was to pay \$2 per acre due the state, which she did pay. The 71.7 acres of land would come to about \$2,151, and, after deducting the amount due the state from Miss Baker's share, would leave her something more than \$600. She pleaded improvements made in good faith, but in her prayer asked for only \$600.

Therefore, since we hold that there was no vacancy where the Elgin survey was located, it follows that, as to appellee, Francis J. Heney, the judgment will be affirmed; but as between the defendants below, Mary J. Baker and Travis Henderson, the judgment of the district court is reversed, and judgment here rendered in favor of Mary J. Baker against Travis Henderson for the sum

of \$600, together with legal interest thereon from March 17, 1910, until paid, and all costs.

Affirmed in part, and reversed and rendered in part.

#### Supplemental Opinion.

Upon further investigation of this case we conclude that there is no sufficient assignment of error justifying us in rendering judgment against Travis Henderson for \$600 in favor of Mary J. Baker, or for any sum whatever, and therefore set aside the judgment heretofore rendered in this case, and here render judgment affirming in all things the judgment of the trial court.

Judgment affirmed in full.

#### CAMP et al. v. SMITH.

(Court of Civil Appeals of Texas. El Paso. March 19, 1914. Rehearing Denied April 23, 1914.)

#### 1. DEEDS (§ 70\*)—SETTING ASIDE—GROUNDS—FRAUDULENT REPRESENTATIONS.

Where the false representations of a vendor of school land purchased from the state, that the land had been classified as dry grazing land when purchased, so that the mineral rights were acquired, while a part of the land had been classified as mineral dry grazing land, whereby no title was secured to the minerals, were not a material inducement to the purchaser, and did not influence him in purchasing the entire land, the representations did not justify the setting aside of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.\*]

#### 2. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 3. DEEDS (§ 69\*)—SETTING ASIDE—GROUNDS—MUTUAL MISTAKE.

Where the mutual mistake of a vendor and purchaser did not constitute a material inducement to the purchase, the mistake did not justify the setting aside of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. § 69.\*]

#### 4. PUBLIC LANDS (§ 173\*)—SCHOOL LANDS—PURCHASE—TITLE ACQUIRED.

A purchase of school lands while Rev. St. 1895, § 4218j, prescribing the requisites of an application to purchase, was in force is not invalidated by any mere inaccuracy in describing the classification of the land which was mere surplusage, as the law then in force did not require any statement of classification; and the subsequent Acts 30th Leg. (1st Ex. Sess.) c. 20, § 6f, requiring the reservation of mineral rights, does not apply to the purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.\*]

Appeal from District Court, Reeves County; S. J. Isaacs, Judge.

Action by J. B. Smith against A. L. Camp and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Buck & Starley, of Pecos, and A. L. Camp, of Ft. Worth, for appellants. Howard & De Armond, of Midland, Hudson & Canon, of Pecos, and J. B. Atkeson, of Artesia, N. M., for appellee.

HARPER, C. J. This suit was brought by appellee against appellants A. L. Camp and G. G. Nesbitt upon four vendor's lien notes for \$1,313 each, and to foreclose the lien upon sections 14 and 15, and the E. ¼ of section 11, block 70, public school lands in Reeves county, Tex., and against Sallie Land Nesbitt, H. H. Lockett, trustee, Toyah Oil & Pipe Company, B. C. Girdley, trustee, et al., E. E. Kirby, the First National Bank of Las Cruces, N. M., Oscar Snow, trustee, and G. Engel, to bar any claim they might have in or to said lands.

Appellants Camp and Nesbitt answered separately, each by general denial, and specially by sworn plea of fraud and failure of consideration, and alleged in substance: That the said lands were school lands, purchased by the appellee, and that in the sale to them appellee had fraudulently represented said lands to have been classified, when he purchased them, as dry grazing, and that he had purchased said lands as dry grazing lands, and had thereby acquired the mineral rights thereon and thereto, and the appellants would acquire such mineral rights to said lands by purchase from him. That appellants were ignorant of the true classification of said lands, and relied upon such representations, and had no notice to the contrary until long after said sale, when it was discovered that the E. ¼ of section 11 was classified, when appellee purchased the same, as mineral dry grazing, and that thereby appellee had failed to secure any title thereto, or to the minerals thereon, if he secured the surface rights. That the purchase was as a whole, and that the lands were purchased for the mineral rights thereon, and that, without such mineral rights, they were not worth what appellee had paid for the same to the state, and that appellants would not have purchased any of said lands had they known that the same, or any part thereof, did not carry the mineral rights. That the purchase was as a whole, and asking a rescission of the contract, and, in the alternative, for a credit for the amount paid for said quarter of section 11. The other defendants either filed disclaimers or defaulted. The trial was had before a jury on May 16, 1913, and the court submitted the case on special issues. Appellee made motion to set aside the findings. The court overruled appellants' motion, and entered judgment for appellee for the entire debt and foreclosure of vendor's lien against appellants, and barring all the rights of the other defendants. Appellants filed motion for new trial, which being overruled, they appealed with appeal and supersedeas bond.

The case was submitted upon special is-

sues. Questions and answers are as follows:

"First. Did appellee make the representations at or prior to the date of the deed that all the lands were classified as dry grazing lands when he purchased? Answered: Yes.

"Second. If yes, did appellants rely thereon? Answered: No.

"Third. Was the E.  $\frac{1}{4}$  of section 11 classified in the Land Office on April 1, 1907, as mineral dry grazing land? Answered: No.

"Fourth. Did appellants know at the date they accepted appellee's deed that said  $\frac{1}{4}$  of section 11 was classified as mineral dry grazing in the Land Office at the time appellee purchased such tract from the state of Texas? Answered: No.

"Fifth. Was the land purchased as a whole or by the acre? Answered: By the acre."

Second assignment charges that the court erred in submitting the second question in the special issues to the jury, and rendering judgment thereon, because the uncontradicted evidence was that plaintiff represented to these defendants prior to the purchase of the lands that all of said lands were classified as dry grazing at the time he purchased same, and that thereby he secured the minerals, that the defendants believed said representations, and acted upon them, and would not have purchased the lands but for such representations, for the object in purchasing the lands was to secure the minerals, etc.

[1] The uncontradicted evidence is not as asserted by appellants in this assignment. The pleadings and evidence raise the issue as to whether or not the plaintiff's title from the state carried the minerals, and the controlling question in this case is: Did the fact that the E.  $\frac{1}{4}$  of section 11, block 70, did not carry the mineral rights (as represented by appellee, so found by the jury) constitute a material inducement to appellants, and influence them (under all the facts and circumstances surrounding the transaction at the time of the trade, and having reference thereto) in purchasing the entire land? *Culberson v. Blanchard*, 79 Tex. 486, 15 S. W. 700. And question No. 2 in effect submitted this question to the jury, and they answered it in the negative, and the surrounding facts and circumstances strongly indicate that such finding is correct.

[2] The evidence was conflicting, at least, and, where it is, the verdict will not be set aside upon appeal. *Texas Standard Cotton Oil Co. v. Hanlon*, 79 Tex. 678, 15 S. W. 703.

The third assignment charges that the court erred in not disregarding answer to same; question is disposed of by what is said next above.

[3] The fourth and fifth assignments charge that the judgment is contrary to the law and evidence, because the uncontroverted evidence shows mutual mistake as to said E.  $\frac{1}{4}$  of section 11 carrying the mineral rights. The court might have assumed or have charged that there was mutual mistake in this respect; but, if there was evidence

to sustain the verdict of the jury that such mutual mistake did not constitute a material inducement to the purchase, as in this case, it would not be reason for setting aside the sale.

The seventh assignment charges that the court erred in not setting aside the answer to question No. 3 under the proposition that they are ambiguous and contradictory, etc.

As said above, it matters not how the land was classified, or what representations were made, or even if both parties were mutually mistaken as to the classification, the mineral rights, etc., if they did not constitute a material inducement to the purchase.

Since assignments 9 and 10 are addressed to the same matters, they are likewise overruled for the reasons given above.

[4] The eleventh assignment is as follows: "Because the verdict and judgment are contrary to the law and the evidence in this: The uncontradicted evidence is that plaintiff applied to buy E.  $\frac{1}{4}$  of section 11 as dry grazing land, when same was classified as mineral land, and without any waiver of the mineral, and that his application and the award thereon were void, and he had no title to said tract when he conveyed same to the defendant, and thereby the consideration pro tanto failed to said notes, and the court should have allowed the \$800 paid for said tract as a credit upon the notes sued upon, which was not done, and because there was a failure of consideration on said tract to extent of \$800 and interest, even though plaintiff obtained the surface rights by his application, and said judgment does not allow same, but is for the full amount of said notes, and is excessive."

The uncontradicted evidence discloses that, at the date of the sale of this land to Smith by commission of the Land Office, it was classified on the records of the Land Office as mineral dry grazing. The application to purchase same by Smith stated that same was classified as dry grazing, and did not contain any waiver of the mineral rights. At the time this tract of land was purchased, the requisites of an application to purchase school land were controlled by article 4218j, Revised Statutes of 1895. In this article there is no requirement whatever that the classification of the land shall be stated, or that in applications to purchase mineral lands there should be any reservation of the mineral right to the state. The incorrect statement of the classification did not affect the validity of the sale, because there is nothing in the law requiring any statement with reference to the classification whatever to be made in the application to purchase or waiver of the mineral rights by the purchaser. Section 6f of the Acts of the 30th Legislature 1907, p. 495, cited and relied upon by Camp, did not become effective until August 16, 1907—several months after Smith purchased the land. Section 6f of this act is the first provision in the law that sales of land classified as mineral should have the

reservation stated in the application to purchase. If the land had been purchased subsequent to the passage of this act, then the authorities cited by appellant, viz.: *Gracey v. Hendricks*, 93 Tex. 26, 51 S. W. 846; *Bowerman v. Pope*, 25 Tex. Civ. App. 79, 61 S. W. 330, 75 S. W. 1093; *Burnam v. Terrell*, 97 Tex. 309, 78 S. W. 500—would be in point. In other words, the applications to purchase by Smith were in accordance with 4218j, Revised Statutes of 1895, and, since this law did not require the applications to specify the classification, and did not require any waiver of the mineral rights, the sale was valid; the mere inaccuracy in describing the classification was of no consequence, as it was surplusage, and, had it been omitted entirely, it would not have affected the sale. Section 6f, Acts of 1907, p. 495, relied upon by appellant, expressly requiring the reservation of the mineral rights, was not effective at the time Smith applied to purchase, and therefore the cases cited have no application.

For the reasons indicated, the assignments are overruled, and judgment affirmed.

SAN ANTONIO & A. P. RY. CO. v.  
WAGNER.†

(Court of Civil Appeals of Texas. San Antonio. March 4, 1914. On Motion for Rehearing, April 22, 1914.)

**1. APPEAL AND ERROR (§ 1040\*)—REVIEW—RULINGS ON PLEADINGS—PREJUDICE.**

In an action for injuries to a railroad brakeman from defendant's violation of the safety appliance law, defendant was not prejudiced by the sustaining of exceptions to the part of its answer applying the federal law concerning automatic couplers, and alleging that its couplers had to be adjusted at times in order to be coupled by impact, etc., since the federal and state statutes on that subject are practically the same; the court having submitted all the issues that could arise under either to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**2. MASTER AND SERVANT (§ 111\*)—INJURIES TO SERVANT—RAILROADS—SAFETY APPLIANCE ACTS—AUTOMATIC COUPLERS.**

The equipment of a railroad engine and cars with automatic couplers, requiring brakemen to go between the cars to adjust them so that they will couple by impact, is not a compliance with either the federal or state law (U. S. Comp. St. 1901, p. 3174; Rev. St. Tex. 1911, art. 6710), making it unlawful for any railroad company engaged in interstate commerce in the one case, and intrastate commerce in the other, to haul or permit to be hauled on its railroad any engine or car not equipped with couplers "coupling automatically by impact," and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, or cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. § 111.\*]

**3. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—RAILROADS—SAFETY APPLIANCE ACTS—VIOLATION—PLEADING.**

In an action for injuries to a railroad brakeman by defendant's violation of the safety

appliance acts (U. S. Comp. St. 1901, p. 3174; Rev. St. Tex. 1911, art. 6710), evidence that the automatic couplers with which the engine and car in question were equipped had to be adjusted at times in order to be coupled by impact, and that such adjustment could be made with safety if the cars were not in motion, but that plaintiff sought to adjust the coupling when the engine was moving toward the car to be coupled, was admissible under defendant's general denial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

**4. MASTER AND SERVANT (§§ 204, 228\*)—INJURIES TO SERVANT—BRAKEMEN—SAFETY APPLIANCE ACTS—VIOLATION—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.**

In an action for injuries to a railroad brakeman by defendant's violation of the safety appliance acts (U. S. Comp. St. 1901, p. 3174; Rev. St. Tex. 1911, art. 6710), neither assumed risk nor contributory negligence was a defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.\*]

**5. EVIDENCE (§ 471\*)—CONCLUSIONS—INJURIES TO SERVANT—RAILROADS—SAFETY APPLIANCE ACTS.**

In an action for injuries to a railroad brakeman by his foot becoming caught between the couplers of an engine and car as he was endeavoring to adjust the same in order that it might couple by impact, evidence that it was necessary to push the drawhead over so as to make the coupling was not objectionable, as a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**6. EVIDENCE (§ 539½\*)—OPINION EVIDENCE—EXPERTS.**

Plaintiff, a railroad brakeman, held qualified to testify, as an expert, that at the time of his injury, while coupling an engine to a car, it was necessary to push the drawhead over in order that the coupling might be made by impact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

**7. EVIDENCE (§ 546\*)—IMPEACHMENT—TESTIMONY IN OTHER CASES.**

A stenographer's transcript of the testimony of a physician in another case could not be used as a basis to attack the physician's competency to testify in the case on trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.\*]

**8. TRIAL (§ 125\*)—ARGUMENT OF COUNSEL.**

In an action for injuries to a railroad brakeman, argument of plaintiff's counsel that the jury should give plaintiff every cent it possibly could "under the pleadings and evidence," that they could not make a mistake in giving him too much "under the evidence," for, if they did, the court would cut it down, but, if they made the verdict too low, it could not be raised, was prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.\*]

**9. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

Plaintiff, a railroad brakeman, was injured by getting his foot caught in an automatic coupler as he was endeavoring to push the drawhead over so as to make the coupling. He lost the toes on one foot, and received other painful and permanent injuries. Held, that a verdict for more than \$10,000 was excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]



## On Motion for Rehearing.

**10. MASTER AND SERVANT (§ 111\*)—INJURIES TO SERVANT—RAILROADS—SAFETY APPLIANCE ACTS—FAILURE TO COMPLY.**

Failure of a railroad company to equip its engines and cars with couplers that will couple automatically by impact, without requiring brakemen to go between the cars to adjust the same, as required by safety appliance acts (U. S. Comp. St. 1901, p. 3174; Rev. St. Tex. 1911, art. 6710), is negligence per se.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. § 111.\*]

**11. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—RAILROADS—SAFETY APPLIANCE ACTS—INTERSTATE COMMERCE.**

Where, in an action for injuries to a railroad brakeman while adjusting an automatic coupler so that the same would couple by impact, the petition alleged that defendant was engaged in interstate and intrastate commerce, and that it used on its railroad in such commerce an engine and car, and that it became the duty of plaintiff then and there to couple the engine and car together, such allegation was sufficient to show that defendant was engaged in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 806-812, 815; Dec. Dig. § 256.\*]

**12. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—RAILROADS—BRAKEMAN—SAFETY APPLIANCE ACTS—PETITION.**

A petition by a brakeman injured by catching his foot in an automatic coupler while endeavoring to adjust the same, alleged that the coupler attached to the engine and car to be coupled would not couple automatically by impact, as required by law, and that, to make the coupling, it was necessary to stand on the footboard of the engine between the engine and the car, and push the drawbar on the engine over so as to make the coupling, sufficiently charged that the coupler on the engine was defective, and not a compliance with the safety appliance acts (U. S. Comp. St. 1901, p. 3174; Rev. St. Tex. 1911, art. 6710).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by William Wagner against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Rehearing denied.

Houston, Boyle & Storey, of San Antonio, for appellant. John Sehorn, of San Antonio, for appellee.

**FLY, C. J.** Appellee sued to recover damages arising from personal injuries inflicted on him through the negligence of appellant. It was alleged that appellee was a brakeman in the employment of appellant, and, while engaged in coupling a locomotive and car, it became necessary for him to stand on the footboard of the engine, between it and the car, and shove the knuckle of the coupler on the engine so as to put it in position to be coupled to the car, and, while so engaged, he slipped and fell, and his left foot was caught between the couplers and was crushed and mangled, and that he was otherwise

seriously, painfully, and permanently injured. It was charged that appellant was negligent in having couplers which would not couple by impact, as required by law, and that such negligence was the direct and proximate cause of appellee's injuries. The evidence developed the fact that appellee was injured, as alleged, through the negligence of appellant in not having its cars properly equipped with couplers that would couple by impact, and prevent the necessity of going between the cars to couple them.

[1] The first assignment of error assails the ruling of the trial judge in sustaining exceptions to that part of appellant's answer which pleaded the federal law as to couplers, and, further, that its couplers had to be adjusted at times in order to be coupled by impact, that the work of adjusting the couplers could have been done with perfect safety if the cars had been standing, but that appellee sought to adjust the coupler when the engine was moving towards the car. The assignment is overruled. If, as contended by appellant, the federal law as to couplers was applicable to this case, appellant was not injured by having the pleading as to that statute stricken out, because the federal and state statutes are practically the same, and all of the issues that could arise under either were submitted to the jury. The federal act of 1893 made it unlawful for railroad companies to haul or permit to be hauled or used on their railroad any car in interstate traffic "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." U. S. Comp. St. 1901, p. 3174. The Texas law (article 6710, Rev. St. 1911) makes it unlawful for any railroad company engaged in interstate commerce "to haul or permit to be hauled or used on its line of railroad within the state of Texas any locomotive, tender, car or similar vehicle employed in moving intrastate traffic within the said state, which is not equipped with couplers coupling automatically by impact and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, cars and similar vehicles." The state law seems to be more comprehensive than the law of Congress, but the decisions of the Supreme Court of the United States have construed the federal statute so as to render it fully as comprehensive as that of the state. The substance of those decisions has been embodied in the Texas statute along with the plain provisions of the federal statute.

As substantiating the statement that the federal decisions have read into the federal statute every provision in the state statute not mentioned in terms in the federal statute, we cite the case of *Johnson v. So. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, in which it was held that locomotives

are embraced in the words "any car" used in the statute, and that the provision of the statute that cars should have couplers "which can be uncoupled without men going between the ends of the cars included coupling as well as uncoupling."

[2] The rejected answer admitted that the couplers were such as required adjustment in order to couple, and that the adjustment had to be made between the cars, and sought to excuse itself on the ground that appellee should not have attempted to make the adjustment while the cars were in motion. The statutes, federal, and state, will not bear the construction that couplers are sufficient that require adjustment by going between the cars. The object of the statutes was to obviate the necessity of men going between cars to couple them, whether moving or standing. To quote the language used in *Johnson v. Southern Pacific Company*, herein cited: "The object was to protect the lives and limbs of railroad employés by rendering it unnecessary for a man operating the couplers to go between the ends of the cars. \* \* \* The primary object of the act was to promote the public welfare by securing the safety of employés and travelers." If men were required to go between "the ends of cars," whether standing or moving, in order to adjust the couplers, neither the federal nor state law was complied with. They did not act automatically if they required that a man should go between the ends of cars to adjust the couplers before they would act. The couplers on the car and engine had failed to act when brought together, and appellee was injured while trying to adjust the coupler on the engine so that it would couple. Merely putting couplers on the cars did not meet the requirements of the law, but they must be in such condition as to couple by impact. So it was held in the *Johnson Case* herein cited.

[3] It is insisted by appellant that it was prevented by the answer being stricken out from proving that the engine and car were equipped as required by law, but the statement of facts contains testimony to that effect introduced by appellant. Under the general denial appellant could have shown all that it pleaded in regard to its couplers, and it was permitted to prove all that it offered on the subject.

[4] Under the facts of this case, neither proof of assumed risk nor of contributory negligence offered any defense. The controverted evidence showed that, if the engine had been equipped with a lever by which the coupler could have been adjusted without the necessity of going between it and the car, there would have been no accident. If appellant's answer had been permitted to stand, it could have availed it nothing, for its admissions that it was necessary to go between the cars to adjust the couplers was an admission that it was guilty of a

violation of federal and state law, and no plea of contributory negligence or assumed risk could relieve it of liability. Articles 6649 and 6650, Rev. St. 1911; Compiled Stats. U. S. of 1901, p. 3174; Act of Congress April 22, 1906 (U. S. Comp. St. Supp. 1911, p. 1323). Whenever injury or death is caused by a failure to comply with the demands of the safety appliance laws, there is absolutely no defense that can be presented by the railroad company. *Railway v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Railway v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; *Mondou v. Railway*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 144; *Winfrey v. Railway*, 227 U. S. 296, 33 Sup. Ct. 273, 57 L. Ed. 518.

There were but two issues in this case, which were submitted to the jury by the court; the first being whether the engine was equipped with such couplers as the law requires, and, if not, was the failure to have it so equipped the proximate cause of the injuries inflicted upon appellee? The court very properly refused to allow other issues, proposed in the special charges requested by appellant, to be interpolated into the case. The only defense that could be presented was that the locomotive was equipped as required by law, and that defense was presented by the court. All of the assignments presenting complaints as to the refusal to give the special charges are overruled.

[5, 6] The evidence of appellee as to the necessity of shoving the drawhead over so as to make the coupling was the statement of a fact, but, if it was an opinion, it was the opinion of one who was qualified as an expert, and it was admissible. Appellee stated that he saw that the drawhead "was shifted way over to my side, and I reached up with my left foot to shift it over so it would couple. \* \* \* If I had not shoved that drawhead over, it would have slipped by and probably have mashed me through here (indicating hips)." None of that testimony was objected to, although it was, in substance, the same as that to which objection was urged, because it showed the necessity for pushing the drawhead. Appellee had been employed as a brakeman by appellant for 13 months, and had worked as a brakeman for 8 years, and was acquainted with the operation of couplers.

[7] A stenographer's report of what witnesses may have testified in other cases could not be used to question the competency of a doctor who testified in the other cases as well as in this. The cases cited by appellant have reference to the stenographer's report of the testimony of a witness, sought to be impeached, on a former trial of the same cause. No decision is submitted holding that the evidence of third parties on a collateral issue in the trial of a different case could be used to impeach a witness in the instant case.

[8] In his closing argument to the jury, appellee's counsel used the following language: "I want this jury to give the plaintiff every cent that it possibly can, under the pleadings and evidence. You cannot make a mistake in giving him too much, under the evidence. If you do, the court has the power, and it is his duty, to cut it down; but, if you make it too low, even if your verdict should be for \$5, there is no power in this court to add even a single postage stamp. Therefore I again ask you to make your verdict as high as you possibly can under the evidence, as you can make no mistake in that direction." The language is decidedly improper, and should have been rebuked by the court. Using the expression "under the pleadings and the evidence" did not eradicate the poison that was injected by the appeal to place the responsibility of the amount of the verdict on the trial judge. A very similar argument was condemned in the case of *Railway v. Nesbit*, 40 Tex. Civ. App. 209, 88 S. W. 891. In that case the attorney said: "If you should give a verdict that is too small, it would not be raised up, but, if you should give a verdict that is too large, the appellate court will correct it by cutting it down. Therefore, if you err, you should err on the side that can be corrected by the appellate court. \* \* \* I am not going to make any mistake, and I will state that it is primarily your duty to assess the damages in this case in accordance with the charge of the court and the evidence; but, while this is true, if you make a mistake and allow him too much, the appellate court will correct it." The Court of Civil Appeals said: "The task of revising jury verdicts in matters of amount is both difficult and delicate, and it ought not to be rendered more so by an invitation to the jury to resolve all doubts in favor of a large verdict, thus passing up to the trial judge and to this court a duty which is not only primarily, but finally, theirs. \* \* \* Such language is a most insidious temptation to a jury, and it is doubtful if its effect can be withdrawn by any action on the part of the trial court." In that case the trial judge, by both verbal and written instruction, sought to prevent the jury from considering the language. In this case no effort was made to withdraw the language from consideration, but objections to it were overruled. The size of the verdict shows an active response to the appeal of appellee's counsel. Appellee claims there was no error in the argument, because the jury were advised to bring in a large verdict "under the pleadings and the evidence," but that could not remove the force of the argument to the effect that the jury should shift the responsibility of a heavy verdict to the trial judge. In the *Nesbit* Case the jury was told that it was their duty to assess the damages "in accordance with the charge of the court and the evidence."

This court is burdened too much with the

onerous duty of passing upon the question of excess in verdicts when brought up in a legitimate manner, and that burden must not be increased by deliberately inviting the jury to bring in excessive verdicts and speculate on the Court of Civil Appeals allowing the amounts to stand or cut them down to reasonable sums. The jury in this instance was told that it was the duty of the trial judge to reduce excessive verdicts, and that was true, but it was not exercised in this case. Trial judges seem adverse to exercising the power intrusted to them in connection with verdicts, and usually shift the responsibility, shifted to them by the jury, to the Court of Civil Appeals, the court of ultimate resort in such matters. To reasonably reduce a verdict as this was secured seems to be doing what counsel expected and maneuvered to obtain, and the court in the *Nesbit* Case refused to entertain the proposition to cut down the verdict. This court, however, has in several instances sought to remedy the injury inflicted by improper argument by compelling a remittitur. *Producers' Oil Co. v. Barnes*, 120 S. W. 1023; *De La Vergne Co. v. Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319; *W. U. Tel. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439. The argument in this case, as in those cited, could have affected nothing except the amount of the verdict. There were over half of the jury that at first favored a verdict for \$10,000 and that, under the facts, we deem sufficient to compensate appellee for the loss of his toes on one foot and the other injuries received.

The twenty-fourth assignment of error, which seeks to present improper conduct of the jury in arriving at a verdict, is not followed by such a statement as is required by the rules. It has been held time and again that a reference to a bill of exceptions in the record is not sufficient. *Griffin v. State*, 147 S. W. 328; *Gibson v. Oppenheimer*, 154 S. W. 694.

The case of *Morris v. Railway*, 158 S. W. 1055, is cited by appellant as deciding that a defective coupler that required adjustment before it would couple did not come under the condemnation of state or federal law. The decision in that case can be justified only by the fact stated that it was not shown that the coupler could not have been adjusted without going between the engine and the car. If the opinion can be construed into holding that a railroad company is under no obligation to keep its coupler in such condition as to couple by impact, without the necessity of any one going between the ends of the cars, it is in direct conflict with state and federal decisions which construe the act of Congress. *Thornton, Federal Employer Act*, p. 293; *Railway v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264. "The true intent and meaning of the statute is not merely that the cars, etc., used in moving interstate commerce shall be equipped with

automatic couplers of the description therein mentioned, but also that such couplers shall be in such condition as to be used automatically while such cars are so engaged." *Winkler v. Railway*, 4 Pennawill (Del.) 80, 53 Atl. 90; *United States v. Railroad*, 177 Fed. 801, 101 C. C. A. 15; *United States v. Railway* (D. C.) 160 Fed. 696. See numerous cases reported in Appendix to Thornton Fed. Emp. Liability & Safety App. Acts, pp. 396 to 710. We do not think that the Court of Civil Appeals of the Sixth District intended to hold anything except that the proof in that case failed to show that the coupler to the engine could not have been adjusted without going between the engine and car. In this case, however, the proof is positive that it was absolutely necessary for appellee to go between the engine and car to adjust the coupler. Appellant in its pleadings practically admitted that the coupler could not be adjusted without going between the engine and car.

[8] If a remittitur of \$5,000 is filed by appellee within ten days, the judgment will be affirmed; otherwise, it will be reversed, and the cause remanded.

#### On Motion for Rehearing.

Appellant states its inability to find any fact or facts showing any act of negligence on its part which created a necessity for appellee placing his foot between the engine and the car in order to couple it. Appellee swore to the necessity, and appellant, in its brief, seeks to justify its failure to have the coupler arranged so that it could be coupled from the outside by the claim that appellee should have stopped the engine, made the adjustment, and then started it up again. The courts do not seem to agree with the contention of appellant; but it is held that the safety appliance act is violated if, "in order to open the knuckle when preparing the coupler for use, it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous position." *United States v. Railway* (D. C.) 167 Fed. 695. If the law was violated by appellant, as, in effect, is admitted, then, no matter how guilty of contributory negligence appellee may have been, appellant is liable. "The statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that an employé of a railroad company would not have to go to another car to make the uncoupling of the car in question." *Railway v. United States*, 168 Fed. 1, 93 C. C. A. 393; *U. S. v. Railway* (D. C.) 162 Fed. 403. It is not contended that the locomotive had any device on the outside by which its coupler could be regulated, the only claim being that appellee should have stopped the engine in order to adjust the coupler of the car. The statute of the United States provides: "That no such employé who

may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such person or corporation so operating such railroad of any statute for the safety of employes contributed to the injury or death of such employé." The statute is too plain to require construction. If appellant did not have the coupler on its engine so arranged that it could be adjusted from the outside, it violated the law, and it does not matter what appellee may have done, if the defective coupler contributed to his injury, and appellant is liable. *Thornton, Safety Appliance Act*, § 222; *Johnson v. Railway*, 178 Fed. 643, 102 C. C. A. 89; *Mondon v. Railway*, 223 U. S. 1, at page 49, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. As said by the Supreme Court in *Railway v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061: "If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

By the act of 1908, Congress made the doctrine of comparative negligence applicable to all cases based on the negligence of the railroad and contributory negligence of the injured party, except in cases where the injury is inflicted or the death caused through a violation of the safety appliance act. In the last class of cases the defense of contributory negligence is wholly abolished. *Richey, Fed. Employers' Liability Act*, p. 39; *Horton v. Railroad*, 157 N. C. 148, 72 S. E. 958. The same rule applies to assumed risk, and authorities on that subject are also authorities on the question of contributory negligence. *Freeman v. Powell*, 144 S. W. 1033; *Colasurdo v. Central R. R. Co.* (C. C.) 180 Fed. 832, and 192 Fed. 901, 113 C. C. A. 379.

It was not shown that there was a hand lever on the engine, and therefore appellee could not use it, and using the hand lever on the car to which the engine was to be coupled, if there was such lever, would not have adjusted the defective coupler on the engine. It may have been contributory negligence for him to kick the defective knuckle, but that would not be a defense, because the defective coupling on the engine contributed to the injury.

Excerpts are made from what is designated the "stenographer's transcript," but no such document has been filed in this court or will be filed in it. This cause has been considered on the agreed statement of facts, approved by the trial judge, and the effect of such statement of facts cannot be impaired or destroyed by a document not filed among the papers, and which has no place among the papers. The statement of facts bears out the statement of this court that appellant was permitted to introduce all the testimony it desired on the subject of the

coupler on the engine. The record fails to show that any testimony offered by appellant was withdrawn by the court from the jury. In the ninth assignment of error it is stated that "the undisputed evidence in this case shows that the coupling apparatus on the car had been adjusted prior to the time of the accident, and it was, at the time of the accident, equipped with couplers coupling automatically by impact." There is no bill of exception as to any refusal to permit testimony as to the condition of the coupler on the engine. As a matter of fact, the engineer testified about the coupler on the engine, and the inspector about the coupler on the car. The inspector also stated that the engine and car should have coupled automatically by impact, and, "if they do not couple with the automatic, they are not in proper condition." And yet, in the face of that testimony by one of its own witnesses, appellant says: "There is not one line of evidence in the record which shows that appellant did not have its cars properly equipped with couplers that would couple by impact; if there be such evidence, we have overlooked it." The evidence of the inspector, taken in connection with the uncontroverted evidence that the car and engine did not couple by impact, shows that the couplers were not in proper condition. Appellee also swore that the coupler on the engine was not in proper condition. He fixed the coupler on the car, which was also out of order, and, in attempting to fix the coupler on the car, he fell and was injured. The evidence is ample to show that the couplers were not in repair.

[10] The petition alleged "that the defendant was negligent in having and permitting the couplers on said engine and car to be so that they would not couple automatically, as required by law," and that was sufficient to charge a failure to comply with the safety appliance act. A failure to have couplers that would couple automatically by impact was a violation of law, and was negligence per se.

The Congress of the United States, and not the courts, have passed the law that "effectually ties the hands of every carrier in the state." Our construction of the law may be a harsh one, but, as said by the Supreme Court in the Taylor Case, hereinbefore cited: "It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body."

It is significant that the inspector examined the car to which the engine was to be coupled, but did not inspect the coupler that was responsible for the accident. He testified fully as to the condition of the car coupler, but not one word as to the engine.

Although the conductor was told by appellee how he was hurt, he made no examination of the locomotive. He said that he left that for the inspector, and that employé was not in a position to inspect because the engine had been sent off. Appellant did not offer to show that the coupler on the engine could have been adjusted from the side, but virtually admits that it could not have been adjusted, except by stopping it. Pulling a lever on the car would not have fixed the defective coupler on the engine. It was the latter that was out of adjustment, and pulling the hand levers of all the cars in the train would not have adjusted the engine coupler. The evidence showed that it could not be adjusted except by a man going between it and the car.

Appellant quotes largely in its brief from cases which arose before the law as to contributory negligence was enacted. The cases cited by appellant in its motion have no bearing on this case. In *Southern Ry. Co. v. Snyder*, 205 Fed. 868, 124 C. C. A. 60, it is distinctly held that the accident occurred before the act of 1908. That act absolutely removes contributory negligence as a defense in cases of injuries arising from defective safety appliances provided for in the employers' liability act.

[11] The petition alleged that appellant was engaged in interstate and intrastate commerce, and that it "used on said railroad in interstate commerce and intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together." The allegation was sufficient to show that appellant was engaged in interstate commerce.

[12] In connection with the claim that there was no allegation as to defect in the couplers that brought them within the scope of the statute, we copy the following from the petition: "Plaintiff avers that the coupler attached to said engine and car would not couple automatically by impact, as required by law; and, for the purpose of making said coupling, it became necessary for plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to make the coupling as aforesaid."

The motion for rehearing is overruled.

JESSE FRENCH PIANO & ORGAN CO. et al. v. ELLIOTT.

(Court of Civil Appeals of Texas. Texarkana. April 2, 1914.)

1. APPEAL AND ERROR (§ 395\*)—EFFECT OF FAILURE TO GIVE SECURITY OR MAKE AFFIDAVIT.

Under Rev. St. 1911, art. 2098, providing that, where appellant or plaintiff in error is unable to pay or secure the costs of appeal, he may appeal upon making strict proof of his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

inability to pay the costs of appeal before the county judge or the court trying the case, a writ of error would be dismissed where plaintiff in error neither filed an appeal bond nor, in lieu thereof, made proof of her inability to pay the costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.\*]

**2. APPEAL AND ERROR (§ 389\*)—SECURITY FOR COSTS—AFFIDAVIT OF INABILITY TO PAY COSTS.**

Under Rev. St. 1911, art. 2098, requiring proof of appellant's inability to pay the costs of the appeal to be made before the county judge, or court which tried the cause, an affidavit made by appellant's attorney before a notary public was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072-2076; Dec. Dig. § 389.\*]

**3. APPEAL AND ERROR (§ 389\*)—SECURITY FOR COSTS—AFFIDAVITS.**

Rev. St. 1911, art. 2104, authorizing an appellate court to allow the appellant to amend a defective appeal bond by filing a new bond, does not authorize the filing of a new affidavit of plaintiff in error's inability to pay the costs on appeal, in lieu of a defective affidavit filed with the petition in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072-2076; Dec. Dig. § 389.\*]

**4. CHATTEL MORTGAGES (§ 161\*)—POSSESSION OF PROPERTY—PROVISIONS OF MORTGAGE.**

A provision of a chattel mortgage, authorizing the mortgagee to take possession of the mortgaged property, wherever it might be found, and sell it at private or public sale upon default or if the mortgagee felt unsafe or insecure before maturity of the security debt, was valid and entitled the mortgagee to take possession without the mortgagor's consent, if he could do so peaceably.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 282-285; Dec. Dig. § 161.\*]

**5. CHATTEL MORTGAGES (§ 147\*)—RIGHTS OF MORTGAGEES AS AGAINST THIRD PERSONS.**

A party to whom mortgaged pianos were delivered by the mortgagor for tuning and repairs had no right to retain possession until its charges for storage, tuning, and repairs were paid, as against a mortgagee, whose mortgage entitled him to take possession at any time, where it knew of the mortgage, and he did not agree that the pianos might be placed with it for repairs and tuning.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 242; Dec. Dig. § 147.\*]

**6. CHATTEL MORTGAGES (§ 173\*)—ACTIONS BETWEEN MORTGAGEE AND THIRD PERSON—SUFFICIENCY OF EVIDENCE.**

In an action for conversion by a chattel mortgagee of pianos against a party which claimed the right to hold them until its charges for tuning, storage, and repairs were paid, evidence held insufficient to show that possession of the pianos was delivered to it by the mortgagor, assuming that that would entitle it to retain possession.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.\*]

**7. CHATTEL MORTGAGES (§ 170\*)—ACTS CONSTITUTING CONVERSION—REFUSAL TO DELIVER ON DEMAND.**

A party who acquired possession of mortgaged pianos without the consent of either the mortgagor or mortgagee had no right to refuse to deliver them to the mortgagee, whose mort-

gage entitled him to take possession at any time, unless its charges for storage, tuning, and repairs were paid, and unless the mortgagor consented to such delivery, and by so refusing it converted them and became liable for their value.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 305; Dec. Dig. § 170.\*]

Error to District Court, Dallas County: Kenneth Foree, Judge.

Action by J. T. Elliott against the Jesse French Piano & Organ Company and Nida H. Hopkins. Judgment for plaintiff, and defendants bring error. Writ of error sued out by the defendant Hopkins dismissed. Judgment affirmed as to defendant company.

The suit was by Elliott against Miss Nida H. Hopkins and the Jesse French Piano & Organ Company. As against Miss Hopkins, Elliott sought a recovery for a balance due and unpaid on a promissory note for \$1,500, interest and attorney's fees in his favor, made by her April 24, 1908, and, as against the piano and organ company, a recovery of the value of three Ivers & Pond pianos and two Starr pianos, which he alleged Miss Hopkins had mortgaged and conveyed to him as security for the payment of the note, and which, he further alleged, the piano and organ company had wrongfully converted to its own use. As alternative relief, in the event it was determined the piano and organ company had not converted the pianos, Elliott sought, as against both it and Miss Hopkins, a foreclosure of the mortgage liens he asserted against the pianos. The trial of the cause in the court below resulted in a judgment as follows: (1) In favor of Elliott against Miss Hopkins for \$1,371.30 as the balance, principal, interest, and attorney's fees, due on the note, and foreclosing the lien asserted by Elliott against the three Ivers & Pond pianos; (2) in favor of Elliott against the piano and organ company for \$700, as the value of the two Starr pianos found to have been converted by it; (3) in favor of the piano and organ company against Elliott for \$300, as the sum due it as storage and drayage charges on the three Ivers & Pond pianos. By the terms of the judgment the \$300 adjudged in favor of the piano and organ company against Elliott was to operate as a credit on the judgment for \$700 in his favor against it, and the said \$700 adjudged in Elliott's favor against said piano and organ company was to operate as a credit on the judgment for \$1,371.30 in favor of Elliott against Miss Hopkins.

U. F. Short, Geo. M. Feild, and Cocke & Cocke, all of Dallas, for plaintiffs in error. W. A. Kemp and A. B. Lacy, both of Dallas, for defendant in error.

WILLSON, C. J. (after stating the facts as above). [1-3] The judgment is before us for review on a writ of error sued out by Miss Hopkins, and also on a writ of error

sued out by the piano and organ company. But we cannot consider the objections there-to urged by the former, because she failed to comply with the law which required that she should either file a bond or, in lieu thereof, should make proof of her inability to pay the costs of an appeal. Article 2098, R. S. 1911; *De la Vega v. League*, 2 Tex. Civ. App. 252, 21 S. W. 565; *Bank v. Carper*, 28 Tex. Civ. App. 334, 67 S. W. 188; *Stafford v. Blum*, 7 Tex. Civ. App. 283, 27 S. W. 12; *Jamison v. Land Co.*, 77 S. W. 969; *Anderson v. Silliman*, 92 Tex. 580, 50 S. W. 576. At the time she filed her petition for the writ, Miss Hopkins filed an affidavit made by her attorney before a notary public that she was unable to pay the costs of the appeal or any part thereof, or to give security therefor. The statute referred to required that she should make proof of her inability to pay the costs before the county judge of the county where she resided, or before the court which tried the cause. Filing the affidavit mentioned above did not satisfy the requirement of the statute. *Graves v. Horn*, 89 Tex. 77, 33 S. W. 322; *Bargna v. Bargna*, 123 S. W. 1143. On the day the cause was submitted to this court, Miss Hopkins filed with the clerk here her affidavit, made before the county judge of Dallas county, that she was unable to pay the costs of the appeal or any part of same. But the filing of this affidavit cannot be given any effect. The statute (article 2104, R. S. 1911) authorizing the filing of a new appeal bond to cure a defect in one previously filed does not authorize the filing of a new affidavit to cure defects in an affidavit previously filed in lieu of such a bond. *Washington v. Haverty Furniture Co.*, 136 S. W. 832; *Wood v. Railway Co.*, 43 Tex. Civ. App. 590, 97 S. W. 323. Under the circumstances stated, we must sustain appellant's motion to dismiss the writ of error sued out by Miss Hopkins.

The piano and organ company insisted in the court below, and insists here, that the testimony showed that Elliott and Miss Hopkins placed the five pianos with it to be repaired, tuned, and sold; that thereafter neither of them had a right to the possession thereof as against it until its charges for the storage, etc., were paid; and that, it appearing its charges had not been paid, it was not guilty of a conversion as against Elliott, when, on his demand therefor, it refused to deliver the pianos to him. Its contention, so far as it applied to the three Ivers & Pond pianos, was sustained by the court below, and the jury was instructed to find, and did find, in its favor on account of the storage, etc., of those pianos. The contention, so far as same applied to the two Starr pianos, was overruled; and, on the theory that the undisputed testimony showed that said piano and organ company had unlawfully converted those pianos, the jury was instructed to find against it for their value. The question presented by the assignments is

as to the correctness of the conclusion reached by the trial court that it appeared, as a matter of law, that the piano and organ company had converted the two Starr pianos.

[4-7] By the terms of the mortgage covering the Starr pianos, Elliott was authorized to take possession thereof "wherever they may or can be found, and sell the same at private or public sale to the highest bidder," in the event Miss Hopkins made default in the payment of the debt it secured, or in the event, at any time before the indebtedness matured, Elliott "felt unsafe or insecure." It is settled that such a stipulation in a mortgage is valid, and that the mortgagee, by virtue thereof, may take possession, if he can do so peaceably, of the mortgaged property without the mortgagor's consent. *Singer Mfg. Co. v. Rios*, 96 Tex. 174, 71 S. W. 275, 60 L. R. A. 143, 97 Am. St. Rep. 901. It appearing from the testimony that the indebtedness secured by the mortgage had matured, the effect of the decision cited is to show that Elliott was entitled to the possession of the pianos as against Miss Hopkins. Was he also entitled to the possession thereof as against the piano and organ company, without first paying charges demanded by them as storage, etc., thereon? Clearly he was not, if it was true, as that company contended it was, that he had agreed that the pianos might be placed with it to be repaired, tuned, etc. But there was no testimony showing Elliott had so agreed. On the contrary, it conclusively appeared that the piano and organ company acquired possession of the pianos without either his knowledge or consent. Therefore a right in that company to retain possession of the pianos until the charges it claimed against same were paid cannot be predicated on an agreement on the part of Elliott. Can it predicate such a right, as against Elliott, upon the fact, if it was a fact, that Miss Hopkins had delivered the possession of the pianos to it for the purposes stated? We think not. It knew that Miss Hopkins had conveyed the property to Elliott to secure her indebtedness to him, and therefore that she could not by her act, and without his consent, create in its favor a lien and rights superior to his. If however, it should be said that the law is that a person, with notice of a mortgage, containing a stipulation like the one in question, in possession of the mortgaged property under a contract with the mortgagor to repair, etc., same, is entitled to retain possession thereof until his charges for such repair, etc., are paid, as against the mortgagee, we would feel constrained to hold that this is not that kind of a case, because it does not appear, from any testimony in the record, that Miss Hopkins delivered the possession of the pianos to the piano and organ company for such a purpose, or, indeed, that she delivered possession of same to it at all. It appeared that Miss Hopkins had been conducting a music school in Dallas, and

that in April, 1910, she closed the school, going to Illinois, where she remained until February, 1911. She testified that when she left Dallas the pianos were in the building where she had been using them, and that she had no recollection of having authorized the piano and organ company to take same from said building. The only other testimony with reference to this phase of the case was that of the manager of the piano and organ company, who said that the two Starr pianos "came down to the store (of the piano and organ company) when Miss Hopkins' conservatory was closed, and came on a telephone message." It seems to us that the testimony that the pianos "came on a telephone message," in the face of Miss Hopkins' testimony that she had no recollection of having authorized the piano and organ company to take same from the building where she left them when she went to Illinois, would not have justified a finding that she sent the message or had it sent, and thereby authorized the piano and organ company to take possession of the pianos. If it would not, then clearly it did not otherwise appear from the testimony than that said piano and organ company wrongfully, both as to Miss Hopkins and Elliott, was in possession of the pianos at the time Elliott demanded same. Under such circumstances, the piano and organ company had no right to refuse to deliver the pianos to Elliott, unless charges it claimed against same were paid, and unless Miss Hopkins consented to such delivery. Its refusal, we think, was such a conversion as rendered it liable to Elliott for the value of the two pianos. 28 A. & E. Enc. Law, pp. 705, 708; *Scaling v. Bank*, 39 Tex. Civ. App. 154, 87 S. W. 717.

There is no error in the judgment, in so far as it is against the piano and organ company; and it is affirmed.

#### CITY OF DALLAS v. COCHRAN et al.<sup>†</sup> (No. 1292.)

(Court of Civil Appeals of Texas. Texarkana.  
April 2, 1914. Rehearing Denied  
April 16, 1914.)

#### TAXATION (§ 244\*)—EXEMPTIONS—PROPERTY USED BY RELIGIOUS SOCIETY.

Under Rev. St. 1911, art. 7507, § 1, exempting from taxation buildings used exclusively for public worship, and not leased or otherwise used with a view to profit, a building used exclusively for public worship is not exempt from taxation where it is owned by a private individual and leased to a religious society, which pays a monthly rental, for it is leased and used by the owner with a view to profit, within the statute, which should receive a strict construction.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 405-414; Dec. Dig. § 244.\*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by City of Dallas against Sam P. Cochran and another. From a judgment for

defendants, plaintiff appeals. Reversed and rendered.

The suit is brought by the city of Dallas for taxes claimed to be due for the year 1911 by appellee Cochran, as owner of certain real estate located in the city of Dallas, and to foreclose a tax lien. The United States Bond & Mortgage Company, Incorporated, was made a party defendant, upon the ground that such company held a mortgage lien on the premises, and a foreclosure of the tax lien as against it was prayed for. The property in suit, described by metes and bounds, is 100 by 90 feet in block 125/33 according to the official map of the city of Dallas. The petition alleges that appellee Cochran rendered the property for taxation to the proper officers of the city of Dallas, and that it was accepted and incorporated in the official rolls. The appellees each answered by denial, and specially averred to the effect that the lot was occupied by a churchhouse, which was the First Presbyterian Church, and that he had, on May 31, 1910, executed a lease or rental contract to the church, by the terms of which the church was to pay a stipulated rental and was to occupy and use the house and the lot for the exclusive purpose of public worship, and that the church had, since said time, used, and is now so using, the entire premises and building thereon exclusively for public worship, and that the premises were by law exempt from taxation for the year 1911. The case was submitted to the court upon an agreed statement of facts, and judgment was rendered in favor of the appellees. The agreed statement of facts, which the trial court adopts, is as follows:

"(1) That on, to wit, about May 31, 1910, the First Presbyterian Church conveyed to Sam P. Cochran, defendant herein, the following described land [description follows], reserving in said deed and notes express vendor's lien to secure the payment of certain indebtedness, to wit, the sum of \$60,000, therein mentioned as part of the purchase money of said lot, \$10,000 of which has been paid, and the two notes remaining unpaid of \$25,000 each, with vendor's lien, having been conveyed by proper deed of conveyance to the United States Bond & Mortgage Company, Incorporated, and that the said United States Bond & Mortgage Company still owns and holds said notes; that subject to the express vendor's lien above mentioned Sam P. Cochran owned said lot on the 1st day of January, 1911.

"(2) That on the date when the said lot was conveyed to defendant it was occupied by a churchhouse, which the First Presbyterian Church has been using for years for the exclusive purpose of public worship; that it had used none of it, or the grounds attached thereto, for any other purpose.

"(3) That on the date when the said lot

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Application for writ of error pending in Supreme Court.



was conveyed to said defendant, he immediately executed to the said First Presbyterian Church a lease or rental contract, which was accepted by the said First Presbyterian Church, by the terms of which they continued to occupy said lots and buildings thereon as they had previously occupied them for the exclusive purpose of public worship, for which they paid the said defendant a stipulated rental; that under the said lease contract said church has, ever since the date of the said conveyance to the present time, including the 1st day of January, 1911, occupied said lot and buildings thereon and used same exclusively for public worship.

"(4) That all of the buildings thereon and furniture in said buildings and the grounds attached thereto are necessary and proper for such use.

"(5) That no part of the said lots, buildings, or furniture has been leased or rented out by the said First Presbyterian Church, or otherwise used by it with a view to profit.

"It is agreed by the parties hereto that if the exclusive use of this property by the said First Presbyterian Church for the purpose of public worship, and under all the circumstances above stated, and that it has not leased out any part of it, or rented it to any other person for profit, does not exempt same from taxation under the laws of Texas, the defendant is liable for taxes thereon due the plaintiff for the year 1911.

"(6) It is agreed that the assessment by the city of Dallas was duly and regularly made, and that the amount of taxes due for the year 1911, exclusive of penalties and interest is \$829.92.

"It is contended by the plaintiff in this case that the fact that defendant has bought the property under the circumstances above stated, and leased it to the First Presbyterian Church, renders him liable for the taxes thereon; whereas defendant's contention is that the ownership of the property might be construed to be in him is immaterial, as the exclusive use of the property by the church exempts it from taxation."

C. F. O'Donnell and Marlon S. Church, both of Dallas, for appellant. Crane & Crane, of Dallas, for appellees.

LEVY, J. (after stating the facts as above). The trial court gave the legal effect of the agreed facts as follows: "It is concluded as a matter of law that the property above described is exempt from taxation by reason of the fact that it was used by the Presbyterian Church for the exclusive purpose of public worship, notwithstanding the fact that the Presbyterian Church did not own the property." The assignments challenge the ruling of the court. Appellee Cochran was the owner of the premises, and leased the church building and lot to the Presbyterian Church for a stipulated rental. And it is the owner who here seeks and claims

exemption from taxation. And thus there arises the precise question for decision of whether the property is exempt, under the statute of this state, from taxation at the hands of the legal owner thereof on account of the use for purely religious worship which the property is put to by the lessees. Section 1, art. 7507, R. S., provides exemption from taxation to the following property, in words as follows: "Public schoolhouses and houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit." The latter clause, "and not leased or otherwise used with a view to profit," has clear and explicit reference alike to each the house, the books and furniture, and the ground occupied by the building. And such clause could not properly be construed otherwise than as a qualifying clause upon each and every subject-matter preceding it in the provision. In this view, then, the provision must be here read as exempting from taxation a house and necessary grounds which are (1) "used exclusively for public worship," and (2) "not leased or otherwise used with a view to profit." The language of the first clause, "used exclusively for public worship," quite clearly denotes the mode and character of use to which the particular property must be put before taxes may not be imposed. But under the second, and qualifying, clause of the provision, the particular property may not be exempted from taxes, though used exclusively for public worship, if "used with a view to profit." It is manifest from the language that the use of the property for church purposes, and the use of the property for profit, cannot both exist if the property is to be exempt. And as the dual use of the particular property cannot exist if the property is to be exempt, it is difficult to perceive how the exemption could apply to the facts here. The fact that the lessee used the premises under a rental contract for church purposes would be opposed by the fact that the owner, claiming the exemption, was himself putting his property to the use of private gain. And requiring that the property be "used" for religious worship, and not "used with a view to profit," would indicate that the Legislature had in mind, in measuring the exemption, the entire use to which the property is put by all concerned. The language does not express any other meaning. If the full use which the property is put to by all concerned must, under the language of the act, measure the exemption, then there is no warrant to construe the provision in hand as saying that the property would be covered by the exemption if it is not rented out by a lessee. The words do not say so. And neither do we think it means that. The purpose of employing the language of limitation in the sec-

ond clause is made apparent when it is considered that without this clause the owners of property might lease it for profit, to be used by the lessee for public worship, and thereby exempt it from taxation. And clearly, we think, the Legislature meant, by adding the language of limitation of the second clause under consideration, to prevent the owners of property, whoever they might be, from taking advantage of the exemption when any profit to them is derived from the particular property.

It is the universal rule applicable to statutes exempting property from taxation that "when an exemption is found to exist it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." 1 Cooley on Taxation (3d Ed.) p. 357. This rule plainly meant that the statute must be taken literally, or, if the construction of the law be doubtful, that the doubt must be resolved in favor of the taxing power and against the exemption. 2 Sutherland, Stat. Con. (2d Ed.) § 539; approved *Morris v. Masons*, 68 Tex. 693, 5 S. W. 519. And, applying these rules, we think the second clause of the provision under consideration, which we are called upon to construe and apply, classifies the premises as taxable, and makes it a subject-matter of taxation, when, as here done by the owner, used for purposes of a private interest.

In the case of *City of Louisville v. Werne* (Ky.) 80 S. W. 224, the owner of the lot leased it to the trustees of the Walnut Street Baptist Church for a term of 20 years, without rent, for the purposes of a mission church. The provisions of the statute of that state, as given in the opinion, provided exemption from taxation to "places actually used for religious worship, with the grounds attached thereto, and used and appurtenant to the house of worship." The court there held the property was shown to be within the terms of the exemption, because of the fact that its entire use was for religious purposes. But neither the facts nor the provisions of the statute of that case are at all like the instant one. And yet it is not doubted that the statute of Texas would apply to and cover an exemption upon the same facts of the case just mentioned. For illustration: If the owner here had agreed for his property to be used by the church for purely religious worship, rent free, the exemption would apply. It would apply because the entire and full use of the property would, in such case, be without a "view to profit" by any one. And it would likewise apply where a church owns the property and uses it exclusively for religious worship. In each instance the property would be put to

the use only of religious worship, and that would be clearly within the terms of the act. But where the facts, as here, appear otherwise, the terms of the act are not met.

In *Scott v. Society of Russian Israelites*, 59 Neb. 571, 81 N. W. 624, the owner of the premises leased it to the society for 10 years for a monthly rental. The statute there provided, as disclosed by the opinion, an exemption to property "used exclusively for religious worship." The court there held that the exemption did not depend, under the terms of the statute, upon the ownership of the property, but upon the uses that such property subserves. But the difference between that statute and the statute of this state can be appreciated the moment it is stated. In that statute there was no limitation upon the exemption. In the statute of this state there is the limitation that such property must not be used with "a view to profit."

But to the contrary of that case is the case of *State v. MacGurn*, 187 Mo. 238, 86 S. W. 139, 2 Ann. Cas. 808, where a lot was leased at an annual rental to a school board to be used for school purposes. The statute there, as stated in the opinion, exempted from taxation "lots in incorporated cities when the same are used exclusively for schools." There the court held that to constitute an "exclusive" use of the premises for school purposes there must be no profit or gain from the property at the hands of the owner. And that case cites several decisions of other states, which can be referred to, placing the same construction upon similar statutes.

Appellant also cites and relies on the cases of *Vall v. Beach*, 10 Kan. 214; *Anniston v. State*, 160 Ala. 253, 48 South. 659. In both of those cases the statute in hand merely declared the property exempt "when the same are used exclusively" for the purposes named. And the statute of this state, as before observed, is not intended to grant exemption without limitation. This difference makes inapplicable the cases cited.

The judgment is reversed and here rendered in favor of the city of Dallas for the amount of the taxes, interest, and penalty sued for against appellee Cochran, with a foreclosure of the tax lien against the property described against both appellees. The costs of the trial court and of this appeal will be taxed against appellees.

MISSOURI, O. & G. RY. CO. OF TEXAS v. BROWNING et al. (No. 1289.)

(Court of Civil Appeals of Texas. Texarkana. March 26, 1914.)

1. DEPOSITIONS (§ 83\*)—NOTICE—TIME OF FILING.

Defendant cannot object to depositions taken and used on behalf of plaintiff, on the ground that defendant had not been legally served with

citation when the depositions were taken, in that it was served in the wrong corporate name.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.\*]

## 2. DEPOSITIONS (§ 83\*)—TIME OF OBJECTIONS.

Under Rev. St. 1911, art. 3876, providing that objections to the form or manner of taking depositions shall be made and determined at the first term of court after the deposition is filed, and not thereafter, a motion to suppress depositions on the ground that notice of the filing of interrogatories for the purpose of taking depositions was not served with citation could be denied, where not made until the second term after the depositions were filed.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.\*]

## 3. EVIDENCE (§ 471\*)—CONCLUSIONS OF WITNESS.

Evidence that a railroad engine was throwing more sparks at a particular time than was usually thrown by other engines passing in that direction was not objectionable as a conclusion, in absence of a showing that witness was not capable of telling, from observation, whether the engine threw more sparks than engines usually did in passing that point.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

Appeal from Grayson County Court; J. O. Adamson, Judge.

Action by William Browning and others against the Missouri, Oklahoma & Gulf Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jno. T. Suggs, of Denison, for appellant. Wolfe, Wood & Haven, of Sherman, for appellees.

**HODGES, J.** On January 16, 1913, the appellees filed this suit against the appellant to recover damages for the destruction of a house by fire. It is alleged that the fire originated from sparks emitted by one of the appellant's locomotives, and that the appellant was negligent in its equipment and operation. In a trial before a jury, a verdict and judgment were rendered in favor of the appellees for \$250.

The first assignment of error is as follows: "The court erred in overruling and failing to sustain the motion of this defendant to quash and suppress the depositions of Maggie Robinson and Columbus Dibble, and in permitting the plaintiff to use and offer in evidence the deposition of said Maggie Robinson, for this: That, at the time the deposition of the said Maggie Robinson was taken, this defendant was not a party to this suit, and no citation commanding it to appear and answer had been served upon it as provided by law, and this defendant filed no cross-interrogatories to said witness, or otherwise in any manner entered its appearance herein, and said deposition was taken and returned at a time when this defendant was not a party thereto, and said deposition was not properly admissible in evidence against this defendant." The proposition following this assignment is as follows: "A deposition taken by plaintiff is not admissible in evidence against

a defendant in a suit when said defendant, at the time said deposition was taken, had not been made a party to such suit and had in no way waived its right to object to the admission of such deposition."

It appears from the record before us that the corporate name of the appellant is the Missouri, Oklahoma & Gulf Railway Company of Texas. The citation issued upon the filing of the plaintiffs' original petition and served upon its agent in certain parts omitted the words "of Texas" from the name of the defendant in the suit. The same words were also absent in the return of the sheriff. No question is made, however, about the service of the citation being upon the duly authorized agent of the appellant and within proper time. At the next term of the court after the service of the citation, the appellant did not answer before the return day. No judgment was taken by default, but counsel for the appellees asked for and obtained permission of the court to have the citation amended by adding the words "of Texas" in the body of the citation and also in the return of the sheriff. Those portions of the citation material to be considered in this connection are as follows: "You are hereby commanded to summon the Missouri, Oklahoma & Gulf Railway Company (of Texas), a corporation, by summoning G. H. Payne, its local agent," etc., "then and there to answer the petition filed in said court on the 16th day of January, 1913, wherein William Browning is plaintiff, and the Missouri, Oklahoma & Gulf Railway Company (of Texas), a corporation, is defendant; the file number of said suit being 8676." Then follow a statement of the nature of plaintiffs' demand and the usual provisions commonly embodied in citations. After the amendment of the citation in the manner above referred to was permitted, the appellant filed an answer to the merits, and on its application the case was continued for the term. At the next term thereafter appellant presented a motion to quash the depositions referred to in the assignment. The motion was based upon the assumption that the citation served upon appellant's agent was insufficient to require it to answer at the time the precept was issued to take the depositions of the witnesses mentioned.

In approving the bill of exceptions the court adds the following qualification: "Plaintiff, William Browning, sued the Missouri, Oklahoma & Gulf Railway Company of Texas. When citation was issued, the body of the citation stated the name of the defendant as the 'Missouri, Oklahoma & Gulf Railway Company'; on the back of the citation the name of the defendant was properly stated, as alleged in plaintiffs' petition (i. e., 'Missouri, Oklahoma & Gulf Railway Company of Texas.' The number in the body of the citation was 8676, and the number on the back of the citation was 8676. The Missouri, Ok-

lahoma & Gulf Railway Company filed an answer in this case the Missouri, Oklahoma & Gulf Railway Company of Texas refused to answer. The plaintiff then filed a motion to permit the clerk to amend the citation by writing in the body of the citation the words 'of Texas' after the words 'the Missouri, Oklahoma & Gulf Railway Company.' Upon hearing of this motion it was shown that G. H. Payne was the agent and only agent of the Missouri, Oklahoma & Gulf Railway Company of Texas in Grayson county, Tex., and that service was had upon the said G. H. Payne. The motion to amend the citation was granted, and, when the same was amended, the Missouri, Oklahoma & Gulf Railway Company, of Texas filed answer, and at the same time filed a motion for a continuance, which said motion for continuance was granted. Two depositions were taken by the plaintiff, pending the proceedings above stated. The defendant refused to cross either set of interrogatories. The plaintiff had new sets of interrogatories issued to take the depositions of these same two witnesses. At the next term of court, the case was set down for trial, and, when same was reached for trial, defendant filed a motion to quash the depositions. 'Plaintiffs' attorneys stated in open court that one of the depositions had been retaken and returned into court; that he was informed by the notary taking the depositions that the other deposition had been taken; and that the same would be returned into court that day. The motion to suppress the depositions was then overruled. The deposition of the witness Columbus Dibble being retaken, the same was read without objection. The deposition of Maggie Robinson not being returned during the trial, the court permitted the original deposition to be read, over the objection of the defendant. The day after the trial the other deposition of the witness Maggie Robinson was returned into court. When the defendant presented a motion for a new trial in this case, I consulted the original deposition of the witness Maggie Robinson and her deposition as retaken, and saw that the same were identically the same, with the exception of her answers to three cross-interrogatories. Without settling out her answers to these three cross-interrogatories, the same simply corroborate her direct testimony, and the motion for a new trial was overruled because a reading of the original deposition was not harmful to the defendant."

[1] In legal effect the contention here is that the appellant was not required to observe any notice with reference to the filing of interrogatories for the purpose of taking a deposition until after it had been legally served with the citation. We do not understand that to be the correct rule of law. *Kottwitz v. Bagby*, 16 Tex. 656; *Connor v. Mackey*, 20 Tex. 748.

It appeared from the bill of exceptions in the first case referred to above that the

plaintiff on the trial offered in evidence a deposition to which defendant objected upon the ground that, at the time of serving the notice upon him, he had no notice of any suit by the plaintiff against him. Judge Wheeler, in rendering the opinion of the court, said this was an objection which should have been presented by a motion to suppress on account of the manner and form of taking the deposition, and that the objection was properly overruled because not seasonably made in the manner required by law. He adds, however: "But, if it had been taken in time, the objection was not tenable. The interrogatories and notice served upon the defendant sufficiently apprised him that the depositions were intended to be used in the trial of a suit then instituted against him; and there was nothing to prevent his propounding cross-interrogatories to the witness, if he chose to do so, though the citation had not been served upon him."

In the second case referred to the same judge used this language: "It is no objection to the taking of depositions, to be read upon the trial, that the defendant has not answered. He is allowed time to file his answer; but, as he may be required to proceed to trial immediately after having answered, it is proper, and may be necessary, that he take steps in advance to obtain his evidence. His failure to do so, when he might have obtained it, would deprive him of the right to a continuance."

[2] It does not appear from the bill of exceptions or from the facts stated in the brief of the appellant that notice of the filing of the interrogatories had not been properly served upon it. It does appear, however, that this objection was not urged until the second term of the court after the depositions had been filed. Article 3676 provides: "When a deposition shall have been filed in the court at least one entire day before the day on which the case is called for trial, no objection to the form thereof, or to the manner of taking the same, shall be heard, unless such objections are in writing and notice thereof is given to the opposite counsel before the trial commences: Provided, however, that such objections shall be made and determined at the first term of the court after the deposition has been filed, and not thereafter." The court had the authority to refuse to entertain this motion at the time it was presented, under the foregoing provisions of the statute.

[3] The second assignment of error complains of one of the answers given by the witness Maggie Robinson, upon the ground that it was the conclusion of the witness, and not a statement of a fact. The answer was as follows: "The engine was throwing more sparks than was usually thrown by other engines passing that point in that direction." There is nothing in the statement in appellant's brief accompanying this assignment

which indicates that the witness was not fully capable of telling from her actual observation whether this engine threw more sparks than engines usually did in passing that point. The objection is untenable, and the assignment is overruled.

The judgment is affirmed.

**CHICAGO, R. I. & G. RY. CO. v. PORTER**  
et al. (No. 1282.)

(Court of Civil Appeals of Texas. Texarkana.  
April 1, 1914. Rehearing Denied  
April 16, 1914.)

**1. RAILROADS (§ 412\*)—INJURIES TO ANIMALS—FENCES.**

Though a railroad company had fenced its right of way sufficiently to prevent stock from getting upon the track, its duty to keep its right of way sufficiently inclosed was not thereafter discharged by the exercise of ordinary care to maintain the fence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1451-1458; Dec. Dig. § 412.\*]

**2. RAILROADS (§ 441\*)—INJURIES TO LIVE STOCK.**

Where a horse was killed upon the right of way of the defendant railroad company, it is presumed that defendant's train ran him down, and it has the burden of proving that the train was owned and operated by another company, though the petition alleged that the horse was run down by defendant's train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

**3. MUNICIPAL CORPORATIONS (§ 753\*)—LIABILITY FOR ACTS OF AGENTS.**

Where the servants of a municipality negligently made an opening in the fence of a railroad company, and a horse which strayed through the opening was killed on the tracks, the municipality is not liable to the railroad company, unless the making of the opening was within the scope of the authority of its agents.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. § 753.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by D. K. Porter against the Chicago, Rock Island & Gulf Railway Company, which impleaded the city of Dallas. From judgment for plaintiff, which denied the defendant relief against the impleaded city, defendant appeals. Affirmed.

This was a suit by appellee Porter against appellant to recover the value of a horse killed by a train operated over its line of railway. It was alleged that the horse was killed "through the negligence and want of ordinary care of defendant's agents and employes operating its said cars, and through the failure of said defendant to protect the railroad by proper fencing at this point." Appellant in its answer alleged that its line of railway was properly fenced at the place where the animal was killed, but that employes of the city of Dallas, while laying water mains for that city, "broke down and removed the fence" which inclosed its right of way, "and left the same open, so that

horses and other animals could get through the same and upon the defendant's track, and defendant charges that the plaintiff's horse, which is alleged to have been killed, and for which he sues, got through the opening left by the servants and the employes of the said city of Dallas and upon the track of defendant and was killed." Appellant asked that the city of Dallas, the other appellee, be made a party to the suit, and that, in the event appellee Porter recovered against it, it have a recovery over against said city. The city of Dallas, having been made a party, filed an answer. The verdict and judgment were in favor of appellee Porter against appellant for the sum of \$250 as the value of the horse, and in favor of the city as to appellant's suit against it.

Lassiter, Harrison & Rowland and Bennett Hill, all of Dallas, for appellant. W. J. Rutledge, Jr., C. F. O'Donnell, M. S. Church, and G. C. Adams, all of Dallas, for appellees.

WILLSON, C. J. (after stating the facts as above). [1] The court instructed the jury, other conditions concurring, to find for appellee Porter if they believed from the evidence that appellant "failed to keep its track fenced with a fence sufficient to prevent stock of ordinary docility from getting through and upon the railroad track." Having properly fenced its track, in the first instance, appellant insists that the duty it owed was only to use ordinary care to keep it so fenced, and cites *Ry. Co. v. Reitz*, 27 Tex. Civ. App. 411, 65 S. W. 1088, decided by the Court of Civil Appeals for the First District, as conclusive of its contention. In *Ry. Co. v. Pruitt*, 49 Tex. Civ. App. 370, 110 S. W. 966, this court held to the contrary, and the Supreme Court, in answering a question we then certified to it, settled the question against appellant's contention, holding that "the condition upon which the immunity is allowed is that the road shall be fenced; that is, that it shall be sufficiently inclosed to prevent the passage of live stock, and not that it shall exercise ordinary care to see that it is maintained in that condition."

[2] It was shown that other railway companies also operated trains over appellant's track at the point where the horse was killed, but the nature of the arrangement between appellant and said other companies under which they so used the track was not shown. Whether the horse was killed by a train operated by appellant or by a train operated by one of said other railway companies did not appear from the testimony. Appellee Porter having alleged that his horse was killed by one of its trains, appellant insists he was bound to prove it, and, failing to do so, was not entitled to recover against it. But in such a state of the case we think a presumption should be indulged

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the horse was killed by one of appellant's trains. "It is a sound proposition, often applied," said the Supreme Court in *Ry. Co. v. Miller*, 98 Tex. 273, 83 S. W. 183, "that a corporation, shown to be owner of a railroad in the operation of which a wrong has been done, is presumed to be in the possession and operation of its road. \* \* \* The presumption to which we have referred puts upon the owner of a railway, on which an injury has been inflicted by moving cars, the burden of showing, at least, that such cars were not operated by it or under its control."

What has been said disposes of the assignments, except one, which question the validity of the judgment in so far as it is in favor of appellee Porter against appellant. In the one excepted, appellant complains of the refusal of the court to peremptorily instruct the jury to find in its favor. On the issue between appellee Porter and appellant, we think the testimony would have more nearly justified a peremptory instruction to find in favor of the former.

[3] The other assignments question the correctness of the action of the court in giving and refusing instructions with reference to appellant's claim of a right to recover over against the city of Dallas in the event appellee Porter recovered against it.

Other conditions concurring, the court told the jury to find in appellant's favor against said city, if they believed its employes "negligently made an opening or gap" in appellant's fence. The contention is that, if the city's employes made an opening in the fence through which the horse passed from the pasture in which it was confined to appellant's track, their act constituted a willful trespass, for the consequences of which the city was liable. If the instruction was erroneous, we think it was so because too favorable to appellant. Unless the act of the employes in making the opening in appellant's fence was within the scope of their employment, the city was not liable, whether the act was willful or merely negligent. 3 *Abbott's Mun. Corp.* § 973 et seq.; *City of Galveston v. Brown*, 28 Tex. Civ. App. 274, 67 S. W. 156. We have found nothing in the record showing that, if the employes of the city made the opening in the fence, they did so in the performance of a duty arising out of their employment. The evidence rather tends to show that, if they made the opening, it was for their own personal convenience merely in reaching a lake of water inside the pasture.

For the reason just suggested, we think the court did not err when he refused appellant's request to instruct the jury to find for it as against the city in the event they found in favor of appellee Porter, if they believed employes of the city "cut down the fence or left down a gap in the fence, \* \* \* and that plaintiff's horse went through the open-

ing in said fence and was killed." If the employes, for purposes of their own, and acting without the scope of their employment, made the opening in the fence, the city was not liable for the consequences of their act. The judgment is affirmed.

#### WILSON et al. v. SEARS.

(Court of Civil Appeals of Texas. Texarkana.  
April 1, 1914. Rehearing Denied  
April 16, 1914.)

#### BROKERS (§ 40\*) — COMPENSATION — EMPLOYMENT OF BROKER.

Where the owner of land told a broker "to look around and find a purchaser," she authorized him to perform a valuable service; and while it may have constituted merely an offer which might be withdrawn before a purchaser was secured, where the offer was not withdrawn, and the owner sold to a purchaser with whom she had been brought in touch through the broker, knowing that the broker had showed the land to such purchaser, the law will imply a promise to pay the broker's commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.\*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by C. W. Sears against Laura C. Wilson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Seth Shepard, Jr., of Dallas, for appellants. W. L. Mathis and Leake & Henry, all of Dallas, for appellee.

HODGES, J. This suit was instituted by the appellee against the appellants to recover the sum of \$615 claimed as commissions on the sale of a tract of land situated in Dallas county. In a trial before the court without a jury a judgment was rendered in favor of the plaintiff below for the amount sued for.

The petition alleged, among other things, that: "On or about the 4th of October, 1910, the plaintiff was employed by the defendants and each of them, acting for themselves and acting through their agent with the knowledge and approval of the said defendants and each of them, to make a sale, on the usual commission, of a certain farm belonging to the defendants or one of them, situated near the town of Reinhart, Dallas county, Tex.; the said farm consisting of about 220 acres. That, for the said services to be rendered by the plaintiff in making sale of said farm, the defendants and each of them expressly and impliedly promised and agreed to pay to the plaintiff the usual brokerage commission, which said usual commission is and was 5 per cent. of the amount for which the property sells." Then follow other allegations showing that the appellee performed the services contemplated by the parties, and that the sum sued for is the amount to which he was entitled as a commission of the purchase price of the property.

The facts show that the land was the separate property of Mrs. Wilson.

The court found the following facts:

"(1) I find: That in the year 1910 Mrs. Laura C. Wilson, wife of Hunter L. Wilson, in her separate right, was the owner of the farm known as the 'Old John Hughes Farm,' located near Garland, Tex. That she bought the place about the summer of 1909, and sold it in the fall of 1910 to Luther Goforth. That some time during the summer of 1910 Mrs. Wilson, the defendant, had a conversation with the plaintiff, C. W. Sears, in relation to the sale of the said property for her. That this conversation occurred at the said farm, and Mrs. Wilson stated to the plaintiff, in answer to his inquiry if she wanted to sell her farm, that she would sell anything she had, provided she could make a profit on it, and asked the plaintiff to look around and see if he could get a purchaser, which he did. That plaintiff had received a commission from John V. Hughes when he sold the same place to Mrs. Wilson for making the sale, which fact was known to Mrs. Wilson. That Mrs. Wilson also knew that Sears was accustomed to receive commissions on land sales made by him. There was no written contract, and nothing was said about commissions, but plaintiff understood that, if he secured a satisfactory sale, he would receive a commission, as also did Mrs. Wilson. In addition to the conversation between plaintiff and Mrs. Wilson, the plaintiff, some months later, had a talk with Mr. John V. Hughes, a relative of Mrs. Wilson; Mrs. Wilson at that time being absent in New York, and Mr. Hughes attending to her business matters for her in her absence. That plaintiff asked Mr. Hughes if Mrs. Wilson still wished to sell her farm, and he said that she did, and plaintiff told him that, subsequent to his conversation with Mrs. Wilson, he had interested a couple of purchasers in the farm, and had him send her a telegram asking her what she would take for the place, and telling her what plaintiff could get for it. The telegram to Mrs. Wilson mentioned the name of plaintiff and showed that he was engaged in the effort of selling the farm for her. The answer of Mrs. Wilson to Mr. Hughes gave a price of \$14,000 on the farm, if sale should be made by a certain date. The contents of this telegram were communicated by Mr. Hughes to plaintiff. In the conversation between plaintiff and Hughes before the telegrams were sent, plaintiff asked to be assured of his commissions, and Hughes stated to plaintiff that Mrs. Wilson would have to pay him a commission if plaintiff sold the farm.

"(2) Following his conversation with Mrs. Wilson, the plaintiff actively engaged himself in making a sale of the farm. He showed prospective purchasers over the place, including Luther Goforth, the man who later purchased the farm from Mrs. Wilson herself, and introduced Goforth and made him

known to the tenant on Mrs. Wilson's farm, which tenant later, at the instance or request of Mrs. Wilson, brought Goforth and another prospective purchaser to Mrs. Wilson; she being then aware of the fact that the plaintiff had shown Goforth the premises and that Goforth was a prospective purchaser introduced to her tenant by the plaintiff, she being otherwise unacquainted with the said Goforth.

"(3) After plaintiff had shown the premises to prospective buyers, and the telegrams above mentioned had passed between Mr. Hughes and Mrs. Wilson, Mrs. Wilson within a few days arrived at Dallas and registered at the Southland Hotel. That the tenant of defendant, who had been introduced to the prospective buyers by the plaintiff, brought two of said buyers in to see the defendant Mrs. Wilson, and, after she had discussed the sale of the farm with both of the two said buyers, she made a sale of the same to Luther Goforth for the sum of \$12,300, a less price than that for which she had authorized the plaintiff to make sale of the farm. The sale was made on the occasion of the first interview between Mrs. Wilson and Goforth, the purchaser. If Sears had offered the place to Goforth for \$12,300, Goforth would have made the purchase from him. Plaintiff first called the attention of Goforth, the purchaser, to the farm as being on the market for sale. At the time that Mrs. Wilson sold the land to Goforth, the plaintiff and Goforth were still engaged in negotiations over the purchase upon the basis of the price which had been given to plaintiff by Mrs. Wilson. That the object of Mrs. Wilson in dealing direct with Goforth was to save the payment of a commission to plaintiff. That the usual broker's commission for the sale of farm land is 5 per cent. of the selling price."

Upon these findings, the court concluded that the appellee was entitled to recover, and awarded judgment accordingly.

It is insisted in this appeal that the facts do not justify the judgment rendered, because they do not show the existence of a contract by which Mrs. Wilson became bound to pay the commissions claimed. The appellee testified, among other things, as follows: "I talked to her (Mrs. Wilson) about selling it one day when she was at the farm. She came over and stayed all night, and I asked her if she wanted to sell the farm, and she said she would sell anything she had, provided she could make a profit on it, and asked me to look around and see if I could get a purchaser, and I did so. The time I had this conversation with her was along several months before I sold the place." The testimony in other respects supports the court's findings of fact, unless it be that portion where he finds that Mrs. Wilson received and replied to the telegram sent by Hughes. According to her testimony, at the time this telegram was received in New

York she was on her way to Texas and did not see it, and knew nothing of any reply having been sent; the telegram was received and answered by her husband in her name. She further testified that Mr. Hughes had no authority to represent her in her real estate transactions. Goforth testified that he desired to buy the property, and went to Sears, the appellee, for the purpose of ascertaining the name of the owner, and whether or not it was for sale. He corroborates Sears in the fact that the latter showed him over the premises and undertook to communicate with Mrs. Wilson through Mr. Hughes. He also testified that, at the time he and Mrs. Wilson concluded to trade, he told her that Sears had shown him over the property.

Counsel for appellants insist that, taking the language of the appellee as to what occurred between him and Mrs. Wilson in its most favorable light, it is not sufficient to support the conclusion that a binding contract was made between the parties. We do not think it is necessary to hold that a contract in its entirety was concluded between the appellee and Mrs. Wilson at the time referred to, in order to support the judgment. When Mrs. Wilson expressed a willingness to sell her land and told the appellee to find a purchaser, she authorized him to perform for her a service which the law regards as valuable, and for which she might well expect to pay a consideration. It may be conceded that at that time, and for several months thereafter, this was but an offer which she had a right to withdraw if she wished to do so; but this was not done. When the appellee performed the service contemplated, he had a right to expect and demand compensation, and the law will imply a promise to pay it.

Counsel for appellants refers to *Dunn v. Price*, 87 Tex. 318, 28 S. W. 681, as being decisive of this case. In that case the facts showed that Dunn was the owner of the Mansion Hotel in Ft. Worth. In a conversation with Price, Dunn remarked that he wanted to sell this property and leave Ft. Worth; that he would take \$30,000 for it. After some further conversation as to what was included in that offer, Price asked Dunn if he was in earnest about taking \$30,000. The latter replied that he was in earnest; that he meant business; and said that if he (Price) did not think he was, to bring him a purchaser and see how quick he would make a deed. Price inferred from that language that he was requested to find a purchaser for the property. He produced one who was ready and willing to take the property upon the terms proposed by Dunn, but the latter insisted on other terms, which prevented a consummation of the trade. In a suit by Price for commissions, the Supreme Court held that the language attributed to

Dunn was not sufficient to support a conclusion that Price had been employed to find a purchaser for the property. We think the facts of that case are clearly distinguishable from those involved in this. It will be observed, by a careful reading of the opinion, that the Supreme Court held that Price had no authority to act for Dunn. The result would have been different, we think, had Dunn used language attributed to Mrs. Wilson in this instance, "Look around and find a purchaser." The evidence shows that Mrs. Wilson knew that the service had been performed by appellee before she concluded her trade with Goforth.

The judgment of the district court is affirmed.

**ST. LOUIS SOUTHWESTERN RY. CO. v. BROWNE GRAIN CO. (No. 1285.)**

(Court of Civil Appeals of Texas. Texarkana. March 26, 1914.)

**1. PLEADING (§ 8\*)—ALLEGATIONS—CONCLUSIONS.**

Where the petition in an action by a carrier for freight alleged that defendant bought corn of the consignor, f. o. b. cars, that the bills of lading stipulated that the owner or consignee should pay the freight, that defendant sold the corn, indorsed the bill of lading, and delivered the same to the purchaser, to whom the carrier delivered the corn at the point of destination, an averment that defendant was the owner and the consignee named in the bill and an averment that defendant was the assignee of the shipper or person signing the bill were mere legal conclusions, and could not be considered in determining the sufficiency of the petition to state a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

**2. CARRIERS (§ 194\*)—CARRIAGE OF GOODS—LIABILITY FOR FREIGHT.**

One who is not the consignor or consignee of goods, and who does not receive the goods from the carrier at the point of destination, but who merely indorses the bill of lading, is not liable for the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. § 194.\*]

**3. CARRIERS (§ 194\*)—CARRIAGE OF GOODS—LIABILITY FOR FREIGHT.**

Where a consignee in a bill of lading stipulating that the owner or consignee should pay the freight assigned the bill of lading before delivery, and the carrier made delivery to the assignee, who purchased the goods from the consignee, the consignee was not liable for the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. § 194.\*]

Appeal from Collin County Court; H. L. Davis, Judge.

Action by the St. Louis Southwestern Railway Company against C. V. Browne and another, doing business under the name of the Browne Grain Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

This suit was commenced in a justice court July 5, 1910. Appellant was the plaintiff. It sought a recovery of \$44.38, which it alleged to be due it by appellees, C. V. and E. P.



Browne, who did business under the name of "Browne Grain Company," as freight on a shipment made November 18, 1907, and a shipment made December 28, 1907. April 4, 1911, appellant so amended its demand as to claim, in addition to said sum of \$44.38, the sum of \$125.75 as freight due it on a shipment made in February, 1908, and on a shipment made March 9, 1909. The judgment of the justice court was in appellees' favor. Appellant prosecuted an appeal to the county court, where, on June 6, 1913, it filed an amended petition, in which it alleged that it was a railway corporation, and, as a common carrier, carried freight for hire, and then alleged that on December 27, 1907, appellees "had shipped from Chickasha, I. T., to Stuttgart, Ark., a car of ear corn \* \* \* over the line of this plaintiff, but not all of the distance on this plaintiff's line. The lawful charges for freight on said shipment, as fixed by the tariffs regularly on file with and approved by the Interstate Commerce Commission and, in effect, at the time, was \$120.62, but the plaintiff, through its agents, collected only the sum of \$106.43, leaving a balance still due of \$14.19. Said car was delivered by this plaintiff's agents at Stuttgart, Ark., and it was the duty of plaintiff and its agents to collect the full amount of the lawful freight charges."

After making similar allegations with reference to other interstate shipments, and claiming as unpaid of the freight charges thereon sums aggregating \$155.21, appellant further alleged as follows:

"(5) In each instance above stated defendants bought the contents of the car above stated, and a bill of lading was issued for each car, and each bill of lading was signed by the agent of the railway company issuing the same, and by the shipper from whom the defendants bought the contents thereof, and in each instance the said bill of lading contained the following clause, to wit: 'It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are agreed to by the shipper and accepted for himself and assigns.' Also the following clause: 'The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery.'"

"(6) The said shipments in each instance passed over a portion of various lines of railway, and, upon delivery of the said cars, it became the duty of the plaintiff to collect the total amount of freight charges due in each instance on each of said cars, and, if mistaken in this allegation, then it alleges that, by reason of the law applicable to the said shipments and the facts, the plaintiff

has become and is the assignee of all parties interested in said shipments and over whose lines of railway the same moved, and is therefore entitled to prosecute this action.

"(7) In each instance above stated the defendants bought the contents of each of the said cars f. o. b. the point of origin, and in each instance sold each of the said cars delivered at destination, and indorsed the bills of lading in each case.

"(8) By reason of the premises, the defendants in each instance became the owner and the consignee of each of the said shipments, and also became the assignee of the shipper or person who signed the said bills of lading.

"(9) The words 'lawful charges,' as used in the preceding clauses hereof, is meant and intended to mean the lawful freight charges as fixed and determined by the tariffs lawfully issued, published, and filed with the Interstate Commerce Commission, in effect, at the several times of the shipments herein made and applying to the articles herein specified.

"(10) By reason of the premises, the defendants have become bound and obligated to pay all the charges on said shipment, and this action is therefore founded upon and is in part evidenced by the said bills of lading, which constitute a written contract on the part of the defendants to pay the several amounts herein sued for."

An exception to the petition, on the ground that it appeared therefrom that the cause of action asserted therein was barred by the statute of limitations of two years, was sustained, and, appellant declining to amend, the cause was dismissed.

E. B. Perkins and D. Upthegrove, both of Dallas, and Garnett & Hughston, of McKinney, for appellant. Sam Neathery, of McKinney, for appellee.

WILLSON, C. J. (after stating the facts as above). We are of the opinion the petition does not state a cause of action against appellees, and that the judgment therefore should be affirmed, without inquiry as to whether, if it did state a cause of action, the statute of limitations of two years would be applicable to it or not.

[1] It appears from the allegations that appellees bought the corn of the consignors thereof f. o. b. the cars at the points where the shipments originated. It further appears that bills of lading covering the shipments, containing a stipulation that "the owner or consignee should [shall] pay the freight and all other lawful charges on said property, and, if required, should [shall] pay the same before delivery," were issued by appellant to the consignors. And it further appears that appellees, having sold the corn, indorsed the bills of lading and delivered same to the purchasers, to whom appellant delivered the corn at the points to which same was destined. It is not alleged, except as a con-

clusion of the pleader from facts alleged, that appellees were the consignees named in the bills; and from the same facts the pleader draws another conclusion, to wit, that appellees were "the assignees of the shipper or person who signed the bills of lading." If by the latter conclusion the pleader meant, as it seems he did, that the consignors were also the consignees, and, as such, had assigned the bills of lading to appellees, then it is not consistent with the other conclusion drawn from the same facts; and for that reason, and for the further reason that, like the other conclusion, it was not warranted by the facts stated, it should not, any more than the other conclusion, be given any effect in determining the sufficiency of the allegations to show a cause of action. *Ewing v. Duncan*, 81 Tex. 236, 16 S. W. 1000. In the case cited the court said: "Courts sit to try causes upon positive averments, and not to hear and determine issues presented by allegations which affirmatively show that the pleader is in doubt as to the truth of the matter alleged."

[2, 3] But, if the conclusions of the pleader should be treated as allegations of fact, and not within the rule announced in the quotation just made from the *Ewing* Case, it would still appear that the petition did not state a cause of action against appellees; for, if they were neither the consignors nor consignees of the corn, nor the persons to whom same was delivered at its destination, but merely the assignees or indorsees of the bills of lading, they clearly were never liable to appellant for the freight. And, if they were the consignees, the liability which prima facie would rest on them as such was shown not to exist by the allegation charging that appellees, before the corn was delivered, indorsed the bills of lading, and so assigned the property to other parties, to whom same was delivered by appellant. 4 *Elliott on Railroads*, § 1559; 2 *Hutch. on Carriers*, §§ 807, 808. In the work first cited it is said: "If the consignee assigns the bill of lading before the goods are delivered to him, his indorsee, by accepting them, usually becomes liable, and the carrier, by delivering them to the latter, releases the consignee, unless the indorsee received them as the consignee's agent." The same rule is thus stated by *Hutchinson*: "If the consignee assigns the bill of lading before the goods are delivered to him, and thus enables his indorsee to receive them, he does not become liable for the freight, unless his indorsee received them as his agent. The ordinary contract of the carrier is to deliver the goods to the consignee or his assigns, 'he or they paying freight,' and whoever accepts them under such a contract becomes liable for the freight; and if the carrier delivers them to an assignee of the contract, without relying upon his lien to secure its payment, he must be understood as relying upon the per-

sonal liability of the assignee alone, if the assignee does not act as the agent of the assignor. A new contract arises, under such circumstances, between the assignee and the carrier." It not only does not appear from the allegations that the parties to whom the corn was delivered were appellees' agents, but, on the contrary, it appears therefrom that at the time the corn was delivered to said parties they were not such agents, but were the owners of the corn by purchase from appellees. Treating appellees as the consignees named in the bills of lading, we do not think the stipulation therein that the "owner or consignee" should pay the freight affects the conclusion we have reached. That stipulation should, we think, be construed as meaning, not the owner or consignee of the corn at the time it was shipped, but the owner or consignee thereof at the time it was delivered by appellant.

The judgment is affirmed.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. WADSACK.

(Court of Civil Appeals of Texas. Texarkana. March 19, 1914. On Motion for Rehearing, April 9, 1914.)

##### 1. APPEAL AND ERROR (§ 499\*)—BILL OF EXCEPTIONS—NECESSITY—INSTRUCTIONS.

Rev. St. 1911, art. 1971, as amended by Acts 1913, p. 113, provides that the charge shall be in writing, signed by the judge, and, after the evidence has been concluded, shall be submitted to the respective parties or their attorneys for their inspection, and reasonable time given for presentation of objections, which shall in every instance be presented to the court before the charge is read to the jury, and all objections not so presented shall be considered waived. Article 2061, as amended by the same act, declares that the ruling of the court in giving, refusing, or qualifying instructions to the jury shall be regarded as approved, unless excepted to as provided in the foregoing articles (articles 2058, 2059, 2600). *Held* that, under such provisions, the only ruling on instructions which is reviewable is the court's ruling on objections to the charge at the time and in the manner specified, which objections cannot be reviewed, unless presented and brought into the record by a bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

##### 2. APPEAL AND ERROR (§ 499\*)—REQUEST TO CHARGE—REFUSAL—REVIEW—BILL OF EXCEPTIONS.

Under Rev. St. 1911, art. 1973, as amended by Acts 1913, p. 113, declaring that, when the instructions asked, or some of them, are refused, the judge shall note distinctly which of them he gives and which he refuses, and shall subscribe his name thereto, and such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error, the amendment having stricken the further clause, "without the necessity of taking any bill of exceptions thereto," the refusal of a special charge cannot be considered on appeal, unless the complaining party shows by bill of exceptions that the particular charge was requested and refused, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the court's action in so doing was excepted to at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by John Wadsack against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Marsh & McIlwaine, of Tyler, for appellant. Johnson & Edwards, of Tyler, for appellee

HODGES, J. About the 4th of September, 1912, Mrs. Nancy Wadsack, the wife of the appellee in this appeal, took passage on a train of the International & Great Northern Railway Company at Arp, in Smith county, Tex., destined for Palestine, in Anderson county. At Jacksonville, a station between those points, the International & Great Northern Railway runs practically north and south. It is there crossed by the line of railway of the appellant, St. Louis Southwestern Railway Company of Texas. The crossing of the two railways is at a common grade between the depot of the International & Great Northern Railway Company and a water tank. The train in which Mrs. Wadsack was riding stopped at the water tank for the purpose of taking water after leaving the depot at Jacksonville, and the coach which she occupied stood directly over the crossing of the two railroads. While in that position one of appellant's freight trains approaching from the north ran against the coach occupied by Mrs. Wadsack, and overturned it, inflicting upon her severe personal injuries. A trial before a jury resulted in a verdict in favor of the plaintiff below for the sum of \$10,000. The suit was originally against both railway companies; but before trial the plaintiff dismissed as to the International & Great Northern Railway Company, and obtained a judgment against the appellant only.

Among the acts of negligence alleged was the failure of the appellant's engineer in charge of the train which caused the injury to bring his engine to a stop before attempting to cross the track of the International & Great Northern Railway Company, in accordance with article 6564 of the Revised Civil Statutes of 1911. There is practically no dispute in the evidence as to the facts immediately attending the collision of the two trains. The engineer in charge of appellant's train testified that before he reached the crossing he knew of the presence of the train in which Mrs. Wadsack was riding; that for some distance north of the crossing the track of the appellant is on a grade sloping to the south; that as he came down that grade he tested the condition of his air brakes several times, and found them to be working satisfactorily; that just before

reaching the crossing he again applied the air, but the brakes failed to hold the train, and, notwithstanding he reversed his engine, he was unable to stop his engine until after it struck and overturned the coach occupied by Mrs. Wadsack. He accounts for the failure of the brakes to work at that particular time by saying that he must have exhausted too much of the air prior to making the final application.

The first assignment of error complains of the following portion of the court's main charge: "So, if you shall find that a locomotive engine being operated by the defendant, St. Louis Southwestern Railway Company of Texas, was not brought to a full stop by the employees of defendant railway company in charge thereof before reaching the crossing of the International & Great Northern Railway Company over the St. Louis Southwestern Railway Company, and if you shall find that, as the direct and proximate result of such neglect, if any, to so stop the locomotive engine, a coach of the International & Great Northern Railway Company, in which plaintiff's wife was riding, was run into by such locomotive engine, and if you find that, as the direct and proximate result thereof, she was injured, it will be your duty to return a verdict for the plaintiff." The objection to this charge is that it is more onerous than the law requires; that it makes the appellant liable absolutely for the injury, without reference to the care which the engineer may have exercised in his efforts to stop the train. The second assignment complains of the refusal of the court to give a special charge, which is as follows: "You are charged that, unless you believe from the evidence in this case that the operatives of defendant's train failed to exercise ordinary care and caution to prevent the locomotive colliding with the train of the International & Great Northern Railway Company, upon which plaintiff's wife was a passenger, then it will be your duty to return a verdict for the defendant in this case." Without reference to the merits of these assignments, we are of opinion that in the present state of the record neither of them can be considered.

The Thirty-Third Legislature adopted some radical amendments to our practice statutes. Article 1971 of the Revised Civil Statutes was amended so as to read as follows: "The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be submitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived." Acts 1913, p. 113.

The transcript contains the following as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the objections made to the main charge of the court:

**"Objections and Exceptions to Charge of the Court.**

**"John Wadsack v. St. Louis Southwestern Railway Company of Texas. No. 7164.**

"In the district court of Smith county, Texas, September term, 1913, comes now the defendant, St. Louis Southwestern Railway Company of Texas, by its attorneys, and excepts to the charge of the court:

"(1) In so far as the jury is therein charged that, if the locomotive was not brought to a full stop by the employes of defendant company in charge thereof before reaching the crossing, defendant would be liable to plaintiff for such damages as his wife sustained, for the reason that the charge is more onerous than the law requires, in that it makes defendant company liable absolutely for the injury, although the jury might otherwise believe from the evidence in the case that the employes of said train exercised proper care to avoid inflicting injury upon plaintiff's wife.

"(2) Because, the evidence showing that plaintiff's wife was not a passenger on one of defendant's trains, defendant was under the duty to exercise only ordinary care for her safety, and as to whether it did or did not exercise such care is under the evidence in this case an issue of fact to be passed upon by the jury.

"(3) Because the effect of the charge, the evidence showing that the train was not brought to a stand, is to tell the jury that the only issue before them is the amount of damages that was sustained by plaintiff's wife.

"(4) Because the court should in his charge define negligence to the jury, and should charge them that, unless they believed from the evidence defendant to be negligent, it would be their duty to return a verdict for the defendant."

Signed by the attorneys for defendant, St. Louis Southwestern Railway Company of Texas.

Indorsed: "File No. 7164. Jno. Wadsack v. St. Louis Southwestern Railway Company of Texas."

The act above referred to also contains the following as an amendment to article 2061 of the Revised Civil Statutes of 1911: "The ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided in the foregoing articles." This article is a part of chapter 19, tit. 37. It evidently refers to the articles which precede it in that chapter—articles 2058, 2059, and 2060. Those articles are as follows:

"Art. 2058. Whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request

time shall be given to embody such exception in a written bill.

"Art. 2059. No particular form of words shall be required in a bill of exceptions; but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain it, and no more, and the whole as briefly as possible.

"Art. 2060. Where the statement of facts contains all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out such evidence in the bill of exceptions; but it shall be sufficient to refer to the same as it appears in the statement of facts."

It was the manifest purpose of the Legislature, in adopting these different amendments, to so reform the practice in our judicial procedure as to reduce the number of reversals on appeal for purely technical errors. Heretofore the rulings of the court in giving and refusing charges was regarded as excepted to in every instance, without any express reservations by bill or otherwise. The effect of the amendment to article 2061 is to place the rulings of the court in giving or refusing charges in the same category with other rulings not appearing of record as to the formalities required for their consideration on appeal. Appellate courts can now no more review the action of the trial court in giving or refusing charges than they can the rulings admitting or excluding testimony, without proper bills of exception. It also follows that bills of exception relating to the giving or refusing of charges must conform to the requirements provided by statute for bills of exception generally.

Article 2064 is as follows: "It shall be the duty of the judge to submit such bill of exceptions to the adverse party or his counsel, if in attendance on the court, and if the same is found to be correct, it shall be signed by the judge without delay and filed with the clerk."

That a bill of exceptions not signed by the trial judge cannot be considered on appeal is too well settled to require the citation of authorities. It seems to be the object of the amended law to restrict appellate courts to the consideration of the very objection which is presented in the trial court. We think the bill should also show on its face a compliance with article 1971 as amended; that is, that before the charge was read to the jury the objection urged on appeal had been called to the attention of the trial court. We must now look to the bills of exceptions in order to determine what the objections to the charge were, and whether or not they were seasonably made.

The instrument embodying the objections presented in this appeal is not signed by the trial judge, and is lacking in other essentials necessary to constitute a proper bill of exceptions, and to entitle it to consideration

on appeal. There is a total absence of any bill of exceptions to the ruling of the court in refusing the special charge upon which the second assignment of error is based. For the reasons stated, neither the first nor the second assignment can be considered.

The remaining assignment complains of the verdict as being excessive. It is unnecessary to state in detail the extent of the injuries which the evidence shows Mrs. Wadsack received. We have carefully considered the evidence upon this issue, and do not feel inclined to disturb the verdict of the jury. There is nothing in the record to indicate that the issue as to the character and extent of the injuries was not fairly presented and properly considered by the jury.

The judgment is accordingly affirmed.

#### On Motion for Rehearing.

Counsel for appellant have filed an able and elaborate argument in connection with the motion for a rehearing, in which it is insisted that the amendatory act discussed in the original opinion does not justify a refusal on the part of the court to consider the two assignments of error. In view of the fact that this decision involves an important rule of practice, we have again considered the questions presented, and shall undertake to state more comprehensively the reasons upon which our ruling is predicated.

We have here practically two questions: (1) Is it necessary, under the act of 1913, in order to have an objection to the main charge of the court considered on appeal, for the complaining party to show by a bill of exception, or by some form of certificate signed by the trial judge, that the particular objection urged on appeal was presented in the court below before the charge was read to the jury? (2) Is it necessary, in order to have the refusal of a special charge considered on appeal, that the complaining party show by a bill of exception that the particular charge was requested and refused, and that this action of the court was excepted to at the time? We shall consider these questions in the order in which they are stated.

[1] As is well known, before the adoption of this amendatory act of 1913 the trial judge was not required to submit his general charge to the parties or their attorneys for their inspection, nor was he required to read his charge to the jury till after the arguments were concluded. There was no necessity for the parties or their attorneys to except, either to the general charge or to the giving or refusing of special charges, in order to enable them to urge objections and exceptions on appeal. Neither was it required that the charges themselves be incorporated in bills of exception in order to become parts of the record on appeal and subject to review. The purpose of the amendatory act of 1913 was to change this practice in some important respects. For instance, it requires that the general charge, after being prepared, shall

be submitted to the parties, or their attorneys, for inspection, and a reasonable time given them in which to examine it and present objections thereto. The objections must in every instance, however, be presented to the court before the charge is read to the jury, and all objections not so presented shall be considered as having been waived. The charge must then be read to the jury before the arguments are made. Under the old practice charges were considered as excepted to for all purposes, and might be reviewed with reference to any objection presented for the first time on appeal. It was evidently the purpose of this amendment to so modify that practice as to restrict the appellate courts to the consideration of the particular objections to the charge which had been called to the attention of the trial judge at a time when he had it in his power to correct mistakes, without the necessity of granting a new trial. Under the old practice he was not required to consider and rule on objections to the general charge before it was read to the jury. Such objections were called to his attention for the first time in the motion for a new trial. They might also be omitted from that motion, and still be available on appeal. Under the new statute, or the amendment to the old, when an objection to the charge is called to the attention of the trial judge before he delivers his instructions to the jury, he is required to make a ruling. He must either sustain the objection in whole or in part, and modify his charge accordingly, or he must overrule the objection, and read his charge to the jury as prepared, notwithstanding such objection. It is this ruling which the appellate court is to review, and which, like rulings on the admission and exclusion of testimony, must be considered with reference to the particular objections urged at the time. No other objection, however tenable, can be now considered, if the statute is obeyed. The question then is: Can this ruling be revised without a bill of exception or some certificate from the trial judge showing the nature of the objection, and that it was presented within the time required by the statute? Article 2058 says that "either party dissatisfied with any ruling, opinion, or other action of the court, must except thereto at the time same is made, or announced, and at his request time shall be given to embody such exception in a written bill." When we consider in the same connection article 2061 as amended and appearing in the same chapter, there would be little room for the contention that a bill of exceptions in the ordinary form could be dispensed with. The uncertainty upon this question grows out of the language of article 1972, which is not amended by the new act. That article is as follows: "Such charge shall be filed by the clerk and shall constitute a part of the record in the cause, and shall be regarded as excepted to and subject to revision for er-

rors therein without the necessity of taking any bill of exception thereto." The legal effect of this language is to make the general charge a part of the record on appeal, without being incorporated in a bill of exception. To say that it thereby becomes subject to revision for any errors urged for the first time on appeal, or in the motion for a new trial, is to annul a material provision of the new act which says that all objection not presented to the trial judge before the charge is read to the jury shall be considered as waived. How, then, shall the appellate court be advised of the ruling on the objection presented, or that any such ruling was in fact made, if not by a bill of exception or some form of certificate by the trial judge? Such a ruling does not otherwise appear of record, and, unless presented in some authentic manner, cannot be considered. In the case before us counsel for appellant, recognizing the necessity for showing that an objection was made to the charge, have incorporated in the transcript a statement to that effect. This statement is not only without the signature of the trial judge, but fails to allege that the objection here urged was presented to the trial judge as required by the new act. The language of the statement may be literally true, and yet the objection might be one which the statute says shall be considered as waived. But, even if the statement were as full and as specific as is necessary to show that the objection is one which should be considered on appeal, it would be anomalous to hold that such an instrument becomes an authentic record. There is as much reason for saying the same method would be sufficient in making up the record as to rulings on the admission or the exclusion of testimony, or to show any other rulings not appearing of record, as to say it is all that is necessary in this instance. Whatever conflict there may be between the provisions of the new act and article 1972 must be settled by giving effect to the later statute. While repeals by implication are not favored, forbearance is not indulged when it becomes necessary to carry into effect the evident purpose of the Legislature as expressed in an act inconsistent with some previous law. When both cannot stand, courts do not differ as to which must yield.

[2] Passing to the consideration of the second question, we think it clear that, in order to have the ruling of the court in refusing to give a special charge reviewed on appeal, an exception must be reserved by a bill in conformity with the provisions of chapter 19. It will be noticed that in amending article 1973 the Legislature simply dropped from the original article the words "without the necessity of taking any bill of exception thereto." That portion of this article which is retained is as follows: "When the instructions asked, or some of them, are refused, the judge shall note distinctly which of them

he gives and which he refuses, and shall subscribe his name thereto, and such instruction shall be filed with the clerk and shall constitute a part of the record of the cause subject to revision for error." The failure to retain the words "without the necessity of taking any bill of exception thereto" shows an evident purpose on the part of the Legislature to repeal that provision. That intention is made clearer still when we consider article 2061 as amended.

Our conclusion is that we cannot consider either the objection to the main charge of the court or his refusal to give the special charge referred to in the second assignment.

Counsel for appellee has intimated a willingness for us to waive any legal objection to the lack of formality in presenting the basis of the first assignment of error—that relating to the main charge of the court. We do not now regard this as a matter resting in our discretion. Nowhere are we advised that this objection to the charge was presented as required by the statute, and it is distinctly enacted that all such objections not so presented shall be considered as waived. That means they shall not be considered on appeal as grounds for reversing a judgment. This statute was enacted as a reform measure, designed to prevent unnecessary reversals. We feel it our duty to observe the spirit of the law and confine our deliberations to those errors which are presented in accordance with its requirements.

Justice LEVY concurs in what is here said, and withdraws his dissent.

The motion is overruled.

# SUPREME LODGE OF FRATERNAL UNION OF AMERICA v. RAY et al† (No. 1257.)

(Court of Civil Appeals of Texas. Texarkana.  
March 17, 1914. Rehearing Denied  
April 9, 1914.)

## 1. EQUITY (§ 3\*)—JURISDICTION—GROUNDS—INADEQUACY OF LEGAL REMEDY.

Equity will take jurisdiction, when necessary, to administer a preventive remedy, or when the ordinary courts are made instruments of injustice, or the legal remedy is inadequate to meet the demands of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 7-12; Dec. Dig. § 3.\*]

## 2. EQUITY (§ 46\*)—JURISDICTION—ADEQUACY OF LEGAL REMEDY.

A legal remedy is not adequate, so as to prevent equity from taking jurisdiction, unless it is as practical and efficient to secure the administration of justice as is the equitable remedy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. § 46.\*]

## 3. INJUNCTION (§ 26\*)—GROUNDS OF JURISDICTION—MULTIPLICITY OF SUITS.

Equity will enjoin the prosecution of numerous suits at law where all of them arise from a common source, involve similar facts, and are governed by the same legal rules, so that the whole litigation may be settled in a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Application for writ of error pending in Supreme Court.

single suit, and it appears that the maintenance of separate suits will materially injure the parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

**4. INJUNCTION (§ 26\*)—GROUNDS OF JURISDICTION—MULTIPLICITY OF SUITS.**

Where separate actions in justice's court by 39 members of a fraternal benefit association were all brought solely to determine the right of the association to put in force an increased rate of assessment, equity will take jurisdiction to restrain the maintenance of the separate actions and to determine the whole matter in one suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

**5. INJUNCTION (§ 26\*)—JURISDICTION—MULTIPLICITY OF SUITS—CONDITIONS PRECEDENT—PAYMENT OF COSTS.**

One entitled to maintain a suit in equity to restrain the maintenance of 39 separate actions, brought against it in justice's court, involving the same question, will be required, as a condition to the assumption of jurisdiction by equity, to pay all costs accrued in the justice's court, but defendants may assert such right against complainant in their answer.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

**6. INSURANCE (§ 719\*)—MUTUAL BENEFIT INSURANCE—INCREASE OF ASSESSMENT—AUTHORITY.**

Under the constitution of a fraternal benefit association, providing that if the assessment provided for is inadequate, then "further assessment" should be made as might be necessary to meet the benefits due and payable, the association may require payment of such increased rate of assessment, without restriction to any particular mode, as is necessary to fully meet the benefits due and payable, as by requiring an increased rate payable per month by each member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Suit by the Supreme Lodge of the Fraternal Union of America against David R. Ray and others. From a decree dismissing the petition on demurrer, complainant appeals. Reversed and remanded.

The Fraternal Union of America, incorporated under the laws of Colorado, is a fraternal benefit association, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and has a lodge system and a representative form of government, and makes provision by assessments on its members for the payment of disability and death benefits. Thirty-nine persons, each holding a certificate in the association, instituted separate suits against it in the justice court in Fannin county to recover all the assessments theretofore paid into the association, claiming that the increased rate of assessment on all its members put into force and effect by the association on April 1, 1913, constituted a breach of contract made with each of them in relation to the rate of assessment to be paid monthly by them. Upon the ground that the single question in controversy between the association

and the plaintiffs in the numerous suits is that of the authority and power of the association under its constitution and by-laws to make the increased rate of assessment, the instant suit is brought by the Supreme Lodge of the association, having the object and purpose of the exercise of equitable jurisdiction by the district court to prevent the prosecution and defense of a multiplicity of suits by deciding the single and common question of fact and law between the association and all the defendants in a single suit. Attached to the complaint is an exhibit showing the names of the respective plaintiffs and the amount sued for in each suit, and the correctness of the amounts inferentially admitted. There has been no judgment of any kind upon any of the suits. A temporary injunction, restraining the defendants from further prosecuting the suits, as prayed for, was granted. At a regular term of the court a general demurrer was sustained to the petition; and, plaintiff declining to amend, the cause was dismissed. The appeal is made to revise the ruling on the demurrer.

According to the complaint the appellant association has a Supreme Lodge, with power to legislate for and on behalf of its members, consisting of Supreme Lodge officers and delegates elected in accordance with its constitution and by-laws by the subordinate lodges. It appeared that the payment of assessments charged to each beneficial member monthly, or at the rate originally adopted, was wholly insufficient and inadequate to fully meet the benefits accrued and payable from the union to the members and their beneficiaries. And in order and with the view to meet and pay benefits due and payable and legally accruing, the Supreme Lodge, at regular meeting of March, 1913, determined to reasonably increase the rate of assessment, and adopted the rate of assessment based upon the National Fraternal Congress Table, effective on April 1, 1913. The original charter provision of the union confers the power to levy and collect assessments upon its members to raise sufficient funds to pay the benefits accruing to the various members and their beneficiaries, and the regularly adopted constitution of the association provided that certain rates of assessment should be charged to each beneficial member, according to age, payable monthly, and "also provided that in the event the same should be found insufficient or inadequate, then further assessment should be made as might be necessary." The increased rate was no more than sufficient to adequately provide for the payment of the death and disability benefits accrued and payable and actually accruing for payment against the association. The application to become a member constitutes a part of the contract, and in the same the applicant agrees that any benefit certificate issued

should be subject to all constitutional provisions and by-laws then and thereafter adopted by the organization, and the certificates provide upon their face for a full compliance with all of the provisions of the constitution and by-laws then and thereafter adopted. The question of law and of fact, it was averred, was common in all the cases in the justice court between the plaintiffs and the defendant. The prayer, upon final hearing, was that it be decreed that the association have full right and authority to change and raise its rates of assessment, and that the plaintiffs have no cause of action against the association, and that the temporary injunction be made perpetual, and for other and proper equitable relief.

Allen & Webster, of Denver, Colo., Mike E. Smith, L. M. Levy, and Theodore Mack, all of Ft. Worth, for appellant. Cunningham & McMahon, of Bonham, for appellees.

LEVY, J. (after stating the facts as above). According to the allegations of the complaint, 39 persons are prosecuting separate actions in the justice court against appellant, all upon claims of a common origin, and predicated upon the single act of the association in putting into force and effect, on April 1, 1913, an increased rate of assessment, and depending upon the determination of the single question of the authority of the association to make the increased rate. If such suits are prosecuted further in the justice court, the peculiar situation is presented, differing from the ordinary cases, of requiring successive trial and retrial of the same question at the hands of the justice court, with the inconvenience, loss of time, and added expense that would follow. In view of the single issue, and as a means to afford relief against such loss, there is reasonably suggested, as being to the material interest of all the parties, the question of why one final decree between all the parties should not be had through a simplified procedure in consolidation of all the suits and issues into one suit between the parties. But the answer to the question must be, if the justice court retains the power to try the cases, that notwithstanding there is but a single and common issue between all the parties, yet administering relief against such irreparable loss that would probably follow many trials is legally impossible in such forum, because the law has circumscribed its power and does not warrant a consolidation of these suits or issues. It would seem to follow, therefore, that though the justice court has jurisdiction to try the subject-matter of each separate suit, a proper relief in the particular situation here could not legally be afforded in that forum against such irreparable injury that would follow. But if, in view of the single question at issue between all the parties, consolidation of the suits in-

to one suit for final decree be to the material interest of all parties, and the single defendant be entitled, as a clear and positive right, to have administered proper relief against irreparable injury from many successive trials of the same issue, and there is want of an adequate remedy or means for administering such relief in the jurisdiction of the justice court, there is manifestly, as a fundamental proposition, a weakened power in the courts to administer justice if there is to be denied to such party aid from a competent court possessing adequate powers to meet the demands of justice. And it is not believed that, if there be a source or ground appearing of equitable jurisdiction, making a court of equity competent to assume or exercise jurisdiction, the denial of the proper exercise of equitable jurisdiction to such court would be warranted upon the sole fact that the justice court in the first instance is empowered to try each suit separately, without regard to the equitable remedy. There is no provision of law denying the exercise of the equitable jurisdiction when appearing and proper to exercise. And it is not the meaning of the terms of the law that the justice court should hold and retain jurisdiction as against the exercise of equitable jurisdiction in a given suit, where the exercise of equitable jurisdiction is properly demanded, and where the justice court does not possess the adequate powers to meet the demands of justice. It is the meaning of the terms of the law that where there is not the need or warrant for the exercise of equitable jurisdiction by a competent court possessing adequate powers to meet the demands of justice in the proper case, the justice court retains and holds exclusive jurisdiction to try its proper cases.

[1] As a fundamental principle equity takes jurisdiction where it is made necessary to administer a preventive remedy, or when the courts of ordinary jurisdiction are made instruments of injustice, or when the right of action is given by law, but the remedy allowable by the court within its jurisdiction is inadequate to meet the demands of justice. *Brown on Jurisdiction*, § 196.

[2] The constitution of the state (article 5, § 8) gives the district court express jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or the constitution. And a remedy is not provided at law unless, as laid down in 1 *High on Injunctions*, § 30, "it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity." The several decided cases of this state granting injunctive relief against cases instituted in justice court when judgments had been entered have no relation to the precise question here, beyond showing that the exercise of equitable jurisdiction is warranted in the proper case by the district court possessing full powers to grant



the proper relief. And the case of *Ry. Co. v. Kuteman*, 79 Tex. 465, 14 S. W. 693, was speaking particularly to the particular facts and situation there, and they are quite dissimilar to the point here. The question of rightful jurisdiction in the district court to hear the complaint is therefore narrowed to the question of whether a court of equity may take jurisdiction to prevent multiplicity of suits, as here involved. We are mindful of the rule that each case should be made to depend upon its own peculiar facts, as carefully outlined in *Hale v. Allison*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and *Ry. Co. v. Woldert Gro. Co.*, 162 S. W. 1174. The equity suit here must result, in view of a single issue common to all the parties, in a consolidation of all the issues between the parties into one suit for final relief, with convenience and of material interest to all parties, and without injurious results to any of them.

[3] The text-books recognize the general rule to the effect that equity will enjoin the prosecution of numerous suits at law where all arise from some common source, and are governed by the same legal rule and involve similar facts, and the whole matter might be settled in a single suit, and it is apparent that the maintenance of many separate suits will result in loss and be against the material interests of the parties. 1 *Pomeroy, Eq. Jur.* (3d Ed.) §§ 245-256; 2 *Story, Eq. Jur.*, § 854, and others; 1 *High on Injunctions*, §§ 12, 62-65.

As said in 2 *Story, Eq. Jur.*, supra, "One class of cases to which this remedial process is properly applied is where there is one general right to be established against a great number of persons; and it may be resorted to either where one person claims or defends a right against many, or where many claim or defend a right against one. In such cases courts of equity interpose in order to prevent a multiplicity of suits; for if each separate party may sue or be sued in a separate action at law and each suit would only decide the particular right in question between the plaintiff and the defendant in that action, litigation might become interminable. Courts of equity, therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right, and, if it be necessary, they will ascertain it by an action or issue at law, and then make a decree binding upon all parties." And in *Pomeroy*, supra, sections 255, 260 and 274, it is stated that equitable jurisdiction is properly exercised where individual claims are legally separate, provided there is a community of interest among all the claimants in the question at issue and in the remedy.

In the case of *Tribette v. Ry. Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the text mentioned in *Pomeroy*, supra, was discussed at length, and pronounced not sound as a fundamental proposition. But the same tribunal, in the later case of

*Crawford v. Ry. Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, pronounces as follows: "We think the doctrine announced by *Pomeroy* is sound, and clearly established by the best considered modern cases."

In the case of *Guano Co. v. Saunders*, 173 Ala. 347, 56 South. 198, 35 L. R. A. (N. S.) 491, the text is further discussed, and it is there pronounced that "unfortunately, however, the text announced by Mr. *Pomeroy* has been followed in a great number of adjudicated cases, and probably in the majority of the cases in which the exact proposition involved has been passed upon." See *So. Steel Co. v. Hopkins*, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464; *Ins. Co. v. Distilling Co.*, 173 Fed. 888, 97 C. C. A. 400, 32 L. R. A. (N. S.) 940; *Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 53. The following cases, besides others, have followed and applied the rule: *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379; *Pfohl v. Simpson*, 74 N. Y. 137; *Bank v. Goddard*, 131 N. Y. 503, 30 N. E. 566.

In *Hamner v. Garrett*, 133 S. W. 1058, the Court of Appeals for the Second District said: "It is not to be doubted that in this state in a proper case the district court may issue an injunction to prevent a multiplicity of suits. See *Ry. v. Dowe*, 70 Tex. 5 [7 S. W. 368]; *Realty Co. v. Haller* [128 Mo. App. 66], 106 S. W. 589; *Piano Co. v. MacMaster* [51 Tex. Civ. App. 527], 113 S. W. 337. These are all cases, however, in which the multiplied suits sought to be enjoined had been instituted or were threatened by persons claiming in a single right separate causes of action, arising from the same source."

[4, 5] It is believed that this particular suit under the particular grounds alleged affords reasons for the exercise of equitable jurisdiction by the district court, and we so hold. A part of the equity devolving upon the complainant is, we think, the payment of all the costs accrued in the justice court, but we observe that the defendants herein can avail themselves of this right by claim therefor in the answer.

[6] The next question is the sufficiency of the complaint, as against a demurrer, upon the subject-matter of the alleged power of assessment. The allegation in point is the authority of the association to raise the rate under the following clause of the constitution: "Provided in the event that the same should be found insufficient or inadequate, then further assessment should be made as might be necessary to fully meet the benefits due and payable." Under the term "further assessment," as alleged, there is power in the association, we think, to enforce such increased payment of money by its members, without restriction to any particular mode, as may be necessary to fully meet the benefits due and payable. And the authority is not wanting, in the term, to obtain the needed increase of payment through the means of increased rate payable per month, or, as provid-

ed by the laws, by each member. It is not believed that a further discussion is necessary.

We conclude the court erred in sustaining the general demurrer, and the judgment is reversed, and the cause remanded.

**PAGACH v. FIRST NAT. BANK OF ROSEBUD et al. (No. 5324.)**

(Court of Civil Appeals of Texas. Austin. April 8, 1914.)

**APPEAL AND ERROR (§ 773\*)—DISMISSAL—GROUNDS.**

Under Court of Civil Appeal rule 39 (142 S. W. xiii), authorizing the dismissal on motion of an appeal where appellant fails to file briefs, as prescribed by law and the rules, unless good cause be shown for the failure, where appellant failed altogether to file briefs in the trial court, as required by Rev. St. 1911, art. 2115, did not file his brief in the appellate court until two days before the day set for submission, and, having withdrawn the transcript soon after filing it, retained it over four months until the day set for submission, upon motion to dismiss, of which notice was duly given, but to which no reply was made, the appeal must be dismissed, as appellee had a right to have the case submitted on the day set, and also to a reasonable time to reply to appellant's brief, and, not having been afforded sufficient time, was entitled to submit the case without brief, ask for a postponement, or move to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Appeal from District Court, Falls County; Prentice Oltorf, Special Judge.

Action between J. H. Pagach and the First National Bank of Rosebud and others. From a judgment for the bank and its coparties, the said Pagach appeals. On motion to dismiss appeal. Appeal dismissed.

Henderson, Kidd & Gillis, of Cameron, for the motion.

RICE, J. Appellee bank has filed a motion to dismiss this appeal, based on the alleged ground that appellant failed to file his brief in this court in time for it to have procured the record and filed a reply thereto. It appears from the record that the judgment in this case was rendered on the 23d of July, 1913, and the appeal was perfected on the 9th day of August next thereafter; and the transcript was filed in this court on the 5th day of November, 1913, and on the 10th of said month it was delivered to counsel for appellant, who kept the same continuously in their possession at Marlin until the 18th of March, 1914, the day upon which the case was set for submission by order of this court. No briefs were filed by appellant in the lower court, as required by article 2115 of the Revised Civil Statutes, and none were filed in this court until the 16th day of March, 1914, on which day this motion to dismiss was filed by appellee bank. In their verified affidavit in support of this motion, it appears that counsel for appellee on three several oc-

casions called on the clerk of this court to ascertain whether or not appellant had filed his brief, and for the purpose of obtaining the record, and on each of said occasions were notified by the clerk that no brief had been filed, and that the record had not been returned. On the 13th of March, appellant sent a copy of his brief to counsel for appellees, who received the same late on the afternoon of said day; whereupon they applied by phone to the clerk of this court to ascertain whether or not the record had been returned, for the purpose of preparing their brief, but were informed that counsel for appellant had not returned the same to this court.

Appellees were entitled to have the case submitted upon the day set, and likewise to a reasonable time within which to reply to appellant's brief, and these are substantial rights. See R. S. art. 2115; rule 39 (142 S. W. xiii); *Krisch v. Richter*, 125 S. W. 935; *Longbotham v. Abercrombie*, 52 Tex. Civ. App. 426, 114 S. W. 428; *Harris et al. v. Bryson & Hartgrove*, 31 Tex. Civ. App. 514, 73 S. W. 548; *Elkins v. Kempner*, 66 S. W. 576; *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462.

Under the circumstances disclosed by this record, we do not think that sufficient time was afforded appellee to file its brief. It was therefore compelled either to permit the case to be submitted without a brief on its part, or ask for a postponement for the purpose of replying, or resort to a motion to dismiss the appeal, which latter course it has seen proper to pursue. Appellant's counsel, though served with notice of this motion to dismiss, have failed to reply thereto; and, in the absence of any excuse or explanation showing why they failed to file their brief in time for appellee to have replied thereto, in accordance with the statute and rules of this court, it becomes our duty, we think, to grant the motion to dismiss the appeal, which is accordingly done, and the appeal dismissed.

Appeal dismissed.

**WAGGONER et ux. v. BRIGGS et al. (No. 1294.)**

(Court of Civil Appeals of Texas. Texarkana. April 9, 1914. Rehearing Denied April 16, 1914.)

**1. APPEAL AND ERROR (§ 547\*)—ASSIGNMENTS OF ERROR—DISQUALIFICATION OF JUDGE—BILL OF EXCEPTIONS.**

An assignment of error that the judgment appealed from was void because the judge was disqualified could not be sustained where there was no bill of exceptions in the record showing disqualifying facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.\*]

**2. COSTS (§ 173\*)—GARNISHMENT—ATTORNEY'S FEES.**

Plaintiff in garnishment cannot recover attorney's fees against the garnishees, since the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

only attorney's fees allowable are those authorized by statute to the garnishee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 688-690; Dec. Dig. § 173.\*]

**3. GARNISHMENT (§ 29\*)—PROPERTY SUBJECT—PLEDGES.**

Whether money pledged to sureties on a bail bond was subject to garnishment as the property of the pledgor depends, not on whether it is in custodia legis, but on whether the rights of the pledgee will be prejudiced thereby.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 47, 50, 74, 98, 100; Dec. Dig. § 29.\*]

**4. GARNISHMENT (§ 29\*)—PROPERTY SUBJECT—PLEDGED PROPERTY—TERMINATION OF PLEDGE.**

Rev. St. 1911, arts. 293, 294, authorize the court to render judgment against a garnishee at the time the court does render the judgment, when it is made to appeal from the garnishee's answer or otherwise that the garnishee is indebted to the defendant in any amount, or has in his possession, or had when the writ was served, any effects of the defendant liable to execution; and article 3744, declares that pledged property is liable to seizure on execution. Held that, where money was pledged to the sureties on a bail bond to secure the pledgor's performance of the condition, and, when judgment was rendered against the sureties as garnishees, their right to hold the money had been terminated by performance of the condition of the bond, the money was subject to garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 47, 50, 74, 98, 100; Dec. Dig. § 29.\*]

Appeal from Rockwall County Court; W. B. Wade, Special Judge.

Action by Ed. S. Briggs and others against T. H. Waggoner and wife. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

On November 12, 1910, T. H. Waggoner was arrested on a felony charge, and on the evening of the same day of his arrest he executed a bail bond, which was approved by the justice of the peace, in the sum of \$500, with E. S. Briggs and L. A. Wilkie as sureties. As an inducement to the sureties to sign the bail bond there was deposited by Waggoner with the sureties \$500 in money, in order to secure and indemnify them in the event there was a forfeiture of the bond by nonappearance of the accused at court according to the terms of the bail bond. At a following term of the district court the accused was indicted, tried, and acquitted of the charge. After the deposit of the \$500 with the sureties, and before the judgment of acquittal, the appellees Waggoner and Meyers had issued and served a garnishment writ on Briggs and Wilkie on their judgment against T. H. Waggoner for \$220 and costs. The garnishment proceedings were tried after the acquittal of the accused. The garnishees set up the facts in their answer. T. H. Waggoner intervened in the suit and claimed, first, that the \$500 deposited with the sureties was the separate property of his wife, and, second, that the funds were in the custody of the law at the time of service of the garnishment, and not subject to garnishment. The court made the

finding of fact that the money deposited by Waggoner was his own money, obtained through the sale of some cotton by him. The evidence warrants the finding of the court. Judgment was entered for the plaintiffs.

T. B. Ridgell, of Rockwall, for appellants.  
Futch & Tipps, of Henderson, for appellees.

LEVY, J. (after stating the facts as above). [1] The ninth assignment contends that the judgment is void because the judge who tried the case was legally disqualified. There is no bill of exception in the record showing any facts of disqualification, and we find nothing in the record that shows legal disqualifications.

The third assignment contends that the facts show that the fund was the separate property of the wife of the intervener. The court made a contrary finding, and the finding is not, as a matter of law, unwarranted.

[2] Complaint is made by the fifth and sixth assignments of the extent of recovery allowed plaintiffs by the terms of the judgment. The judgment of the county court of Rusk county in transferring the suit expressly taxed the costs against plaintiffs, and they cannot recover such costs under the present judgment. The judgment here reads, as material to the point: "It is therefore adjudged and decreed by the court that J. H. Waggoner and I. B. Meyers do have and recover of Ed. Briggs and L. A. Wilkie, garnishees, judgment for the sum of two hundred and twenty and 70/100 dollars, with 6% from this date on their debt, and the further sum of eighty and no/100 dollars, their costs and all costs of suit in this behalf expended, and for all of which let execution issue." Plaintiffs did not sue for \$80 besides their debt of \$220.70. This item of \$80 is, according to the evidence, attorney's fees and other expenses incurred by the garnishees. But the plaintiffs themselves are not entitled to recover against the garnishees such attorney's fees. Attorney's fees are a matter of compensation under the statute only to the garnishee, and not a liability of the garnishee to the plaintiff. The recovery of \$80 by the plaintiffs constitutes fundamental error, and must be eliminated from the judgment.

[3,4] The remaining assignments lead to the same point for error. The contention is that the money pledged to the sureties to induce them to become sureties on appellant Waggoner's bail bond is exempt from garnishment at the hands of a creditor of the pledgor. The pledge of funds is purely a voluntary contract. The pledgee has a qualified property in the thing pledged, and is entitled to the possession. There remains in the pledgor a legal interest such as the law will recognize. Therefore any obstacle to seizure and sale under execution or garnishment is not upon the ground that the property is in the custody of the law. The objection to the

seizure must rest, if at all, upon being in violation of the rights of the pledgee under the contract with the pledgor. Under the common law pledged property could not be taken under execution against the pledgor without first divesting the pledgee's right of possession by paying him the amount of the debt. But the statute of this state now subjects pledged property to seizure under execution. Article 3744, R. S. And article 294, R. S., authorizes judgment against a garnishee for "any effects of the defendant" which are "liable to execution." This statute would seem to affirmatively answer the question of whether pledged funds are subject to garnishment. But this statute controlling garnishment of pledged property does not relieve the plaintiff from showing at the time the judgment is rendered that his right to have the property subjected to his debt is perfected, and that the pledgee is not entitled to retain it as security for the performance of the obligation on the part of the pledgor. Here the proceedings were actually tried after the rendition of the judgment of acquittal of the accused. On the acquittal of the accused the agreement as to the pledged property was ended, and the pledgees had no contingent or further interest in the fund as security for the performance of the bail bond. The garnishees answered by setting up the facts, and asking the court to decide the rights between all parties. The statute authorizes the court to render judgment against the garnishee, at the time the court does render the judgment, when it is made to appear "from the garnishee's answer or otherwise" that the garnishee "is indebted to the defendant in any amount," or "has in his possession, or had when the writ was served, any effects of the defendant liable to execution." Articles 293 and 294, R. S. If the court, at the time he is called upon to make final judgment, can look to facts disclosed by the "garnishee's answer," or as shown "otherwise," as authorized by the statute, to determine the right of the plaintiff to a judgment, then at the time the judgment was entered in the instant suit there was no obstacle whatever against subjecting the funds to garnishment.

The case cited by appellants of Medley v. Radiator Co., 27 Tex. Civ. App. 384, 66 S. W. 87, involved the question of whether a balance to become due on an uncompleted building contract, entire and indivisible in its nature, was subject to garnishment. There were several creditors contesting the priority of the garnishment lien. The court there held, in determining the priority of liens of the creditors, that the lien of the garnishment attaches only to such liability as had accrued at the date of service, or which accrues between the service and the date named for the answer, and at that time there was not owing or accrued any debt, and hence the garnishee acquired no legal lien.

The facts and the question involved are quite dissimilar to the instant case.

The case of Loftus v. Williams, 24 Tex. Civ. App. 393, 59 S. W. 291, was where a garnishment was issued against money in the hands of a clerk of the court, held by him for payment to a defendant in execution. Clearly, as held by the court, such property was in custodia legis.

In Welch v. Renfro, 42 Tex. Civ. App. 460, 94 S. W. 107, Renfro's suit against Welch was for unliquidated damages, and, as held by the court, the plaintiff's cause of action was not for a debt within the meaning of the statute authorizing garnishment proceedings, and consequently the writ was quashed. The latter part of the opinion, relating to the exemption of the money, was not necessary to the decision of the case. But, assuming that it was a necessary ground for ruling in that case, and not dicta, the facts are very unlike those of the instant case, and the ruling not opposed to the instant ruling. There an assignment of the funds was made to Blount & Garrison by the accused, and the accused was trying, as against the officer and Blount & Garrison, the assignees, to subject the funds to garnishment. The court said that under these circumstances the accused was barred by the terms of his assignment from any right to the funds.

The case of Cope v. Shoemate, 139 Mo. App. 4, 119 S. W. 503, relied on by appellants, is where Dent received money from Mrs. Shoemate for going on the injunction bond of Mrs. Shelton, and was garnished by Cope, the execution creditor of Mrs. Shoemate. Cope first sued out a garnishment writ while the injunction was pending. This suit was tried on the answer of the garnishee denying he owed Mrs. Shoemate anything, and asserting a specific lien on the fund. A judgment resulted in favor of the garnishee on the issues involved. After the final termination of the injunction suit Cope sued out another garnishment writ against Dent. And the first judgment was pleaded as res adjudicata. The court overruled the plea on the ground that, at the time the judgment was rendered, "Dent held a specific lien on and was entitled to retain the \$200 in his hands as against Mrs. Shoemate." But, as remarked by the court, "after the injunction suit had been determined in Mrs. Shelton's favor, and Dent discharged from liability as her bondsman, the \$200 remained in his hands free from any claim or lien, was garnishable assets, and might be garnished by Cope on his judgment against Mrs. Shoemate, if it belonged to her." The decision is under the facts there, and the ruling not at all opposed to the ruling of the instant case. At the time the court was called upon to render judgment in the instant case it was made to appear conclusively and admittedly that the terms of the pledge had been fully performed, and that there was no lien or claim assert-

ed by the garnishees, and that the property was that only of the defendant Waggoner.

The judgment is reformed so as to eliminate the recovery in favor of the plaintiff against the garnishees of the \$80 and as so reformed will be affirmed. The plaintiffs Waggoner and Meyers will, for the error, be taxed with the costs of appeal.

**FIRST NAT. BANK OF IOWA CITY, IOWA, v. HUMPHREYS. (No. 1284.)**

(Court of Civil Appeals of Texas. Texarkana. March 26, 1914.)

**1. BILLS AND NOTES (§ 370\*)—ACTIONS—CONSIDERATION.**

Defendant purchased a lot of jewelry, giving his note for the purchase price, the seller agreeing to give a bond as security, for its guaranty of the quality of the goods. Held that, when transferred to a bona fide purchaser without notice, defendant could not set up the fraud of the seller in refusing to execute the bond, for the debt was sufficient consideration to support the note, and, as the fraud did not affect the execution of the instrument, the note could not be impeached in the hands of a bona fide purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. § 370.\*]

**2. BILLS AND NOTES (§ 92\*)—CONSIDERATION—SUFFICIENCY.**

Where a note is taken as collateral security for a debt then created, the debt is sufficient consideration to support the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. § 92.\*]

**3. BILLS AND NOTES (§ 537\*)—ACTIONS—BONA FIDE PURCHASE.**

Where there was nothing in any way to impeach the testimony of the cashier of a bank which held the note in suit that it was purchased before maturity for value and without notice of the payee's fraud, it is proper to direct a verdict in favor of the bank.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.\*]

Appeal from Van Zandt County Court; C. L. Stanford, Judge.

Action by the First National Bank of Iowa City, Iowa, against A. J. Humphreys. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

L. Davidson, of Canton, for appellant. R. M. Lively, of Canton, for appellee.

HODGES, J. The appellant sued the appellee in the county court of Van Zandt county to recover the sum of \$220 due upon a promissory note. The facts show that on March 30, 1910, the appellee executed and delivered the note sued on to the Equitable Manufacturing Company. By its terms the note was payable to the order of that company in installments, the first of which was due four months after date, and the last, one year after date. It appears from the evidence that the appellant acquired the note in due course of trade, before the maturity of the first installment. The appellee in his

answer admitted the execution of the note, but claimed that it was void by reason of a fraud perpetrated at the time of its execution. The facts stated in the answer are, in substance, as follows: The defendant was a merchant, and was approached by an agent of the Equitable Manufacturing Company, and solicited to purchase a lot of jewelry. After some negotiations, a trade was concluded, and the appellee agreed to execute his note for \$220 for a designated quantity of the goods. At the time the note was procured, it was agreed by and between the appellee and the agent of the manufacturing company that the latter would execute a bond as security for its guaranty that the quality of the goods was as represented, and this bond was to be deposited in the First National Bank of Canton, Tex., before the note was to become effective. Appellee further alleges that the goods were shipped and received, but no bond was ever executed, and for that reason the contract to pay the note was never a binding obligation. The appellant alleged and proved that it procured the note for value in due course of trade, without notice of the defenses alleged in the answer.

[1, 2] The court gave, among others, the following charge: "If you believe from the evidence that, at the time defendant signed the instrument sued on, and simultaneously with the signing of said instrument, the agent of the original payee agreed and promised to furnish a good and valuable bond, or obligation, to protect defendant in the sale and handling of said jewelry, and that said bond, or obligation, was to be so furnished as set out in defendant's answer, and that the defendant was induced by said promise to so furnish said bond, or obligation, to sign said note, and that said note was to be of no effect until said bond, or obligation, was so furnished, and you further find from the evidence that the said original payee failed and refused to comply with said promise, if you find any promise was made to furnish said bond, or obligation, then you will find for the defendant." In view of the undisputed facts, this charge should not have been given. *Davis v. Gray*, 61 Tex. 506; *Mulberger v. Morgan*, 34 S. W. 148; *Wilson v. Denton*, 82 Tex. 536, 18 S. W. 621, 27 Am. St. Rep. 908; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170; 1 *Daniel on Negotiable Instruments*, §§ 836, 854; *Tiedman on Commercial Paper*, §§ 280, 286. Where a note is taken as collateral security for a debt at that time created, and on the faith thereof, the consideration is sufficient, and the indorsee is a purchaser for value in due course of business. 7 Cyc. 930, and cases cited in the notes.

In order for fraud to be available against an innocent holder for value, it must relate to the execution of the instrument, not merely to the consideration. In other words, the

fraud must be such as to render the execution void not merely voidable. See cases cited above. According to the appellee's own testimony, the instrument he signed is just what he intended to sign, and fully expressed the contract. Hence there is nothing to impeach its validity. The bond referred to was a part of the consideration for the note, and the failure to furnish the bond was a failure of the consideration to that extent. The note was delivered to the payee, or its agent, and thereby permitted to enter the channels of commerce as a valid and binding obligation. Unquestionably the charge of fraud, if true, would constitute a good defense as between the maker and the original payee, or one purchasing with notice, actual or constructive.

[3] The evidence showing a purchase by the appellant before maturity, for value, without notice of the defensive matter, consisted of the deposition of its cashier. There is nothing in the record which in any way tends to impeach the credibility of this witness. Under the circumstances, the court should have instructed a verdict for the appellant. *Long v. Shelton*, 155 S. W. 945.

The judgment of the trial court will be reversed, and here rendered for the appellant for the amount sued for, and all costs both of this court and the court below.

#### FIRST NAT. BANK OF IOWA, CITY, IOWA, v. DORSEY.

(Court of Civil Appeals of Texas. Texarkana.  
April 2, 1914.)

##### 1. BILLS AND NOTES (§ 378\*)—EFFECT.

The fraudulent alteration of a note by changing the time of payment, the amount of principal to be paid, and extracting a material condition requiring the payee to execute a bond to secure the faithful performance of a specified contract avoided the note and precluded a recovery thereon, even in the hands of a bona fide holder for value without notice.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 985-992; Dec. Dig. § 378.\*]

##### 2. APPEAL AND ERROR (§ 1040\*)—RECEPTION OF EVIDENCE—CURING ERROR.

Error, if any, in overruling exceptions to a plea of failure of consideration for a note sued on by a bona fide holder, and in receiving evidence in support of such plea, was cured by an instruction that the jury should return a verdict for plaintiff, notwithstanding a failure of consideration, unless they found that the note had been materially altered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

Appeal from Kaufman County Court; Jas. A. Cooley, Judge.

Action by the First National Bank of Iowa City, Iowa, against C. W. Dorsey. Judgment for defendant, and plaintiff appeals. Affirmed.

The suit originated in the justice court, and is by appellant against the appellee on a

promissory note for \$175. The petition alleged that the note was executed by appellee on February 17, 1910, payable to the order of the Equitable Manufacturing Company, and due in six installments, in 4, 6, 8, 10, 12, and 14 months, respectively, after date, and that the appellant bank purchased it from the Equitable Manufacturing Company in the ordinary course of business, before maturity and for a valuable consideration. The appellee filed a sworn plea of non est factum, averring the vice in the note sued on to be unauthorized and fraudulent alterations of material terms of the note since the delivery to the agent of the Equitable Manufacturing Company, and also plead failure of consideration, conditional delivery of the note, and conspiracy to defraud appellee on the part of the payee of the note and the bank. The case was tried to a jury. The only issue of fact submitted by the court to the jury for their decision was in respect to the plea of non est factum, and the verdict of the jury was in favor of the defendant.

The Equitable Manufacturing Company is engaged in the wholesale jewelry and advertising business. Its authorized agent contracted a sale to appellee on February 17, 1910, of certain jewelry of a specified quality, which was to be shipped to him thereafter. The contract was in writing, and the contract price was to be payable in six installments, but such contract is not in the record. Appellant offered in evidence the note sued on as the note signed by appellee for the jewelry, and proved a purchase from the payee in the ordinary course of business, before maturity, for a valuable consideration, and without notice of any of the alleged defenses. The managing partner of the payee of the note testified that they received the note through mail from their agent and then sold it to the bank. The agent does not testify. The appellee testifies that, as an inducement to him to execute and deliver a note for the total purchase price agreed to be paid for the jewelry, if it should meet the quality contracted for, the appellant's agent agreed that appellant would execute a bond to secure the faithful performance of the contract, and that the bond would be deposited with the First State Bank of Terrell, Tex. Appellee says he then signed a note payable to appellant's order in five installments of \$27.50 each, and one of \$34, and that at the time the words "The Equitable Manufacturing Company agrees to furnish a bond to protect C. W. Dorsey in this contract" were written with an indelible pencil on the side of the note as a term of agreement in the note. After execution of the note, appellee at once delivered it to the agent of the Equitable Manufacturing Company. Appellee says he did not agree to any change or alteration of the note, and that any alterations or erasures were made after he delivered the note, and without his knowledge or au-

thority. The note sued on and the note appellee executed are, appellee says, different in this: The note sued on has the principal to be paid in the first five installments of \$28, and in the last of \$35, while the one he signed has the principal payable in each of the first five installments of \$27.50, and in the last of \$34; and the note sued on has the figures "\$175.00" written in ink on the upper left-hand corner, while the note he signed had no figures there; and the note he signed had the words "The Equitable Manufacturing Company agrees to furnish a bond to protect C. W. Dorsey in this contract," while the note sued on has on it no such words. The only testimony in rebuttal of appellees is the testimony of a witness for appellant that in the justice court trial appellee said nothing about any changes or alterations in the note sued on, but claimed that the jewelry was no account. The verdict of the jury involves the finding of fact that material alterations were fraudulently made in the note after the delivery of the same by appellee, and that such alterations were made without the knowledge and authority of appellee. And there is evidence to support the finding of fact on the part of the jury.

Dashiell, Crumbaugh & Coon, of Terrell, for appellant. Wynne, Wynne & Gilmore, of Wills Point, for appellee.

LEVY, J. (after stating the facts above). The appellant filed a sworn plea of non est factum. The plea could be properly construed only as averring that the note sued on had been fraudulently altered after its delivery to the agent of the Equitable Manufacturing Company by changing the amounts and dates of payment, and by entirely erasing therefrom the contract stipulation "The Equitable Manufacturing Company agrees to furnish a bond to protect C. W. Dorsey in this contract." The court in his charge authorized a verdict for appellee upon the finding by the jury of fraudulent alteration of the note as pleaded. Appellant first directed a general exception to the entire averment, which was by the court overruled, and next excepted to submitting the plea to the jury, as without evidence to support it, and further asked a peremptory instruction in favor of appellant, which was refused. All the assignments in respect to the questions can here be considered together for a ruling. Appellant makes the contention that the exception to the plea should be sustained, because it failed to allege that the appellant had knowledge or notice of the alleged alteration. The unauthorized alteration of a completed instrument by a material change in its terms, with intent to defraud, is forgery. Article 531, P. C. 1896 of Texas.

[1] The alteration that would affect the legal validity of the instrument may consist in changing the time of payment and the amount of principal to be paid, or in extracting from it some material provision incorporated in it, as, is averred, was done in this instance. 2 Daniel on Neg. Instr. (5th Ed.) §§ 1375, 1384, 1391. As further illustrations: *Morris v. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36; *Baldwin v. Bank*, 104 Tex. 122, 133 S. W. 864, 184 S. W. 1178; *Otto v. Half*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56. And the fraudulent alterations of a note so far alters its legal effect as that it cannot be sued on in its altered form, nor read in evidence to support an action, even when brought by a bona fide holder without notice. 2 Daniel Neg. Instr. (5th Ed.) § 1413; 3 Page on Contracts, § 1398; *Otto v. Half*, supra; *Adams v. Faircloth*, 97 S. W. 507; *Morris v. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36. It is believed to be sufficient reason for overruling the objection to the plea that no party can enforce a negotiable instrument if it be not genuine. There was no error, further considered, in submitting the plea to the jury, unless, as claimed by appellant, there was no evidence warranting the issue. The appellee testified in accordance with his sworn plea. If the testimony of appellee be true (which was for the jury to say), there was a very material change in the note after he delivered it to the agent of appellant, and such alterations were made without his knowledge or authority. As a consequence of such evidence, the court was required to pass the question to the jury for decision by them. Assignments Nos. 1, 5, and 8 are therefore overruled.

[2] Appellee pleaded failure of consideration of the note, and a conditional delivery to the agent of the payee. The pleas were excepted to, on the ground that they were not available defenses against a bona fide holder of the note without notice. The court overruled the exceptions. And appellee offered evidence in support of the pleas, which was objected to by appellant upon the same ground above stated. The objections were overruled by the court. But, when it came time for the court to instruct the jury, he peremptorily charged them that they should return a verdict for plaintiff, notwithstanding a failure of the consideration. So any error of the court in respect to the rulings mentioned was eliminated as an injury when the court, by a binding instruction, told the jury that such defense pleaded and proven could not at all avail the defendant, and that they must nevertheless find for the plaintiff. Assignments Nos. 2, 3, 4, 6, and 7 are overruled, as without injury warranting a reversal.

The judgment is affirmed.

**DEES v. THOMPSON.**

(Court of Civil Appeals of Texas. El Paso.  
April 9, 1914.)

**1. SET-OFF AND COUNTERCLAIM (§ 22\*)—TORT ACTIONS—DISCONNECTED ACTS.**

In an action for the wrongful killing of a horse, the defendant cannot set off damages arising from trespass committed by the horse, and his keep after a former trespass, since the statute relating to set-off does not cover disconnected claims for damages arising in tort.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 26-37; Dec. Dig. § 22.\*]

**2. DAMAGES (§ 87\*) — PUNITIVE DAMAGES — NECESSITY OF ACTUAL DAMAGES.**

A verdict allowing punitive damages, without also allowing actual damages, is contrary to law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.\*]

**3. APPEAL AND ERROR (§ 1033\*) — HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.**

One who sues for actual and punitive damages, and recovers judgment for punitive damages only, cannot, on appeal, raise the question that the jury could not allow punitive damages, without also allowing actual damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**4. HIGHWAYS (§ 68\*)—EVIDENCE AS TO EXISTENCE—SUFFICIENCY.**

Proof that a road was indicated and named as a public road on a plat filed before the controversy arose, and that it was referred to several times in the testimony, is not sufficient to establish, as a matter of law, that it was a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 220-233; Dec. Dig. § 68.\*]

**5. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERRORS—NECESSITY OF PROPOSITIONS AND STATEMENTS.**

Assignments of error, not supported by propositions and statements, as the rules require, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**6. APPEAL AND ERROR (§ 722\*)—ASSIGNMENTS OF ERROR—CONFORMITY TO MOTION FOR NEW TRIAL—STATUTORY PROVISIONS.**

The provision of Acts 33d Leg. c. 136, that assignments contained in a motion for a new trial shall constitute the assignments upon which the cause is presented on appeal is mandatory, where a motion for a new trial was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.\*]

**7. APPEAL AND ERROR (§§ 722, 758\*)—ASSIGNMENT OF ERROR — CONFORMITY TO MOTION FOR NEW TRIAL—STATUTORY PROVISIONS.**

The statute does not change the former rule that assignments must be correctly copied in the briefs, and that it is not permissible to present assignments reconstructed as to either form or substance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996, 3093; Dec. Dig. §§ 722, 758.\*]

**8. APPEAL AND ERROR (§ 301\*)—ASSIGNMENTS OF ERROR—ERRORS NOT REQUIRING ASSIGNMENT.**

The only errors which can be considered by the Court of Appeals, other than those which may be passed upon without an assign-

ment, are those called to the attention of the trial court in the motion for a new trial, and the appellate court will not attempt to construe reconstructed assignments in the briefs to determine whether the errors are the same as those assigned in the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

**9. APPEAL AND ERROR (§ 722\*)—ASSIGNMENTS OF ERROR—ERROR SUBSEQUENT TO MOTION FOR NEW TRIAL.**

As to errors arising subsequent to a motion for a new trial, and which cannot be raised in the motion, probably the proper practice is to file distinct assignments in relation thereto with the clerk of the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.\*]

**10. APPEAL AND ERROR (§ 282\*)—ASSIGNMENTS OF ERROR—TRIAL BY THE COURT.**

Acts 33d Leg. c. 136, making the assignments of error in the motion for a new trial the assignments on appeal, does not change the rule that no motion for a new trial need be filed in cases tried to the court, in which findings of fact and conclusions of law are filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. § 282.\*]

**11. APPEAL AND ERROR (§ 722\*)—ASSIGNMENTS OF ERROR—TRIAL BY THE COURT.**

In such cases the assignments of error are still to be filed with the clerk of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.\*]

**12. APPEAL AND ERROR (§ 1175\*) — DISPOSITION OF THE CASE—RENDERING JUDGMENT.**

Where the court erroneously overruled exceptions to defendant's cross-action, and, after verdict, rendered judgment on the cross-action in an amount equal to the judgment for plaintiff on his cause of action, the case need not be remanded for new trial, but judgment will be rendered for the plaintiff in the amount due on his cause of action, under Rev. St. 1911, art. 1626, authorizing the Court of Civil Appeals to render such judgment as the court below should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Appeal from Pecos County Court; Howell Johnson, Judge.

Action by Frank Dees against D. W. Thompson. From a judgment for plaintiff and for the defendant in an equal amount upon a set-off, plaintiff appeals. Cross-action stricken out, and judgment rendered for plaintiff in the amount of the damages found by the jury.

Chas. T. Haltom and W. A. Hadden, both of Ft. Stockton, for appellant. R. D. Blaydes and W. C. Jackson, both of Ft. Stockton, for appellee.

HIGGINS, J. Dees sued to recover the sum of \$456, actual damages, and \$400, punitive damages, claimed to have been sustained by reason of the wrongful shooting and killing by Thompson of a horse. Defendant answered by a general denial and counter-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



claim for various amounts alleged to be due by reason of trespasses committed by the animal upon various dates, and expenses sustained in caring for and feeding the horse while it was trespassing upon a certain occasion previous to the shooting. Upon trial before a jury, verdict was returned in favor of plaintiff for sum of \$50, punitive damages, and in favor of defendant upon his cross-action in sum of \$25 for feeding and caring for the horse upon the occasion mentioned, and further sum of \$25, damages sustained by reason of trespasses committed by the horse. Upon this verdict judgment was rendered in favor of plaintiff for sum of \$50 against Thompson, and in Thompson's favor against Dees for a like sum, and it was ordered that the two sums should offset each other and no execution issue. From this judgment Dees has appealed.

[1] The first and second assignments complain of the overruling of exceptions addressed to defendant's counterclaim, upon the ground that it was an independent cause of action, in no wise incident to or connected with plaintiff's cause of action. In an action for damages upon tort, the defendant cannot set off or reconvene for damages resulting from a tort previously committed by plaintiff. The statute relating to this matter does not cover disconnected claims for damage arising in tort. *Hart v. Davis*, 21 Tex. 411; *Shook v. Peters*, 59 Tex. 395. The special exception in relation to this matter should have been sustained, and the cross-action stricken out. *Boyd v. Clark*, 21 Tex. 425; *Carothers v. Thorp*, 21 Tex. 358; *Castro v. Gentiley*, 11 Tex. 28.

[2, 3] Under the third assignment, appellant complains that the verdict of the jury was contrary to law in allowing him punitive damages without also allowing actual damages. In this contention he is correct, but it is not a matter of which he can complain. Appellee might well do so, but not appellant.

[4] The fourth assignment complains of the court's charge in not assuming as a proven fact that a certain road was a public one, the proposition being that, since the facts are undisputed, the question whether the road was of a public or private character was one of law, which should have been decided by the court. The statement in the brief of the facts relied upon as showing its public character is that it was indicated and named as a public road on a plat appearing in the statement of facts, which plat was filed anterior to the happening of any of the incidents in this case, and that the road was referred to several times in the testimony. We fail to see upon what theory it can be contended that these facts alone are sufficient, as a matter of law, to invest a road with a public character.

[5] The fifth and sixth assignments are not supported by such propositions and statements as the rules require, and are not en-

titled to consideration. In passing, however, it may be said they do not present reversible error.

[6] The suggestion is respectfully made to counsel for appellant that in causes which they may hereafter have pending in this court, a due regard be had for the rules of briefing, and attention is particularly called to the fact that, under the law at present, the assignments contained in the motion for new trial in the lower court constitute the assignments of error upon which the cause must be here presented. Acts 33d Leg. Regular Session, c. 136, p. 276. When a motion for new trial has been filed, this provision of the statute is mandatory. *Edwards v. Youngblood*, 160 S. W. 288.

[7] Under the law previous to this amendment it was held that the assignments must be correctly copied in the briefs, and that it was not permissible to present assignments reconstructed as to either form or substance. *Fessinger v. El Paso Times Co.*, 154 S. W. 1171; *Mt. Franklin, etc., v. May*, 150 S. W. 756; *Biggs v. Miller*, 147 S. W. 682; *Horseman v. Coleman Co.*, 57 S. W. 304; *Martin v. Bank*, 102 S. W. 181; *Alexander v. Bowers*, 79 S. W. 342; *Ry. Co. v. Adams*, 55 Tex. Civ. App. 245, 118 S. W. 1155; *Bowers v. Goats*, 146 S. W. 1013.

There is nothing in the amendment changing this rule, as each point raised in the motion can and should be presented to this court as an assignment of error in the language in which the matter was called to the attention of the trial court in the motion there filed. *Iowa Mfg. Co. v. Walcovich*, 163 S. W. 1054.

[8] Under the amendment and the rules, the only errors which can properly be entertained by this court, other than those which may be passed upon without an assignment, are those called to the attention of the trial court in the motion for new trial, and the impropriety of presenting reconstructed assignments in the brief is pointed out and well stated in *Edwards v. Youngblood*, supra. See, also, *Overton v. Colored Knights of Pythias*, 163 S. W. 1053, and *Iowa Mfg. Co. v. Walcovich*, supra.

We take this occasion to place counsel practicing in this court upon notice that the assignments copied in brief and presented here must be true copies of the corresponding portions of motion for new trial when such motions have been filed in trial court. This court will not undertake to determine whether an assignment was raised in such motion, where it is presented here in language different from that in which the matter was presented to the trial court. To countenance the filing here of reconstructed and amended assignments will frequently necessitate the determination of whether or not the error was called to the attention of the court below, which in many instances would require careful and critical comparisons, and a correct conclusion still be doubt-

ful. This will be obviated and the opportunity prevented of securing reversals upon errors not assigned in lower court which this court might, at times, do if the rule determined upon be not strictly enforced.

[8] As to those errors which of necessity, were not raised in the motion, probably the proper practice would be to file distinct assignments in relation thereto with the clerk of lower court, as required by the old statute and rules. *Overton v. Colored Knights of Pythias*, 163 S. W. 1053. Assuredly, it was not the legislative purpose to deprive litigants of the right to have errors and wrongs righted arising or transpiring subsequent to the overruling of their motion for new trial, and such an error so assigned will be considered by this court.

[10] As to cases tried before the court in which findings of fact and conclusions of law are filed, a motion for new trial need not be filed. *American, etc., v. Mercedes, etc.* (San Antonio) 155 S. W. 236; *Cooney v. Dandridge* (El Paso) 158 S. W. 177; *Moore v. Rabb* (Galveston) 159 S. W. 85.

[11] And in such case the assignments are to be filed with the clerk of the court below, as was formerly done in all cases. The amendment does not alter the old practice in this respect. Some of the observations here made with respect to matters of practice are not called for in this case, but they are made to the end that the members of the bar practicing here may be advised of the manner in which this court views these matters, to the end that they may govern themselves accordingly.

[12] The error of the court in overruling the special exception to the cross-action does not require a remanding of the cause for a new trial, as it affected only the cross-action upon which the verdict in *Thompson's* favor for \$50 was returned. This court, under authority of article 1626, Revised Statutes, will render the judgment which should have been rendered in the court below, viz., that the exception to the cross-action be sustained, the cross-action stricken out, and judgment rendered in favor of *Dees* for the sum of \$50, and that he recover all of his costs.

As reformed, the judgment is affirmed.

COOPER et ux. v. MAREK et al. (No. 5305.)  
(Court of Civil Appeals of Texas. Austin.  
March 4, 1914. Rehearing Denied  
April 1, 1914.)

#### 1. ESCROWS (§ 1\*)—NATURE AND REQUISITES IN GENERAL.

Before an instrument can become an escrow, the contracting parties must actually agree thereto, and an agreement between the grantors as to the distribution of the purchase price was not binding on the grantee, who was not a party thereto.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 1-3, 5; Dec. Dig. § 1.\*]

#### 2. TRUSTS (§ 202\*)—CONVEYANCE—APPLICATION OF PROCEEDS.

Where a father and children executed a deed and also an agreement as to the distribution by the father of the purchase price, to which the grantee was not a party, and the father, who acted for the children as well as himself, delivered the deed to the grantee, the grantee was not bound to see that each of the children received his proportionate share of the purchase price, according to the agreement, and one of the children could not object that the delivery was unauthorized, because she did not receive her share.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 271, 272; Dec. Dig. § 202.\*]

#### 3. FRAUD (§ 30\*)—DECEPTION CONSTITUTING FRAUD—RELIANCE ON REPRESENTATIONS—PERSONS LIABLE.

One of several grantors was not entitled to object, as against the grantee, that she had been misinformed as to her liability on a mortgage on the land, unless she was deceived and misled by the grantee.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 35; Dec. Dig. § 30.\*]

#### 4. APPEAL AND ERROR (§§ 969, 1046\*)—TRIAL (§ 25\*)—ARGUMENT—OPENING AND CLOSING—DISCRETION OF COURT—HARMLESS ERROR—REVIEW.

Under district and county court rule 37 (142 S. W. xx), providing that counsel for an intervenor shall occupy the position in the argument assigned him by the court, according to the nature of the claim, the matter is within the sound discretion of the court, which is not subject to review unless abused, and error could not be predicated on the refusal of the court to permit intervenors to open and close the argument, where there was nothing to indicate any injury therefrom.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3846-3848, 4128-4131, 4134; Dec. Dig. §§ 969, 1046; Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

#### 5. APPEAL AND ERROR (§ 173\*)—RESERVATION OF OBJECTIONS—NECESSITY OF PRESENTATION TO TRIAL COURT.

An objection to the validity of a deed, which was not raised in the pleadings nor in any matter brought to the attention of the trial court, cannot be urged for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

Appeal from District Court, Milam County;  
J. C. Scott, Judge.

Suit for partition by F. A. Marek and another against John W. Barrett and others, wherein W. N. Cooper and wife intervened. From a judgment for plaintiffs, the intervenors appeal. Affirmed.

W. A. Morrison, of Cameron, for appellants. Henderson, Kidd & Gillis, of Cameron, for appellees.

RICE, J. B. C. Barrett and his eight children owned 400 acres of land on the Francisco de los Rios survey in Milam county, which was the community property of himself and his deceased wife, and which he and his said children, except John W. Barrett, agreed to sell to F. A. Marek for the sum of \$20,250; and, on the 11th day of June, 1912, in pursuance of said agreement, they execut-

ed their deed to Marek for said land, and at the time of its execution signed a written agreement providing for a division of the proceeds of such sale when the same should be paid by Marek, which deed, together with said agreement, was deposited by B. C. Barrett (who appears to have been acting for himself and children in making such sale) in the First National Bank of Cameron. It was contemplated that Marek should pay part cash and give his notes for the balance of the purchase money, the proceeds of which, when sold by B. C. Barrett, together with the cash, was to be distributed by him among the grantors, said agreement providing that the children should have one-half of the proceeds, less an \$1,800 mortgage due upon the land, which was to be deducted from their portion, the father paying off the other liens upon the property out of his part thereof. Upon the payment of the money and execution of the purchase-money notes by Marek, the deed was delivered to him by B. C. Barrett, and he subsequently sold one-half of the land to A. N. Green. Within a few days after the delivery of the deed to Marek, Barrett sold the notes to Mrs. Zimnia Watson, as he was authorized to do by said agreement, depositing their proceeds in the Cameron State Bank, leaving checks therein, payable to the order of each of his children, except J. W. Barrett, for their share of such proceeds, amounting to \$1,010 each, including Mrs. Laura Cooper. John W. Barrett sold his  $\frac{1}{16}$  interest in the estate to his brother B. J. Barrett, taking in part payment therefor his three vendor's lien notes for the sum of \$600 each. Said checks were accepted by all of the children, except Mrs. Cooper, who declined to do so on the ground that the same was not sufficient in amount, and that she had been misinformed with reference to her liability on the mortgage above mentioned. Thereafter, on the 8th day of April, 1913, Marek and Green brought this suit for partition against John W., and B. J. Barrett, alleging that they (plaintiffs) owned an undivided  $\frac{15}{16}$  of said land, and that B. J. Barrett owned an undivided  $\frac{1}{16}$  thereof, and that John W. Barrett was asserting some claim or interest therein, as the vendor of B. J. Barrett, and that plaintiffs were in possession of their part of said tract, and defendant B. J. Barrett in possession of his part. The defendant John W. Barrett answered that he had conveyed his portion to his codefendant B. J. Barrett, and in part consideration thereof had taken the three notes mentioned, retaining a vendor's lien, and asked that in partition he be protected as to his lien and crops then growing on the place. Cooper and wife intervened, setting out the facts showing their interest in the transaction, as above stated, alleging that since the death of her mother, which occurred September 17, 1890, her father had remained in possession of the entire tract, during which time he had appropriated the rents

and revenues thereof for more than 20 years to his own use and benefit, and that her pro rata part thereof amounted to \$125 per annum; that at the time she and her husband executed the deed to Marek it was contemplated and agreed that all of the owners would sign same, but that her brother J. W. Barrett had refused to execute said deed, and that she had been misinformed as to her rights, without stating by whom, and was led to believe, from statements made to her, that she was liable for the payment of a  $\frac{1}{8}$  part of the deed of trust thereon, which had been executed by her father, which, together with interest, amounted to the sum of \$1,926, and that under said misapprehension she had obligated herself to pay her part thereof, to wit, \$240.75, which she would not have executed if she had known the facts; that neither of the plaintiffs had ever paid her for her interest in said land, and that by the terms of the agreement she was entitled to have \$1,024.44, and that the deed had been delivered to Marek without her authority, for which reason the title did not pass out of her; and it is alleged that plaintiffs had knowledge of the existence of her rights in the premises. It was further alleged that, while she had been advised that the check was at the bank for her, she refused to accept it, and so notified plaintiffs, stating the reason therefor. Plaintiffs answered, specially denying that they had made any misrepresentations, or that any such were made with their knowledge or by their authority; that they had in good faith complied with the terms of their contract, paid the consideration stipulated, and that the deed had been delivered to them without any knowledge of the facts set up in the plea of intervention, and further alleged that they were not parties to the agreement between the grantors with reference to the sale of said land and the distribution of the proceeds, and therefore were in no wise bound thereby. The case was tried before a jury, and on a peremptory instruction, returned a verdict in favor of plaintiffs for  $\frac{15}{16}$  of the land, and in favor of the defendant B. J. Barrett for the remaining  $\frac{1}{16}$ , and the case as to the interveners was submitted on one issue made by them and refused on the other. A verdict and judgment was rendered against them, and decree was entered determining the rights of the parties in accordance with the verdict and protecting the liens of J. W. Barrett and Mrs. Watson, who also had been made party defendant, and had set up her right as holder of the notes mentioned.

[1, 2] The first error assigned is that the court refused to give a peremptory instruction in behalf of interveners, for the reason that the deed was delivered to the plaintiffs without their consent and in contravention of the escrow agreement. We overrule this assignment, because if the deed was ever left in the bank as an escrow, which is doubtful under the evidence, still, the collateral agree-

ment between the grantors with reference to the division of the proceeds for which the land sold was no part thereof, and was clearly not binding upon Marek, as he had never signed it nor agreed thereto. *Am. & Eng. Ency. Law*, vol. 11, pp. 335, 336, in which it is stated that the deposit in such case must be made by the agreement of the parties to the instrument. A delivery made by the depositor alone will not be sufficient to constitute a valid escrow. See, also, 3 *Words & Phrases*, p. 2464, where it is clearly shown that, before an instrument can become an escrow, the contracting parties must actually agree thereto. In the present case the facts fail to show that Marek had anything to do with said contract relating to the division of the proceeds among the grantors, and hence was not bound thereby. The deed was delivered to Marek by B. C. Barrett, who under the evidence seems to have been acting in behalf of himself and the others, and the title passed to Marek thereby, notwithstanding the parties failed to properly divide the purchase money among themselves. No duty was imposed under the law upon Marek to see that each of the heirs received their proportionate part of such money. Therefore, the evidence did not justify the submission of the issue as to the deed's being delivered in contravention of the escrow agreement, for which reason the second assignment is also overruled.

[3, 4] The court did not err in charging the jury to find against interveners in the event they were not deceived and misled by statements made to them relative to the \$1,800 mortgage. Nor do we think the court erred in refusing to permit interveners to open and close the argument. This matter, under rule 37 (142 S. W. xx), is within the sound discretion of the trial court, and, unless abused, is not the subject of review. There is nothing in the record indicating that any injury resulted to interveners therefrom; and, since the evidence negatives the fact that they were misled by any misrepresentations by either Marek or B. C. Barrett, the court might properly have given a peremptory instruction to find in favor of plaintiffs.

[5] We overrule the seventh assignment, complaining that the deed was improperly delivered because appellants did not receive their share of all the purchase money, in that Rogers, the real estate agent, was paid \$1,000 commissions for making the sale, because this matter was not raised in the pleadings, nor in any manner brought to the attention of the trial court, and cannot be urged for the first time here; and, as their father, who had employed said agent and agreed to pay him such sum as commissions for his services, appears to have been representing them in the transaction, we fail to see how any complaint could be made on this score.

The remaining assignments have been considered, and are regarded as without merit. Finding no reversible error in the record, the judgment of the court below is affirmed.  
Affirmed.

### SEARS v. AINSWORTH.

(Court of Civil Appeals of Texas. El Paso.  
March 28, 1914. Rehearing Denied  
April 23, 1914.)

#### 1. PUBLIC LANDS (§ 178\*)—SCHOOL LANDS—CONTRACT TO CONVEY—TIME AS ESSENCE.

Time was necessarily of the essence of a contract to purchase, on a certain date, a section of public free school land, the required three years' occupancy of which had not been completed by two years, in view of the somewhat onerous conditions of occupancy imposed by law, so that the purchaser was required to perform on the date fixed.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 579-582; Dec. Dig. § 178.\*]

#### 2. EVIDENCE (§ 23\*)—JUDICIAL NOTICE.

The Court of Civil Appeals takes judicial notice that the purchase of public free school land from the state is upon a condition of occupancy which is more or less onerous.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.\*]

#### 3. PUBLIC LANDS (§ 178\*)—SCHOOL LANDS—SALE—PERFORMANCE BY VENDOR—UNREASONABLE DELAY.

Where plaintiff agreed to convey a section of public free school land on March 1st, the purchaser's failure to tender performance until July was an unreasonable delay, though he was ill up to about May 1st, in absence of other circumstances excusing his failure to perform after recovery.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 579-582; Dec. Dig. § 178.\*]

#### 4. VENDOR AND PURCHASER (§ 180\*)—TENDER OF PERFORMANCE—TENDER BY GUARANTOR.

The vendors of land could not be required to accept purchase-money notes executed by one who had guaranteed performance by the purchaser, instead of notes executed by the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 366; Dec. Dig. § 180.\*]

#### 5. GUARANTY (§ 78\*)—LIABILITY OF GUARANTOR.

The fact that the note sued on was given by defendant to guarantee the payment by a contract purchaser of land, of the consideration of the purchase, and not as a forfeit upon the purchaser's failure to perform, would not be a defense to an action on the note by the vendor on the purchaser's failure to perform; defendant being primarily liable on the note as between himself and the vendor.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 91, 92; Dec. Dig. § 78.\*]

Appeal from Andrews County Court; N. P. Ross, Judge.

Action by J. C. Ainsworth against A. W. Sears. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. Gibbs, of Midland, for appellant. J. M. Caldwell and Jno. B. Howard, both of Midland, for appellee.

HIGGINS, J. On July 25, 1910, appellee Ainsworth contracted to convey to Calvin

Taylor section 9 in block A42, public free school land in Andrews county. The three years' occupancy thereof required by law would not be completed until the spring of 1912. Appellant Sears conducted the negotiations in behalf of Taylor. It not being at that time convenient for Taylor to settle and reside upon the land, the same was not to be conveyed to him until March 1, 1911, at which time he was to make a cash payment of \$500 and execute purchase-money notes to cover a balance of \$2,060, divided into four equal installments and payable in one, two, three, and four years after date, with interest. On date Ainsworth made this contract, he conveyed the land to J. N. Norwood, with whom he arranged that the same should be by him in turn conveyed to Taylor on the date aforesaid. The purchase-money notes to be given by Taylor were to be payable to order of Norwood, and the cash payment of \$500 was to be paid to Ainsworth. To guarantee the performance by Taylor of his contract of purchase, Sears executed a note for \$500 in appellee's favor, due March 1, 1911, and placed same in escrow, to be delivered to Ainsworth for collection in event Taylor failed on said date to comply with his contract of purchase. On March 1, 1911, Ainsworth and Norwood were in the county seat of Andrews county, ready, willing, and able to comply with aforesaid contract; but Taylor was not present and did not offer to comply with his contract and make settlement upon the land until the summer of 1911. Some time during the month of March, 1911, and several times subsequent thereto, Sears requested appellee to have Norwood convey the land to him or to some one whom he (Sears) would designate. This appellee refused to do. It seems that Taylor's reason for not settling upon the land on March 1, 1911, and otherwise complying with his contract of purchase was due to illness which incapacitated him from so doing. Not until July, 1911, did he come to Andrews county and offer to comply with his purchase and make settlement upon the land.

This suit is by Ainsworth against Sears upon the \$500 note aforesaid given to guarantee the performance by Taylor of his contract. The case was tried before the court and judgment rendered in favor of Ainsworth. Findings of fact and conclusions of law were filed by the trial court. The court found that the physical disability of Taylor continued not later than May 1, 1911; that Ainsworth refused to comply with the request of Sears for conveyance made during March, 1911, because "Taylor had failed to comply with his part of said contract, and for the further reasons that the conditions then affecting said Ainsworth and said Norwood were such that no transfer could then be made for reasons over which said Ainsworth had no control, and said forfeit money note had thereby been forfeited to plaintiff

on March 1, 1911." The court also found time was of the essence of Taylor's contract to purchase on March 1, 1911, and that the amount of the note sued upon given by Sears to guarantee performance by Taylor became a liquidated and enforceable demand upon Taylor's breach.

[1, 2] The first assignment of error is to the effect that the evidence is insufficient to support the court's finding that time of performance was of the essence of the contract. This must be overruled. If the land concerning which the parties contracted had been patented, there might be some merit in the contention that an offer by Taylor to comply with his contract of purchase within a reasonable time after March 1, 1911, would have saved a forfeiture of the \$500 evidenced by the note sued upon; but this court judicially knows that the purchase of public free school land from the state is upon a condition of occupancy which is more or less onerous. It was a matter of no little importance to the owner of section 9 that the prospective purchaser, Taylor, should promptly comply with his contract and make settlement on March 1st as he had agreed. This circumstance alone, we think, would be sufficient to warrant the court in making the finding of which complaint is made.

[3] Certainly his failure to tender performance until July was an unreasonable delay in the absence of any facts tending to explain or extenuate same. His illness and consequent incapacity was assigned as an excuse for his failure to tender performance on the contract date, but there is an unchallenged finding that this disability terminated not later than May 1st. This delay of at least two months is unexplained, and no excuse whatever is offered. There is evidence to support the trial court's finding, and this court is bound by the same.

[4] As to the demand made by Sears, subsequent to March 1st, that conveyance be made to him or to some one whom he might designate, this raises a question quite apart from that of whether or not there is evidence to support the court's finding upon the issue noted; but as to this phase of the case it may be remarked that there is nothing to show tender of notes executed by Taylor for the unpaid purchase money, and Ainsworth and Norwood could not, under the contract, be required to accept the notes of Sears or any one else, in lieu thereof. So the demands of Sears possessed no saving grace.

The second assignment is predicated upon the premise that time was not of the essence of the contract. The trial court made an adverse finding as to this issue, and there is evidence to support it as shown above. The assignment must be overruled, since it rests upon a false premise.

[5] By his third assignment, appellant urges that the judgment is unsupported by the evidence and findings of fact, in this, that

the note sued upon was given by defendant to guarantee the payment by Taylor of a cash consideration which Taylor contracted to pay, and not as a forfeit. This matter does not constitute a defense to the note. As between Sears and Ainsworth, Sears was primarily liable upon the note. Taylor was not a party thereto. If the relations between Sears and Taylor were such as to make Sears merely a surety, then it would only have given Sears the right to make Taylor a party defendant and obtain judgment over against him. Taylor was not a party to the note upon which the suit was based. Certainly judgment cannot be obtained upon an express contract against one who is not a party thereto.

Affirmed.

STEVENS et al. v. CROSBY et al. (No. 289.)  
(Court of Civil Appeals of Texas. El Paso.  
March 5, 1914. On Rehearing,  
April 23, 1914.)

1. BOUNDARIES (§ 3\*) — CONFLICTING ELEMENTS—CALLS FOR COURSE AND DISTANCE—CALLS FOR MONUMENTS.

Where there is a conflict between calls for course and distance in grants of adjacent lands and calls therein for the bank of an old bed of a river as the boundary between the grants, the latter must prevail.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

2. BOUNDARIES (§ 37\*) — EVIDENCE — SUFFICIENCY.

In trespass to try title involving the location of a boundary between adjacent grants, evidence held to sustain the finding that the junction of two river beds forming the boundary was at a designated point as claimed by plaintiff.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

3. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

4. BOUNDARIES (§ 32\*)—ISSUES, PROOF, AND VARIANCE.

Where, in trespass to try title, the controlling issue was the location of an old bed of a river with reference to the lands in controversy, and not with reference to calls for course and distance, failure of plaintiff to prove that the course of the old bed was along the calls for course and distance given in his pleadings did not amount to a variance between the pleadings and the proof.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 145; Dec. Dig. § 32.\*]

5. PLEADING (§ 374\*)—ISSUES, PROOF, AND VARIANCE.

Though the pleadings and proof must correspond, the substance of the pleadings only need be proved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1217-1223; Dec. Dig. § 374.\*]

6. EVIDENCE (§ 353\*) — BOUNDARIES—DECLARATION OF FORMER OWNER—ADMISSIBILITY.

Where, in trespass to try title, the issue involved was the location of an old bed of a river, and defendant claimed under a town to which

a grant was made, bounded by the old bed, a statement in a deed executed by the town with reference to the location of the old bed was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.\*]

7. BOUNDARIES (§ 32\*)—PLEADINGS—AMENDMENTS—ISSUES.

Where, in trespass to try title involving the issue of the location of an old bed of a river forming the boundary between adjacent grants, the fact that plaintiff, by an amended petition, demanded less land than he was lawfully entitled to recover did not prevent him from proving the true boundaries of his grant as determined by the location of the bed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 145; Dec. Dig. § 32.\*]

8. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE.

It is not error to refuse a requested charge covered by a correct charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

9. TRIAL (§ 191\*) — INSTRUCTIONS—COMMENT ON EVIDENCE.

Requested instructions assuming facts not in evidence are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

10. ADVERSE POSSESSION (§ 110\*)—PLEADING—DEFENSES.

Where, in trespass to try title, defendant relied on the defense of limitations, and showed that he and his predecessors in title had claimed the land in controversy under deeds duly registered, and had paid the taxes thereon for about 19 years, and that the actual possession during that period was on land within the grant relied on by plaintiff, defendant could not be deprived of his right to rely on limitations by the fact that plaintiff filed an amended petition so describing his land as not to include the land so occupied.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 636-645; Dec. Dig. § 110.\*]

11. ADVERSE POSSESSION (§ 100\*)—ACTUAL POSSESSION—CONSTRUCTIVE POSSESSION.

A grantee who takes actual possession of a part of land conveyed by his deed, duly recorded, acquires thereby constructive possession to the limits of the boundaries specified in the deed, though the deed includes land in a prior grant to another who has not taken actual possession of any part of the grant, and, where such possession continues undisturbed for the statutory period, he acquires title to the entire tract described by the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

12. EVIDENCE (§ 433\*)—PUBLIC RECORDS—PAROL EVIDENCE.

A map which is an archive of the land office may be shown by parol evidence to be incorrect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990-2004; Dec. Dig. § 433.\*]

13. APPEAL AND ERROR (§ 719\*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

The correctness of a charge will not be considered on appeal, where no assignment of error relating thereto was filed in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3460; Dec. Dig. § 719.\*]

Higgins, J., dissenting in part.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

Action by Josephine Crosby and others against H. B. Stevens and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Millard Patterson, T. A. Falvey, J. A. Buckler, and J. F. Woodson, all of El Paso, for appellants. Stanton & Weeks, McBroom & Scott, and D. Storms, all of El Paso, for appellees.

HIGGINS, J. Appellees brought this suit in trespass to try title to recover survey No. 144 on the north bank of the Rio Viejo, in El Paso county, patented to Juan and Jacinto Ascarate on September 14, 1886, described in first amended original petition as follows: "Beginning at a cottonwood post on the bank of the Rio Viejo, south 545 varas from the northeast corner of the G. M. Collingsworth survey No. 14; thence down the north bank of the said Rio Viejo following its meanders, as follows: North 73° east 180 varas; south 83° east 353 varas; thence south 23° east 332 varas; thence south 22° west 92 varas; thence south 1° west 126 varas; thence south 24° east 166 varas; thence south 41° east 138 varas; thence south 43½° east 74 varas; thence south 76° east 185 varas; thence south 64½° east 490 varas to a stake set in the present county road; thence south 62° 41' east 584.2 varas; thence south 67° 31' east 270 varas to a stake set on the G. H. & S. A. Ry. right of way; thence," etc.

The foregoing portion of field notes is quoted in view of the filing of a trial amendment to the petition to which attention is hereafter directed.

The land was surveyed and patented by virtue of an act of confirmation of the Legislature approved February 11, 1858. 4 Gammel's Laws, p. 1027. This act relinquishes the right of the state in several tracts of land to various claimants, including Juan and Jacinto Ascarate, to whom three leagues were relinquished called "El Rancho de Ascarate." The lands were not specifically described, and the act further provided that the lands should be surveyed, platted, and patents issued in accordance with existing laws. In accordance with this act, the land was surveyed by one Randolph in 1886, and, as stated above, patented September 14, 1886.

By an act approved January 31, 1854 (4 Gammel's Laws, 42), two leagues of land were granted to the inhabitants of the town of Ysleta, "commencing at the northwest [should be southwest] corner of the town tract of Ysleta on the Rio Grande; thence up said river with its meanders to the point where the Rio Grande and the Rio Viejo separate; thence down the east bank of the Rio Viejo to the southwest corner of survey number twelve, located in the name of T. H. Dugan, etc." Some time prior to the

grants to the Ascarates and inhabitants of Ysleta, the Rio Grande had changed its course, and the term "Rio Viejo" is a Spanish one meaning "Old river." The Ascarate grant is situate north and northwest of the Ysleta grant. It will be noted that the north line of the western portion of the Ysleta grant is the east (it would more properly be termed north) bank of the Rio Viejo. The south line of the Ascarate is likewise the east (more properly north) bank of the Rio Viejo, and Randolph, when he surveyed the grant, undertook to locate and describe the meanders of the Old river by course and distance.

The defendants in the cause, appellants here, disclaimed as to all of the land sued for, except a certain parcel, which they described by metes and bounds, and claimed under chain of title emanating from Ysleta as a part of the grant to its inhabitants aforesaid. The parties entered into a stipulation by which it was agreed that as to the premises involved, and which, in fact, were situate within the boundaries of the Ascarate grant, claimed by plaintiffs, that the record title was in plaintiffs, and, if shown, in fact, to be situate within the limits of the Ysleta grant, that the record title was in defendants.

[1] The south line of the Ascarate grant, as described by course and distance in the survey and patent, embraces the land claimed by appellants as a part of the Ysleta grant. It is patent from the foregoing statement that the east or north bank of the Rio Viejo is the dividing line between the Ascarate and Ysleta grants eastward or downward from the junction of the New and Old rivers, and, in case of conflict between the course and distance calls in the south line of the Ascarate patent and the Rio Viejo, the latter will prevail, and that the Ysleta grant would take precedence over the Ascarate to the extent of the conflict. As to this phase of the case, the suit thus resolves itself into one of boundary; the issue being as to the true location of the Rio Viejo downward from its junction with the new river at the date of the Ysleta grant in 1854. The foregoing statement will not adequately and fully portray the location of the lands in controversy and the two original grants, but it could not be done completely without incumbering the record with maps. It is deemed sufficient, however, for the purposes of this opinion.

The Ascarate grant, as sued for and described in the petition, followed the description given in the patent, and which, as stated, was based upon Randolph's survey in 1886. By a trial amendment appellees changed the calls for course and distance of the south line of the Ascarate, so as to circumscribe and lessen the area of land claimed in the southern portion of the grant, and disclaimed as to the land south of the line fixed by the trial amendment. This amend-

ment reads: "That said plaintiffs so amend their first amended original petition so that the calls beginning at the point 545 varas south of the northeast corner of the Collingsworth survey No. 14, shall read as follows, to wit: N. 73 deg. E. 180 varas, S. 83 deg. E. 453 varas, S. 23 deg. E. 332 varas, S. 22 deg. W. 94 varas, S. 1 deg. W. 65 varas, N. 60 deg. 30' E. 214.5 varas; thence S. 76 deg. E. 185 varas, thence S. 64 deg. 30' E. 490 varas crossing the railroad, S. 12 deg. W. 104 varas, S. 71 deg. E. 140 varas, S. 25 deg. E. 120 varas, S. 33 deg. 30' E. 53 varas; thence S. 55 deg. E. 540 varas, S. 67 deg. E. 270 varas, from which said 270-vara call the line follows as in the 'first amended original petition.' That said plaintiffs further represent that, by reason of an erroneous survey of said line comprising the south boundary line of the Ascarate grant near the beginning point thereof, as above shown, the plaintiffs believed that the land lying south of said line and survey above set forth was not within the boundaries of the Ascarate grant, and have filed in other causes involving the title to said grant pleadings setting forth the said line above described as the south boundary line of the Ascarate grant and the north bank of the Old river; that, by reason of the fact that said land lying between the said boundary line set forth above and the more recent surveys made by R. J. Owen, J. W. Eubank, county surveyor, and Deputy County Surveyor F. E. Baker, correcting the former survey as shown by the above line, the said plaintiffs inserted in their said first amended original petition the field notes of such corrected survey; and plaintiffs further aver that they hereby disclaim for the purpose of this suit only any title, ownership, or possession of the land and premises lying south of the boundary line hereinbefore set forth and shown by the foregoing field notes, and between same and the lines as recently run by the surveyors aforesaid, and they further reserve all rights which were available to them under their former pleadings in this cause, except their claim of and to the property hereinbefore described and situated south of the field notes hereinbefore set forth and the line as run by said recent surveys; but plaintiffs hereby reserve their right to show by the testimony heretofore introduced and by the testimony that may be introduced in the trial of this cause the true boundary line of the said Ascarate grant, and also the true boundary line of the Ysleta grant No. 2, as the same was run by the original surveys of the said grants upon which patents were issued and have been introduced in evidence; and plaintiffs further represent that this trial amendment is filed for the purposes of this suit only, and that said plaintiffs reserve all their rights in any other suits that are pending or may be brought by the plaintiffs in reference to the said grant made to Juan and Jacinto Ascarate, and in reference to the

ownership of plaintiffs thereof, or as to any suits pending or that may be filed against the plaintiffs herein involving the title to said Ascarate grant. Wherefore the said plaintiffs pray judgment of the court decreeing them title to and possession of all the land and premises described in plaintiffs' first amended original petition filed in this cause on the 20th day of March, 1913, except as to the land and premises shown by the above amendment and disclaimer, and lying southerly of the field notes hereinbefore set forth."

The effect of the change in the course and distance calls is to lessen the conflict between the land originally claimed by appellees, and that of appellants, as the line fixed by the amendment was north of the south line as originally described by course and distance.

[2] The first four assignments question the sufficiency of the evidence, appellants' contention being:

First: "That the plaintiffs did not prove that the north line of the Rio Viejo extended along the line alleged by them, and consequently the verdict and judgment are contrary to, and not supported by, the evidence, and should have been for the defendants."

Second: "That the evidence clearly shows that the north bank of the Rio Viejo extended along the north line of tract claimed by defendants, and consequently the verdict and judgment should have been in their favor."

There is a mass of evidence in the record bearing upon the question at issue, viz., the location of the Rio Viejo in 1854 from its junction with the present bed of the Rio Grande, downward towards the mouth of the river. This evidence, for the most part, consists of numerous maps and testimony of various surveyors, detailing the result of their efforts to locate the true course of the Rio Viejo. To incumber the record with these maps and extended statement of the testimony of the various witnesses would be profitless. We will therefore confine ourselves to a brief statement of the salient features of the evidence regarded as supporting the verdict. An item of controlling importance is to first locate the junction of the Rio Viejo and present Rio Grande, and light is shed upon this question by deed from town of Ysleta to J. W. Tays, dated August 9, 1873, of a 600-acre tract of land described as "Beginning at a point on the Old river, set for the N. W. corner of lot No. 208 in the new division; thence N. 54° W. 720 varas; thence S. 15° E. 270 varas; thence S. 32° W. 200 varas; thence S. 64° W. 170 varas; thence S. 84° W. 160 varas; thence S. 62° W. 1,110 varas; thence S. 81° W. 240 varas to the junction of Old and New river; thence down the river S. 14° E. 300 varas," etc. At the end of the first call is a stone admitted to be in the bed of the Rio Viejo. W. J. Tays, it seems, was the official surveyor of



the town of Ysleta, and a map made by him fixes the junction at the point contended for by appellees. This deed and map is sufficient to support a finding that the junction of the two river beds was at the point contended for by appellees, instead of further westward and northward, as appellants contend.

As stated above, there is a stone at end of the first (N. 54° W. 720 varas) call in the Tays deed, and it is admitted that this is in the bed of the Rio Viejo; so, if it be that the course of the Rio Viejo from the Tays junction downward to this stone be such as to lie southward and eastward of the land in controversy, then necessarily it was situated in the Ascarate grant and not in the Ysleta. That it did so run is established:

(a) By the Tays map aforesaid, upon which the course of the Rio Viejo is delineated as lying so as to embrace the controverted premises within the Ascarate grant. (b) By the testimony of Benigno Alderete, who, upon being shown the Tays map and his attention called to the Old river indicated thereon, was asked to state what it indicated and if he was familiar with the line of the Old river, stated: "Yes, I believe it is the Old river." He was then asked whether the Old river shown on the map represented the river he referred to when he was a boy and saw water in it and stated: "I believe it is."

(c) By the testimony of the surveyor, Owen, according to whose testimony the Rio Viejo, as he identified same by appearances and indications upon the ground, lay to the southward of the line described by course and distance in the trial amendment as the south line of the Ascarate grant, and south and east of the land claimed and recovered by appellees.

[3] This court cannot lawfully, and will not, disregard the finding of the jury that the controverted premises were situated in the Ascarate grant, in the face of the evidence quoted. The vagrant, wandering nature of the Rio Grande river is well known, and the testimony in the record indicated many old river beds in this vicinity, and after this great lapse of time it is, of necessity, difficult, if not impossible, to definitely locate the course of the Rio Grande in 1854 between the Ascarate and Ysleta grants.

The jury heard all of the evidence, and, while they might not have been able to accurately determine the precise course of the Rio Viejo, yet by their verdict they necessarily found that the land lay to the northward and westward of the Rio Viejo, which would place it within the limits of the Ascarate, and without the Ysleta. Their finding is supported by the evidence indicated, and it will not be disturbed.

[4] What has just been said applies also to another position taken by appellants. It is embraced within their contention first above quoted, and, reduced to its last analysis, it

is that there was a failure of proof upon appellees' part, in that it is not shown that the course of the Rio Viejo was along the calls for course and distance given in their pleading. This is regarded as being without merit. The location of the Rio Viejo by course and distance is of no special or practical importance in determining the issues here presented. The controlling issue is the location of the Rio Viejo with reference to the land in controversy, and not with reference to the calls for course and distance. The location of the Rio Viejo would control the course and distance calls, and, if it lay south and east of the premises claimed by appellants, it placed same in the Ascarate grant, and it is immaterial whether or not its course corresponded with the course and distance which it is alleged to follow. It involves no question of variance or failure of proof as to the controlling issue in the case. The issue is not the location of the Rio Viejo by course and distance, but as regards the lands sued for. The issue was proven in favor of plaintiffs, when it was shown that it lay south and east of the land in controversy. *Bank v. Webb*, 128 S. W. 426; *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631, at second column page 633; *Hanaford v. Morton*, 22 Tex. Civ. App. 587, 55 S. W. 987, at second column page 988; *Clark v. Hills*, 67 Tex. 141, 148, 2 S. W. 356; *Brown v. McDougal*, 63 Tex. 193, 196; *Duff v. Moore*, 68 Tex. 270, 4 S. W. 530, 531.

[5] Those cases cited by appellants, in which it is broadly stated that the boundary lines proven must correspond with the description contained in the petition, are inapplicable to the state of facts here presented. While the allegations and proof must correspond, yet the substance of the allegations only need be proven. What is said above disposes of the questions presented by the first four assignments.

Under the views just expressed, the court did not err in refusing defendant's special charge No. 2, reading: "You will not consider in this case the statement made in the deed introduced in evidence from the town of Ysleta to J. W. Tays that the point at the south or southwest end of the call in same, extending S. 81° W. 240 varas from the west end of the 1,110 varas call was the junction of the Old river and the Rio Grande"—and special charge No. 3, reading: "You are charged that in the year 1854, when the Ysleta grant was confirmed, the west end of the Ysleta grant or place where the Rio Viejo separated from the Rio Grande was (and now is for the purposes of this case) more than one-third mile west of the west end of the land that is claimed by the defendants in this case and called in the evidence the Harris tract"—the refusal of which is made the basis of the fifth and sixth assignments.

[6] Since appellants hold under the town

of Ysleta, the statement in its deed to Tays with reference to the point of junction of the Old and New rivers was admissible.

[7] As stated above, the trial amendment did not preclude appellees from showing that the Rio Viejo lay to the south and east of land covered by the disclaimer; that the point in issue in this case is whether the land in controversy lies in the Ascarate or Ysleta grants, and this question is controlled by the location of the Rio Viejo on the ground.

The effect of appellants' contention is that, if plaintiffs in a boundary suit sue for less land than they are lawfully entitled to recover, they would not be permitted to prove that the boundaries of their grant were more extensive and comprehensive than they had alleged. Manifestly such a position is not well taken. See authorities last above cited.

The fifth, sixth, seventh, and eighth special charges, the refusal of which is made the basis of the seventh, eighth, ninth, and tenth assignments, were likewise properly refused, for the reason that it was necessary only for plaintiffs to prove that the land claimed lay within the Ascarate grant, and this question was controlled absolutely by the location of the bank of the Rio Viejo; the trial amendment did not alter the fact that such location was the controlling feature in the case.

[8] Special charge No. 9 which reads, "You are charged that the bank mentioned by the witnesses as being north of the stone, the beginning corner of the land described in defendants' answer, was the north or northeast bank of the Rio Viejo in 1854, as shown by the evidence and the plaintiffs' pleadings, and, if you believe the same bank extended from said place in a westerly direction with the north line of the land claimed by defendants in their answer, you will find for defendants for said land," was properly refused, since the same bank found at defendants' beginning corner might have extended along the entire length of the line claimed by them as their north boundary, and still not have marked the course of the Rio Viejo upward. The bank mentioned westward may have been simply the bank of foothills, and not of the Old river. Furthermore, the issue raised by this charge was fully and admirably covered in appellants' special charge No. 1 given by the court, and which reads: "You are charged that, if you believe from the evidence that in the year 1854, and prior to that time, the east bank or the northeast bank of the Rio Viejo was at the north line of the tract claimed by the defendants in this case, any change that may have occurred in the course of the Rio Grande after that time or after the time of its separation from the Rio Viejo would be entirely immaterial, and, if you believe that in 1854 the east bank or the northeast bank of the Rio Viejo was at the north or northeast line of the tract claimed by the defendants in this case, you will find

that the record title to the land claimed by the defendants in this case was in the town of Ysleta at the time of its conveyance to Fruedenhal in the year 1888, and will find for the defendants for the land claimed in their answer."

[9] Special charges Nos. 10 and 11 were properly refused; there being no evidence called to the attention of this court showing that any of the surveyors had arbitrarily left the bank of the Rio Viejo at defendants' beginning corner and sought a bank at some other place, or that field notes and maps had been made merely to support a theory, as was assumed in the charges. They violate the rule which forbids the court to comment upon the evidence.

[10, 11] The fourteenth assignment complains of the action of the court in peremptorily instructing against appellants upon the issue presented by their plea of the five-year statute of limitation; the fifteenth of the refusal of a peremptory instruction in their favor upon this issue; the sixteenth of the refusal of a special instruction submitting the issue to the jury.

The suit was filed July 6, 1909. Appellants, and those under whom they hold, have claimed the land in controversy, under deeds duly registered, paying taxes thereon when due, since May, 1889, when the deed from the town of Ysleta to appellants' grantor, Fruedenhal, was recorded. The land is specifically described in the deeds by metes and bounds.

Defendant Harris testified they had a tenant upon the land named Regalado who lived upon the same; that Regalado went there in 1889, and remained there until his death, 3 or 4 years ago. The trial was in 1913 which would fix his death in 1909 or 1910. According to this testimony, Regalado was upon the land continuously for 20 years, beginning 1889. According to the testimony of defendant Matthias, Regalado resided upon the land as their tenant for about 19 years prior to the filing of the suit. Other witnesses testified to occupancy by Regalado as a tenant of appellants. The house occupied by him was situate on the land which lay between the south line of the Ascarate grant, as described by course and distance in the first amended petition, and the line as described in the trial amendment, the title to which land was disclaimed by appellees in the trial amendment. The house was in a northerly direction from the junction of the Old and New rivers, as shown on the Tays map, and apparently upon land within the bounds of the Ascarate grant.

The fifteenth assignment may be disposed of with the observation that an issue is raised as to the tenancy relationship of Regalado, which alone would render improper a peremptory instruction in appellants' favor upon issue of limitation.

There is nothing in the record called to

our attention to show that in 1889 the appellees or their grantors were in actual possession of any part of the Ascarate grant, and the legal seisin which attached by virtue of their ownership was broken by the entry of Regalado, and appellants, by virtue of such entry, acquired constructive possession of all the land in the Ascarate grant to the extent of the boundaries called for in their deeds. *Cunningham v. Frandtzen*, 26 Tex. 38; *Evitts v. Roth*, 61 Tex. 84; *Cantagrel v. Von Lupin*, 58 Tex. 570; *Wood on Limitations*, § 259. Such actual possession of part, with resulting constructive possession to limits of the boundaries contained in their deed, continued undisturbed until the entry of one Calsadillas, who settled upon northwest corner of land in controversy about 1895 or 1896. His original entry was tortious, apparently without any claim and as a naked trespasser; but about 1898 or 1899 he attorned to the Ascarates. From the date the occupancy of Calsadillas as a tenant of the Ascarates begun, the constructive possession of appellants, by virtue of occupancy of Regalado, was broken, and their seisin was limited to the part of which Regalado had pedal possession. *Parker v. Baines*, 65 Tex. 605; *Evitts v. Roth*, supra. There is nothing in the testimony of the various witnesses quoted by appellees to show any disseisin of appellants' constructive possession prior to 1898 or 1899.

The testimony of Villareal is almost wholly unintelligible. It gives no accurate idea as regards dates or the location of the land, which he refers to as being in Babbitt's possession and use. Rogers did not go there until 1907. One Armenta testifies regarding some land he went upon in 1897 and cultivated, but it is not located so that this court can identify it, and further he entered as a trespasser, and there is no pretense of a tenancy under appellees until two years later. Thus it is seen that, from 1889 until 1899, appellants, according to their evidence, were in actual possession by tenant of certain land included within the boundaries of their deeds, and, by virtue thereof, had constructive possession of the whole for a period of more than five years, and had the right to have the issue of limitations under the five-year statute submitted to the jury.

We gather from appellees' counter proposition, argument, and authorities cited that they rely upon the principle with reference to constructive possession recognized and applied in *Turner v. Moore*, 81 Tex. 206, 16 S. W. 929; *Cook v. Lister*, 15 Tex. Civ. App. 31, 38 S. W. 390; *Beaumont Pasture Co. v. Polk*, 35 S. W. 614; *Payton v. Caplin*, 24 Tex. Civ. App. 364, 59 S. W. 624; *Hess v. Webb*, 113 S. W. 618; *Blaske v. Settegast*, 123 S. W. 220; *Lowry v. McDaniel*, 124 S. W. 710; *Mayhan v. McManus*, 130 S. W. 881; and *Noland v. Weems*, 141 S. W. 1031.

Had the premises upon which Regalado en-

tered and of which he had actual possession been situate in the Ysleta grant, then, under the authorities cited, it is quite clear his constructive possession would not have extended beyond the limits of the Ysleta, and attached to lands in the Ascarate owned by appellees; but apparently such is not the case with reference to the land upon which he actually entered. It is true it was upon land covered by the disclaimer contained in the trial amendment and south of the line there described, but, according to all of the evidence offered by appellees, locating the Rio Viejo so as to embrace within the Ascarate the land for which they sued, the house and cultivated lands of Regalado were north of the Rio Viejo and its junction with the New river, which would place him upon the Ascarate, and upon land in no wise conflicting with the Ysleta grant. His constructive possession of the premises in controversy was therefore dependent upon whether or not he was upon the Ascarate grant, and apparently he was. If he was upon the Ascarate, the rule would apply giving constructive possession to all of the land in the Ascarate contained in boundaries of appellants' deeds. He was in actual possession of a part of the Ascarate covered by the deed of his landlords, and the authorities cited by appellees do not support their contention that constructive possession did not extend to all of the land in that grant covered by the deed. Upon the contrary, they expressly recognize its application under the facts here presented. The application of the rule could not be defeated by a mere disclaimer on part of appellees to the land, so in actual possession, and by them giving a course and distance description of the Ascarate south line to the north of the true location of the Rio Viejo. The bank of the Rio Viejo was the dividing line between the grants from its junction with the New river; all land to the south of this bank was in the Ysleta grant; that to the north thereof was in the Ascarate. Pleadings and disclaimers cannot alter this fact, nor can the rules with reference to constructive possession be thus evaded or defeated. Appellees will not be permitted to recover upon the question of boundary by fixing the Rio Viejo at one point so as to embrace in the Ascarate the land for which they sue, and then defeat the application of a well-established rule relating to constructive possession by a disclaimer and description of an imaginary line, so as to apparently place the land in actual possession in another grant. In this connection it may be stated that no such subdivision of the Ascarate is shown as would make applicable the rule contended for by appellees. As we understand their contention, it is that the rule applies because the constructive possession would not be permitted to extend to land in the Ascarate by virtue of actual possession in the Ysleta. This, it seems, is not the case presented by the facts in evidence, which con-

control the question, rather than the disclaimer and description of south line of the Ascarate contained in the trial amendment. The trial court erred in withdrawing the issue of limitation from the jury.

[12] The court did not err in permitting the witness Owen to testify with reference to the Tays map, as indicated in seventeenth assignment. The map had been offered in evidence by appellants, and, if it was incorrect, appellees could show that fact by the testimony of a surveyor familiar with the facts. The fact that it is a land office archive does not affect the right to show it to be incorrect.

Considering the charge as a whole, and in connection with appellant's special instruction No. 14, given by the court, we are not prepared to sustain the objection to the eighth paragraph of the general charge, but, upon retrial, suggest that the criticism made be obliterated.

[13] Under the twentieth assignment it is urged that the court erred in giving a special instruction of plaintiffs, reading: "You are further instructed, gentlemen of the jury, upon request of the plaintiffs, that the initial or beginning point in any field notes and maps or surveys, as shown by the evidence introduced before you, are of no greater importance than any other corner or point purporting to be located by such field notes or maps, and you are further instructed that it is permissible and lawful, in making a survey according to prior existing field notes, to reverse the calls and follow the footsteps of the original surveyor in their reverse order, as it is to follow the footsteps of such original surveyor by beginning with the initial point and proceeding to survey out the various calls in the order in which such original surveyor made such survey on the ground." The propriety of giving this charge cannot be considered, as no assignment of error relating thereto was filed in the lower court. The question presented is not fundamental in its nature, and we therefore decline to consider the assignment.

For the error indicated, with respect to the issue of limitation, the cause must be reversed and remanded. The majority of the court hold that the reversal should be a general one, and it is so ordered. The writer is of the opinion that the reversal should be a limited one; that it should be reversed and remanded for a new trial on the issue of limitation only; and that the issue of boundary be not reopened and submitted. That this is the proper order that should be entered, I think, is supported by the following authorities: *McConnell v. Wall*, 67 Tex. 352, 5 S. W. 681 (see original opinion in 65 Tex. 397); *Wells v. Littlefield*, 62 Tex. 28 (original opinion in 59 Tex. 556); *Telegraph Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; *Shirley v. Ry. Co.*, 78 Tex.

131, 10 S. W. 543; *Id.*, 24 S. W. 809; *Hanrick v. Hanrick*, 81 S. W. 795; rule 62a for the Government of Courts of Civil Appeals (149 S. W. x). *Nona Mills Co. v. Jackson*, 159 S. W. 932; *Benjamin v. Ry. Co.*, 49 Tex. Civ. App. 473, 108 S. W. 408; *Marshall v. City of San Antonio*, 63 S. W. 138.

#### On Rehearing.

The members of the court concur in the view that the motions for rehearing, filed herein by appellants and appellees, respectively, should be overruled, and it is so ordered.

The writer desires to collate the authorities and briefly state the grounds of his conclusion that this cause should be remanded for trial on the issue of limitation only.

Article 1048, R. S. 1879, discussed in *Wells v. Littlefield*, post, reads: "Where the judgment or decree of the court below shall be reversed the Supreme Court, or Court of Appeals, shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below." This statute was carried forward into the Revised Statutes of 1895 as article 1027, and into Revised Statutes of 1911 as article 1626, in the same language, except, only, that in the statutes of 1895 and 1911 it is made applicable to Courts of Civil Appeals, instead of the Supreme Court and Court of Appeals.

In *Wells v. Littlefield*, 59 Tex. 556, upon trial of right of property, the cause was remanded with directions to the court below to enter such judgment in favor of Wells as, under the law announced in the opinion, he was entitled to on the former trial, and to allow him such recovery as he had a right to in the state of the record below had the decision there been in his favor upon the trial of the right to the property in controversy. The trial court, upon a showing by Littlefield of newly discovered evidence, was about to reopen and retry the whole case, and, in issuing a mandamus to compel observance of its instructions, the Supreme Court, in *Wells v. Littlefield*, 62 Tex. 28, says: "But it is urged that the writ cannot be used in this instance, because the Supreme Court cannot reverse and remand a cause except for a new trial upon all the issues in the case, both those which were and those which were not determined by the court in passing upon the appeal. This view seems to be based upon the language of our Revised Statutes, art. 1048, which provides that, 'where it is necessary that some matter of fact be ascertained, or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below.'

This article is the same as that contained in the act in force at the time the Revised Statutes were adopted, with the exception that the words 'new trial in the court below' are used in the Revised Statutes, instead of the words, 'definite decision,' which occur in the former act. There is but little material variance between these two expressions, and in the case of *Chambers v. Hodges*, 3 Tex. 517, they were treated by Chief Justice Hemphill as having a similar meaning. We do not consider that by the use of the words 'new trial' it was meant that, no matter what might be the decision of this court, or how far it had settled the rights of the parties, in every case where a cause was remanded it should be reopened upon all the issues which could possibly arise in it, both those which were determined and those which were not by the decision of the Supreme Court. Examples readily occur in which this court may close investigation as to points passed upon in its opinion, but permit it as to others which it is necessary to ascertain, before a proper judgment disposing of the rights of the parties can be pronounced; for instance, in a suit for land where judgment has gone for a defendant who had pleaded improvements made in good faith. If that judgment is reversed, the court might well render its judgment decreeing the land to the plaintiff, but remanding the cause for the purpose of ascertaining the value which should be allowed the defendant for his improvements. For other instances, see *Wood v. Wheeler*, 7 Tex. 25, and *Anderson v. Powers*, 59 Tex. 213. The language of the statute itself seems to imply that the very facts which are wanting so as to prevent this court from fully disposing of the case are those which the new trial may be given to ascertain. At least that it would not be out of the power of the court to remand the cause for a definite finding of these facts alone. It has been the practice of this court from its earliest days down to the present time to reverse and remand causes to the district court, and to enter judgments in accordance with their decisions. *Chambers v. Hodges*, 3 Tex. 517; *Peters v. Caton*, 6 Tex. 554; *Wood v. Wheeler*, 7 Tex. 13; *Id.*, 9 Tex. 127; *Anderson v. Powers*, 59 Tex. 213; *Cowan v. Nixon*, 28 Tex. 240. This having been the uniform practical construction given to the act in force before the Revised Statutes were adopted, and the latter having adopted substantially the language of that act, it must have been the intention of the Legislature that the same interpretation should be applied to the new statutes. *Hillebrand v. McMahan*, 59 Tex. 450; *State v. Smith*, 55 Tex. 447. We think this court had authority to remand the cause to be disposed of as required in the opinion of the court."

*Wall v. McConnell*, 65 Tex. 397, was a suit against a county treasurer for recovery of money belonging to the county improperly

retained by that officer as commissions. The rights of the treasurer depended upon the date certain drafts were collected. This order was entered: "The judgment of the court below will be reversed and the cause remanded, in order that inquiry may be made as to the time at which the money collected on the drafts given to cover amounts to which the county was entitled on insurance was received, and that judgment may be there entered in accordance with this opinion." The court below followed these instructions, refused to reopen the entire case, and, upon subsequent appeal (67 Tex. 352, 5 S. W. 681) from the judgment so entered upon the instructions, it was said: "This cause, having been tried without a jury, was before this court at the last term, and is reported in 65 Texas, 397. The rights of the parties were then determined, except as to one item, in reference to which the evidence was not sufficiently full to enable this court to render the proper judgment. The judgment was reversed, and the cause remanded, with instructions to the court below to ascertain when Houston county received certain money on an insurance policy which it held, and then to render a judgment in accordance with the opinion. It became necessary to ascertain when the insurance money was received, in order that the commissions to which the appellant was entitled, as county treasurer, might be known; he being entitled, to a certain date, to 2½ per cent. on moneys received, and only to one-half of that sum after that date. When the cause was called for trial, after being remanded, it was admitted that the insurance money was received at such time as to entitle the appellant to the higher commissions, but he insisted on opening the whole case and having a trial by a jury, which was refused. This is assigned as error. The court below did not misunderstand the former judgment of this court, and correctly refused to reopen the entire case. If the appellant was of the opinion, when the judgment of this court was entered at the last term, that on another trial he could make proof that would show his right to be other than by the record if then appeared, he should have asked this court so to reform its judgment as to give him an opportunity to do so. This he did not do. To have given him a jury trial would have been useless; for every fact affecting his right which could be inquired into was admitted to be as he claimed it to the utmost extent. There is no error in the judgment, and it will be affirmed."

The rule of practice established by these two cases has been many times observed and enforced.

In *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, the rights of the parties were finally determined and adjudicated, except those arising upon the issues presented by the claim of E. G. Hanrick for contribution, and the cause was re-

versed, and remanded for the sole purpose of a further accounting between the parties in accordance with the opinion. See, also, opinion of the Court of Civil Appeals upon subsequent appeal in 81 S. W. 795.

In *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327, it was said: "A separate suit could have been brought for each of the three parcels of land for which this action was brought. The controversies as to the several titles grew out of the transactions wholly distinct from each other. Such was the case of *Cooper v. Lee*, 75 Tex. 114 [12 S. W. 483], in which this court found error in the proceedings as to one tract of land, but no error as to another tract which had been recovered in the same judgment in the court below. In the first instance the judgment as a whole was reversed, and the cause remanded, but, upon a motion for rehearing and to reform the judgment, the court affirmed the decree below as to the one tract, and reversed and remanded the cause as to the other. [It is to be noted that the action upon the motion does not appear in the report of the case.] In the present case we find reversible error as to the tract of land first conveyed to Mrs. Schuster, but no error as to the last. She recovered the city lot bought January 9, 1882. The judgment of the court below will accordingly be reversed as to the tract of 20 acres of land conveyed to Mrs. Schuster February 17, 1881, and the cause remanded for a new trial as to that. It will, in all other respects, be affirmed."

In *Shirley v. Ry. Co.*, 78 Tex. 131, 10 S. W. 543, the cause was remanded "with instructions to the court below to try the issue whether the sale of the Waco & Northwestern Railway made to the Houston & Texas Central Railway Company through and under the terms and provisions of the deed of trust executed by John T. Flint for and as president of the Waco & Northwestern Railway Company to Gray and Botts, the trustees therein mentioned for the Houston & Texas Central Railway Company, was fraudulent as to appellant's rights as a creditor of said Waco & Northwestern Railway Company, and to try no other issue now made or presented by the pleadings in this cause. And, if, upon a trial of the issue above instructed to be tried, it shall be found that said sale so made under said deed of trust was not fraudulent, then and in that event judgment shall be entered against the trustees for the stockholders and creditors of said Waco & Northwestern Railway Company in their representative capacity only for the sum of \$16,453.90, with interest on said sum from the date of the judgment from which this appeal was taken, together with a foreclosure of appellant's lien upon the railway and appurtenances thereto belonging from Bremond, in Robertson county, to the city of Waco, in McLennan county, against said trustees and the said Houston

& Texas Central Railway Company to enforce its payment. And that judgment be rendered against said trustees for the sum of \$96,602 with interest thereon also from the date of the judgment from which this appeal was taken, to be paid out of any assets in their hands as such trustees. And, if, upon a trial of the issue above directed to be tried, it should be found that the sale of said Waco & Northwestern Railway and its appurtenances under the terms of said deed of trust was made with intent to defraud the creditors of said Waco & Northwestern Railway Company, then and in that event the said Waco & Northwestern Railway Company shall be adjudged subject to sale for the satisfaction of the judgment to be rendered in favor of appellant against said trustees."

In *Benjamin v. Ry. Co.* (Dallas) 49 Tex. Civ. App. 473, 108 S. W. 408, the plaintiffs sued the railway company for damages resulting from the maintenance by the railway company at its shops of certain oil on its premises, and allowing the same to escape so as to pollute the water of a creek upon which the plaintiff's land was situated, which pollution caused damage to plaintiff's crops, the destruction of fish, and injury of his cattle. The trial resulted in a verdict for the railway company, and the plaintiff appealed. Upon appeal the court determined that the case had been correctly tried as to the issue affecting damage to crops, fish, etc., but that error had been committed with reference to the issue of damage to plaintiff's cattle, and reversed and remanded the case on account of such error. On rehearing the court limited the remand of the case to the issues relating to the damages to the cattle, assigning reason for limitation upon issues to be retried as follows: "The court in its general charge presented each of these items separately and distinctly, so that the jury, in considering them, could not have possibly gotten them confused with the other items of damage presented, or with each other, and their verdict was, in effect, that plaintiff did not suffer damage as to either of them, which finding is supported by the evidence. The error in the court's charge on which a reversal was based related alone to damages to cattle, and which in no way was calculated to affect the finding as to the crops of oats and grass and fish. Such being the condition of the record showing that plaintiff has had a fair and impartial trial as to these items, he should not be allowed to have another chance to recover as to them. Therefore the judgment heretofore rendered will be changed, affirming as to said items, and reversing as to the remainder of said items."

So, in the case at bar, the error of the court in withdrawing the issue of limitation in no wise relates to and in no possible way can it affect the boundary question. Whatever the facts may be with respect to limitation, they cannot affect the location of

the Rio Viejo, which alone controls the determination of the boundary issue.

In *Marshall v. City of San Antonio* (San Antonio) 63 S. W. 138, the plaintiff sued the city for breach by it of a contract for the construction of a certain sewer system. Under the contract, he was to perform certain specific services and to be paid according to certain classifications. When the work was about a third completed, a dispute arose between him and the city as to the construction of a contract, and the city relet the contract to another company. Plaintiff sued for the work done by him, and for profits he alleged he would have made but for such alleged breach by the city. The city answered, seeking affirmative relief by reason of the alleged cost of having the contract completed after plaintiff's default. It admitted that it held certain funds due the plaintiff, but that it had a right to credit the same upon its claim and to recover a balance over against the plaintiff. The case was tried before a jury, which found in favor of the city. On appeal, the Court of Civil Appeals, by Judge Neill, held that the error was committed in reference to the issue of the city's right to a recovery against plaintiff, and reversed and remanded the case. On motion for rehearing, however, they limited the remand to the issues in which error had been found, saying: "The issue of the amount of damages, if any, sustained by the city, which involves its right to withhold said sum of money, is the only one which, in our opinion (save the claim of the intervener as assignee of said fund), was not properly disposed of in the trial court. Therefore, under authority of *Shirley v. Ry. Co.*, 78 Tex. 150, 10 S. W. 543, our former reversal of the entire judgment is set aside, and to this extent only the motion for rehearing is granted, and the judgment of the court below is reversed, and the cause remanded, with instructions to the court below to try the issue above stated, and to try no other issue now made or presented by the pleadings in this case; and if, upon the trial of the issue instructed to be tried, it shall be determined that the city is entitled to withhold said sum of money by reason of the damages it claims to have sustained, to enter final judgment in favor of the city; but, if, upon the trial of said issue, it shall be determined that the city is not entitled to withhold said sum of money, or any part of it, then to enter final judgment in favor of plaintiffs in error (plaintiffs below) against the city for said sum, or such part of it as may be determined it is not entitled to withhold from plaintiffs in error. With this modification of our former judgment, the motion for rehearing is overruled."

*Nona Mills Company v. Jackson* (Galveston) 159 S. W. 932, was a suit in trespass to try title for certain lands, and for damages for timber taken from the land. The plaintiffs,

as tenants in common, recovered the land, and also recovered damages for the timber taken from the land. An opinion by Judge Pleasants held that the plaintiffs, who were tenants in common, were entitled to recover the land, etc., as against defendants who had no title, but that they could only recover that portion of the damages for timber cut and taken from the land to which their interest in the land entitled them, and the evidence failed to show what their particular interest in the land was, and therefore failed to show what portion of the damages they were entitled to recover. The court, therefore, by reason of such error, reversed the case as to the recovery of damages for the removal of the timber, and remanded the cause, with instructions to the trial court to hear evidence upon the question of what interest the plaintiff had in the sum found to be the amount of the damages, and to give them judgment accordingly. The court cited rule 62a for its action in so remanding the case. It may be suggested that this practice violates the provisions of article 1997, Revised Statutes 1911, which reads: "Only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law." This statute, however, relates to judgments of the district and county courts. Judgments of the Courts of Civil Appeals are governed by article 1626, R. S. 1911. *Wells v. Littlefield* and *Wall v. McConnell*, supra.

The reasons for the rule that in some instances permits the Supreme Court and Courts of Civil Appeals to reverse a case in part and affirm in part, or to remand on certain issues, are not altogether applicable to trial courts. *Schintz v. Morris*, 13 Tex. Civ. App. 580, 603, 35 S. W. 516, 36 S. W. 292. And it would seem that article 1626, as construed by the Supreme Court in the two cases mentioned, furnishes the exception permitted by article 1997. At any rate, the rule and practice is well established of affirming as to certain parties and reversing as to others, when a proper decision of the case as to one is not dependent upon the judgment as to the other. *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548; *Ry. Co. v. Ems*, 92 Tex. 577, 50 S. W. 928; *Wimple v. Patterson*, 117 S. W. 1034; *Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; *State v. Dayton Lumber Co.*, 164 S. W. 48. So it would seem that article 1997 has never been considered by the Supreme Court as standing in the way of limited reversals or remanding with instructions, and to the writer it seems that these authorities indubitably establish the right of this court to foreclose further investigation and retrial of an issue, which has been once correctly tried and decided, and which is entirely severable from, and in no wise dependent upon, other issues in the cause improperly tried or erroneously decided. But the Courts of Civil Appeals seem to have enforced it in but few instances, and on

November 22, 1911, the Supreme Court promulgated for the observance of said courts a rule with reference to reversals as follows: "If it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error." Rule 62a (149 S. W. x).

We must certainly assume that the Supreme Court acted advisedly in promulgating this rule, and had a definite purpose in mind which it desired to accomplish. Its language alone, to the mind of the writer, bears obvious and unmistakable proof that it was intended to cover and enjoin upon the Courts of Civil Appeals the observance of the rule of practice recognized and declared in the various cases to which reference is made above. And I am further firmly convinced that the rule is most salutary, and should be enforced in all instances where applicable. Its manifest tendency is to a quicker and surer administration of justice without the sacrifice of any substantial right. Now in the case at bar there are two issues: First, of boundary; second, of limitation. The boundary issue is wholly severable, and in no wise dependent upon limitation, and to assume otherwise is an evasion of the question controlling the proper remanding order to be entered. The boundary question depends upon the location of the Rio Viejo. Whatever the facts may be with respect to payment of taxes, adverse possession and claim by defendants would not change its location. The issue as to its location has been tried without error, and decided in plaintiff's favor. Why try it again? Why should not further inquiry as to its location be foreclosed, since it has been investigated and determined in a trial free from error? The issue having been once fairly and impartially decided against appellants, they should not be permitted to again try the same. It is neither just, right, nor proper. *Benjamin v. Ry. Co.*, supra.

Under the general order of reversal entered herein, the issue as to the Rio Viejo's location will be retried, as well as limitation. Suppose the cause be submitted upon special issues, that a finding against defendants be returned upon the issue of limitation, but in their favor upon the question of boundary, that this trial was without error; upon appeal to this court the judgment would be affirmed. This court would thus finally affirm a judgment in defendant's favor upon the issue of boundary, which issue upon this appeal, it is said, was correctly decided in plaintiff's favor.

I am of the opinion that the finding of the jury as to the location of the Rio Viejo should not be disturbed, and that, upon retrial, the inquiry should be confined to the issue of limitation.

**WOLF et al. v. LANE. (No. 5241.)**

(Court of Civil Appeals of Texas. San Antonio.  
April 1, 1914. Rehearing Denied  
April 29, 1914.)

**1. TRESPASS TO TRY TITLE (§ 44\*)—SUFFICIENCY OF EVIDENCE—OWNERSHIP.**

Where, in trespass to try title, though defendants pleaded not guilty and a general denial, the ownership of the land was not really in issue, the controversy being as to damage for pasturing cattle on the land, and defendant did not claim the land, but, on the contrary, admitted that he leased it from plaintiff, and a deed from defendant to plaintiff was in evidence, there was sufficient evidence of plaintiff's ownership to justify an instruction to find for plaintiff as to the title; it not being necessary to show a title from the state, where plaintiff's title and possession, until the ouster, is not disputed.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

**2. TRESPASS TO TRY TITLE (§ 46\*)—VERDICT—SUFFICIENCY.**

Where the petition, in trespass to try title, alleged title, and that defendants ousted plaintiff from possession, thereby damaging him, and the real issue was as to damages for pasturing cattle on the land, a verdict finding defendants guilty as charged, and assessing damages, was not insufficient as failing to find as to the ownership, since a verdict defective in not finding expressly upon an issue may be aided by the pleadings, and defendants could not be guilty as trespassers unless plaintiff was the owner.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 68; Dec. Dig. § 46.\*]

**Appeal from District Court, Dimmit County; J. F. Mullally, Judge.**

**Action by B. G. Lane against E. A. Wolf and another. From a judgment for plaintiff, defendants appeal. Affirmed.**

Geo. C. Herman, of Batesville, and J. O. Rouse, of Carrizo Springs, for appellants. Wm. H. Davis, of Crystal City, Vandervoort & Johnson, of Carrizo Springs, and Ben P. Lane, of San Antonio, for appellee.

CARL, J. B. G. Lane sued E. A. Wolf and John Wolf in the form of trespass to try title to 3,840 acres of land in Dimmit county, and for damages. The real issue was for damages for pasturing cattle on the land. E. A. Wolf had sold this land to Lane, and then leased it from him. E. A. Wolf occupied the land until March, 1911, when he and Lane entered into a memorandum of agreement which was to date back to January 1, 1911, whereby he was to have free use of the pasture and \$25 per month in consideration of his putting about 60 acres in cultivation, building certain fences, etc., and Lane was to have one-half of the crop. This contract was to run until January 1, 1912. Lane was also to furnish teams, etc. Lane says it was agreed that Wolf should have the right to keep only about 40 head of horse stock on the land; that at that time John Wolf had stock in the pasture which he promised to take out, but which he did not take out until about January 1, 1912. He



further says that E. A. Wolf did not make the improvements; that at the time he saw the pasture there were 400 or 500 head of cattle in it, but that he was not there from the time the contract was signed in March until August, 1911, when he again visited it and found the grass all gone. Ed English says he sold E. A. Wolf 800 or 900 head of cattle, but that Wolf sold part of them before he took them out of the pasture. Sam English says that during 1911 E. A. and John Wolf were in possession of the land in controversy, and had cattle there; that John Wolf put some cows in there, and that there were about 300 of them, but that John Wolf sold them in the summer of 1911; that the cattle were a mixed lot; and that E. A. Wolf claimed to own the cattle which were put in the pasture. E. A. Wolf says that he first put in 135 head of cattle of his own, and that later he put in some 200 head more, and that, when he left there in August, 1911, there were from 450 to 480 head of cattle in the pasture. John Wolf says that, when he bought the cattle from E. A. Wolf, he was to pay for them only as he took them out; that E. A. Wolf owed him, and he paid for them by giving credit to E. A. Wolf. He says he took out all but 150 head in September, 1911; that at the time he had about 350 to 380 head, which he turned into the Capones land, leased from Prior in September, 1911. John Wolf says he paid E. A. Wolf \$50 per month for the pasture by crediting him with that amount. Lane says John Wolf, in March, 1911, promised him he would take the cattle out, after he had repeatedly requested him to do so.

The two defendants entered a plea of not guilty and general denial, and the court charged the jury that the title to the land was in the plaintiff, and to find for him, and then gave a charge on the matter of damages. The verdict of the jury was: "We, the jury, find the defendants guilty as charged, and assess the damages at three hundred (\$300.00). C. M. Decker, Foreman." On that verdict, the court entered judgment in favor of appellee, Lane, for the land and also for \$300 damages.

The defendants below did not claim the land; but E. A. Wolf claimed the free use of it under his contract.

June ———, 1911, Lane sold an undivided one-half interest in the 3,840 acres of land to N. V. Henderson, and in the same month Henderson and Lane sold to E. C. Monday an undivided one-half in all of it, thus leaving Lane a one-fourth interest.

[1] It is contended that the verdict was insufficient to authorize the court to enter judgment for the land, because it did not dispose of all the issues. That is, no finding was made as to the ownership of the land, although the court charged the jury that plaintiff owned it, and so to find. The ownership of this land was not really in issue, although the usual plea of not guilty was entered.

Wolf did not claim the land, but, on the contrary admits that he had leased it from Lane. Furthermore, a deed was introduced whereby E. A. Wolf conveyed this land to Lane; and where, as in this case, Lane is shown to have a deed, and his possession, until the ouster, is not disputed, it is not necessary that he connect himself back with the sovereignty of the soil. The deed introduced and his evidence of ownership were sufficient proof of his ownership, especially when not attacked or questioned, and the court properly instructed the jury that they should find for the plaintiff as to the title to the land. *Kolb v. Bankhead*, 18 Tex. 232; *G., C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 528, 26 S. W. 43. In the *Kolb v. Bankhead* Case, *supra*, a similar suit to this was brought on account of the cutting of timber, and the deed to the plaintiff was introduced to show ownership. The jury in that case returned a verdict as follows: "We, the jury, find the defendant guilty, and impose a fine of one hundred dollars." It was claimed this was insufficient; but Justice Wheeler affirmed that case. It is stated therein that the introduction and identification of the land described therein raises a presumption that title and ownership of the premises vested in the plaintiff. That would certainly be true in this case, where the defendants admitted the ownership was not in them, and a deed from E. A. Wolf to B. G. Lane was introduced. This, coupled with the defendants' acknowledgment that they leased from Lane, is sufficient.

[2] This suit is one in trespass, and, when the jury finds defendants guilty as charged, it necessarily follows that they found that the land belonged to plaintiff, and defendants had interfered with his possession. The petition charged that the land belonged to plaintiff, and that they had ousted him from possession, thereby damaging him. To this they pleaded not guilty; but the jury said they were guilty and assessed damages, which they could not have done without finding that plaintiff owned the land. A verdict defective in not finding expressly upon an issue may be aided by the pleadings, and is sufficiently certain when it can be made certain by reference to the pleadings. *Parker v. Leeman*, 10 Tex. 119; *Newcomb v. Walton*, 41 Tex. 318; *Munn v. Martin*, 4 Willson, Civ. Cas. Ct. App. § 61, 15 S. W. 195. In *Newcomb v. Walton*, *supra*, suit was on a note which was described in the petition, and the verdict was: "We, the jury, find for the plaintiff, with eight per cent. interest on the note from date." Chief Justice Roberts says that "by reference to the petition whatever ambiguity there may be in this verdict may be rendered perfectly certain, and on that ground is sufficient." If we look to the pleadings, they charge ownership of the land in Lane, and that defendants are guilty of damages in trespass. They pleaded not guilty. The verdict says they are guilty as charged, and the jury could only

have arrived at such a verdict by finding that Lane owned the land. That follows by necessary implication. *Jones v. Ford*, 60 Tex. 127; *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 231; *Traylor v. Townsend*, 61 Tex. 148. In *Meyer v. Hill*, 45 S. W. 333, the verdict was: "We, the jury, find for the defendant as prayed for in his answer." And Chief Justice James said it was sufficient.

There could be but one interpretation of the verdict rendered, and that is that the defendants were guilty of trespassing, and they could not have been trespassers as to Lane unless the jury found that he owned the land. The assignments raising this question of the sufficiency of the verdict are overruled.

We have examined the other assignments, and, finding no merit therein, overrule the same.

The judgment is affirmed.

### CAMPBELL v. HONAKER'S HEIRS et al. (No. 7113.)

(Court of Civil Appeals of Texas. Dallas.  
March 28, 1914. Rehearing Denied April 25, 1914.)

#### 1. EXEMPTIONS (§ 45\*)—"TRADE OR PROFESSION."

One conducting a moving picture show is engaged in a "trade" or "profession" within Rev. St. 1911, art. 3785, subd. 5, exempting from execution the tools, apparatus, and books belonging to any trade or profession.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

#### 2. EXEMPTIONS (§ 45\*)—PROPERTY EXEMPT—APPLIANCES FOR MOVING PICTURE SHOW—"TOOLS."

Appliances used for producing moving pictures in a moving picture show are exempt from execution as "tools" or apparatus within Rev. St. 1911, art. 3785, subd. 5, but the chairs used by the audience are not exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7000-7005.]

#### 3. EXEMPTIONS (§ 4\*)—STATUTES—CONSTRUCTION.

Exemption statutes must be liberally construed to affect their objects and promote justice.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 4. COURTS (§ 91\*)—CONTROLLING DECISIONS—DECISIONS OF SUPREME COURT.

The Courts of Civil Appeals must follow the decisions of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.\*]

#### 5. EXEMPTIONS (§ 13\*)—TOOLS OF TRADE OR PROFESSION—ABANDONMENT.

The mere fact that one who conducted a moving picture show in a leased building was removing his appliances therefrom at the expiration of the lease did not show an abandonment of the business so as to remove the appliances from the protection of the exemption statute. Rev. St. 1911, art. 3785, subd. 5.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 12; Dec. Dig. § 13.\*]

#### 6. EXEMPTIONS (§ 45\*)—TRADE OR PROFESSION.

That one was operating an opera house and a moving picture show at the same time in different parts of rented premises did not prevent him from claiming the appliances used to produce the moving pictures as exempt within Rev. St. 1911, art. 3785, subd. 5, exempting tools and apparatus belonging to any trade or profession.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

Appeal from Collin County Court; H. L. Davis, Judge.

Action by the heirs of W. B. Honaker and another against A. O. Campbell. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

L. C. Clifton, of McKinney, and J. W. Donaldson, of Bonham, for appellant. W. R. Abernathy, of McKinney, and R. L. Moulden, of Farmersville, for appellees.

TALBOT, J. Honaker & Herron, a firm composed of W. B. Honaker and W. P. Herron, rented to the appellant, Campbell, a two-story building in the town of Farmersville, Tex.; the upper story of said building to be used as an opera house and the lower story to be used for the purposes of a moving picture show. The upper story or room was rented from the 11th day of August, 1911, to the 15th day of July, 1912, at \$15 per month, and the lower story or room from the 15th day of August, 1911, to the 1st day of January, 1912, at \$20 per month. Appellant took charge of the rented property, furnished the picture show machinery, chairs, etc., and conducted and ran a moving picture show in the lower room, as contemplated in his lease contract, and used the upper room as an opera house, but to what extent does not appear. It does appear, however, that no shows were given in the opera house part of the building after some time in November, 1911. The machinery and furniture put into the building for the purpose of operating the moving picture show consisted of one "Underwriter's Model Type B No. 1471 Edison Machine, one Underwriter's Model B Edison Perfecting Kinetoscope, Manufacturers' Sale No. 1853, 225 folding chairs, and metal machine outfit, all curtains there belonging and a tin horn"—the entire property being of the value of \$200. On the 1st day of December, 1911, while operating his moving picture show, appellant received a message calling him to the bedside of a sick son in Oklahoma City. Upon receipt of this message, appellant placed his moving picture show business in charge of Joe Stanford of Farmersville, and left to attend his sick son. Stanford ran the business during appellant's absence, which was until December 31, 1911. When appellant returned the appellees had taken possession of the upper story of the rented building, and were fitting it up to be used as a hotel. There was then due and unpaid

on the rental contract the sum of \$199, and appellant was informed that he must not move from the rented premises any of the property used in conducting the moving picture show business. Appellant attempted to remove said property from the building, and appellees on the 1st day of January, 1912, instituted suit against him in the justice court for the said sum of \$199, due for rent, and sued out a distress warrant and caused the same to be levied upon said property. A trial of the case in the justice court resulted in a judgment in favor of appellees here, with a foreclosure of the landlord's lien upon the property seized under the distress warrant. From this judgment the appellant Campbell appealed to the county court, where judgment was again rendered in favor of appellees with a foreclosure of the landlord's lien on the property which had been used by appellant in conducting his picture show business, and appellant appealed to this court.

[1] The controlling question presented for decision, and the only one insisted upon by appellant's counsel in argument at the bar, is whether or not the property which appellant had been using in operating his moving picture show is exempt from forced sale under subdivision 5 of article 3785, Revised Statutes of 1911, which reserves to every family exempt from every species of forced sale for the payment of debts "all tools, apparatus and books belonging to any trade or profession." The evidence is without dispute that appellant was at the time of the seizure of his property and the trial of this case the head of a family. From the time he leased the building involved in this suit up to immediately before the seizure of the property in controversy he had been engaged in conducting a moving picture show in said building and using said property therefor. Without contradiction he testified, among other things, as follows: "I am the defendant in this suit. I am 50 years old. I now reside at Farmersville, Tex., Collin county. I was engaged in the picture show business and running an opera house prior to and up to January 1, 1912. I was living at and carrying on my picture show business in Farmersville, Tex., up to January, 1912, when the plaintiffs filed this suit against me for rents and sued out a distress warrant and seized my moving picture show outfit and put me out of business, and it has been in charge of the officers since. It was owned and operated by me. It was all the means I had for a support. I had no other trade, calling, or profession at the time, but was by profession a blacksmith. The picture show consisted of the following property, to wit: One Underwriter Model Type B No. 1471 Edison Machine, one Underwriter Model Type B Edison Perfecting Kinetoscope, Manufacturers' Sale No. 1853, 225 folding chairs, metal machine outfit and curtains used in said house, and tin horn. All this property, tools, and apparatus was used by me in running my

picture show business, and it was all necessary in that business, and was designed and intended for that business. I could not have run the business without it. It was all the property, tools, and apparatus I owned, and the picture show business and opera house business were the only businesses, trades, and professions that I had, and was the only means I had to support myself and family. The machinery was operated by hand. That is, the films were turned by crank that moved them around so as to produce the picture, and this crank was turned. The light used in connection with the machine to expose the pictures was the electric light connected with the Farmersville Electric Light Plant. The light could have been produced by other means than electricity. I never operated the machine myself but three or four times. Mr. Peal operated it for me. I was moving my property out of the building and had considerable of it out when it was levied upon. The officers took my property from me and have it now."

It has been held that the word "trade" is often used in its broader sense, and as equivalent to "occupation," "employment," or "business," whether manual or mercantile; that, indeed, in its broad and general sense it covers and embraces all occupations in business with the possible exception of the learned professions and those that pertain to liberal arts and the pursuit of agriculture. It is also held that the word "profession" in its larger and broader meaning embraces "the business which one professes to understand and to follow for subsistence." *Betz v. Maler*, 12 Tex. Civ. App. 219, 33 S. W. 710, and cases therein cited. It is clear, we think, that conducting and operating a moving picture show is a trade or profession within the meaning of the statute to which we have referred. It was the occupation or business of appellant and the one which he followed for the subsistence of himself and family.

[2, 3] But were the articles of property seized by the distress warrant and upon which the landlord's lien was foreclosed "tools" or "apparatus" within the meaning of the statute in question? Clearly so we think, except the chairs. The printing press, type, and cases needed in a printing office and owned by the editor and publisher of a newspaper were held to be exempt from forced sale under this statute. *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601. And likewise, the barber chairs and mirrors, used by a barber, a citizen of this state, and head of a family, in carrying on his trade, were held to be exempt from execution. *Fore v. Cooper*, 34 S. W. 341; *Allen v. Thompson*, 45 Vt. 472. So we think it must be held that the Underwriter's Model Type B No. 1471 Edison Machine, the Underwriter's Model B Edison Perfecting Kinetoscope Manufacturers Sale No. 1853 machine, and metal machine outfit, which were and are absolutely

essential to the conducting of the appellant's moving picture show business, are exempt from forced sale for the payment of appellees' debt. Statutes of the character in question have been liberally construed, usually, "with a view to effect their objects and to promote justice," and in *Green v. Raymond*, cited above, it is said with respect to our statute that "the terms used, and especially the word 'apparatus,' is strikingly apt, a generic term of the most comprehensive signification." It is certainly broad enough to embrace within its meaning those items of appellant's property which we have said must be held to be exempt from seizure and forced sale for the payment of appellees' debt. The trade or business of appellant was that of operating and conducting a moving picture show, and the "apparatus" essential thereto must of necessity include the property which we hold to be exempt. To deprive him of it as appellees seek to do would destroy his business and take from him, according to his undisputed testimony, the only means he has of supporting himself and family. This we think would not be in accord with the liberal construction generally given statutes similar to the one we have under consideration, and we have no disposition to depart from that construction.

[4] As an original proposition submitted to us, we would also hold that the chairs, seized under and by virtue of appellees' distress warrant and upon which the landlord's lien was foreclosed in the county court, were exempt from forced sale; but the decision of our Supreme Court in the case of *Simmang v. Pennsylvania Fire Ins. Co.*, 102 Tex. 39, 112 S. W. 1044, 132 Am. St. Rep. 846, is opposed to this view and must be followed. In the opinion in that case it is admitted that the keeping of a restaurant is a trade within the meaning of the statute under consideration; but it was held that notwithstanding that fact an ice box or refrigerator, which was being used and necessary, in conducting the restaurant by the keeper, was not exempt from forced sale as a tool or apparatus belonging to his trade. In support of this holding the Supreme Court cites the case of *Heidenheimer v. Blumenkron*, 56 Tex. 314, and *Dodge v. Knight* (Sup.) 16 S. W. 626. We do not believe these cases support the decision of the Supreme Court, and agree with the views of the Court of Civil Appeals at Galveston, as expressed in *Hammond v. McFarland*, 161 S. W. 47, to the effect that said cases of *Heidenheimer v. Blumenkron* and *Dodge v. Knight*, only decide that household and kitchen furniture used by a restaurant or hotel keeper is not exempt from forced sale under subdivision 2 of the statute above cited, which exempts such articles when used for family purposes, and have no bearing upon the question of whether an ice box is exempt as a tool or apparatus belong-

ing to the trade of a restaurant keeper. The case of *Frank v. Bean*, 3 Wilson, Civ. Cas. Ct. App. § 211, which is also cited by the Supreme Court with approval, does, it seems, sustain the decision in *Simmang's Case*. If the ice box in *Simmang's Case* was not exempt, then we are unable to see how the chairs in this case can be held to be exempt; and therefore, in accordance with that opinion, we hold that the chairs levied upon by appellees in this case were not exempt from forced sale, and that the lower court's action in so holding was not error.

[5] The contention of appellees that appellant had abandoned the moving picture show business at the time this suit was filed and the levy of the distress warrant made is not, we think, sustained by the record. There is no evidence that tends to show that appellant did not intend to begin conducting his moving picture show business as soon as he could obtain a suitable building in which to do so. The mere fact that his lease of appellees' building had expired and he was removing his property from said building would not warrant a finding that he had definitely abandoned said business.

[6] Nor do we think the fact that appellant had been running an opera house and his moving picture show at the same time and in different parts of the rented premises seriously affects the question. *Nichols v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859. In the case just cited it is said upon the subject of a person multiplying his employments, and claiming several exemptions created by statute for several distinct pursuits, that the "Massachusetts rule is more in harmony with the spirit of our exemption laws, \* \* \* and that in this state one who actually engages in several trades to earn a support for himself and family can hold as exempt the necessary tools and apparatus for carrying on all of them."

The judgment of the court below is reversed, and the cause remanded to be tried in accordance with the views expressed in this opinion.

Reversed and remanded.

MISSOURI, O. & G. RY. CO. v. BORING.  
(No. 7110.)

(Court of Civil Appeals of Texas. Dallas.  
April 4, 1914. Rehearing Denied April 25, 1914.)

1. TRIAL (§ 139\*)—CAUSES OF ACTION—DIRECTED VERDICT—WHEN AUTHORIZED.

Where there was evidence to establish one ground of recovery alleged in the petition, a peremptory instruction requested by defendant was properly refused, though plaintiff could not recover on another ground alleged.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

**2. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

In an action for injuries to a section hand while attempting to remove a hand car from a track, evidence *held* to justify a finding that the accident was caused by the negligence of the foreman in causing the weight of the car to fall on the section hand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**3. TRIAL (§ 203\*)—PLEADING—ISSUES—INSTRUCTIONS.**

Ordinarily, where plaintiff presents two causes of action, the court's withdrawal of one of the causes from the jury eliminates that ground of recovery and the defense set up against it, and defendant may not complain that the defense was not presented in the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

**4. TRIAL (§ 145\*)—WITHDRAWAL OF ISSUES—FAILURE TO SUBMIT ISSUES.**

The failure of the court to submit an issue to the jury withdraws the issue from their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 841; Dec. Dig. § 145.\*]

**5. MASTER AND SERVANT (§ 287\*)—INJURY TO SERVANT—EVIDENCE—ISSUES.**

Where, in an action for injuries to a section hand while attempting to remove a hand car from the track, the evidence showed that a car weighed about 800 pounds, and that one person could take a car off the track, and that three men were engaged in removing the car, the issue of the carrier's negligent failure to furnish a sufficient number of men to handle the car with safety was not raised, and an instruction submitting that issue was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.\*]

**6. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Where, in an action for injuries to a section hand while attempting to remove a hand car from a track, caused by the negligence of the foreman in permitting the car to fall on the section hand, thereby causing hernia, there was no evidence that plaintiff had suffered a rupture before the accident, and a physician testified that, if he had been diseased and weak at the time of the accident, that condition had nothing to do with the injury, the refusal to submit the issue of plaintiff's weak or diseased condition as a cause of the accident was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

**7. EVIDENCE (§ 123\*)—RES GESTÆ—STATEMENTS ADMISSIBLE AS PART OF THE RES GESTÆ.**

A statement by one of the parties to an occurrence which resulted in injury, made at the time of the occurrence, with reference to the cause of the injury or the conduct of the parties is admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.\*]

**8. EVIDENCE (§ 123\*)—RES GESTÆ—STATEMENTS ADMISSIBLE AS PART OF THE RES GESTÆ.**

The statement of a section foreman, in the instant after the happening of an accident to a section hand under his control, as to the cause of the accident was properly received as a part of the res gestæ when material to the issues as then disclosed by the pleadings and the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.\*]

**9. EVIDENCE (§ 118\*)—RES GESTÆ—STATEMENTS ADMISSIBLE AS PART OF THE RES GESTÆ.**

A statement admissible as a part of the res gestæ is not rendered inadmissible because it contains a profane expression.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 297-302; Dec. Dig. § 118.\*]

**10. TRIAL (§ 89\*)—EVIDENCE—MOTION TO STRIKE.**

Where evidence when received was admissible under the issues as then disclosed by the pleadings and the proof, but thereafter the evidence became immaterial because of the withdrawal of the issue under which it was admissible, the remedy was by motion to strike out the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.\*]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by J. H. Boring against the Missouri, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Suggs, of Denison, for appellant. J. E. Cawthon, of Denison, and Jones & Hassell, of Sherman, for appellee.

**TALBOT, J.** This is an action to recover damages for personal injuries sustained by the appellee through the negligence of appellant's section foreman, Riddle, while appellee, employed as a section hand, and the said Riddle were attempting to remove from appellant's railroad track a hand car used by them in connection with their work. Appellee alleged, as grounds of negligence: (1) That, in order to remove the hand car from the track, "the plaintiff, the said section foreman, and another laborer took hold thereof with their hands, and, as they raised or lifted said car from the rails, said section foreman pushed and shoved said car against and upon plaintiff in such a manner as to place the great weight of the car upon him, and at the same time then and there dropped the end of the car which he was then lifting, thereby causing the great weight of the car to fall upon and against plaintiff, dragging and pulling him down," from which he received and suffered a serious inguinal hernia on both sides; (2) that, if mistaken in the aforesaid alleged cause of his injuries, then he says the defendant, its agents, servants, and employes neglected, failed, and refused to furnish a sufficient force of men to do the work which plaintiff was required to do when hurt; that, in order to perform said work with safety, not less than four men should have been employed, when in fact defendant had only three men; that defendant knew, or by the exercise of ordinary care could have known, that said force of three men was wholly inadequate and insufficient to perform said work with safety, notwithstanding which defendant employed and furnished said inadequate and insufficient

force to do and perform said work. The defenses pleaded were a general denial, and that plaintiff's injury resulted from his own negligence and unfitness for the work in which he was engaged, which unfitness was due to his weak, sick, and diseased condition prior to and at the time he claims to have been injured; that he was engaged in interstate commerce; and that his injury resulted from a risk incident to the business he was engaged in and was assumed by him. A trial of the case resulted in a verdict and judgment in favor of the plaintiff for the sum of \$2,500, and, the defendant's motion for a new trial having been overruled, it appealed.

[1] The first assignment of error complains of the trial court's refusal to instruct the jury at defendant's request to return a verdict in its favor. The proposition advanced under the assignment is: "Where the evidence is undisputed that the plaintiff at the time he received his injury was engaged in interstate commerce, as employé of a common carrier by railroad, that the force furnished to handle a hand car, in connection with the moving of which he was injured, was insufficient to his knowledge, before the injury, that he continued in the movement notwithstanding such knowledge, and the evidence respecting the proximate cause of the injury, if not undisputed, was such that ordinary minds could only reach the conclusion that the attempt to move the car with an insufficient force was the proximate cause of the injury, the defendant, having pleaded that the plaintiff was engaged in interstate commerce, and assumed the risk of injury therefrom, is entitled to a peremptory instruction to the jury to return a verdict in its favor." As has been seen, the plaintiff based his right of recovery upon two separate and distinct grounds of negligence: First, the negligence of appellant's section foreman, under whom he was working, in shoving against him the hand car they were attempting to remove from the railroad track, and then dropping the end of the car in such a manner as to place or throw the great weight of the car upon plaintiff; second, in negligently failing to furnish a sufficient number of men to handle the car with safety. There was ample evidence to establish the first ground of negligence alleged, and, this being true, the peremptory instruction requested by defendant was properly refused, even though plaintiff might have been precluded from a recovery upon the second ground of negligence alleged by the doctrine of assumed risk.

[2] The plaintiff testified: "I received directions from the foreman, Mr. Riddle, with reference to moving that hand car off of there. I undertook to remove the hand car. The foreman, Mr. Riddle, and my father assisted me. The foreman and I picked up one end of the car, and my father swung onto the

opposite end. There is something built upon the hand car that stands up from it. They are the levers. The levers are in the center of the hand car. My father had hold of the lever, and had his foot on the end of the car. He just took hold of the car and swung back, with his foot on the end of the hand car pulling back this way. I was on the northeast corner of the hand car. The road runs north and south there, and the car was setting up and down the track. Mr. Riddle was on the northwest corner. We picked up the opposite end from my father. We lifted it and carried the end of it off the track. That end of the car should have been carried around eight or ten feet in order to remove it from the track. It should have been carried just half way around. We did not carry it halfway around. The foreman swung his part of it and turned it loose. The hand car has got handles to pick it up by. He turned loose of the handle. When he turned loose the weight of the car went on me and hurt me in my side in the lower part of my bowels. I can describe the way it felt. It was just a tear. It appeared to be a tear and hard pain; just like I had a knife in me. I was pitched over on the car. My father pushed the car off then. The foreman made a statement there with reference to turning it loose. He asked me if it hurt me when he dropped the hand car on me, and I told him it did."

G. W. Boring testified: "At the time my son got hurt he and Mr. Riddle, the foreman, were carrying the hand car around. They were on the north end of the car. Mr. Riddle had hold of the northwest corner, and my son had hold the northeast corner. Mr. Riddle was west of my son. When they started around I was a step or two from them, and I just hurried up and put my left foot on the car and took hold of the lever with my left hand to help them, and just about the time I got that done Mr. Riddle just gave it a jerk and turned loose, without saying a word; without saying he was ready or anything else. My son just kind of fell over on the car. When he turned it loose the north end of the car was kind of angling with the track, or when he made his swing to turn it loose it was kind of angling. It wasn't around as far as he wanted it, and he just made a little swing and turned all holds loose. They did not lift the whole car as they undertook to go around with it. They lifted one end. I had hold of the lever. I was pulling back on it to kind of take the weight off of them. They were lifting up on the front end, and I was bearing down on the other end. When he turned that loose there the end that they had hold of just fell right down on the ground. My son just stood there with his hands on the car, and Mr. Riddle just walked right around the car and stopped, and I pushed it out on off, and I just turned around to the water keg to get

me a drink, and as I turned around there to the keg Mr. Riddle says, 'Did I hurt you when I dropped the car on you?' and he [plaintiff] says, 'Yes.' Mr. Riddle said that right there in just an instant after it happened. He said it looked like the God-damned railroad was too short to furnish enough men to handle the hand car."

The cases cited by appellant do not control a decision of the question here presented. The principle enunciated in them would probably be applicable to the facts alleged in the second count of plaintiff's petition as a basis of recovery; but that phase or branch of the case was not submitted to the jury, and hence in effect withdrawn from their consideration.

Appellant's second and third assignments of error are submitted together, and the third complains of the court's refusal to give the following special charge, namely: "Even if you believe from the evidence that defendant failed to furnish a sufficient number of men to handle the hand car at the time and place plaintiff claims to have been injured, and that defendant was guilty of negligence in so failing, yet if you believe that such failure and negligence was the sole cause of plaintiff being injured, if he was injured, you cannot find in his favor, and must return a verdict for defendant." The proposition here is: "Where the evidence is undisputed that the plaintiff at the time he received his injury was engaged in interstate commerce, as employé of a common carrier by railroad, that the force furnished to handle a hand car, in connection with the moving of which he was injured, was insufficient to his knowledge, before the injury, that he continued in the movement, notwithstanding such knowledge, and the evidence respecting the proximate cause of his injury, if not undisputed, was ample to sustain a finding by the jury that the attempt to so move the car was the proximate cause of the alleged injury, defendant, having pleaded that plaintiff was engaged in interstate commerce, and assumed the risk of injury from such handling of the car, is entitled to a charge affirmatively submitting the issue to the jury."

[3, 4] Ordinarily, where the plaintiff by his pleadings presents two causes of action or grounds of recovery, the withdrawing by the court of one of the causes of action from the consideration of the jury eliminates that alleged ground of recovery and the defense set up against it, and complaint cannot be made that such defense was not presented in the court's charge; and that the failure of the court to submit an issue to the jury has the effect to withdraw it from their consideration is well settled. *Railway Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716; *Thompson v. Field*, 164 S. W. 1115, recently decided by this court, and not yet officially reported.

[5] But, regardless of whether or not the action of the court in failing to submit to

the jury the alleged failure of defendant to furnish sufficient men to handle the car in question with safety as a basis of recovery by plaintiff, there was no error in refusing the special charge under consideration. The testimony pointed out in appellant's brief does not sustain its assignment of error and proposition to the effect that the evidence was sufficient to justify a finding by the jury, as authorized by the refused special charge, that the failure of defendant to furnish a sufficient number of men to handle the hand car at the time and place plaintiff claims to have been injured was the sole cause of plaintiff being injured. The testimony quoted in support of the contention is that of the plaintiff, his father, G. W. Boring, and appellant's witness Gleason. The only testimony of the plaintiff that remotely bears upon the question is the statement that "a fair estimate of the weight of a car would be between 700 and 1,000 pounds," and that of his father is of but little more probative force. In this connection he simply said: "If the three of us had been at the end of the car, there would not have been plenty of us to lift it off. I have seen a few hand cars handled with three men at one end." While appellants' witness Gleason testified: "I am familiar with the hand car that they had in use between Denison and Red River. It is a Sheffield car. I would judge the weight of one of these cars to be about 300 pounds. I can put one of these cars off and on the track by myself, one end at a time. I weigh about 160 pounds. In handling the car I do not pick up the whole car; I pick up one end of it and walk around and let the other end drag, derailing it, or else will roll it. I won't say as to the exact weight of the car. I said it weighed about 350 pounds." Clearly this testimony did not raise as an issue of the proximate cause of plaintiff's injury the failure of the defendant to furnish a sufficient number of men to handle the hand car with safety, much less that it was the "sole cause of plaintiff being injured." It does, however, make plain the correctness of the trial court's action in declining to submit as ground of recovery the alleged failure of defendant to furnish a sufficient number of men to handle the car, and leaves the fact that the proximate cause of plaintiff's injury was the negligence of appellant's section foreman in dropping the weight of the car upon the plaintiff as established beyond question by the other evidence in the case. At all events the evidence as a whole shows that, if the turning loose of the hand car by the section foreman and dropping the weight of it on plaintiff was not the sole proximate cause of plaintiff's injury, such action on the foreman's part was a concurring proximate cause thereof.

[6] The fourth and fifth assignments of error challenge the correctness of the court's action in refusing special charges requested

by the defendant submitting as an issue of the proximate cause of plaintiff's injury his alleged weak, sick, or diseased condition. The evidence did not call for or authorize the giving of either of these charges. As stated above, the evidence shows that the plaintiff's injury was caused by the conduct of appellant's foreman in negligently turning loose his hold of the hand car and thereby throwing the weight of the same upon plaintiff, and the evidence is wholly insufficient to show that the physical condition of the plaintiff contributed in any manner to the injury he received, and the special charges should not have been given. There is no evidence that plaintiff had suffered a rupture before the accident in question occurred, and the undisputed testimony of appellant's physician, Dr. Rolen, affirmatively shows that, if plaintiff was in fact weak and diseased at the time he was injured, such condition had nothing to do with bringing about the injury of which he complains. This witness testified: That, where a man is situated as the undisputed evidence shows that plaintiff was situated, and had the weight of a car thrust upon him in the manner that the undisputed evidence showed that plaintiff did, but one of two things could have produced the rupture; it was either a completion of a partial rupture before, or he was ruptured at the time of the accident. That an intelligent physician making an examination under these circumstances could arrive at no other conclusion. He further testified: "A man who was in a weakened condition would not be any more liable to suffer that sort of an injury than a man of robust strength similarly situated and placed. It would not make any difference. Sometimes a man who is very muscular from the very fact that he is muscular, a sudden strain put on him will cause the tenseness of those muscles to tear." There was no evidence whatever that plaintiff had been ruptured prior to the accident in question.

[7-10] Nor do we think the court committed reversible error under the circumstances shown, if error at all, in allowing the witness G. W. Boring to state that at the time of the accident resulting in injury to the plaintiff appellant's foreman, Riddle, said: "It looked like the God-damned railroad was too short to furnish enough men to handle the hand car." As contended by counsel for appellee, "an exclamation or statement made by one of the parties to a transaction resulting in injury at the time of the happening of such transaction, and having reference to its cause or to the conduct of the parties, is *res gestæ*." This statement and the time and circumstances under which it was made are testified to by the witness G. W. Boring. He said: "Mr. Riddle just walked right around the car and stopped, and I pushed it out on off, and he just held there with

the car and walked backwards, and I just turned around to the water keg to get me a drink, and as I turned around there to the keg Mr. Riddle said, 'Did I hurt you when I dropped the car on you?' and he says, 'Yes.' Mr. Riddle said that right there in just an instant after it happened. I don't suppose it was over a minute after he dropped the end of the car before he made this talk; maybe not that long; just long enough for me to push the car back and turn around back to the water keg on the other side of the track. He said it looked like the God-damned railroad was too short to furnish enough men to handle the hand car." Plaintiff's petition presented two grounds of recovery, one based upon the negligence of the foreman in handling the car, and the other upon the negligence of the railway company in failing to provide a sufficient force to handle the car with safety. At the time this testimony was offered and admitted, it was pertinent to the issue tendered by plaintiff's pleadings that the defendant was guilty of negligence proximately resulting in plaintiff's injury in failing to furnish a sufficient number of men to handle the car with safety. Plaintiff's petition presented no question of interstate commerce, and no evidence had then been introduced tending to show that the parties were engaged in interstate commerce, nor was it then known that the evidence would be insufficient to entitle plaintiff to go to the jury on the issue of insufficient force. These things being true, the statement of the foreman was admissible as a part of the transaction itself. The profane expression used, and the fact that it was made in reference to the foreman's employer, would in no manner, we think, affect its admissibility. We are of opinion, however, that, had a motion been made when it became apparent that the plaintiff must fail on the issue tendered of the insufficient force to handle the car, or when it was made known that such issue would not be submitted to strike out the testimony, such motion should have been sustained. Such course on the part of the defendant or a requested charge to the jury to disregard the testimony was, under the circumstances, we think, necessary to enable defendant on appeal to avail itself of the error in the admission of the objectionable testimony, and, neither course having been resorted to, we think it is in no position now to complain. At least it furnishes no sufficient ground to warrant a reversal of the case.

The seventh and eighth assignments of error, which are grouped, have been examined, with the conclusion reached that they disclose no good reason for reversing the case, and will be overruled, without discussion.

The verdict is sustained by the evidence, and, no reversible error being found in the record, the judgment is affirmed.



**CHICAGO, R. I. & G. RY. CO. v. HOWELL.**  
(No. 1238.)

(Court of Civil Appeals of Texas. Texarkana.  
April 1, 1914. Rehearing Denied  
April 16, 1914.)

**1. APPEAL AND ERROR (§ 699\*)—QUESTIONS REVIEWABLE—RECORD.**

Where the record does not show any requested peremptory instructions for appellant, an assignment of error to the refusal of the court to give a requested peremptory instruction must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.\*]

**2. EVIDENCE (§ 429\*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS—ADMISSIBILITY.**

Where, through mistake, fraud, or negligence, a ticket agent failed, without the knowledge or consent of a passenger, to incorporate into a ticket the real agreement between the parties, parol evidence was admissible to show the true contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. § 429.\*]

**3. CARRIERS (§ 258\*)—PASSENGERS—TICKETS—CONTRACTS.**

Where a passenger ticket purports to be a contract ticket offered for a consideration of a reduced rate, the passenger is bound by its lawful stipulations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1035, 1036; Dec. Dig. § 258.\*]

**4. CARRIERS (§ 252\*)—PASSENGERS—TICKETS—CONTRACTS.**

Where a carrier authorized its agent to place on sale two kinds of return trip tickets containing different date limits, and established rates for each class of tickets, the carrier could not discriminate against a passenger by refusing to sell him a ticket of either class as he might demand.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1009, 1010, 1015; Dec. Dig. § 252.\*]

**5. CARRIERS (§ 252\*)—PASSENGERS—TICKETS—CONTRACTS.**

A ticket agent authorized to sell two kinds of return trip tickets, with different date limits for the return trip, must issue a ticket providing for the time limit demanded by a passenger, and, where the agent inserts, without the fault of the passenger, an erroneous date limit for return, the passenger may recover the damages sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1009, 1010, 1015; Dec. Dig. § 252.\*]

**6. CARRIERS (§ 277\*)—PASSENGERS—TICKETS—CONTRACTS.**

Where a passenger who contracted for a return ticket, good until October 31st for the return trip, received, without his knowledge, a ticket fixing the limit as September 15th for the return trip, and, on attempting to make the return trip after September 15th and before October 31st, he was compelled to pay cash fare, he could recover the amount of the cash fare, less any sum which he failed to pay to obtain a ticket with October 31st as the limit for the return trip.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

**7. APPEAL AND ERROR (§ 719\*)—ASSIGNMENT OF ERROR—FUNDAMENTAL ERROR.**

The error arising from an award of excessive damages based on a mathematical computa-

tion is fundamental, and will be considered on appeal, though there is no assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by W. H. Howell against the Chicago, Rock Island & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

This is an action brought by appellee against the railway company to recover damages for wrongful failure to furnish him with a round-trip ticket from Dallas, Tex., to Seattle, Wash., correctly stating the terms of the contract in respect to the date of the return limit. There was a trial to a jury, and the verdict was in favor of appellee for \$104.

The substantial facts established by the evidence are that appellee and his wife desired to visit relatives in Seattle, Wash. With this trip in view, the husband, on June 4, 1911, went to the ticket office of appellant and inquired of the ticket agent as to the designated routing and price and return date limit of a round-trip ticket to Seattle. The ticket agent of appellant informed the husband that the appellant company had on sale two kinds of tickets having the same designated route from Dallas to Seattle and return, and explained to him the routing, price, and return date limit. When filled out one of the coupon tickets would fix the return date limit to September 15th after the date of the ticket, and the other ticket would fix the return date limit at October 31st. The price of the first ticket was set by the company at \$70 for the round trip, and the second was set at \$81.25 for the round trip. The husband returned to the ticket office on June 5th and inquired further concerning the tickets, routing, and date limit, and was informed thereof, as before, by the agent. Appellee testified that again on June 6th he returned to the ticket office and stated to the ticket agent that he desired to and would purchase two round-trip tickets over the designated routing which would provide for and fix the return date limit of October 31st, and the agent agreed to make out and sell him two round-trip tickets over the routing stated fixing the return date limit at October 31st, and that after the terms of the agreement were thus reached between them the agent proceeded to draw up the tickets, and after he had finished he handed them to appellee, who signed his name on one and his wife's name on the other. This, appellee said, was at about 3 o'clock, and he and his wife were to prepare to leave on the train leaving at 6 o'clock following. He further said he did not read over the tickets before signing, and that the contents were not explained to him by the agent, and that he relied on the tickets exhibiting the full terms

of the agreements as to the fixed date limit of return being October 31st. The appellee and his wife went on the trip, and on October 3d, intending to return, presented the tickets at the validating office, and were there informed that the tickets had expired as read from the face of the tickets. Appellee had not read the tickets, and this was the first time that he had actual knowledge that the return date limit appeared in the tickets as September 15th. The tickets were not honored, and appellee had to pay \$104 railway fare for himself and wife back to his home over the same route. There is a conflict, however, between the evidence of appellee and of the ticket agent in respect to the agreement of fixing the date limit of return. The agent testifies that appellee selected the date limit of return of September 15th and asked him to fix that date in the tickets, stating that it was cheaper, and that he agreed to do so and did do so in accordance with the agreement. And the agent further says that he explained to appellee, before signing, that that date was in the tickets. Appellee denies the statement of the agent. This conflict was settled by the jury in favor of appellee, and accordingly we adopt the finding of the jury.

We make the findings of fact, as supported by the record, that on June 6, 1911, the appellant's ticket agent contracted with appellee to sell and deliver to him two round-trip tickets from Dallas, Tex., to Seattle, Wash., over the particular routing therein, with the fixed return date limit at October 31, 1911, and that the ticket agent negligently failed to insert in the face of the tickets the true agreed fixed date of October 31, 1911. The tickets agreed to be sold and purchased were tickets fixed and authorized by the appellant to be sold alike to the general public over the designated routing and at the reduced price established by appellant. Appellee suffered the damages allowed by the jury, and the evidence warrants the amount.

Lassiter, Harrison & Rowland and Bennett Hill, all of Dallas, for appellant. Wood & Wood, of Dallas, for appellee.

LEVY, J. (after stating the facts as above).

[1] The first assignment predicates error upon the refusal to give a requested peremptory instruction to the jury to return a verdict for appellant. As the record here does not contain or show any requested peremptory instruction, we cannot assume that one was presented and refused by the court, and the assignment must be overruled.

[2] The second and fourth assignments, here considered together, predicate error in allowing the appellee to testify with reference to negotiations and terms of agreement between himself and the agent of appellant concerning the purchase of the two tickets, because the tickets furnished appellee were in writing and constituted written contracts,

and such testimony had the effect to vary and contradict the written terms. The petition of appellee alleged that, through mistake, fraud, and negligence on the part of the ticket agent of the appellant, occurring without the knowledge or consent of appellee, there was failure by the agent to incorporate into the tickets the true and real agreement fixing the return date limit as October 31st. To support the allegations supplementary evidence is competent to show what was the real contract indicated by the tickets. *Railway Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. 631; *Railway Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028; *Railway Co. v. Wynn*, 44 Tex. Civ. App. 29, 97 S. W. 506. The assignments are overruled.

[3-5] The third assignment predicates error in submitting to the jury the issue as to whether the agreement between appellant's ticket agent and the appellee was that the return date limit extend to October 31st. This point is based on the contention that parol evidence was inadmissible to modify or change the stipulation of the return limit of September 15th expressed in the face of the ticket. Under the pleading and the evidence there was an issue for the jury, and the assignment is overruled. When the ticket purports to be a contract ticket offered under the consideration of reduced rates, it is not doubted that the passenger would be bound by its lawful stipulations. *Railway Co. v. Lee*, 104 Tex. 82, 133 S. W. 868. In that case the question was not what was the true contract within the authority of the agent to make between the company and Lee, as is here, but whether the stipulation in the ticket offered of: "(2) It will not be accepted for passage unless this contract is signed in ink by the purchaser and also by the agent for the issuing company"—could be varied or waived by an issuing agent having no authority to do so. The question presented by the facts in the instant case is entirely dissimilar. Here the railway company had authorized the ticket agent to place on sale two kinds of tickets—one to have and contain a date limit for return of September 15th, and the other of October 31st. Having established the rates and time limit within which the tickets should be used, and offering such character of contract tickets to the public for choice, the company could not lawfully discriminate against appellee by refusing to sell him a ticket under either contract according to his choosing of return dates. And the ticket agent in the proper performance of his duties for the company was clothed with the authority to agree on the part of the company with appellee in respect to the issuance of a ticket providing the particular time limit within which the ticket should be used. And if appellee made selection of the time limit of October 31st, as authorized by the company, it was incumbent upon the ticket agent to issue the ticket pro-

viding such time limit. Having shown by the evidence on his part a breach of the real contract between the appellant and himself occurring through the fault of the appellant's agent, appellee was entitled to have the issue of what was the real contract submitted to the jury. This exhausts the extent of the assignment.

[8, 7] While the matter of excessive damages is not made the basis of assignment, yet we believe it is a matter of fundamental error here. The fares paid back home amounted to \$104. To entitle appellee to an October 31st limit he was owing and should pay \$162.50, which was \$17.50 more than the proof shows he paid. This \$17.50 should be deducted from the \$104, making appellant owing \$86.50. A carrier is not authorized to sell for less than the established rate to all, and the passenger is required to pay the same fare paid by all. It is not lawful to contract otherwise. The judgment is therefore here reformed so as to allow appellee a judgment for \$86.50, with interest, and as so reformed will be affirmed; but appellant, by reason of the error, should recover the cost of this appeal, and it is so directed.

#### STATE v. HOUSTON BELT & TERMINAL RY. CO. (No. 5333.)†

(Court of Civil Appeals of Texas. Austin.  
March 18, 1914. Rehearing Denied  
April 15, 1914.)

##### 1. COMMERCE (§ 27\*)—POWER TO REGULATE—INTERSTATE COMMERCE.

A domestic corporation operating terminal facilities and depots within the state and controlling the operations of such facilities, whose service consisted entirely of switching and transferring cars between points in and near a city for other companies, in furnishing freight and passenger depots, and in loading and unloading cars for other railway companies, which, for an agreed toll or rental, used its terminal facilities, though it did not participate in the through rate, and was not a party to the bills of lading, and though its charges did not come from a shipper, and were made directly against the other railroad companies upon a wheelage basis, was engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.\*]

##### 2. COMMERCE (§ 69\*)—POWER TO REGULATE—INTERSTATE COMMERCE.

Rev. St. 1911, art. 7384, providing that every individual or domestic or foreign corporation owning or controlling any terminal companies or railroads doing a terminal business within the state shall pay an occupation tax equal to 1 per cent. of its gross receipts from all sources whatever, is not invalid as imposing a burden upon interstate commerce, as applied to a terminal railway company engaged in domestic and interstate commerce, since it does not impose a direct tax upon the gross receipts, but an occupation tax, levied for the privilege of exercising a particular occupation, and such a tax is valid, though its amount is determined from the gross receipts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113–119; Dec. Dig. § 69.\*]

##### 3. COMMERCE (§ 69\*)—POWER TO REGULATE—INTERSTATE COMMERCE.

The state has power to levy a valid occupation tax upon the domestic business of a company owning and operating a terminal railway within the state and transacting both interstate and domestic business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113–119; Dec. Dig. § 69.\*]

##### 4. STATUTES (§ 188\*)—RULES OF CONSTRUCTION—MEANING OF LANGUAGE.

It is a cardinal rule of construction, incorporated into the statute law in the state, that the language of a statute must be given its usual and ordinary import, unless other language used by the same Legislature indicates that another and different meaning was intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.\*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Civil action by the State against the Houston Belt & Terminal Railway Company. From a judgment for defendant, the State appeals. Reversed and rendered.

B. F. Looney, Atty. Gen., and Luther Nickels, Asst. Atty. Gen., for the State. Andrews, Ball & Streetman, of Houston, for appellee.

KEY, C. J. The state of Texas brought this suit against the Houston Belt & Terminal Railway Company, seeking to recover certain taxes alleged to be due under article 7384 of the Revised Statutes of 1911, which article is a portion of an act of the Thirtieth Legislature providing for the levy and collection of occupation taxes upon certain classes of persons and corporations.

The answer of the defendant, among other things, assailed the constitutionality of the statute referred to, and charged that it violated several provisions of the federal Constitution and of the Constitution of this state. The defendant is a domestic corporation.

According to the undisputed facts, if the statute referred to is valid, the state is entitled to recover \$27,656.49 as taxes, and the further sum of \$4,315.35 as interest. The pleadings filed by each party were sworn to, and the facts therein stated were not denied under oath, and therefore the trial court correctly held that the facts were as stated in plaintiff's petition, and in the defendant's answer, and we adopt that court's findings of fact. As conclusions of law, the learned trial judge held: (1) That the defendant was a common carrier engaged in the transportation of interstate and foreign commerce; and (2) that the article of the statute referred to, and the act of the Legislature under which the suit was brought, attempt to reach and tax the gross receipts of the defendant, from whatever source derived, including those from interstate commerce, and is therefore in contravention of the provision of the federal Constitution relating to interstate and foreign commerce; and for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

that reason the statute was held to be void, and judgment was rendered for the defendant, and the state has appealed.

[1] The first complaint in appellant's brief embodies the contention that the trial court erred in holding that appellee is a common carrier engaged in interstate and foreign commerce, and in that brief the facts bearing upon that point are summarized as follows: "It was not alleged that appellee and any other railroad company was under a common management and control, but appellee alleged that it was a corporation organized under the laws of Texas and maintaining its principal office in Houston, Tex., and there operating terminal facilities and depots, and that appellee 'controlled' the operations, etc. of such facilities. It did not participate in the through rate, nor was it a party to the bills of lading, etc., nor did its charges come from the shipper, but were made directly against the other railroad companies upon a wheelage, etc., basis, so much per car switched, etc. Its service consisted entirely of switching and transferring cars between points in and near Houston for other railroad companies, in furnishing freight and passenger depots, and in loading and unloading cars for other railroad companies at that place, and such other railway companies, for an agreed toll or rental used appellee's terminal facilities."

Conceding the facts to be as stated, upon the authority of *United States v. Union Stockyards, etc., Co.*, 226 U. S. 296, 33 Sup. Ct. 83, 57 L. Ed. 226, we overrule the contention urged in behalf of the state, and uphold the decision of the trial court upon that point. The case cited is quite analogous, and the points urged and the argument made by the Attorney General's department in this case were fully considered and decided otherwise in that case.

[2] As to the second ruling, we have reached a conclusion at variance with that reached by the trial court, and the reasons for that conclusion will now be stated. On account of that provision of the federal Constitution which confers upon Congress exclusive power to regulate commerce between the several states and foreign countries, the Supreme Court of the United States, in a long line of decisions, has held that it is not within the power of a state to levy any tax the direct effect of which is to impose a burden upon interstate or foreign commerce. Within that class of cases are several striking down and declaring void certain state enactments held by the Supreme Court to constitute a direct tax upon the gross receipts of interstate carriers, among which may be mentioned *G. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, and *Meyer v. Wells Fargo Express Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445. On the other hand, and parallel with that line of decisions, is a class of cases decided by the same high authority, and holding that it is no violation

of any provision of the federal Constitution for a state to levy and collect an excise or occupation tax upon a carrier engaged in domestic commerce, even though the legislation fixing the tax prescribes that the amount thereof shall be equal to a given per centum of the gross receipts of the carrier, and notwithstanding the fact that a portion of such receipts may be derived from transportation which constitutes interstate commerce. The leading case in support of that doctrine is *Maine v. Grand T. Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; and in the more recent case of *United States Express Co. v. Minnesota*, 223 U. S. 355, 32 Sup. Ct. 215, 56 L. Ed. 459, the court said: "The right of the state to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, 5 Interst. Com. R. 1; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, 3 Interst. Com. R. 695; *Ficklen v. Taxing District*, 145 U. S. 1, 22, 12 Sup. Ct. 810, 36 L. Ed. 601, 606, 4 Interst. Com. R. 79. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such."

In *Maine v. Grand T. Railway Co.*, supra, the state statute levied an excise tax for the privilege of exercising its franchise in the state upon every corporation, person, or association operating a railroad within that state (Maine), and prescribed that the amount of tax should be equal to a per centum of the gross receipts of the railroad. The gross receipts referred to were derived in part from interstate commerce, but, notwithstanding that fact, the Supreme Court held that the statute was, in effect, an occupation tax, and did not place a direct burden upon interstate commerce; and in the course of the opinion it was said: "The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax was, in effect, the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists

in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And, if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected, and, if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

With the foregoing statement of certain established rules and principles, and quotations from pertinent cases, let us examine the statute involved in this case. The Thirtieth Legislature passed a law entitled "An act providing for the levy and collection of an occupation tax upon individuals, companies, corporations and associations, pursuing any of the occupations, viz.: Express companies; telegraph and wireless telegraph; gas; electric light, electric power or waterworks or water and light plant business; \* \* \* the business of street railway companies, the business of interurban, trolley, traction or electric street railway companies, \* \* \* the business of owning, controlling, managing or operating any terminal railway company or terminal railway," etc. Act 30th Leg. (1st Ex. Sess.) c. 18.

Sections 1 to 15 of that act, in express terms, levy occupation taxes upon all individuals, companies, corporations, or associations owning, controlling, operating or managing a large number of specified private or quasi public enterprises, and section 16 reads as follows: "Each and every individual, company, corporation or association, whether incorporated under the laws of this or any other state or territory or of the United States, or any foreign country, which owns, controls, manages or leases any terminal companies, or any railroad doing a terminal business within this state, shall, on or before the first day of April, 1907, and quarterly thereafter, make a report to the comptroller of public accounts, under oath of the individual, or of the president, treasurer or superintendent of such company, corporation or association showing the total amount of its gross receipts from all sources whatever within this state during the quarter next preceding, and the average market value thereof during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one per cent. of the total amount of its gross receipts from all sources whatever as shown by said report."

A portion of section 25 of that act is also deemed pertinent, and which reads as follows: "All persons, associations of persons,

firms, and corporations upon whose business an occupation tax is imposed under this act, shall, upon the taking effect hereof, be exempted and relieved from the operation of the act of the 29th Legislature, approved April 17, 1905, being chapter 146 thereof, providing for the taxation of the intangible assets of certain corporations, associations and individuals, and all sections of the act of the 29th Legislature, being chapter 148, thereof approved April 17, 1905, imposing on (an) occupation tax upon the occupations herein taxed are hereby repealed."

[3,4] Unless it should be held that the Legislature did not intend to levy an occupation tax, and used language indicating that it did so intend as a subterfuge, in order to place a direct tax upon gross receipts, then it seems to us that it must be held that the statute constitutes a valid exercise of state authority, and is free from the objection urged; and we do not feel called upon to thus impugn the motives and purposes of the members who constituted the Legislature and the Governor who approved the act. The proof shows that appellee owns and operates a terminal railway within the city of Houston, and that it transacts both an interstate and domestic business. Now, it cannot successfully be denied that the state has the power to levy a valid occupation tax upon the domestic business referred to; and the Supreme Court of the United States has held, and, as we understand, still holds, that a statute may prescribe that the amount of such occupation tax may be fixed as a given per centum upon gross receipts, including those derived from interstate commerce. It is a cardinal rule of construction, incorporated into statute law in this state, that, in construing a statute, its language is to be given its usual and ordinary import, unless other language used by the same Legislature indicates that another and different meaning was intended. Applying that rule to this case, it seems to us that it must be held that the tax in question was not intended as a direct tax upon gross receipts, but as an occupation tax, or a tax levied for the privilege of exercising a particular occupation; and, if such was the legislative intent and purpose, then the statute does not violate any provision of the federal Constitution.

Learned counsel for appellee insist that no material difference exists between this statute and the Texas statute which was construed by the Supreme Court in *Galveston, H. & S. A. Ry. Co. v. Texas*, supra. We are unable to concur in that view. That statute was not any portion of a law purporting to levy occupation taxes, did not designate the tax as an occupation tax, and used interchangeably the terms a tax upon gross receipts and a tax equal to 1 per cent. of the gross receipts. The Supreme Court of the United States and this court construed that statute as levying a tax directly upon the gross receipts, though.

the Supreme Court of this state and a large minority of the Supreme Court of the United States held otherwise. That case comprised one of a series of cases in this court involving the same question, and the reasons which induced this court to reach the conclusion that the statute there under consideration was not an excise or occupation tax, but a tax upon gross receipts, will be found in the opinions filed in the case of *Galveston, H. & S. A. Ry. Co. v. Davidson*, 93 S. W. 436; and one of the strongest reasons was that, as originally presented to the Legislature, that law was entitled "An act levying an occupation tax," and in its body the tax was designated as an occupation tax, which provisions so designating the tax were stricken out before the bill passed the Legislature, thereby indicating that the Legislature did not intend to levy an occupation tax. The enactment now under consideration is designated in its caption, and in almost every section, as an occupation tax law, and we find no sufficient reason to give it any other construction. It would seem to be inconsistent, if not absurd, to say that a state may lawfully levy an occupation tax, the amount of which is to be determined by gross receipts from whatever source derived, and then to say that, because the state has so framed its law as to accomplish that result, it must be held that it did not intend to levy an occupation tax, but that its purpose was to levy a direct tax upon gross receipts.

We also deem it proper to say that, in our opinion, there is much force in the contention of appellant's counsel that the statute under consideration, in effect, levies a commutation tax, which method of state taxation has been held not to contravene the federal Constitution. *Ficklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 810, 38 L. Ed. 601; *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614. While it is true that by section 22 it is declared that, except as therein stated, all taxes levied by the act should be in addition to all other taxes levied by law, it is provided by section 25 that all who are required to pay an occupation tax by reason of that law are to be exempted and relieved from the operation of a former law providing for the taxation of intangible assets. But for that provision, appellee's intangible assets would be subject to taxation under the former law referred to, and therefore it would seem that it was the purpose of the Legislature, in the enactment of section 16 of the law referred to, that the tax therein levied should be in lieu of and as a substitute for the taxes which might otherwise have been collected under the former law. And, if such was its purpose, and the amount of taxes so levied by section 16 is not shown to be unreasonably more burdensome than the taxes from which appellee

is relieved, it would seem that it should be upheld as a commutation tax, even if it be construed as a tax upon gross receipts. *G., H. & S. A. Ry. Co. v. Texas*, supra.

We deem it unnecessary to discuss any other question, and content ourselves with the statement that, after due consideration of all the questions involved in the appeal, our conclusion is that the statute under consideration violates no provision of either federal or state Constitution, and therefore it becomes our duty to uphold and enforce it.

In closing this opinion, it is deemed proper to express our satisfaction with the assistance which has been rendered by able counsel of the respective litigants, consisting of well-prepared briefs, and of concise and pointed printed and oral arguments.

For the reasons stated, the judgment appealed from is reversed, and judgment here rendered for appellant for \$31,971.84.

Reversed and rendered.

## UNDERWOOD et al. v. MIDLAND FURNITURE & HARDWARE CO. et al.

(No. 323.)

(Court of Civil Appeals of Texas. El Paso. April 9, 1914.)

### APPEAL AND ERROR (§ 387\*)—JURISDICTION—FILING OF APPEAL BOND.

Where the appeal bond was not filed within 20 days after the adjournment of the trial court, as required by Rev. St. 1911, art. 2084, the appellate court acquired no jurisdiction, and the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064–2070; Dec. Dig. § 387.\*]

Appeal from Midland County Court; J. H. Knowles, Judge.

Action by the Midland Furniture & Hardware Company and another against J. A. Underwood and another. From a judgment for plaintiffs, defendants appeal. Dismissed.

A. S. Rollins, of Amarillo, for appellants. Earl Anderson, of Midland, for appellees.

HARPER, C. J. The appellee, the Midland Hardware & Furniture Company, filed this suit in the justice court of precinct No. 1, Midland county, where, upon trial, it secured judgment against the appellants, and they appealed to county court and filed appeal bond. Appellees filed motion to dismiss this appeal because the appeal bond was not filed in the county court within the time prescribed by statute.

The transcript of the county court shows that the term of the court at which the judgment was rendered, from which this appeal was prosecuted, adjourned on the 26th day of July, 1913. The appeal bond was filed August 21, 1913. The bond not having been filed within 20 days after the adjournment of the trial court, as required by the statute, this

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court has no jurisdiction to hear and determine the case, and the appeal must be dismissed. Article 2084, Rev. Civ. Stat. 1911; *Nash v. Noble*, 52 Tex. Civ. App. 425, 114 S. W. 848; *Simpson v. Baker*, 57 Tex. Civ. App. 460, 122 S. W. 959.

Dismissed.

**EPPLER et al. v. HILLEY. (No. 7900.)**

(Court of Civil Appeals of Texas. Ft. Worth. March 28, 1914.)

**1. COURTS (§ 169\*)—COUNTY COURT—JURISDICTION—AMOUNT INVOLVED.**

Where a justice court judgment in a garnishment case, including costs and attorney's fees, exceeded \$200, and was less than \$500, the county court had jurisdiction to determine its validity in a suit to enjoin its collection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-425, 428-436, 443, 456, 458, 465; Dec. Dig. § 169.\*]

**2. JUSTICES OF THE PEACE (§ 87\*)—ENJOINING COLLECTION OF JUDGMENT.**

A party to a garnishment proceeding in justice court, who appeared and controverted the truth of the garnishee's answer, was bound by the judgment, and could have errors reviewed only by appeal or writ of error, and not by a suit to enjoin collection of the judgment, where the judgment was not absolutely void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 295-305; Dec. Dig. § 87.\*]

**3. JUSTICES OF THE PEACE (§ 87\*)—ENJOINING COLLECTION OF JUDGMENT.**

A justice court judgment in a garnishment case was not void because of an alleged defect in the service of the citation in the original suit, since the validity of the judgment in that suit was in issue and determined in the garnishment case, and hence collection of the garnishment judgment could not be enjoined.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 295-305; Dec. Dig. § 87.\*]

**4. COURTS (§ 120\*)—COUNTY COURT—JURISDICTION—AMOUNT INVOLVED.**

The county court had no jurisdiction to determine the validity of a justice court judgment for less than \$200 in a suit to enjoin its collection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 120.\*]

Appeal from Eastland County Court; E. A. Hill, Judge.

Action by S. F. Hilley against M. T. Eppler and others. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

S. W. Bishop, of Gorman, and J. R. Stubblefield, of Eastland, for appellants. W. E. Vaught and M. J. Smith, both of Gorman, for appellee.

SPEER, J. M. T. Eppler recovered a judgment against S. F. Hilley in the justice's court of precinct No. 5, Eastland county, for the sum of \$150 and costs of suit. A writ of garnishment was issued in this cause against the First State Bank of Rochester, and the bank answered, admitting that it

owed the defendant Hilley. This answer was controverted by the defendant, and the garnishment proceeding was transferred to the justice court of precinct No. 5, Haskell county, where the same was regularly tried and a judgment rendered in favor of the plaintiff against the defendant and the garnishee for the sum of \$199.50, and the costs of suit. The defendant, Hilley, instituted this suit in the county court of Eastland county against the plaintiff M. T. Eppler and the garnishee, First State Bank of Rochester, for an injunction restraining the collection and enforcement of said judgments. There was trial before the court without a jury, and a decree entered in favor of the plaintiff, perpetually enjoining the collection of said judgments, and the defendants have appealed.

[1] The judgment in the garnishment case, including costs and attorney's fees, being in excess of \$200 and less than \$500, the county court of Eastland county had jurisdiction to determine its validity. *Lazarus v. Swafford*, 15 Tex. Civ. App. 367, 39 S. W. 389; *Dean v. State*, 88 Tex. 295, 30 S. W. 1047, 31 S. W. 185; *Arnold v. McNinch*, 56 Tex. Civ. App. 555, 121 S. W. 904; *Lyons Bros. v. Corley* (Tex. Civ. App.) 135 S. W. 603.

[2, 3] It is undisputed that appellee was a party to this garnishment proceeding, and appeared in the case controverting the truth of the garnishee's answer. He is therefore bound by the judgment entered, and his only remedy for errors committed was by appeal or writ of error regularly prosecuted, neither of which remedies he has pursued. The remedy by injunction cannot be made to take the place of such appeal. Of course, if the judgment in the garnishment case were absolutely void, appellee might attack it in the proper court, or even ignore it altogether, but there is nothing in the case to suggest that such judgment is void, since its alleged invalidity rests upon the fact that the judgment in the case out of which the garnishment proceedings arose is alleged to be void because the citation served on appellee was directed to the sheriff, or any constable of Comanche county, Tex., but was served by a constable of Eastland county. Necessarily the validity of appellants' judgment against appellee was an issue in the garnishment case, for without a judgment in the parent case appellant would not be entitled to recover as he did in the garnishment case. The validity of the Eastland county judgment was therefore determined in the garnishment case.

[4] The judgment of the county court is consequently reversed, and, the facts being undisputed, judgment is here rendered in favor of appellants, dismissing the appellee's cause of action. This order is made, however, without prejudice to the respective rights of the parties as to the validity of the Eastland county judgment, since the county court of Eastland county had no jurisdiction

to determine that question. See the authorities above cited.

Reversed and rendered.

CONNER, C. J., not sitting.

# UNDERWOOD v. JORDAN. (No. 5328.)

(Court of Civil Appeals of Texas. Austin.

March 25, 1914.)

## 1. APPEAL AND ERROR (§§ 690, 757\*)—RECORD—MATTERS PRESENTED FOR REVIEW.

Error could not be predicated upon the admission of the testimony of witnesses claimed to be inadmissible under the pleadings, where neither the brief nor the bill of exceptions showed what the witnesses testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908, 3092; Dec. Dig. §§ 690, 757.\*]

## 2. SALES (§ 130\*)—ACTIONS FOR RESCISSION—PETITION—RELiance ON REPRESENTATIONS.

In an action by a purchaser of mares to rescind for false representations, a petition alleging the representations that they were false, and that the purchaser gave faith and credit to them, and on account thereof was induced to enter into the contract, sufficiently alleged the purchaser's reliance on the representations, and that they were a material inducement, to admit evidence as to the making of the representations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 322-324; Dec. Dig. § 130.\*]

## 3. TRIAL (§ 260\*)—INSTRUCTIONS—REPETITION.

It was not error to refuse a special charge which, so far as applicable, was covered by the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 4. SALES (§ 38\*)—RESCISSION—GROUNDS—MISREPRESENTATIONS.

A buyer of horses induced to make the contract by reason of false representations was entitled to recover, in an action for a rescission, irrespective of any effort on his part to ascertain the truth of the representations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.\*]

## 5. SALES (§ 130\*)—ACTIONS FOR RESCISSION—INSTRUCTIONS.

An instruction that, if defendant sold plaintiff two horses, and, as an inducement for plaintiff to purchase them, made false and fraudulent representations as to their qualities, if such representations were material, if plaintiff believed them and did not know, and could not by the exercise of ordinary care have known, whether they were true or false, and if they were made for the purpose of inducing the purchase, to return a verdict for plaintiff for a rescission and the amount of the purchase price was not objectionable as failing to charge that plaintiff must have relied upon the representations and have been damaged thereby.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 322-324; Dec. Dig. § 130.\*]

## 6. TRIAL (§ 235\*)—INSTRUCTIONS—EFFECT OF PRESUMPTIONS.

In an action to rescind a contract for fraud, an instruction that contracts are presumed to be fair, and not unlawful or fraudulent, and that the party who attacks them as fraudulent had the burden of proving the fraud by positive or circumstantial evidence, was properly refused, as it is improper to charge as to the effect of such presumption.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. § 235.\*]

## 7. TRIAL (§ 240\*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

Such charge was properly refused as argumentative, where the court had properly charged on the burden of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.\*]

## 8. PRINCIPAL AND AGENT (§ 136\*)—FRAUDULENT REPRESENTATIONS—PERSONAL LIABILITY OF AGENT.

A seller of horses was not absolved from liability for fraudulent representations made by him, though he was acting as agent for another party.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.\*]

Appeal from Lampasas County Court; M. M. White, Judge.

Action by Robert W. Jordan against Jack Underwood. From a judgment for plaintiff, defendant appeals. Affirmed.

Word & Walker, of Lampasas, for appellant. H. F. Lewis and J. C. Abney, both of Lampasas, for appellee.

RICE, J. On the 28th of May, 1913, appellant sold two mares to appellee for the sum of \$290 cash, and this suit was brought by appellee against appellant for cancellation and rescission of said sale, or in the alternative for damages, alleging that appellant falsely and fraudulently represented said mares to be sound, safe, and true pullers, and that they were five and eight years of age, respectively, and, believing said representations to be true, he was induced to purchase same. After general demurrer and general denial appellant specially answered, admitting that he sold the animals, as alleged, to appellee, but did so as agent for Crouch, the owner thereof, and denied that he had made any misrepresentations with reference thereto, but, on the contrary, that he told appellee that he had never seen said horses worked, but that Crouch had worked them. In a supplemental petition appellee alleged that appellant represented that he had traded for said mares, and that they belonged to him, and that he had no notice whatever that the same belonged to Crouch or any other person. There was a jury trial, resulting in a verdict and judgment for appellee rescinding the contract of sale, and awarding judgment in his favor for the sum of \$290; judgment was rendered in favor of appellant, however, for the mares, from which this appeal is prosecuted.

[1, 2] By the first two assignments it is urged that the court erred in permitting Hodges and appellee to testify over appellant's objection as to the representations and statements made by the latter to appellee at the time of the trade, on the ground that there was no allegation in the pleadings that appellee relied upon such representations, and that the same were a material inducement thereto. Neither the brief nor the bill

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of exceptions contained any statement as to what these witnesses testified, for which reason no error is shown. We differ with appellant, however, in his statement that the allegations of the petition did not warrant the introduction of the testimony complained of. The petition contained averments setting out the representations, stating that they were false, and that plaintiff gave faith and credit to them, and on account thereof was induced to enter into the contract, etc. This, we think, was amply sufficient to warrant the introduction of the testimony, and we therefore overrule each of said assignments.

[3, 4] We overrule the third assignment, because special charge No. 3, the refusal of which is complained of therein, so far as applicable, was covered by the main charge; and further because it stated an incorrect proposition of law, to the effect that plaintiff could not recover in the event he failed to exercise ordinary care to ascertain the falsity of the statements made, as he had the right to recover, if he was induced to make said trade by reason of such false statements, irrespective of any effort on his part to ascertain the truth thereof.

[5] The fourth assignment complains that the court erred in failing to charge that plaintiff must have relied upon the statements and representations of defendant before he could recover, and the fifth urges that the court erred in failing to charge that the plaintiff must have been damaged by the statements and representations of defendant before he was entitled to recover. We think the main charge in this respect not subject to the objections urged. It was as follows: "Now, if you believe from a preponderance of the evidence that on or about May 28, 1913, the defendant, Jack Underwood, sold to plaintiff two certain horses in consideration of the sum of \$290, as alleged in plaintiff's petition, and if you further believe from the evidence that, as an inducement for plaintiff to purchase the horses, defendant made false and fraudulent representations to him as to the qualities of said horses, as alleged, and that if said representations were material, and plaintiff believed them to be true, and did not know, and could not by the exercise of ordinary care have known, whether said representations were true or false, and that Underwood made such representations, if any, to said Jordan for the purpose of inducing him to purchase the horses, then you will return a verdict for him for rescission and for the sum of \$290." We therefore overrule said assignments.

[6, 7] The court did not err, in our opinion, in failing to give appellant's special charge to the effect that contracts are presumed to be fair, and not unlawful or fraudulent, and that the party who attacks them as fraudulent had the burden of proving the fraud by positive or circumstantial evidence, because

it is improper to charge as to the effect of such presumption; besides, the charge was argumentative, and the court had properly charged on the burden of proof, for which reasons the sixth assignment is overruled.

Under the evidence appellee was not required to make any inquiry of Crouch with reference to the horses, but had the right to rely upon the statements of appellant with reference thereto, for which reason special charge No. 10 was properly refused. We therefore overrule the seventh assignment.

[8] It would have been improper to charge, as appellant contends, on the question of agency as pleaded, because the proof failed to show any such agency; but, even if it had, we do not think appellant would be absolved from liability for fraudulent representations, if any, made by him. The eighth assignment is therefore overruled.

We have carefully considered the remaining assignments, and regard them without merit, for which reason they are all overruled.

The evidence amply sustains the verdict, and, finding no error in the proceedings of the trial court, its judgment is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. McNATT. (No. 7101.)

(Court of Civil Appeals of Texas. Dallas.  
April 4, 1914. Rehearing Denied  
April 25, 1914.)

### 1. CARRIERS (§ 320\*)—INJURY TO PASSENGER—TAKING QUESTION FROM JURY—TESTIMONY PHYSICALLY IMPOSSIBLE.

In an action for injuries to plaintiff's wife, where the allegations of the complaint were established by the wife's testimony alone, her testimony that she received serious and permanent internal injuries, which caused a miscarriage, when another coach or train came into violent collision with the coach in which she was a passenger, thereby throwing her against the arm of a seat, was not physically impossible, so as to require its rejection by the court and a directed verdict for the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

### 2. TRIAL (§ 252\*)—REQUESTED INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for injuries to a passenger, where the defendant pleaded contributory negligence, but there was no evidence to support that defense, it was proper to refuse a special charge requested by the defendant on that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

### 3. APPEAL AND ERROR (§ 1060\*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Remarks by plaintiff's counsel in his argument to the jury which he withdrew upon objection, were not prejudicial, where the size of verdict did not indicate that they in any way affected the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

**4. CARRIERS (§ 321\*)—CARRIAGE OF PASSENGERS—INSTRUCTIONS—WARNING TO PASSENGER.**

In an action for injuries to plaintiff's wife, caused by an unusual jar to the coach in which she was a passenger, where there was no evidence that she had warning that a coupling was about to be made between coaches, an instruction which predicated a verdict for the plaintiff upon a finding, among other things, that the collision was without notice or warning was not erroneous, since she was not bound to anticipate the rough handling of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

**5. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—TRIVIAL DEFECT.**

An instruction, allowing plaintiff to recover for damages "suffered" by himself and wife by reason of injuries to the wife, is not prejudicial because of the use of the word "suffered" instead of "sustained," since it would not cause a larger verdict to be rendered than otherwise would have been.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**6. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.**

A verdict of \$1,500 for internal injuries to plaintiff's wife, which resulted in a permanent displacement of her internal organs, and in a miscarriage and permanent disability, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

Action by W. J. McNatt against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins, of Dallas, and Crosby, Hamilton & Harrell, of Greenville, for appellant. Evans & Carpenter, of Greenville, for appellee.

RAINEY, C. J. We find the statement of the case in appellant's brief correct, which is as follows: "Appellee, W. J. McNatt, brought this suit in the district court of Hunt county against appellant, the St. Louis Southwestern Railway Company of Texas, to recover damages on account of injuries alleged to have been received by his wife, Lura McNatt, on the 19th day of February, 1912, while a passenger on defendant's train from Ft. Worth to Greenville, Tex. It was averred in the petition "that at Noel Junction, which is a station on defendant's said line of railway, while the said train was stationary, and while plaintiff's said wife was seated therein, the agents and servants in charge of another train or engine, or of the engine or some of the cars composing the train on which she was a passenger, caused or permitted such engine and car or cars to run against and collide with the coach in which plaintiff's wife was riding with great, unusual and unnecessary force, and without notice or warning to plaintiff's wife, causing her to be thrown against the arm or some

other part of the seat or car, injuring her, as hereinafter alleged; that at said time plaintiff's said wife was advanced several months in pregnancy; that the aforesaid sudden, violent, and unanticipated movement of the train strained plaintiff's wife in the small of the back, injuring, lacerating, stretching the spinal cord muscles, ligaments and nerves thereof, and strained, lacerated, and otherwise injured her ovaries, and especially producing prolapsus of the right ovary, and straining, lacerating, and otherwise injuring the womb, and female and pelvic organs, producing inflammation of the womb and ovaries, shocking and lacerating and straining her nerves and nervous system, causing her to suffer great physical and mental pain, which she then suffered, and has continued to suffer, since said date and will reasonably so suffer in the future; and she was thereby further caused to suffer great physical and mental pain, and especially bearing down pains in the back and pelvic region, and was threatened with miscarriage, which resulted in premature birth of the child, resulting in its death, and she has been rendered wholly unable to do or perform any labor, and she has been confined to her bed, and is still so confined; that her said injuries are permanent." "Appellant urged a general demurrer and a number of special exceptions to the petition, which were overruled. Appellant interposed the general issue, and the plea of contributory negligence and assumed risk. The case was tried before a jury, and there was a verdict and judgment for appellee for \$1,500."

We find that the material allegations of plaintiff's petition were established alone by the testimony of Mrs. McNatt.

[1] Appellant complains of the failure of the court to instruct a verdict for defendant, as the evidence was insufficient to support the verdict. The proposition is submitted that "the testimony of a witness, uncontradicted by the statement of any other witness, should be rejected, if known physical situations or matters of common knowledge show that the witness is mistaken, or that the testimony cannot be true; and, where the verdict and judgment rest solely upon such evidence, and the lower court has refused a peremptory instruction, the appellate court should reverse such judgment." We agree with counsel that if the evidence shows that it is a physical impossibility for Mrs. McNatt to have been injured in the manner she testified to by her, then the jury should have returned a verdict against appellee, but we do not view the testimony in that light. We cannot say that it was an impossibility for her to have been injured in the manner she testified she was hurt, and, this being so, it was peculiarly a question for the jury to determine whether they would accept her evidence or reject it.

The claim that Mrs. McNatt was suffering

with the same troubles before she came to Texas that she now complains of is not conclusively shown, and there was evidence that she had recovered from any troubles she may have had, if any, before coming to Texas, and the evidence was such as to warrant the jury in returning the verdict they did.

The second and third assignments of error raise practically the same question we have just considered, and we will not consider them further.

[2] The fourth and fifth assignments complain of the court's refusal of a special charge on contributory negligence. There is no evidence that raises the issue of contributory negligence in our opinion, therefore no error in the court's not giving said charge.

[3] The sixth assignment complains of the remarks of counsel in his argument to the jury. We are of the opinion no injury resulted to appellant from such remarks. Upon objection the remarks were withdrawn, and the size of the verdict does not indicate that the remarks in any way affected the jury.

[4] The seventh assignment of error complains of the third paragraph of the court's charge, which reads: "If you believe from the evidence that on or about February 19, 1912, plaintiff's wife was a passenger on one of defendant's trains, and that at Noel Junction defendant's employes in charge of one of its trains negligently caused a collision to occur between the coach in which she was sitting and another car or train of cars, with unusual and unnecessary force, without notice or warning to plaintiff's said wife, and that such collision, if any, caused her to be thrown against the arm of the seat in which she was sitting, and injured her in any or all of the ways alleged in plaintiff's petition, and that such acts or omissions, if any, on the part of said employes was negligence, as that term is herein defined, which proximately caused such injuries and damages, if any, you will find for plaintiff, unless you find for defendant under other portions of this charge." The criticism is to the language of the court, "without notice or warning" to plaintiff's wife, etc. We see no error in this respect. There was no evidence tending to show that Mrs. McNatt was apprised that the coupling would be made with unusual or unnecessary force, nor was Mrs. McNatt called upon to anticipate such rough handling of the train, and there is no error in the court's charge.

[5] The eighth assignment complains of the court's charge on the measure of damages, which is: "If you find for plaintiff you will allow him such sum as will fairly and reasonably compensate him for the damage, if any, suffered by himself and wife by reason of said injuries, if any; and, in this connection, you may take into consideration physical and mental pain suffered by Mrs. McNatt, if any, and that she will suffer, if

you find from the evidence that she will continue to suffer, and diminished capacity, if any, of plaintiff's wife to perform work and labor."

[6] If the court had used the word "sustained" in place of the word "suffered" in the third line of said charge, there could have been no room for criticism. He did sustain damages for the injuries his wife received, and could recover damages for his wife's pain and suffering, both mental and physical; also for diminished capacity of his wife to perform work and labor. We are of the opinion that the charge as written did not cause a larger verdict to be rendered by the jury than would otherwise have been.

The ninth assignment complains of the verdict as excessive. If the testimony of Mrs. McNatt is true as to the injury and her suffering, the appellant is fortunate in getting off so light.

We think there is no merit in the tenth assignment of error, and it is overruled.

The judgment is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. FRELES. (No. 5297.)

(Court of Civil Appeals of Texas. Austin.  
March 4, 1914. Rehearing Denied  
April 15, 1914.)

### 1. MASTER AND SERVANT (§ 180\*)—LIABILITY FOR INJURIES—NEGLIGENCE OF VICE PRINCIPAL.

Under Rev. St. 1911, art. 6641, providing that all persons engaged in the service of a railroad company intrusted with the authority to direct any other employe in the performance of any duty are vice principals and not fellow servants with their coemployes, a railroad company's foreman having authority to direct a boiler maker to assist in moving a boiler in the roundhouse was a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.\*]

### 2. NEGLIGENCE (§ 1\*) — ACTS OR OMISSIONS CONSTITUTING—"ACTIONABLE NEGLIGENCE."

To constitute "actionable negligence" the act done or omitted must be one which a person of ordinary prudence would not have done or omitted and from which it ought reasonably to have been anticipated that injury would result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

### 3. MASTER AND SERVANT (§ 125\*)—LIABILITY FOR INJURIES—UNANTICIPATED DANGERS.

A master's ignorance of the probable danger from an act or omission is not necessarily an excuse, as it is his duty to know what he could learn by exercising such diligence as the circumstances reasonably demand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

### 4. MASTER AND SERVANT (§ 125\*)—LIABILITY FOR INJURIES—UNANTICIPATED DANGERS.

Where an employer did not know of a danger and could not reasonably have discovered it by the exercise of such diligence as the circum-

stances reasonably demanded, he is not liable for an unforeseen injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**6. MASTER AND SERVANT (§ 97\*) — LIABILITY FOR INJURIES—UNANTICIPATED DANGERS.**

Plaintiff, an expert boiler maker and repairer, was directed to and did prepare a boiler for moving; the only practical method of moving it being by rolling it. While assisting in rolling it rapidly over soft ground covered by cinders by direction of the foreman, his glove caught in one of the studs of the boiler, a bolt projecting at least three-fourths of an inch, thereby throwing him over the boiler and in front of it resulting in injuries. *Held*, that the injuries were due to an inevitable accident, and not to the employer's negligence, since the foreman owed no duty to plaintiff to inspect the boiler, and, even had he inspected it and discovered the bolt, he was not as an ordinarily prudent man required to anticipate danger therefrom, especially as no superior or technical knowledge or experience was required to know whether or not there was danger, and plaintiff therefore was as capable of estimating the danger as the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

Action by W. O. Freles against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

E. B. Perkins, of Dallas, and Scott & Ross, of Waco, for appellant. John Lovejoy and Presley K. Ewing, both of Houston, and J. D. Williamson, of Waco, for appellee.

**Findings of Fact.**

**JENKINS, J.** 1. Appellee was a boiler maker and repairer, and was engaged in that business as an employé of appellant. Appellant's foreman ordered appellee to dismantle an upright boiler, which had theretofore been in use by appellant for the purpose of moving the same out of the way. Appellee testified: "In order to dismount it there was a bunch of pipes and several different things on it that had to be taken off; the fire door, the injector, and I don't know what all there was on it. I undertook to disconnect every piece of iron or pipe or anything of that kind that was attached to the boiler, and undertook to disconnect it before I took it down from its place. I undertook to disconnect all of the pipes and pieces of machinery of every kind that was attached to the boiler in any way that would prevent rolling, take it loose from it before we began to move the boiler. We took everything from it that would prevent rolling."

2. As thus prepared for being moved, the boiler consisted of a round piece of steel or casting, 10 or 15 feet long and about 4½ feet in diameter, weighing about four tons. Appellant's foreman ordered appellee and ten other employes to move this boiler to the place where it was intended to leave it, some

10 or 12 feet beyond the turntable; this space was covered with cinders. The boiler was turned onto its side, rolled on the iron rails leading to the turntable, a distance of about 125 feet. The turntable was turned so that its side upon which was the boiler was next to the cinders, and the foreman then gave orders, the intent of which was that the employes should roll the boiler off of the turntable and across the cinders, to the place where it was to be deposited. There was a bolt, about ¾ of an inch in diameter, and extending out of the boiler about 2½ inches. This bolt caught in appellee's leather glove, and jerked him over the boiler and in front of it. The boiler rolled upon and injured him as alleged in his petition. He recovered judgment for \$10,000 damages. It is not contended by appellant that the damages are excessive.

3. Appellee alleged: "That it was desired by defendant to remove a certain boiler, upright when in position, but which had then been taken down, out of the roundhouse, in which roundhouse there was a turntable probably 60 feet or more long, the boiler being about 10 feet long and about 4½ feet in diameter, and weighing about 4 tons. That said Miller (appellant's foreman) in the course of his authority for defendant of superintendence, control, and direction as aforesaid, then and there commanded, ordered, and directed plaintiff and his co-workmen, being ten in number, to move said boiler out of said roundhouse, first onto the turntable, and, after turning the turntable so as to avoid rolling the boiler across the rails (which could not be done), then to roll it over cindered or soft ground to the place at which it was intended to be put, outside of the roundhouse, so as to get it out of the way. That after the men had rolled said boiler onto the turntable and it was ready to be moved off the turntable, or about that time, Miller then and there commanded, ordered, and directed the men, including plaintiff, in substance to apply all their strength to the movement of such boiler, so that it would have velocity enough to cross the soft ground over which it had to pass, saying in substance, if not in exact words, 'Boys, get her to going good and hard, so that we can get her across that soft ground,' and after same had started, saying in like manner again: 'Give it to her boys! Come on with her!' That pursuant and in obedience to said commands, directions, and orders so given, the men pushed the boiler as hard as they could, the ten of them with great velocity, at and about which time, being within a few seconds after obedience to such requirement so begun, plaintiff's glove or sleeve caught in one of the studs of the boiler, being a bolt with threads on it, projecting about ¾ of an inch, and probably about 2½ inches thick, whereby he was thrown over the boil-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er, it moving with great velocity as aforesaid, and fell on his head and right hip and other parts of his body, and the boiler rolled over his arm and his head and body down to the lower part of his breast plate, before it could be stopped, by means whereof he was caused to suffer serious and permanent injuries."

The evidence sustains these allegations. Appellee further alleged:

"That plaintiff is informed and believes, and so states, that the usual and proper method to have pursued in the moving of said boiler, which was entirely practicable, was to put planks down over the soft earth, which planks were there available for the purpose, so as to avoid the great velocity so directed to be applied to said boiler, as aforesaid, and to this method no objection could be urged except that it would take a little more time.

5. "That the defendant, by its said agent, Miller, was negligent towards plaintiff in giving aforesaid orders, and each of them for the moving of said boiler, and in adopting the method he did in moving same, and in not adopting said usual and proper method of moving the same, and such negligence was a proximate cause of aforesaid injuries to plaintiff, without which same would not have happened.

6. "That plaintiff's regular and usual work was that of a boiler maker, as aforesaid, but he was under duty by his employment to do whatever he might be told to do by his said superior, Miller, or suffer discharge, although outside of his regular and usual employment; and thereof said defendant, through said Miller, knew.

7. "That plaintiff had previously aided in the moving of boilers for short distances by other methods, and he had rolled smaller boilers; but he was inexperienced in boiler moving by the method adopted on the occasion in question, and he had never before taken part in the moving of a boiler that way. That he was called upon to act in a few seconds when said orders were given, and obeyed the same without time for forethought or calculation, wearing his gloves and sleeves as he was accustomed to do, and as it was necessary for him to do in his work, to avoid hot engines, etc., and as he and others similarly engaged always did, and the danger of doing the work in which he shared at the time of said casualty was, under the circumstances of his environment at the time, not so glaring or obvious to him, particularly in view of his inexperience, that a man of ordinary prudence would have declined and suffered discharge, which would have been the penalty.

8. "That the method pursued on the occasion in question, of moving said boilers, was not reasonably safe, but threatened dangers in many ways or directions, so that the defendant by its said agent, in pursuing that

method, might reasonably have anticipated or foreseen injury of some sort to employes engaged thereat, as a natural and probable consequence, or as likely to ensue."

9. It will thus be seen that the alleged grounds of negligence were: (a) That appellee was inexperienced in moving boilers by the method attempted; (b) that the danger was unknown to him, and under the circumstances was not obvious to him; (c) that the method used in moving the boiler was not the usual method; (d) that it was not a proper or safe method; and (e) that appellant's agent was negligent in giving the haste orders.

(a) As to appellee's experience, he testified: "I never in my life moved a boiler that way before. My general employment was boiler maker. I had never had any experience in moving a boiler that way." This testimony was not contradicted.

(b) The evidence sustains the allegation that the danger was unknown to him, and that it was not obvious to him.

(c) There was no testimony that the method adopted was not the usual method. The only evidence on this point was that of the foreman, who testified: "I had assisted in moving several boilers before this one. All of the boilers that I have ever seen moved and helped to move were just rolled right on the ground. Rolled them anywhere we wanted to; you can roll a round boiler on the ground."

(d) As to the method employed being a safe one (apparent safety) appellee testified: "I knew we were going to shove it over those cinders after we got started. \* \* \* I did not have any idea or the least suspicion in the world that I was likely to have an accident, or there was any danger to me by reason of rolling that boiler fast. I never had time to think of it. It didn't occur to me at all until I was whirling over the boiler." Appellant's foreman testified: "It did not at any time before the injury occur to my mind that it was at all likely or probable that a man might be thrown over the boiler, and the boiler run over him. \* \* \* That there was the slightest danger of any one connected with the handling of the boiler getting hurt in any way." No one testified that the danger was apparent or suspected. As to there being a safer method, appellant's foreman testified: "If I had put a plank down over the cinders and had ordered the boiler rolled over the plank, the cinders would not have given way so much. I think we could have rolled it along over the planks very much like we rolled it over the rails. That would have been a slow way of doing it. Yes, it is reasonable that we could have stopped the boiler, if for any reason it had been necessary, if we had been rolling it slow. There wasn't any particular rush about moving that boiler off. \* \* \* If planks had been placed on those cinders and elevated

as high as the edge of the pit, and the boiler had been rolled over slowly, it would not have been as likely to hurt any one." This testimony was not contradicted.

(e) Appellant's foreman gave the haste order, as alleged by appellee.

10. Appellant alleged contributory negligence on the part of appellee in wearing leather gloves, while assisting in moving the boiler. The evidence does not show that appellee was guilty of negligence in so doing.

[1] 11. Appellant's foreman, Miller, had authority to direct appellee to assist in moving the boiler 'n the manner in which he undertook to move it, and therefore, under R. S. art. 6641, was the vice principal of appellee.

#### Opinion.

In view of the disposition which we make of this case, it is unnecessary for us to pass upon any of appellant's assignments of error, except the first, which is as follows: "The court erred in refusing to give to the jury defendant's special charge No. 1, as follows: 'Gentlemen of the jury, you are charged that the plaintiff having failed to show any act or combination of acts sufficient to constitute negligence upon the part of the defendant railway company, acting through its foreman, you will therefore return a verdict for the defendant.'"

[2-4] In our opinion, appellee's injuries were received through inevitable accident, and that the facts as above stated fail, as a matter of law, to show negligence on the part of appellant, for which reason we sustain said assignment. By "negligence" as is here used we mean culpable negligence. It is not the doing of every act which results in injury to another, or the failure to do everything that could have been done to avert such injury, that is negligence in a legal sense. To constitute negligence the act must be one which a person of ordinary prudence would not have done, or would not have omitted to do, as the case may be; and from which act or omission it ought reasonably to have been anticipated that injury would result. Ignorance of the master as to the probable danger is not necessarily an excuse, for it is his duty to know whatever he could have learned by the exercise of such diligence as the circumstances reasonably demanded of him. But when he does not know of the danger and could not reasonably have discovered the same by the exercise of such diligence, and an unforeseen injury occurs, it is not by his negligence, but upon pure accident.

[5] We do not think that it can be said, generally speaking, that rolling an iron cylinder 10 or 15 feet long and 4½ feet in diameter, on a turntable and over ground covered with cinders, is a dangerous business. What fact was known to appellant's foreman, or could have been known to him by the ex-

ercise of ordinary diligence, that rendered such act dangerous in this case? Was it his duty to inspect the boiler? As to the other ten employes, perhaps so; but as to appellee, who was an expert boiler maker and repairer, and who had been instructed to prepare the boiler to be moved, and who must have known that it was to be rolled, as that was the only practical method of moving it, did not the foreman have the right to presume that appellee had removed everything that would interfere with safely rolling the boiler to the place where it was to be deposited? Had the foreman inspected the boiler ever so carefully, would he have discovered anything to suggest to the mind of a reasonable man that some of the employes might be injured in rolling the boiler? He might have discovered the bolt. Would that have suggested danger? Evidently the appellee knew that the bolt was there. He testified that it did not suggest any danger to his mind. Presumably he was a man of ordinary prudence. It is not always true that the master will not be responsible where the facts are equally as well known to the servant as to him, for, in some instances, though the servant knows the facts, he may not realize the danger which the master, by reason of his superior knowledge, ought to apprehend. But in the instant case it required no superior or technical knowledge or experience in rolling boilers to know whether or not there was danger in rolling this particular boiler in the manner and under the circumstances that it was rolled. It does not appear that the foreman knew that appellee was wearing his gloves. That fact was known to appellee, and he did not anticipate any danger therefrom; nor do we think as an ordinarily prudent man he was required to do so. If the danger was apparent, we do not see how appellee could escape the contention of appellant that he was guilty of contributory negligence, he being in possession of all the facts, and as capable of estimating the dangers as was the foreman. We do not think that the injury was the result of negligence upon the part of either the foreman or of the appellee. Of course, if there had been no bolt on the boiler, and if the foreman had not ordered it to be rolled rapidly, and if appellee had not had on gloves, the injury would not have occurred in the manner that it did. But, as said in *Nolan v. Shickle*, 3 Mo. App. 300, "probably scarcely a mishap occurs where the wisdom which comes after the event cannot suggest some expedient by which, through the exercise of more abundant caution, the accident might not have been prevented."

For the reasons stated, the judgment of the trial court is reversed, and here rendered for appellant.

Reversed and rendered.

## THE HOMESTEADERS v. BRIGGS.†

(Court of Civil Appeals of Texas. Dallas.

April 11, 1914.)

## INSURANCE (§ 723\*)—MUTUAL BENEFIT INSURANCE—WARRANTIES—STATEMENTS AS TO HEALTH.

Where the application for mutual benefit insurance warranted that the answers concerning the health of the applicant were proper, that the truth thereof should be a condition precedent to the contract, and that the certificate issued thereon should be void if the answers were untrue or evasive, and the certificate contained a warranty of good health and made the application a part thereof, the answers relating to the applicant's health were warranties, and if they were untrue the beneficiary cannot recover on the certificate.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.\*]

Appeal from District Court, Limestone County; H. B. Daviss, Judge.

Action by S. S. Briggs against The Homesteaders. Judgment for the plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Locke & Locke, of Dallas, for appellant.

RAINEY, C. J. Simeon Singleton Briggs sued The Homesteaders to recover on a certificate insuring the life of appellee's wife, Angie O. Briggs, for his benefit. The order defended on the ground that various misstatements were made in the application for the certificate by Mrs. Briggs, as to her physical condition, etc. The trial resulted in a verdict and judgment in favor of appellee, from which this appeal is taken.

The defendant requested a charge to the effect that under the evidence the plaintiff was not entitled to recover and the jury should find for defendant.

In the written application for insurance made by Mrs. Briggs, she made statements in answer to certain interrogatories as follows:

"1. A. Are you in strong, robust health and free from disease? Yes. B. How long have you been so? Most life. \* \* \*

"3. \* \* \* B. Has any physician ever given an unfavorable opinion of your physical condition with reference to life insurance or otherwise? No. (Who and when?) No. \* \* \*

"5. Have you now or have you ever had any of the following diseases or symptoms? (The examining physician will require the person being examined to answer the following separately and explain the meaning of the terms used so that the answers may be true and correct.) A. \* \* \* bronchitis, \* \* \* chronic cough, consumption, la grippe, \* \* \* pneumonia, spitting blood, or any other disease of the throat or lungs? No. \* \* \* E. \* \* \* Shortness of breath? \* \* \* No. \* \* \* G. \* \* \* malaria, \* \* \* or any disease not mentioned? No.

"6. Have you consulted or been under the care of a physician any time within the past ten years? Yes. (Explain fully, giving cause of illness, dates and names and addresses of all physicians consulted.) Dr. Herring, Mexia, Texas. If any of the above have been answered 'yes' please explain fully in the following form:

Disease or Injury.	Date.	Duration.	Was Recovery complete?	Attending Physician.
Pneumonia	1906	2 Weeks	Yes	Dr. I. H. Herring.

"13. Is there any fact relating to your physical condition, personal or family history or habits which has not been stated in the answers to the foregoing questions and with which the society ought to be made acquainted? No.

"14. Have you reviewed each and all of the above questions and answers to the same, and are you sure they are correct? Yes."

The application signed by Mrs. Briggs also stipulates: "I declare and warrant that \* \* \* the above statements, together with the statements and answers made, or to be made, by me in other parts of this application are literally true. I further agree that any untrue statement or answer, or any concealment of facts, intentional or otherwise, in this application (including the succeeding parts hereof) \* \* \* shall forfeit the rights of myself and my beneficiary, or beneficiaries, to any and all benefits to be derived from my membership in said society. I do hereby declare and warrant that the above are fair and true answers to the foregoing questions and agree that the truth of the answers to the said questions shall be a condition precedent to any contract or certificate issued upon the faith of said questions and answers; and it is acknowledged and agreed by the undersigned that this application shall form a part of my contract with this society and that if there be, in any of the answers herein made, any untrue or evasive statements or any misrepresentations or concealment of facts, then any certificate granted hereon or membership obtained in this society shall become null and void and all payments made by me or for me on account of said membership shall be forfeited to the society. I further agree that \* \* \* if any answer or statement made in this application \* \* \* is not literally true, \* \* \* then any benefit certificate issued on this application \* \* \* shall become immediately void and of no effect, and all money paid thereon shall be forfeited to said society."

The benefit certificate contains the following provision: "I hereby warrant that I am in good health and that no change has occurred in any condition or respect as set forth in my application, which application is made a part of this certificate and I accept

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

this benefit certificate and agree to all the conditions therein contained, and I also understand and agree that the constitution and by-laws of the society as the same now are or may be hereafter enacted, together with the application and this certificate, shall constitute my contract with this society."

The evidence shows that Mrs. Briggs at the time of signing the application for insurance was not in strong, robust health, but that she was delicate and sickly. In the application when questioned as to having certain diseases, among them, pneumonia, and a cough, she answered, "No," when in fact the evidence conclusively shows that she had a hacking cough and had had pneumonia several times. In answer to the question if she had been under the care of a physician in the last ten years and if the recovery was complete, she answered that she had pneumonia in 1906, and that recovery was complete, when the evidence shows that she had a spell of pneumonia in 1909, and was seriously ill, and after which she gradually drifted into consumption, from which she died in November, 1910. The evidence also shows that if she had answered said questions truthfully it would have shown her physical condition such as that she could not have procured insurance.

The answers of Mrs. Briggs relating to her health were material to the risk and constituted warranties, and, said answers being untrue, the appellee has no right to recover. *Insurance Co. v. Pinson*, 94 Tex. 553, 63 S. W. 531; *Sup. Lodge v. Payne*, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277.

The judgment is reversed, and judgment is here rendered for appellant.

#### BIXLER v. RINN. (No. 5317.)

(Court of Civil Appeals of Texas. Austin.  
March 18, 1914.)

##### 1. SALES (§ 53\*)—ACTIONS BY SELLER—EVIDENCE—FRAUD.

In an action for the purchase price of a stock of jewelry, evidence held insufficient to take to the jury the question of fraudulent misrepresentations by the seller as to the quality of the jewelry.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. § 53.\*]

##### 2. APPEAL AND ERROR (§ 1175\*)—DISPOSITION OF CASE—RENDERING JUDGMENT—INSUFFICIENT DEFENSE.

Where plaintiff proved his case in the lower court, and the defendant failed to establish any defense whatever, so that plaintiff was entitled to a directed verdict, judgment will be rendered for plaintiff in the Court of Appeals on appeal from a judgment for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Appeal from Bell County Court; W. S. Shipp, Judge.

Action by Miles F. Bixler against P. W. Rinn. From a judgment in the county court

upon appeal from a justice of the peace in favor of the defendant, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Sam D. Ware, of Belton, for appellant.  
M. E. Monteth, of Belton, for appellee.

RICE, J. This suit was brought by appellant originally in the justice court, to recover the purchase price of certain jewelry sold by him to appellee, wherein he recovered judgment, but on appeal to the county court judgment went in favor of appellee, from which this appeal is taken.

It appears from the evidence that on October 30, 1911, appellee signed a written order for said jewelry, which was accepted by appellant, which described the character, kind, and quality thereof, containing a stipulation that delivery to the carrier constituted a delivery to him, agreeing to pay freight charges thereon. It also contained a stipulation to the effect that the order was not subject to countermand. Later the goods of the kind, character, and quality mentioned therein were delivered to the carrier, and went forward in due course to appellee. Upon their arrival at his station he, without opening them, returned same to appellant by the same carrier, with a statement to the effect that he was unable to pay for them, and could not procure insurance on his store, and therefore would not take them out. Appellant refused to receive them, but finally, to prevent their sale for freight charges, paid the same, notifying appellee that he would hold them subject to his order.

[1] After a general demurrer and general denial, appellee sought to rescind the sale, chiefly on the ground of fraud, alleging that he was induced to sign said written order or contract for the goods by reason of false representations on the part of plaintiff's agent, to the effect that said goods set out therein were merchantable jewelry of the quality capable of being sold to appellee's customers, when as a matter of fact they were mere sham jewelry, trinkets, or junk of quality not capable of being sold to his customers, which representations were alleged to be material and false, were known to be such to plaintiff's agent at the time they were made, and that if he (appellee) had known that said representations were false, he would not have signed said instrument; further, that it was agreed between him and said agent taking said order that he should not receive said goods unless he could obtain insurance on his stock of merchandise; and that, after making diligent effort to obtain insurance, he failed to procure same, and on account of such failure the contract was vitiated. There was absolutely no evidence to sustain the allegation of fraud; but, on the contrary, it appeared that the goods shipped conformed in every respect to those ordered; and by evidence offered in ap-



pellee's behalf it appeared that they were merchantable and could be sold, while an expert witness in behalf of appellant testified that if the company shipped the class of goods described in the order (about which there was no controversy), it was a remarkable bargain. The defendant did not even open the goods, much less offer them for sale, and therefore it was impossible for him to have shown that they could not have been sold to his customers. Under the contract a delivery to the carrier was in law a delivery to appellee. See *Specialty Furniture Co. v. Kingsbury*, 60 S. W. 1030.

[2] We sustain the first assignment, urging that the court erred in submitting the issue of fraud to the jury. The court likewise gave a charge to find in favor of defendant if they believed that the jewelry was purchased on condition that he could get insurance on his stock of merchandise, which he failed to procure. It is unnecessary, however, to discuss this feature of the case, since appellee confesses that such charge was error. This, therefore, left appellee without any defense whatever. The plaintiff, having proved his case, was entitled to judgment, and the court erred in not instructing a verdict in his behalf, for which reason judgment is now here rendered for him.

Reversed and rendered.

#### HAMILTON v. GREEN. (No. 7056.)

(Court of Civil Appeals of Texas. Dallas.

April 4, 1914. Rehearing Denied

April 25, 1914.)

#### 1. LIMITATION OF ACTIONS (§ 19\*)—EQUITABLE ACTIONS—REFORMATION OF INSTRUMENTS.

An answer seeking affirmative relief, which was indorsed as directed for suits in trespass to try title, and which alleged that the land in controversy had been partitioned by agreement between the heirs of a former owner, but that, by mistake, the deed to plaintiff's grantor had included more land than was agreed upon and that defendant received less than he should, and that the plaintiff's grantor had agreed to a repartition, of which fact plaintiff had knowledge, shows merely an equity to reform the partition deed, and not title to the land, and therefore was, within the contemplation of the statute of limitation, a suit for the reformation of a deed, which was barred in four years by Rev. St. 1911, art. 5690, and not a suit to recover the shortage in land.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 73-85; Dec. Dig. § 19.\*]

#### 2. TRESPASS TO TRY TITLE (§ 32\*)—ACTION—TITLE.

The facts alleged did not support a suit in trespass to try title; since, if true, they did not amount to an allegation of title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 39-41; Dec. Dig. § 32.\*]

#### 3. LIMITATION OF ACTIONS (§ 170\*)—EFFECT ON OTHER REMEDY.

While a suit to reform a deed and one in trespass to try title may be determined in one proceeding, yet if the title depends upon the

reformation of the deed, and the right to such reformation is barred by the statute of limitations, the right to proceed with the suit in trespass to try title also fails.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 656; Dec. Dig. § 170.\*]

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Action by W. J. Green against J. P. Hamilton. Judgment for the plaintiff, and defendant appeals. Affirmed.

Callicutt & Call and Jack & Jack, all of Corsicana, for appellant. Woods & Kerr, of Corsicana, for appellee.

RASBURY, J. Appellee sued appellant in the court below, alleging that appellant was interfering with appellee and his tenants in the possession, use, and enjoyment of certain lands in Navarro county, of which he was the owner in fee simple. Injunction restraining appellant from his alleged unlawful acts pending a trial was sought, with prayer that it be made perpetual upon a hearing on the merits. Temporary writ of injunction was issued as prayed. No motion was made to dissolve same, and the case remained on the docket in the condition stated for probably two years, when appellant filed answer seeking affirmative relief, wherein it was alleged that the lands described in appellee's petition were a portion of the lands which descended to the heirs of Jesse L. Hamilton according to the law of descent and distribution. The answer, which was also indorsed as directed for suits in trespass to try title, then alleged as basis for the relief, sought the following facts: When Jesse L. Hamilton died, those entitled to his estate believed one of the tracts of land owned by him contained 199½ acres. This tract, by agreement of all concerned, was set aside to appellant and Lola Beauchamp, son and daughter, respectively, of Jesse L. Hamilton; Lola Beauchamp to have 72 acres thereof, and appellant the remaining 127½ acres. Lola Beauchamp's 72 acres were surveyed and set off to her; appellant taking the balance, supposing it to contain 127½ acres. As a matter of fact, the tract contained approximately 30 acres less than supposed, due to the error or mistake of a third person to whom the parties referred the division of the land and the preparation of the deeds of partition; the result being that Lola Beauchamp received more land out of said tract than she was entitled to, based upon the proportion or ratio indicated by the figures stated. Appellant, after discovering the mistake, the date of which discovery is not shown, demanded of his sister, Lola Beauchamp, a re-survey and repartition of the land and a correction of the deed. She agreed to do so, but, in fact, did not. She subsequently died, and those entitled to do so sold the land to appellee. Appellee had notice of the facts alleged, and, after his purchase, agreed to re-

partition the land and correct the deed. The prayer of appellant was, in substance, that evidence be heard, the land ordered resurveyed and repartitioned, and the deed from the appellant to Lola Beauchamp and the one from Lola Beauchamp's heirs to appellee be corrected so as to conform to the agreement of repartition between appellant and his sister.

Appellee, in his reply to appellant's answer seeking a resurvey and repartition of the land and a correction of the deed, set out as defensive matter the following facts: The heirs of Jesse L. Hamilton did, in fact, partition the land in controversy in the year 1896, and made deed to Lola Beauchamp, née Hamilton, therefor, appellant joining in same, said deed being recorded in Navarro county January 11, 1897. Mrs. Beauchamp went into visible, actual, and complete possession of the lands upon execution of the deed, fenced it from the other portion of the tract, continuing such possession until her death in 1900. After her death her husband and her children continued such possession until May 18, 1907, at which time her husband, Joe R. Beauchamp, who had acquired the land by purchase from his children for valuable consideration, conveyed same to appellee by general warranty deed, which deed was, on May 22, 1907, recorded in Navarro county. Appellee purchased the land in good faith for value, without notice, actual or constructive, of any fact concerning any mistake relating to the quantity of land received by Lola Beauchamp or her right under the partition to hold the amount described in her deed. Appellant did not give appellee notice of any such claim, nor did appellant at any time agree to a resurvey and repartition thereof, nor did appellant make any claim of mistake in the partition of the land or ask or demand a repartition thereof, or make any claim to any of the land held by appellee on account of such mistake, until January 1, 1911.

Other facts supporting other rights and defenses were urged by both parties, but it is unnecessary, as indicated, to particularize them in order to determine the issue presented.

There was a trial before jury. Verdict was for appellee, followed by judgment quieting appellee in the permanent and undisturbed possession, use, and enjoyment of his premises, and making the temporary writ of injunction permanent.

[1] On demand of appellee, and on the theory that the suit was one to correct a mistake in a deed and reform the same, and not for the recovery of lands, the court instructed the jury that, depending upon their finding upon certain conflicting facts, the cause of action would be barred, because not commenced and prosecuted within four years from the time of the accrual of the right to sue. Article 5690, R. S. 1911. It is contended by appellant that the charge should not

have been given, because it appears from the pleading that the purpose of the suit was to recover lands by suit in trespass to try title. The contention is, in our opinion, unsound. The case made by appellant is that he and his sister were mistaken in the number of acres contained in the tract of land which they divided between them, and that, as a result, his sister got more land than she should have received. If appellant's sister did, in fact, receive more land in the division than she was entitled to, the result, in law, was that, as between themselves, appellant had an equitable interest, not title, in the land deeded to his sister, in the ratio of whatever the shortage was shown to be bore to the basis upon which they had agreed to divide. His interest was but an equity, capable of being ascertained and enforced only by a direct proceeding to set aside the deed or correct it upon proper pleading and evidence, and was not, in contemplation of the statutes of limitation, a suit to recover land. *McC Campbell v. Durst*, 15 Tex. Civ. App. 522, 40 S. W. 315.

[2] Further, the facts alleged by appellant will not support an action of trespass to try title, for the reason that such allegations, if true, do not constitute title, a necessary ingredient in such suits. As said in *Gilmore et al. v. O'Neil et al.*, 139 S. W. 1162: "Until a court of equity had acted upon the pleading and facts, and granted a correction of the instrument to make it read as was intended by the parties, he had no title by virtue of it that he could use as a defense." In short, until it was ascertained, by a hearing upon the very facts urged by appellant in his amended answer, that there was a mistake in the deed and a correction or reformation of the same had, suit in trespass to try title could not be maintained, and hence the four-year statute was applicable, and, the jury having found against appellant on all conflicts relating to notice, etc., a finding under said statute should be sustained.

[3] We do not mean to say that a suit to cancel or correct deed and one in trespass to try title may not be determined in one proceeding. We think it can. Before the land may be recovered in such proceeding, however, the correction or reformation of the deed is an essential preliminary step, and if, in the progress of the suit, the four-year bar is pleaded, and the facts raise the issue which is resolved by the jury for the one in possession, the fact that such dual relief is sought is immaterial; since a favorable finding upon the questions of limitation destroys the right to sue in or proceed with the suit in trespass to try title.

Other assignments of error are urged, but they become immaterial, in view of our conclusion that the facts pleaded by appellant show the suit was one to correct and reform a deed, and which suit was by the verdict of the jury filed approximately 14 years after adverse possession of the land commenced.

The judgment is affirmed.

**LUCKENBACH et al. v. THOMAS et al.**  
(No. 5199.)

(Court of Civil Appeals of Texas. San Antonio.  
April 1, 1914. Rehearing Denied  
April 29, 1914.)

**1. EVIDENCE (§ 417\*)—PAROL EVIDENCE—ADMISSIBILITY.**

Where a grantor sues on notes given for the price and for a foreclosure of the vendor's lien retained in the deed, the notes and deed evidence a completed written contract, and all prior negotiations and agreements are merged therein, so that they cannot be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

**2. VENDOR AND PURCHASER (§ 274\*)—FORECLOSURE OF VENDOR'S LIEN—DEFENSES.**

A grantee resisting the payment of notes for the price and the foreclosure of a vendor's lien retained by the deed cannot go behind the notes and deed; and a pleading relying on the omission of a stipulation in the prior contract of sale is insufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 769-771; Dec. Dig. § 274.\*]

**3. REFORMATION OF INSTRUMENTS (§ 16\*)—GROUNDS—FRAUD—ACCIDENT—MISTAKE.**

A deed cannot be reformed by the addition of a stipulation therein, unless the stipulation was omitted by fraud, accident, or mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.\*]

**4. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONSIDERATION.**

Where a guaranty of a vendor that water was obtainable on the land was part of the consideration for the purchase-money notes executed by the purchaser, the guaranty was a contractual one, and could not be proved by parol in a suit on the notes and for the foreclosure of the vendor's lien retained in the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

**5. REFORMATION OF INSTRUMENTS (§ 18\*)—MISTAKE OF LAW.**

Where the parties to a contract discovered before its execution that a stipulation was omitted therefrom, but they believed, on the advice of an attorney, that the stipulation was, nevertheless, binding, the contract would not be reformed so as to include the stipulation, unless either party was misled by the other or by the intentional misrepresentation of the attorney.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 72, 73; Dec. Dig. § 18.\*]

**6. VENDOR AND PURCHASER (§ 110\*)—CONTRACTS—EXECUTED CONTRACTS—EFFECT.**

Where there was a breach of warranty contained in a contract of sale before the delivery of the deed, the purchaser, accepting the deed containing the warranty with knowledge of the breach, could not rescind, but could merely recover damages for the breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 196, 197; Dec. Dig. § 110.\*]

**7. FRAUD (§ 23\*)—ACTS CONSTITUTING.**

Where a purchaser could determine the facts of sufficiency of a water supply for irrigation as well as the vendor, and he refused to buy from an agent because he would not guarantee the water supply and he investigated the water supply in the county before the purchase, he did not rely on the vendor's representations as to the permanency of the water sup-

ply, and could not recover on the theory that the vendor's representations were fraudulent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.\*]

**8. VENDOR AND PURCHASER (§ 114\*)—FRAUD—RESCISSION.**

Where a purchaser, with knowledge that a well, guaranteed by the vendor to supply the necessary water for irrigation, flowed so poorly that irrigation on all but a small part of the land had to be abandoned, made improvements on the premises and partial payments of the price and interest without objections, he elected not to repudiate the sale, and he could not compel a rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 202-204; Dec. Dig. § 114.\*]

**9. VENDOR AND PURCHASER (§ 284\*)—FRAUD—RESCISSION—DELAY—INSTRUCTIONS.**

In an action on purchase-money notes and for the foreclosure of a vendor's lien retained in the deed, defended on the ground of fraud and breach of warranty, an instruction submitting the issue of unreasonable delay in complaining of the fraud or the breach as a defense, and stating that a finding of unreasonable delay would not prevent a finding for the purchaser, if otherwise entitled to recover, and an instruction that, if the jury found for a rescission, and found the facts presented in the instruction submitting the issue of fraud, the jury should allow such damages as were sustained by the purchaser, were objectionable, as failing to make the jury understand that unreasonable delay in complaining of the fraud was an absolute defense to a demand for rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 796-799; Dec. Dig. § 284.\*]

**10. CANCELLATION OF INSTRUMENTS (§ 50\*)—REPUDIATION OF CONTRACT WITHIN REASONABLE TIME AFTER DISCOVERY OF FRAUD—QUESTION FOR JURY.**

Whether one complaining of fraud inducing a contract repudiated the contract within a reasonable time after discovery of the fraud, so as to justify rescission, is frequently for the jury, and in such cases the court must submit the issue.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 105, 106; Dec. Dig. § 50.\*]

**11. APPEAL AND ERROR (§ 237\*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.**

Where a party did not challenge the sufficiency of the evidence to raise an issue by asking a peremptory instruction, he could not, on appeal, complain of a charge submitting the issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.\*]

**12. COVENANTS (§ 130\*)—FRAUD—DAMAGES.**

The rule that the measure of damages which a purchaser may recover is the difference between the consideration given for the land and the value thereof applies only in cases where the vendor was guilty of fraud inducing the purchase, and does not apply in cases of the vendor's breach of a warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 245-253, 255, 256, 257; Dec. Dig. § 130.\*]

**13. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—OMISSION IN INSTRUCTIONS.**

Where the jury found that a purchaser was entitled to rescind on the ground of the vendor's fraud, the failure to submit any measure of damages for fraudulent representations, in the event the purchaser had delayed for an unreasonable time before complaining of the fraud,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or had approved the purchase after knowledge of the fraud, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**14. VENDOR AND PURCHASER (§ 127\*)—RESCISSION—RECOVERY.**

A purchaser cannot, after repudiating the purchase on the ground of the fraud of the vendor, continue to make improvements and recover therefor in a suit to rescind the purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 231; Dec. Dig. § 127.\*]

**15. FRAUD (§ 52\*)—REPUTATION FOR TRUTH AND VERACITY—ADMISSIBILITY.**

Where the issue of fraudulent representations, made by a vendor to a purchaser, could only be determined by virtue of the credit to be given to the testimony of the parties as to whether representations were made and whether they were true or false, evidence of the general reputation of the vendor for truth and veracity was inadmissible.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 48; Dec. Dig. § 52.\*]

**16. TRIAL (§ 25\*)—RIGHT TO OPEN AND CLOSE—ADMISSIONS BY DEFENDANT.**

Where, in a suit on purchase-money notes and to foreclose a vendor's lien retained in the deed, the purchaser admitted the execution of the notes and liability thereon, but did not admit the execution and delivery of the deed, the vendor had the right to open and close the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by C. A. Luckenbach and others against M. S. Thomas and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

J. F. Carl, of San Antonio, for appellants. Taliaferro, Cunningham & Birkhead, R. P. Coon, and F. R. Williams, all of San Antonio, for appellees.

**MOURSUND, J.** Appellants, C. A. Luckenbach, A. J. Luckenbach, Adolph Wendler, Bruno Wendler, Henry Wendler, and John F. Nooe, sued M. S. Thomas and Ira Paxton upon four promissory notes dated November 19, 1909, payable to plaintiffs, executed by M. S. Thomas, due respectively on the 20th day of September of the years 1910, 1911, 1912, and 1913, the first three being for \$1,466.67 each, and the fourth for \$660, all bearing 7 per cent. interest per annum, payable annually, and providing for 10 per cent. attorney's fees if placed in the hands of an attorney for collection after maturity, and further providing that failure to pay interest on any note when due should, at the option of the holder, mature all notes. Plaintiffs alleged that said notes were given in part payment for 200 acres of land out of survey 79, grantee J. H. Gibson, certificate 348, in Dimmit county, the field notes of said land being given, and sought a foreclosure of the vendor's lien retained in the deed executed by them to said Thomas for such land. It was further alleged that default had been made in the

payment of interest and the principal of the note first maturing, for which reason all notes had been declared due; that no payments had been made, except \$260 upon note No. 1 on November 19, 1909; that the land had been conveyed by Thomas to Paxton, who had assumed the payment of the notes. The case was dismissed as to Paxton.

M. S. Thomas answered by general demurrer, general denial, and for special answer said: That plaintiffs in August, 1909, composed the "Wendler-Luckenbach Land Company," and A. M. Delcambre was their agent; that defendant was desirous of buying and developing an irrigable farm in Southwest Texas, and authorized and instructed T. C. Thomas to look at lands in that section, and, if he could find a tract upon which there was, or could be procured, a flowing well of permanence and sufficient strength to irrigate the entire tract, and such tract could be obtained for a reasonable price, then to purchase the same for defendant; that such desire on the part of M. S. Thomas, together with the authority of T. C. Thomas, was made known to said Delcambre; that Delcambre told T. C. Thomas he had a tract of land for sale such as M. S. Thomas wanted, and showed him the land described in plaintiff's petition; that T. C. Thomas there met C. A. Luckenbach, of the Wendler-Luckenbach Land Company, and told him that M. S. Thomas wanted only land upon which a flowing well of abundant strength could be had; that Luckenbach represented that defendant could get a well on said land as strong as a certain well on other lands owned by said company, which well was then flowing at the rate of 1,200 gallons per minute, and then and there, before defendant had invested any money in said land, guaranteed that, if defendant purchased said land, defendant would get such a well on said land as the one shown him, and that such well would continue to flow such stream for all time to come, and, further, that such well would be sufficient to put water on every part of said land without the necessity of pumping; that said Luckenbach advertised the lands of said company, stating that the flowing wells on the same were guaranteed by him, and the firm of Delcambre, Jones & Co., agent for plaintiffs, advertised said lands, with plaintiffs' knowledge and consent, as being in the "Carrizo Springs artesian belt, where irrigation is accomplished by drilling wells through an impervious cap rock to tap a limitless supply of purest water that is forever driven by natural pressure high above the surface," and described a well on the lands of said company as having been completed eight years prior thereto by A. Eardley at a cost of \$850, and as having a flow of 1,260 gallons per minute, which it had retained for eight years without any sign of weakening, and represented that such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a well, with a reservoir to store the water, would easily irrigate 400 acres of land, and that lands upon which a well could be procured could be sold by said Delcambre, Jones & Co. at from \$35 to \$50 per acre; that said advertisements and literature, and the representations contained therein, were brought to the attention of T. C. Thomas in the fall of 1909, and before the contract was made to purchase any of said lands for defendant; that such representations were made for the purpose of inducing T. C. Thomas to purchase said land for defendant, and that they were material, and were believed and relied upon by T. C. Thomas, and, but for the making thereof and his belief therein, said Thomas would not have purchased said land for defendant; that said representations were not true; that T. C. Thomas, relying upon said representations, on September 20, 1909, entered into a written contract to purchase 160 acres of plaintiffs' land for defendant, and later, to wit, in December, 1909, a 40-acre tract was verbally added to said contract, the 200 acres thus contracted for being the land described in plaintiffs' petition; that T. C. Thomas had no knowledge of the flow of water necessary for irrigation purposes, and relied upon Luckenbach for such information, which fact Luckenbach knew: that it was the intention of all parties to the written contract that the same should, by its terms, guarantee that the well to be drilled on the land therein described should furnish a flow of water sufficient to irrigate the entire tract, and that the flow should be permanent, and, if such contract does not express such intention, or if it expresses an intention not in harmony with the same, then the failure to express such intention, or the expression of such contrary intention, is the result of fraud on the part of the Wendler-Luckenbach Land Company, or accident, or mistake on the part of the scrivener, or on the part of the parties to said contract; that said contract was consummated by delivery of deed conveying the land in question signed by plaintiffs, dated November 19, 1909, and the payment by defendant of the first payment of \$1,800, and the execution by this defendant of the notes sued upon herein; that in October, 1909, defendant, acting by T. C. Thomas, let the contract for the drilling of a well on said land, and in November, 1909, the well was completed; that in January, 1910, defendant had 35 acres of land cleared and ready for water, but, part of same being above the level of the well, it became necessary to pipe the water to the higher ground, a distance of 400 feet, and the water was turned into said pipe line in the latter part of February, and by March 1, 1910, the flow was so weak that the 4-inch pipe was only two-fifths full where it discharged into the ditch; that by the last of April, 1910, the well flowed so poorly that irrigation had to be aban-

doned on all but 35 acres of land, and on July 1, 1910, the well had ceased to flow through the pipe line, and that summer it entirely ceased to flow. Defendant further alleged that he had spent various sums in developing and improving the land, the items aggregating \$4,407, and had paid interest on deferred payments of purchase money, \$336, also interest on amount due for drilling well, \$52.80, and had lost a feed crop on 20 acres of land, to his damage \$100; also that his time and labor for one year was worth \$600, and that he still owed \$660 for the drilling of the well; that said expenditures were made and obligations incurred before defendant had knowledge of the fraud on the part of the plaintiffs. Defendant further alleged that, if said representations were not fraudulent, then that plaintiffs believed the water supply was adequate and permanent, and the contract was entered into under a mistake of fact material to the transaction under which all parties were laboring. Defendant, further, by verified plea, alleged that the abundance and permanency of the flow of water in the well to be drilled upon said land was the material part of the contract for the sale of said land and of the contract represented by the deed thereto, and was a material part of the consideration, and the failure of the flow of water was a material failure of consideration; that the falsity of the representations was not discovered by the defendant or his agent until after the delivery of the deed and execution of the notes, such failure not being brought to their notice until the fall of the year 1911. Defendant prayed that plaintiffs take nothing by their suit; that the sale be rescinded, the notes canceled, and that he recover of plaintiffs his damages by reason of expenditures, improvements etc., and, in the alternative, for his damages, should the remedy of rescission be denied him. He tendered a reconveyance of the land.

Plaintiffs filed a supplemental petition containing a general demurrer to the answer, various special exceptions, a general denial, and a special plea as follows: That, if they ever made a contract as alleged by defendant, the defendant accepted a deed under and by virtue of the terms of the contract, after he had satisfied himself that plaintiffs had carried out their part of the agreement, and that he expressed himself as satisfied, and is estopped to deny that plaintiffs carried out their agreement; that, at the time the well came in, they were ready to abide by their contract and repay to defendant his earnest money and the costs of the well, if the well was not satisfactory, but defendant was highly pleased with the well, and thereupon the land was conveyed to him and the notes executed, whereby defendant estopped himself from denying that plaintiffs had complied with their contract, and he thereby waived any action for breach of contract or

warranty; further, that defendant was guilty of laches in failing to complain of the alleged fraud until this suit was filed.

Defendant filed a trial amendment, alleging that, when the contract before referred to was read, said T. C. Thomas and C. A. Luckenbach discovered that a material stipulation agreed upon by the parties had been omitted; that both parties, believing that such stipulation could be ingrafted upon and added to the contract, and being advised by the attorney who drew the contract that, when so ingrafted upon and added to the contract, the same would be a binding part of the contract, and both parties believing such to be the effect thereof, in order to avoid rewriting the contract, again agreed to such stipulation in the presence of the subscribing witnesses to said contract; that defendant would not have signed the contract had it not been for such belief; that the stipulation so agreed to was that plaintiffs guaranteed the flow of the water from the well in question to be adequate to irrigate the entire tract purchased, and that same would continue to flow an adequate stream for ten years from the date of said contract. Wherefore defendant prayed that effect be given to the agreement as actually entered into by the parties.

Plaintiffs filed three exceptions to the trial amendment, and denied all the allegations thereof.

The trial resulted in a verdict and judgment granting defendant a rescission of the sale and a cancellation of the notes, also a recovery upon his cross-action for damages in the sum of \$2,896, of which \$660 was to be applied to paying the balance due for drilling the well. Plaintiffs appealed.

Appellants have briefed a large number of assignments of error, many of which present, in different ways, the same questions of law, and we shall not undertake to discuss them in regular order. It will be noted from our statement of the pleadings that, while the petition contains averments sufficient to constitute allegations that fraudulent representations induced the acceptance of the deed and execution of the notes, defendant relying upon the representations which induced the execution of the preliminary contract as sufficient to set aside the general warranty deed and notes, dated November 19, 1909, but, in fact delivered five months after the execution of the contract of sale, it is further alleged in a general way that a verbal guaranty was made by plaintiffs to the effect that a flowing well could be obtained on the land sold, which, for all time to come, would furnish ample water to irrigate all of said land, and that such guaranty induced the purchase by defendant of the land described in plaintiffs' petition. However, on the third day of the trial, defendant filed a trial amendment, alleging that such guaranty was only for ten years, and that it was omitted from the written contract, dated September 20, 1909, on account of a mutual mistake of law.

[1] The contract sued upon by plaintiffs was evidenced by the deed and notes described in plaintiffs' petition, which evidenced a completed written contract. *Earle v. Marx*, 80 Tex. 42, 15 S. W. 595. The deed and notes constituted the final contract between the parties, into which all previous negotiations and agreements became merged. *Milliken v. Callahan Co.*, 69 Tex. 214, 6 S. W. 681; *Johnson v. Clarkson*, 30 S. W. 71; *Walker v. Brosius*, 90 S. W. 655; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

[2] Appellee sought to resist the payment of the notes and the foreclosure of the lien retained by the deed, and his defenses, if he has any, should be directed at the contract evidenced by such instruments. The trial amendment contains no allegation that said verbal guaranty was omitted from the deed by any mistake of law or fact, and it would be difficult to maintain such a contention, in view of the fact that five months intervened between the execution of the contract of sale and the delivery of the deed. The court should have required defendants to direct their pleadings at the deed and notes, and therefore should not have considered the trial amendment as sufficient to allege any defense. Plaintiffs had filed a special exception to defendant's second amended answer, seeking to have the court require defendant to elect whether he sued for damages on the contract of September 20, 1909, or the contract evidenced by the deed, which exception was overruled, the court doubtless considering the allegations of fraud with respect to the contract as going to the deed also, because it was alleged that such fraud was not discovered until after the deed was delivered, and inferentially that it induced the acceptance of the deed and execution of the notes. In this, we think, there was no error, and assignment of error No. 40 is overruled. Plaintiffs did not demur generally to the trial amendment, nor except on the ground that it alleged no defense to the contract evidenced by the deed and notes, but did except on the ground that it sought to vary the terms of a written contract by parol, and that it was in contravention of the statute of frauds, in that it sought to set up and assert a verbal warranty extending for more than one year.

[3] Had it been pleaded that such guaranty was omitted from the deed, in the absence of fraud, accident, or mistake, the deed could not be reformed so as to include such guaranty therein, because it would vary the same in a material manner. *Earle v. Marx*, supra; *Lynch v. Ortleib*, 70 Tex. 730, 8 S. W. 575; *Belcher v. Mulhall*, 57 Tex. 20; *Rubrecht v. Powers*, 1 Tex. Civ. App. 282, 21 S. W. 318; *Weaver v. City of Gainesville*, 1 Tex. Civ. App. 286, 21 S. W. 317; *Willis & Bro. v. Byars*, 2 Tex. Civ. App. 134, 21 S. W. 320; *Loonie v. Tillman*, 3 Tex. Civ. App. 334, 22 S. W. 524; *Kansas City Packing Box Co. v. Spies*, 109 S. W. 432; *Beard v. Gooch*, 130

S. W. 1022; *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925.

[4] If it be considered that the guaranty was a part of the consideration for the notes, it is a contractual one, and therefore cannot be proved by parol. *Coverdill v. Seymour*, 94 Tex. 8, 57 S. W. 37; *Boone v. Mierow*, 33 Tex. Civ. App. 295, 76 S. W. 772; *Finn v. Krut*, 13 Tex. Civ. App. 36, 34 S. W. 1013; *Southern Building Ass'n v. Winans*, 24 Tex. Civ. App. 544, 60 S. W. 827.

[5] Defendant alleged that, when the contract was read, both parties discovered that the guaranty had been omitted, but both of them, believing that the guaranty could be ingrafted upon the instrument by parol, and being so advised by the scrivener, in order to avoid rewriting the instrument, again agreed upon such guaranty. It is not contended that any mistake was made as to the terms of the written agreement, or the legal effect thereof. Both parties knew exactly what it contained, and its legal effect, but it is alleged that they made a mistake of law in believing that the verbal guaranty would be binding. The question, then, is whether an agreement shall be binding and enforceable in law because both parties believe it to be binding and enforceable, when neither party was misled by the other, or by the intentional misrepresentation of an attorney. We think, in such a case, the mistake of law cannot be invoked to reform or rescind the written contract. To permit it would be to open the gates for interminable litigation, and to practically repeal the statute of frauds. When parties are making a written contract, which is read over, and they discover that an important clause is omitted, no excuse should be received as to why such clause is not inserted therein, and we may say further that, if appellee's contention be true, he was grossly negligent in not having the few words interlined in the contract which would express the provision that plaintiffs were to guarantee the flow of water therein provided for to be adequate to irrigate all of such land, and to remain adequate for that purpose for ten years. *Lott v. Kaiser*, 61 Tex. 672; *Ins. Co. v. Hill*, 127 S. W. 286; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 74; *Pomeroy's Equity Jurisprudence*, § 839.

The same rules would apply to the contract of September 20, 1909, had no deed been made, and suit been brought on the contract, and therefore we sustain assignments of error Nos. 23 and 24, which complain of the overruling of such exceptions, and also assignment No. 41, which complains of the admission of evidence in support of the plea of a verbal guaranty.

[6] The court, by his charge, authorized the jury to find for a rescission of the sale, if they found that the guaranty set up in the trial amendment was established, and that it had not been complied with. Had such guaranty been embraced in the deed, or a

separate written contract of even date with the deed been made to that effect, we fail to see how the failure to comply therewith could be ground for rescission, in the absence of an express agreement to that effect. If it had been embraced in the contract dated September 20, 1909, and the well had failed before delivery of the deed, defendant would have been released from the obligation to take the land, but, after the trade is closed, the deed delivered, and the consideration in money and notes has passed, such a provision, if embraced in the deed, would be a mere warranty, the breach of which would not entitle appellee to rescission, but merely to damages. *Jones v. George*, 61 Tex. 350, 48 Am. Rep. 280; *El Paso & S. W. Ry. Co. v. Eichel & Weikel*, 130 S. W. 926; *Harroll v. McDuffie*, 128 S. W. 1149; *Simkins on Contracts*, pp. 912, 913. The tenth, twelfth, and thirteenth assignments, which complain of the court's charge which authorized a rescission for breach of the guaranty set up in the trial amendment, are therefore sustained.

[7] Passing to the issue of fraud made by the pleadings, it appears that some matters of fact are alleged, but that much of the plea is based upon representations of permanency of water supply, a matter that defendant could determine, with the facts before him, equally as well as plaintiffs, and, judging by the allegations that a guaranty was required and the testimony that it was exacted, as well as that defendant refused to buy from another agent, because he would not guarantee the supply of water, and defendant's testimony that he had used due prudence to investigate the water supply in that county, it seems clear that defendant did not rely upon any allegations that a permanent water supply could be obtained. *Lynch v. Ortlieb*, 70 Tex. 727, 8 S. W. 515.

[8] It is alleged by defendant that by the last of April, 1910, the well flowed so poorly that irrigation on all but 35 acres had to be abandoned; that by the latter part of May, 1910, it was necessary to irrigate day and night and Sundays to save the crop; that on July 1, 1910, it ceased to flow through the pipe line; and in the summer of that year entirely ceased to flow. T. C. Thomas, defendant's agent, who bought the land and conducted all business with reference thereto, lived on the land until June, 1910, at which time the water got so low that he left the land and went into the real estate business. He admitted that he knew in July, 1910, that the well was "not any good," and that he had been "buncoed." He paid plaintiffs \$336 interest in the fall of 1910, and in December, 1910, conveyed to Paxton 80 acres of the land for \$11,200, of which \$2,600 was paid by the conveyance of property in Illinois. Upon the advice of his attorney, he sued Paxton, and recovered the land because of Paxton's failure to make payments. He built two tanks, one of which never became filled, because

there was no flow of water after he got it completed. They were completed in September, 1910. Thereafter the reservoirs were connected by piping, which was paid for in November, 1910. His personal labor in improving, harrowing, and developing the land extended over a period of 15 months. He made no complaint until June, 1912, after suit was filed in January, 1912, and did not demand a rescission until he filed his answer; in fact, as late as June, 1911, he wrote letters to plaintiffs stating that he was trying to raise money to pay interest and also to make a payment upon the principal of defendant's notes, and stating that he expected to sell some of the land in Kansas City. This appears to be a clear case of the defendant making an election not to repudiate the sale, as he dealt with the property as his own, after discovery of the fraud, if any fraud existed, and failed to promptly tender reconveyance and demand a rescission. *Wells v. Houston*, 23 Tex. Civ. App. 653, 57 S. W. 584; *Guthrie v. Lyon & Sons*, 98 S. W. 432; *Railway v. Cade*, 100 Tex. 37, 94 S. W. 219; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 S. W. 857; *Railway v. Jowers*, 110 S. W. 948.

[9] The court, by paragraph 4 of its charge, sought to submit unreasonable delay in complaining of the fraud or of the breach of guaranty as a defense against rescission, but stated that such a finding would not prevent a finding for defendant under paragraphs 5 or 6, if they believed from the evidence that defendant was entitled to recover under either of said paragraphs. Paragraph 5 is to the effect that, if the jury find for a rescission, and therefore find for defendant on plaintiff's cause of action, and find the facts supported and presented in paragraph 2 (which submitted the issue of fraud), then to allow such damages, if any, as were sustained by defendant on account of such fraudulent representations. When paragraphs 4 and 5 are considered together, it occurs to us that the jury could not have understood that unreasonable delay in complaining and repudiating constituted an absolute defense to the action, in so far as rescission was sought. In paragraph 6 the jury is told, in effect, that, if they find against the rescission of the sale and cancellation of notes, and if, nevertheless, they find all the facts supposed and presented for their determination in paragraph 3 (wherein the issue of verbal guarantee was submitted as a ground for rescission), and further find that, by reason of such guaranty and nonfulfillment of guaranty, if any, and of the sale of the land under such guaranty, the defendant sustained any of the injuries or losses complained of in his answer and cross-action, then to find in favor of defendant for such damages as would reasonably compensate him for the injuries or losses sustained by him, in which they may include only the difference in value of the land with

well thereon, if of the character verbally guaranteed, and its actual value, with interest thereon at 6 per cent. per annum from date of contract until time of trial. It was the intention of the court by this paragraph to submit the issue of damages for breach of the verbal guaranty, in the event that, under paragraph 4, the jury found that defendant had lost his right of rescission.

[10] Appellants, by assignment No. 27, object to the charge as a whole, on the ground that it permits the jury to determine whether to rescind the contract or recover damages. So far as the issue of breach of the guaranty is concerned, we have already held that it would not entitle defendant to rescind had it been made a part of the deed. As to the issue of fraud, we need only say that cases frequently arise in which the question whether the party complaining of fraud has repudiated within a reasonable time after discovery of the fraud becomes a question of fact to be determined by a jury, and in such cases the court submits the question whether the facts are such as to show that the remedy of rescission has been lost. *Railway v. Cade*, 100 Tex. 37, 94 S. W. 219; *Railway v. Jowers*, 110 S. W. 948.

[11] The court took the view that this case contained such an issue, and it does not appear that appellants challenged the sufficiency of the evidence to raise such issue by asking any peremptory instruction to find against defendant as to his plea for rescission. We therefore cannot sustain said assignment, which, in a general manner, complains of the charge without questioning the sufficiency of the evidence to raise the issues submitted.

[12] Paragraph 6 is attacked on the ground that it submits an erroneous measure of damages; appellant contending that the measure of damages is the difference between the consideration given for the land and the value of the land, citing *George v. Hesse*, 100 Tex. 44, 98 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456. The rule laid down in that case applies to fraud cases, and not to those for breach of a warranty.

[13] In this case the court failed to submit any measure of damages for fraudulent representations, to be applied if defendant had delayed for an unreasonable time in complaining, or had recognized and approved the sale after knowledge of the fraud, and therefore lost his right of rescission under paragraph 4 of the court's charge. Appellant complains of this omission in the proposition under the seventeenth assignment, but, as the jury found for rescission, we would not reverse the judgment if this was the only error complained of.

[14] Paragraph 5 of the court's charge permits a recovery for all expenditures pleaded by defendant in the event the jury finds defendant entitled to a rescission, and fails to limit the recovery to such items as were in-



curred prior to the discovery of the fraud. This is erroneous. Defendant cannot, after repudiating his purchase, continue to improve the place and recover for such improvements. In his answer, defendant failed to itemize his expenditures by stating when and to whom they were paid. Special exceptions were directed by plaintiffs at the answer on this account, which should have been sustained. Assignment No. 3 complains of such ruling, but we do not think it is briefed so as to merit consideration, and only pass upon same because the case will be reversed on other grounds.

The special charge complained of in the twentieth assignment was erroneous, as pointed out, but we think the jury, in view of the general charge, and of expressions contained in the special charge, were not misled thereby to believe that representations, though true, could be the basis for fraud. The assignment is overruled.

[15] By assignment 42 complaint is made of the court's refusal to permit plaintiffs to prove their general reputation for honesty and fair dealing. Our courts have been very liberal in permitting testimony of general reputation for truth and veracity, where an attack has been made upon parties by showing contradictory statements made by them or by testimony of circumstances constituting an attack upon their credibility. See *Houston Electric Co. v. Faroux*, 125 S. W. 922, and cases therein cited. It has also been held by this court that, where a party is charged with fraud in procuring an insurance policy upon which he brought suit, and with procuring the property to be burned, his character for truth, honesty, and fair dealing was directly assailed, and it was competent for him to prove that his general reputation for truth, honesty, and fair dealing was good. *Fire Ass'n of Philadelphia v. Jones*, 40 S. W. 44. Testimony that a boy's reputation for honesty was good was held admissible in a case where he was charged with embezzlement. *Largeant v. Beard*, 53 S. W. 90. See, also, *Word v. Houston Oil Co.*, 144 S. W. 334; *Cudlipp v. Cummings Export Co.*, 149 S. W. 447. In the case of *Roach v. Crume*, 41 S. W. 86, it was held, however, that a defendant sued upon a claim that he held land in trust, and who testified he was the sole owner thereof, could not prove his good reputation for honesty and fair dealing. Our courts have been more liberal in permitting such evidence than the weight of authority appears to warrant. See *Chamberlayne on the Modern Law of Evidence*, §§ 3273, 3281, 3282. We are unwilling to extend the doctrine further, and to apply it in a case where fraud is charged, especially where such charge is not based upon circumstances from which different inferences might be drawn, but it is to be determined by virtue of the credit to be given to the testimony of the

witnesses as to whether or not certain statements were made, and whether or not they were true or false. If the party charged with making false representations, even though it is charged that same were made knowingly, can be permitted to strengthen his testimony by proof of his good reputation for honesty, it appears reasonable that the other party, who is sought to be put in the attitude of seeking to unjustly mulct his opponent in damages to which he is bound to know he is not entitled, should also be permitted to bolster his testimony by proof of his good reputation for honesty. Thus a large number of witnesses would be called, and the controversy resolved into one to determine which could establish the best reputation. We overrule the assignment. *Chamberlayne Mod. Law of Ev. § 3282; Greenleaf on Ev. § 54; Underhill on Ev. § 10.*

The seventh assignment is sustained. The error, however, is one which would not require a reversal.

[16] The thirty-ninth assignment is sustained. The admission made by appellee for the purpose of being permitted to open and close the case was not sufficient. It was not made in the language of rule 31 for the district and county courts, but was carefully limited to an admission of the execution of the notes and liability thereon. Appellee contends no reservation was made, but the very expression he cites in support of his contention, which expression occurs near the end of the admission, is qualified by a reference to the cause of action therein before set out which related merely to the notes. All question of the execution and delivery of the deed, containing the reservation of the vendor's lien, is carefully avoided. It appears that appellee deemed it unwise to admit the truth of the allegation with respect to the execution of the deed, which constituted a portion of the contract sued upon by appellants, and therefore it was still incumbent upon appellants to make such proof in order to establish their cause of action as claimed in their petition. If there be one affirmative fact important to a recovery by plaintiffs not admitted by defendant, plaintiff has the right to open and conclude. *Steed v. Petty*, 65 Tex. 490; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663; *Dry Goods Co. v. Bank*, 31 Tex. Civ. App. 238, 71 S. W. 604; *Taylor v. Reynolds*, 47 Tex. Civ. App. 344, 105 S. W. 65; *Meade v. Logan*, 110 S. W. 188; *Cockrell v. Ellison*, 137 S. W. 150; *Ins. Co. v. Baker*, 10 Tex. Civ. App. 525, 31 S. W. 1072; *Berry Bros. v. Fairbanks, Morse & Co.*, 51 Tex. Civ. App. 561, 112 S. W. 429; *Smith v. Bank*, 74 Tex. 541, 12 S. W. 221.

Assignments 6, 8, 9, 10, 21, 22, 25, 30, 31, and 32 are overruled.

The assignments not hereinbefore disposed of will not be considered because not sufficient or not briefed in accordance with the

rules. Most of them relate to matters already discussed, while others relate to questions which will not arise upon another trial.

The judgment is reversed, and the cause remanded.

CARL, J., being of counsel, did not sit in this cause.

#### WATSON v. RICE. (No. 514.)

(Court of Civil Appeals of Texas. Amarillo.  
March 14, 1914. Rehearing Denied  
April 25, 1914.)

#### 1. APPEAL AND ERROR (§ 1051\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR—RULINGS ON EVIDENCE.

Where facts are proved without objection, the admission of improper testimony to prove the same facts cannot form the basis for an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 2. APPEAL AND ERROR (§ 882\*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE—OBJECTIONS—WAIVER.

A party who did not object to evidence establishing a fact, and who requested the court to submit a special charge on the point, thereby waived error, if any, in admitting, over his objection, testimony establishing the same fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 3. EVIDENCE (§ 419\*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS—CONSIDERATION.

Parol evidence to show the real consideration for a contract is admissible, though contradicting the recited consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

#### 4. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.

Parol evidence of the terms and conditions on which a negotiable instrument has been delivered to the payee and of the understanding between the parties is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

#### 5. EVIDENCE (§ 444\*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.

A buyer of an interest in a machine, who seeks to recover from the seller the sum paid to bona fide indorsees of purchase-money notes, may prove by parol the agreement under which the notes were given and show that the seller orally agreed to return the notes if the buyer within 90 days expressed dissatisfaction with his purchase.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

#### 6. SALES (§ 126\*)—CONTRACTS—CONSTRUCTION.

Where a contract of sale stipulated that, if the buyer was not satisfied with the transaction at the expiration of 90 days, the seller would repay the buyer the cash paid, and return the notes given for the balance, the buyer was not required to call on the seller for a repayment and a return of the notes before the expiration of the 90 days, provided he became dissatisfied and determined to do so before the expiration of the 90 days.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.\*]

#### 7. TRIAL (§ 192\*)—INSTRUCTIONS—ASSUMPTION OF FACT.

The court in its instructions may assume a fact established by uncontradicted evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

#### 8. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered under proper instructions, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 9. TRIAL (§ 296\*)—INSTRUCTIONS—SUBMITTING ISSUES.

Where the entire charge fairly submits plaintiff's case and the facts set up in defense, a charge submitting plaintiff's case is not objectionable as taking defendant's contention from the jury and emphasizing the contention of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

#### 10. SALES (§ 126\*)—CONTRACTS—CONSTRUCTION—RIGHTS OF BUYER.

Where a contract of sale gave the buyer a specified time in which to express his dissatisfaction, and provided that thereupon the seller would refund the cash paid and return the purchase-money notes, the buyer was not required to express his dissatisfaction before the specified time, though he acquired, before that time, knowledge of the facts entitling him to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by W. M. Rice against H. D. Watson. From a judgment for plaintiff, defendant appeals. Affirmed.

Synnott & Underwood, of Amarillo, for appellant. Madden, Trulove & Kimbrough, of Amarillo, for appellee.

HALL, J. This is an appeal from the district court of Potter county, and we quote from appellant's statement of the nature and result of the suit as follows: "This was a suit for damages for breach of an alleged contract to redeliver notes of the plaintiff. The plaintiff Rice had executed notes to the defendant Watson, aggregating \$825, and paid the defendant \$185 in cash, and the defendant negotiated the notes. This suit was brought to recover \$185 in cash and the amounts of the notes which plaintiff had to pay by reason of their having been transferred to an innocent purchaser, and he based his cause of action upon an alleged agreement, at the time the notes were executed and the cash paid, by which he claimed the defendant Watson agreed to redeliver the notes to him when the first one became due and repay his cash if the plaintiff Rice was dissatisfied with the transaction and desired the notes returned and the cash repaid." The case was tried before a jury, resulting in a verdict in favor of the plaintiff Rice for the sum of \$1,276.52, and judgment was entered accordingly.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The substance of plaintiff's amended petition is: That on or about April 20, 1909, the defendant Watson was promoting the sale of machinery and a patent right for making concrete building blocks under what is known as the Ferguson system, and that defendant had procured 14 other parties to sign a certain agreement in writing by which said parties agreed to pay defendant \$15,000 for one of the machines for making such blocks, and a certain royalty on all blocks manufactured by them. That thereupon defendant presented such contract to plaintiff and requested him to execute the same as the fifteenth man and pay plaintiff \$185 in cash and execute three notes at \$275 each, due in 90 days, 6 months, and 9 months, respectively. The plaintiff alleges that he repeatedly refused to pay such cash or sign the agreement or to execute the notes; that, in order to induce him to do so, defendant represented to plaintiff that this machine would produce a better building material than would brick and produce it much cheaper than brick, and proposed to plaintiff that, if he would execute the papers and notes and pay the cash, then, in the event plaintiff was not satisfied with the transaction at the time the first note matured, defendant would repay plaintiff such cash, with interest, and return to plaintiff his notes; that, relying upon such promise to return the notes and repay the cash, he executed contract and notes and paid \$185; that the 90 days intervening between the date of the execution of the papers and the maturity of the first note was given to plaintiff as the time in which he should investigate the merits of the block machines and the material produced thereby and determine whether or not he was satisfied with the same and whether or not he would demand the return of the notes and the repayment of the money. He alleges further that the defendant Watson fraudulently represented the merits of the machine and material produced thereby, and that all of his representations in regard thereto were false; that plaintiff was induced thereby, and by the promise to repay his money and return his notes within 90 days, to consummate the deal; that during the 90 days plaintiff expressed his dissatisfaction and elected to have the notes and money returned to him; that the defendant sold and transferred the notes to a bona fide purchaser; and that plaintiff had been required to pay them. There was prayer for the principal sum of \$1,000, with interest and attorneys' fees provided for in the notes.

The substance of the defendant's pleading is that the machines and the building material produced by them in all things complied with the representations made by defendant; that the citizens subscribing thereto appointed a committee, of which plaintiff was a member, to test the machine and its products, which was done, and thereafter plaintiff executed said notes and paid the \$185; that, at

the time said notes were executed and the money paid by plaintiff, defendant was not present and acting and did not make any representations whatever; that the entire contract was evidenced by the writings contained in the original contract and notes; that, if there was any agreement to release plaintiff from his obligations, the agreement of all the parties was subsequently reduced to writing, and defendant had no notice and knowledge that plaintiff was relying upon any such agreement; that after plaintiff had made another investigation of the machine, and visited various cities for this purpose, and was fully in possession of all the facts, the defendant offered to release him from all obligations and surrender to him his notes, which proposal plaintiff refused to accept, thereby ratifying the contract and estopping himself from this suit; that, long after the alleged agreement to release plaintiff, the unconditional promissory negotiable notes were executed; and that thereafter plaintiff assisted in securing a charter for the company, became its general manager and one of the directors, and continued to be such manager and director until long after the maturity of said first note, by reason of which plaintiff was estopped.

[1] A number of assignments of error were grouped by appellant, urging the general proposition that the parol evidence tending to prove an agreement on the part of Watson to return the notes and money, if appellee should become dissatisfied within 90 days, tends to contradict and vary the terms of the written contract, consisting of the subscription contract and the notes in question, and was inadmissible. The record shows that this evidence was objected to when the appellee Rice was upon the stand, but the witness J. W. Crudgington testified to the same facts without objection on the part of appellant. The testimony, having been admitted, even if improperly done, cannot form the basis for an assignment, if the same facts are deduced from another witness without objection.

[2] Several special charges were asked by the appellant covering this issue, and, if the position of appellant was tenable otherwise, we think it has been waived by not objecting to the testimony from Crudgington and by requesting the court to submit special charges upon the point. And, even if the matter was properly before the court for consideration, we doubt if the appellant's contention could be sustained.

[3-5] This is not a suit by the holder of the notes themselves, because appellee Rice has paid them, and his petition has the double aspect of suing for the recovery of his money, based upon the verbal agreement to return the money and notes within 90 days in the event he should become dissatisfied, and also an action for fraud and deceit by reason of false representations alleged to have been made by appellant with reference to the mer-

its of the machine and the value of its products for building purposes. The evidence tends to show that Rice was the last man who consented to enter into the contract for the purchase of the machines, and that he was induced to enter into it by the promise on the part of appellant to return him his money, with 10 per cent. interest, and his notes, if he should become dissatisfied within the 90 days. The contention on the part of appellee is that such promise was part of the consideration for the execution of the notes and subscription contract; and it is well established in this state that parol evidence is admissible to establish the real consideration for a contract, although it may tend to vary or contradict the recited consideration; and it has further been frequently held that parol testimony is admissible to show the terms and conditions upon which a written instrument and even negotiable instruments have been delivered to the payee, and to show the entire understanding and agreement between the parties. Under this rule it has been held that where one signed a contract, agreeing to take a certain amount of street car advertising from another at a given rate, and delivered it to the latter's agent, the former could show, in an action on the contract, that the real contract was an oral agreement for a less amount at a lower rate, and that he signed the written contract so that his order might be shown to other prospective customers, without disclosing that he had been given a lower rate. *Southern, etc., Ad. Co. v. Metropolis S. M. Co.*, 91 Md. 61, 46 Atl. 513.

If Watson had sued upon the notes it is clear that the appellee could have pleaded failure of consideration and interposed the defense that the machine did not fulfill the warranty; and, in our opinion, the appellee's position is not altered for the worse because he has been forced to pay off the notes and now seeks to recover, basing his action upon fraudulent representations and the agreement above set out. It is held that, if the writing is invalid so that it never had any legal effect, the rule denying the admission of parol evidence has no application, and likewise where its validity is questioned on the ground of fraud. 2 Elliott on Contracts, § 1629. The author quoted further says: "The question usually is as to whether the parol evidence sought to be introduced contradicts or alters the written contract or leaves it to stand unchanged and simply tends to establish an additional collateral agreement. It is often difficult to determine this question, and there is much conflict among the authorities. The form in which the question arises may sometimes be an important factor in determining the admissibility of the evidence, and, referring to leases, it is said that a part of the conflict in the decisions may be explained if we observe that it is one question whether such a collateral agreement may be proved for the purpose of sustaining an action for

its breach and a different question whether it may be proved for the purpose of defeating an action on the written lease." Another writer suggests the following test for determining whether a parol agreement is collaterally admissible: If it interferes with the writing it cannot be proved. If, on the other hand, it relates to a matter beyond the scope of the written contract, the writing does not affect it. In each case it must be determined from the character of the writing and from the circumstances of the case whether the parol agreement offered to be proved was in regard to a matter which it is reasonable to infer the parties thought settled by the terms of the writing and, if it was, evidence to show it should be excluded. The writing must speak just so far as it is fair to conclude that the parties, acting as reasonable men, and using intelligible language, intended it should speak, and no further. *Id.* § 1633. "There is also a class of cases in which it is held that parol evidence of a collateral contemporaneous agreement, which assumes the contract as indicated by the writing and undertakes to deal with some contingency or new relation of the parties in the future, that may arise under the written agreement, is admissible." *Id.* § 1634. "The general rule which excludes parol evidence, when offered to contradict or vary the terms, provisions, or legal effects of a written instrument, is subject to many qualifications. Among these qualifications is one to the effect that conditions relating to conditions precedent may be shown by extrinsic evidence. A party who concedes that the instrument evidencing the contract was placed in the possession of the party seeking relief, but claims that the latter took it with the understanding that it was not to go into effect until the happening of some other or further event, and that such event has not transpired, is not considered as one seeking to vary or contradict a written contract, but is one endeavoring to show that no contract between the parties ever in fact came into existence. For this reason evidence of such conditions precedent is held admissible. The cases which so hold merely give recognition to the well-settled rule that an instrument may be delivered by one party to another to take effect on the happening of a contingency, and that, by such collateral agreement, the legal operation of the writing is merely postponed until the happening of the contingency." *Id.* § 1636. We think the court did not err in admitting the testimony and in overruling the exceptions and submitting the question to the jury. *Merchants' National Bank v. McAnnulty*, 31 S. W. 1091; *Id.*, 89 Tex. 124, 33 S. W. 963; *Downey v. Hatter*, 48 S. W. 32; *Pope v. Talliaferro*, 115 S. W. 309; *Mfg. Co. v. Powell*, 78 Tex. 53, 14 S. W. 245; *I. & G. N. Ry. Co. v. Dawson*, 62 Tex. 262.

[8] The appellee's allegation was that, if the plaintiff was not satisfied with his con-

tract at the time of the maturity of the first note, then the appellant would relieve him of his obligation and refund the cash payment and return the notes. The proof sustained this allegation. Under this state of the pleadings and evidence, it was not necessary for the appellee to call upon appellant for a return of the notes and repayment of the money prior to the expiration of the 90 days, provided he became dissatisfied and determined to do so before the expiration of said time. The evidence tends to show that, at the time the first note matured, Watson was not in the state, and it further shows that, notwithstanding his agreement, he had transferred the notes to the bank at Shattuck, Okl., within seven days from the date of their execution. In our opinion the court's charge is not subject to the criticism urged in the thirty-fifth, forty-seventh, fifty-third, and fifty-ninth assignments of error.

[7] The thirty-sixth and thirty-seventh assignments of error complain of this portion of the third paragraph of the charge that if the jury "find from the evidence that defendant, soon after the execution of said three notes, negotiated or transferred said notes to an innocent purchaser before maturity of the first note, thereby placing them beyond his control, and that plaintiff was compelled to pay said notes," etc., and insists that it assumes that the notes were placed beyond the control of the appellant. The uncontroverted evidence shows that appellant sold the notes to an Oklahoma bank, which bank in turn sold them to an Amarillo bank for value before their maturity, and without notice of any infirmity existing in them. It is not error for the court in its charge to assume the truth of uncontroverted evidence.

[8] Under the fortieth, forty-first, and sixty-first assignments of error, appellant complains that the court instructed the jury not to consider the question of defendant's tender to cancel their agreement. If there was error in this charge, it was in assuming that the defendant Watson had made a tender. The evidence fails to show that any such tender as the law requires was made by him at that time, and we think, under the agreement, Rice had the full time stipulated in which to decide whether he would retain his stock or demand a rescission of his subscription. The question of Rice's knowledge of the conditions and of the truth or falsity of the representations which had been made was properly submitted by the court under conflicting evidence, and has been settled by the verdict of the jury. We think the court correctly refused the instruction requested by appellant upon this issue.

[9] Under the forty-fifth and fiftieth as-

signments of error appellant insists that the court erred in the fifth and seventh paragraphs of his general charge, wherein the jury are instructed that if they believe the machines and the materials and the process in manufacturing fail to produce the concrete cement blocks of the class, character, value, durability, and costs of producing, substantially as represented by the defendant and as alleged by plaintiff, and that the failure, if any, to make such blocks was due to unskillfulness in the operation of said machine and preparation of the material, to find for the defendant. The charge is criticised because it takes the defendant's contention from the jury and emphasizes the plaintiff's contention. If we read the entire charge, we find that the court has fairly submitted the plaintiff's case, as well as the facts set up in defense by the defendant upon this question. These assignments are overruled.

[10] The remaining assignments, which relate to the question of ratification and the sufficiency of the charge in other respects, are overruled. The evidence does not show conclusively that appellee was thoroughly cognizant of the defects and shortcomings prior to the expiration of the 90 days. The express terms of the contract gave him a specific time in which to express his dissatisfaction, and to hold that he should have expressed it sooner, even though he had come into full knowledge of all the facts and circumstances entitling him to rescind, would be to make a new contract for the parties.

The evidence admitted by the court and complained of by the eleventh and nineteenth assignments of error should not have been permitted; but, since the same facts were elicited without objection from other witnesses and at other times during the trial, the error is harmless. The evidence of appellee, to the effect that he had observed certain publications bearing on cement as a building material, and had found no reference in them to the Ferguson system, was properly admitted in rebuttal to the evidence of defendant's witness James Barron.

The last three assignments, submitted together, go to the sufficiency of the evidence to support the verdict and the judgment. The evidence, taken as a whole, while sharply conflicting upon the main issues, is sufficient to sustain both theories of the case insisted upon by plaintiff in the court below.

Upon a review of the entire record, we believe a proper verdict and judgment has been rendered, and such matters as may be deemed irregularities in the conduct of the trial have not affected the determination of the case upon its merits.

We therefore affirm the judgment.

**CALDWELL v. STALCUP et al.** (No. 587.)  
(Court of Civil Appeals of Texas. Amarillo.  
March 28, 1914. On Motion for Re-  
hearing, April 25, 1914.)

**1. CONTRACTS (§ 5\*)—CONSTRUCTIVE CONTRACT  
—ATTORNEY'S FEES.**

A bank to which notes were indorsed agreed with plaintiff, an attorney, that he should sue on the notes and have for his services the 10 per cent. attorney's fees stipulated therein, and the bank afterwards transferred the notes pending the suit thereon under an agreement that the transferee should carry out the agreement with plaintiff, who agreed to look to the transferee for payment for his services. The notes were afterwards transferred to defendant, who became a party to the suit; but, before he became a party thereto, he knew that plaintiff had sued on the notes, and of the agreement under which he did so. Defendant procured another attorney to intervene in the suit for him before judgment was rendered, agreeing to credit him with \$50 for his services, and the judgment was taken in defendant's name, instead of in the name of the bank. *Held*, that defendant was bound, as on a constructive or quasi contract, to pay to plaintiff the attorney's fees recovered, after allowing defendant a credit for the \$50 paid by him to the other attorney.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 7; Dec. Dig. § 5.\*]

On Motion for Rehearing.

**2. ASSIGNMENTS (§ 48\*)—EQUITABLE ASSIGN-  
MENT.**

An agreement between plaintiff, an attorney, and the owners of notes by which plaintiff was authorized to bring suit on the notes in consideration of the 10 per cent. attorney's fees stipulated for therein operated as an equitable assignment of such attorney's fees to plaintiff.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 133; Dec. Dig. § 48.\*]

Appeal from Potter County Court; W. M. Jeter, Judge.

Action by R. E. Stalcup against E. W. Caldwell and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

J. H. H. Stahl, of Stratford, and Synnot & Underwood, of Amarillo, for appellants. Cooper, Merrill & Lumpkin and Reeder & Dooley, all of Amarillo, and M. Cammack, of Stratford, for appellees.

**HUFF, C. J.** R. E. Stalcup brought suit in the justice court against National Bank of Commerce, the First National Bank of Stratford, and E. W. Caldwell, for services rendered under a contract in the case of National Bank of Commerce v. W. T. Dortch, in the district court of Sherman county, Tex., on a fee for such services, \$211.40, with a credit of \$50, leaving balance due of \$161.40. The case was tried in the justice court, in which judgment was rendered, and, from that judgment, appealed to the county court, in which last court judgment was rendered in favor of R. E. Stalcup for the amount sued for against the First National Bank of Stratford and E. W. Caldwell, and, in case the bank should pay the judgment, then in its

favor over against E. W. Caldwell for the amount so paid, and in favor of the National Bank of Commerce from which judgment E. W. Caldwell appeals.

The facts show that T. D. Lipscomb sold to W. T. Dortch a tract of land, and as part consideration took three notes for the sum of \$800 each. One of these notes was transferred to Galbraith-Foxworth Company, which company placed that note in the hands of R. E. Stalcup as an attorney to bring suit, which he did. Lipscomb was indebted to the National Bank of Commerce of Amarillo in the sum of \$1,500, and as security he transferred the other two notes for \$800 each to said bank as collateral security. After the indebtedness of Lipscomb fell due, and the two notes of \$800 each held by it were due, that bank delivered the two notes to R. E. Stalcup, the attorney and appellee herein, for the purpose of suit, which he brought. The agreement with the bank and Stalcup was that he should have the 10 per cent. stipulated for the notes. Afterwards the two suits, one of Galbraith-Foxworth against Dortch and the Bank of Commerce against Dortch, were consolidated and finally prosecuted to judgment, which was rendered in 1913, including the attorney's fees on all the notes. However, previous to judgment Lipscomb made arrangements with the First National Bank of Stratford to procure money with which to pay off the note held by the Bank of Commerce, under an agreement that the Stratford bank should take the collateral notes and suit and hold as collateral to the obligation to it by Lipscomb. The Bank of Commerce consented to so transfer the note on condition that the Stratford bank should become liable for the attorney's fees therein, and should carry out its agreement with Stalcup, and that Stalcup would release it from further liability on its contract with him. The Stratford bank assented to this, and Stalcup agreed to look to the Stratford bank. It appears, also, that service had not been obtained in the suit on file, and it was continued for the purpose of service, and by agreement of parties thereto that the cases should be consolidated. It appears that Lipscomb was also indebted to E. W. Caldwell for some amount not shown by the record, and that Caldwell agreed to take the notes and as part payment therefor credit Lipscomb's account with same, and that he should pay the difference between the account and the value of the notes, which he did, and that money was paid into the Stratford bank on Lipscomb's indebtedness, and that bank turned over to Lipscomb the two notes; Lipscomb agreeing to protect Stalcup in his attorney's fees. Caldwell's testimony is to the effect that at that time he had no notice that suit had been instituted on these two notes. Both notes were past due at the time Caldwell procured them. The evidence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is sufficient to warrant the court in finding that, before Caldwell made himself a party to the suit then pending, he knew that Stalcup had charge of these notes and had sued thereon. Caldwell's testimony shows that he employed one Rudolph, who was an attorney, and who was indebted to him, for the sum of \$50, to intervene in the suit then pending in his behalf, and that Rudolph should have credit on his account with Caldwell for that amount. Rudolph, before judgment was rendered, appeared for Caldwell and intervened in the suit. Stalcup agreed with Rudolph that he would give Rudolph \$50, or credit his fee with \$50, the amount Rudolph was to receive, and the judgment was then taken in the name of E. W. Caldwell, instead of the Bank of Commerce, foreclosing for the amount sued for, together with attorney's fees on the land. The testimony is sufficient to show that Stalcup never in fact relinquished the control and possession of the notes, and that the Bank of Commerce and the Stratford bank and Lipscomb recognized his right to control these notes.

[1] Under the facts of this case, we think that the agreement entered into between the Bank of Commerce and Stalcup had the effect to transfer him 10 per cent. of the principal and interest due on the notes as attorney's fees. Suit was brought and prosecuted to judgment under that agreement. The Stratford bank took an assignment of the note and suit with the express agreement that the 10 per cent. should be paid to Stalcup as his compensation. Lipscomb procured the notes retransferred to him under the same agreement. The suit thereon remained on the docket under all the transfers. Caldwell purchased the notes, he says, without actual notice of the suit, but after they were due. The evidence is sufficient to support the finding of the court that long before judgment was obtained he recognized Stalcup as an attorney in the case. Thereafter he had himself made a party to that suit, and a judgment was taken in his name, instead of the name of the National Bank of Commerce, in whose name it had been prosecuted up to that time. Under that suit Caldwell procured judgment for the 10 per cent. as attorney's fees. These fees, by agreement, and under the service rendered, belonged to Stalcup, and unless, upon some equitable ground, Caldwell is released, he should have paid them over to Stalcup. The Supreme Court has held that a provision of the kind set out in the notes in question is in the nature of an indemnity against the cost of procuring judgment, and, unless they are shown to be unreasonable or unconscionable, the holder of the notes may recover them. *Lanier v. Jones*, 104 Tex. 247, 136 S. W. 255; *Bank v. Robinson*, 104 Tex. 166, 135 S. W. 372. Before Caldwell procured judgment he knew that Stalcup had brought the suit and was prosecuting it. Up to that time he had been out but \$50 additional as attorney's fees.

Stalcup gave his account credit for that amount so, if he had no notice of the agreement when he purchased the notes, or when he employed an attorney, he was put upon notice that another attorney had been employed to procure the judgment upon these notes before he took the judgment for the full amount of the stipulated attorney's fees as his indemnity, when his costs were in fact only \$50. This was a fund to which the two banks looked to pay the attorney's fees, and was the fund for which Stalcup agreed to do the work. We think equity and right is satisfied when Caldwell gets credit for the \$50 paid, and that it would not be just for him to appropriate the remainder to his use and leave the Stratford bank to pay this obligation out of some other fund than these fees. Caldwell having appropriated the funds to his use, which, by agreement with parties who then had the right to make the same, belonged to Stalcup, he should be held to pay the Stratford bank in case it has to pay Stalcup. We think this is a constructive or quasi contract (*Simpkins on Contracts* [3d Ed.] 471) which the law will impose on Caldwell in order that full justice may be done by all parties.

We believe the trial court has correctly decided this case, and it will therefore be affirmed.

#### On Motion for Rehearing.

In view of appellant's motion for rehearing, we make the following additional finding of fact:

Stalcup testified: "Mr. Galbraith, for the bank, at the time the notes were placed with me, and later Mr. Bynum, in person, contracted to pay me the 10 per cent. provided in said notes as attorney's fees for making the collection."

Mr. Bynum, cashier of the National Bank of Commerce, testified: "We agreed to pay Judge Stalcup the 10 per cent. stipulated in the notes as his fees in the matter. We promised to pay Judge Stalcup the 10 per cent. of the notes for his fees; but the First National Bank of Stratford agreed to take our place, and Mr. Stalcup agreed to it, and to look to the Stratford bank for his fees."

The cashier of the First National Bank of Stratford testified: "Our bank agreed with the National Bank of Commerce that we would assume their contract with Stalcup. Lipscomb had agreed all along that he would pay these fees as he was the person in real interest. I was willing that the attorney's fees should be paid out of the proceeds of the foreclosure, and it was my understanding that the fees were to be paid after the foreclosure was consummated."

[2] We think, under the agreement of the parties, that Stalcup, as an attorney for the collection of the notes in question, was in effect an equitable assignment of the amount due the attorney for such service. *Milmo National Bank v. Convery*, 8 Tex. Civ. App.

181, 27 S. W. 822. Caldwell, by virtue of this suit and the services rendered by Stalcup, in obtaining the judgment, secured 10 per cent. on the amount of the notes, which otherwise he was not entitled to, and which he did not pay for when he purchased the notes. This 10 per cent. was Stalcup's under the contract, and any sort of diligence or inquiry on the part of Caldwell, when he purchased these notes, would have given him notice of this assignment. We think the case was properly disposed of, and the motion is therefore overruled.

### BIRD v. LESTER et al. (No. 576.)

(Court of Civil Appeals of Texas. Amarillo.  
March 14, 1914. Rehearing Denied  
April 25, 1914.)

#### 1. HUSBAND AND WIFE (§ 119\*)—CONVEYANCES—SEPARATE ESTATE.

A conveyance by a husband to his wife by a deed reciting a valuable consideration and duly recorded vested title in the wife as her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 424-429, 447; Dec. Dig. § 119.\*]

#### 2. SPECIFIC PERFORMANCE (§ 116½\*)—PROCEEDINGS—PLEADING—PETITION.

A petition for specific performance and for damages if specific performance is impossible, which showed on its face that the vendor did not own the land at the time he contracted to sell, was subject to general demurrer as to the portion seeking specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 376; Dec. Dig. § 116½.\*]

#### 3. VENDOR AND PURCHASER (§ 349\*)—CONTRACT—BREACH BY VENDOR—DAMAGES RECOVERABLE—PURCHASER.

A petition seeking damages to the amount of the difference between the contract price and market value, for failure to convey land that defendant did not own when he contracted to sell it, which did not allege fraud or a willful refusal to convey, was subject to general demurrer, as plaintiff was not entitled to recover such damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039-1042; Dec. Dig. § 349.\*]

Error to District Court, Garza County; W. R. Spencer, Judge.

Action by J. A. Bird against J. P. Lester and others. From a judgment on demurrer for defendants, plaintiff brings error. Affirmed.

See, also, 163 S. W. 658.

R. N. Grisham, of Sweetwater, for plaintiff in error. J. D. Martin, of Alpine, and Higgins & Hamilton, of Snyder, for defendants in error.

HALL, J. The plaintiff in error instituted this suit in the district court of Garza county, against defendants in error, J. P. Lester and wife, Loula Lester, and their vendees, H. G. Smith and J. P. Crowley. The petition contains three counts. In the first count plaintiff in error seeks specific performance of a certain contract executed in the name

of J. P. Lester, in which the name of Loula Lester was signed "by J. P. Lester," and reciting that the said Lester had executed a deed of conveyance to a certain section of land described in the contract for and in consideration of the sum of \$2,500, paid to the said Lester by the said Bird, as follows: "That whenever the above deed is duly executed and signed by the wife of the party of the first part and returned to the first National Bank of Post City, Texas, the said J. A. Bird, party of the second part, is to pay over to the said bank, for the benefit and credit of the said J. P. Lester, \$1,000 in cash and receive from the said bank the above-mentioned deed and the remaining \$1,500 to be paid to the said J. P. Lester by the said J. A. Bird, in mares to be delivered at Roswell, New Mexico, on the first day of April, 1913, the same being fifteen mares at \$100.00 each, aggregating and making the \$1,500 above stated; and it is hereby agreed by both parties hereto that the said mares are to be cut out of a herd of mares owned by the said J. A. Bird, now located in New Mexico, by C. A. Buchanan, and the said J. P. Lester does hereby agree to accept the cut by the said Buchanan as above stated." There are stipulations in the contract which we do not deem it necessary to set out. The second count of plaintiff's petition seeks to recover damages in the event specific performance cannot be decreed. The third count is confusing, and we are not sure what relief plaintiff seeks other than the return of the deed which Lester had signed and which it is alleged was delivered to Lester for the purpose of procuring the signature of his wife thereto, and in the alternative for damages by reason of the failure to return the deed. It is shown in the petition that, after the execution of the contract, Lester and wife conveyed the land in question to H. G. Smith and J. P. Crowley, and both specific performance and damages is sought against them as vendees. The defendants filed general demurrers, which were sustained by the court, and plaintiff's assignments of error are based upon this action of the trial court.

[1, 2] Plaintiff's petition shows that J. P. Lester, prior to the time the contract of sale sued upon was entered into, had conveyed the property to his wife, Loula Lester, by deed reciting a valuable consideration and duly recorded in the deed records of Garza county. The effect of this conveyance was to vest title to the section of land in Mrs. Lester as her separate property. Emery et al. v. Barfield, 156 S. W. 311; Jones v. Humphreys, 39 Tex. Civ. App. 644, 88 S. W. 403; Watts v. Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258; Hardin v. Jones, 29 Tex. Civ. App. 350, 68 S. W. 836. It thus appearing from the face of the petition that J. P. Lester did not own the property at the time he entered into the contract of sale, that portion of the petition seeking specific perform-



ance was subject to general demurrer. *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120; *Sutton v. Page*, 4 Tex. 142; *Vaughn v. Farmers' & Merchants' National Bank*, 126 S. W. 690; *Hall v. York's Adm'r*, 22 Tex. 642.

[3] The second count of the petition seeking damages alleges the damages suffered by plaintiff to be the difference between the market value or intrinsic value of the land and the contract price declared to be \$3,900. There is no allegation of fraud or willful refusal on the part of Lester to convey the property, and plaintiff is clearly not entitled to recover such damages. *Clifton v. Charles*, supra; *Stinson v. Sneed*, 163 S. W. 989 (decided by this court, not yet officially reported). No such special damages as plaintiff would be entitled to recover under the authority of *Clifton v. Charles*, supra, and kindred authorities, were pleaded or prayed for by plaintiff.

We think the trial court did not err in sustaining the general demurrers, and the judgment is affirmed.

#### DUBLIN ELECTRIC & GAS CO. v. THOMPSON. (No. 7914.)

(Court of Civil Appeals of Texas. Ft. Worth. April 11, 1914.)

##### 1. WATERS AND WATER COURSES (§ 206\*)—WATER COMPANIES—CONTRACTS—SUPPLYING WATER—SUFFICIENCY OF EVIDENCE.

In an action against the proprietor of a water plant, evidence held to show that when its agent told a consumer that he would be furnished water for all purposes, neither party contemplated the furnishing of water for fire protection, and hence it was not liable for its failure to furnish water for such purpose; it appearing that the city government had assumed the burden of fire protection.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 302; Dec. Dig. § 206.\*]

##### 2. WATERS AND WATER COURSES (§ 206\*)—WATER COMPANIES—SUPPLY TO PRIVATE CONSUMERS.

An individual or company authorized to do so may so contract as to incur a liability for damages proximately resulting from a failure to furnish water sufficient to extinguish fire.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.\*]

##### 3. CONTRACTS (§ 143\*)—CONSTRUCTION—MEANING OF LANGUAGE.

While as a general rule the terms of a contract are to be given their full effect and meaning, the intention of the parties governs, and their situation, the subject-matter, and other circumstances may be looked to in determining the meaning of terms, though not in themselves ambiguous, and a party will be bound by that meaning which he knew the other party supposed the words to bear.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 723, 743; Dec. Dig. § 143.\*]

Appeal from District Court, Erath County: W. J. Oxford, Judge.

Action by J. N. Thompson against the Dub-

lin Electric & Gas Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

E. E. Solomon, of Dublin, and Templeton, Beall & Williams, of Dallas, for appellant. Hickman & Bateman, of Dublin, for appellee.

CONNER, C. J. Appellee instituted this suit against the appellant to recover the sum of \$4,028, the alleged value of a house and its contents claimed to have been destroyed by fire on the 12th day of July, 1911. It was alleged in the plaintiff's petition that he was a resident of the town of Dublin and that the defendant was operating a water plant in said town; and, in substance, that the defendant through its manager and agent M. S. Karmany had for a valuable consideration, as stated in the petition, contracted "to furnish appellee all the water he wanted for all purposes at all times;" that upon the date stated his house caught fire which was discovered by the plaintiff in its incipency; and that he attached a hose to a hydrant in the yard with which he could and would have extinguished the fire had there been water, but that there was none in the pipes, by reason of which he was unable to extinguish the fire and his house and contents were totally destroyed, to his damage in the amount claimed. The defendant answered by a general denial and by special answers setting up, first, that the water service contemplated in the contract was for domestic purposes and to be in quantity suitable for such purposes only; that the defendant company was not authorized to enter into a contract for fire protection, nor was it engaged in the business of furnishing water therefor to private patrons; that the agent through whom the plaintiff alleged the contract had been made was but a local agent and wholly unauthorized to make any such contract as alleged. There were also several other special pleas not necessary to notice. The trial before a jury resulted in a verdict and judgment for the plaintiff J. N. Thompson in the sum of \$2,250, and this appeal has been prosecuted.

[1] Upon the conclusion of the testimony, the defendant requested a peremptory instruction in its favor, and the vital question in this case arises under the assignment to the action of the court in refusing this instruction. There is little or no dispute in the testimony. Substantially it is as follows: It was shown that the town of Dublin in which plaintiff's premises were located contains about 2,500 people with a city government; that the appellant company had about 355 customers on its system for the distribution of water, which was furnished through service pipes from one-half to three-fourths inches in size; that the company had a contract with the city for fire hydrants; but

that the city had nothing to do with the service pipes. The plaintiff Thompson testified upon the point in question as follows: "I had been on the flat rate all the time until some time after Karmany took charge of the plant. Don't know how long I ran without the meter after he took charge, but a good while. By the 'flat rate' I mean I just paid \$1 a month. I had hydrants on my premises. These hydrants were connected with the water mains. I put the meter on something like a year before the house burned, which was the 12th day of July, 1911. I talked with Mr. Karmany before he put the meter on. He sent a man up there to put the meter on. Before Karmany put the meter on, I had a talk with him in which conversation he said he was going to put meters on everybody. He told me that, and I told him I objected to him putting a meter on me. I said: 'I don't mind paying you for all the water I use, but don't want to pay you for measuring it to me.' What I meant by not wanting to pay him for measuring it to me was that I did not want to pay him 25 cents a month for the meter. Karmany told me that he would charge me 25 cents a month for the meter and I objected. I told him I was willing to pay him for all the water I used, but didn't think it was right for me to pay him 25 cents a month extra to furnish something to measure water to me, that I thought the company ought to furnish that, and he said he was going to put them on everybody. He said he would put the meter on and charge me 25 cents a month for the meter and 50 cents a thousand gallons for the water. Later on I told him I objected to paying him for the meter rent, and he said I would have to do it or he would cut the water off, and stated to me it was best for me to have the meter on there, and that then I could use all the water here for any purpose that I wanted to use it for; and he said: 'Don't you be uneasy about that, we will have all the water there you want to use for any purpose all the time. You can run it on the ground if you want to.' I went on and paid for the meter, paying him 25 cents a month for it, with the expectation of getting all the water I wanted to use, and that is why I did it. I think it was about 12 months after I had that talk until the fire occurred, as well as I remember."

On cross-examination plaintiff further said: "I had ordinary hydrants at my place. My hydrant was about six feet from my front door, not in front, but kinder to one side. All the hydrants were there when I went there. I had been using them to get water. I had used the water for sprinkling purposes. I had a garden hose. I had a hydrant close to the kitchen door, on the other side. The other hydrant was at the lot. I had no hydrants at all in the house except a regular bathroom hydrant in the bathroom. I went to the back hydrant, beside the kitchen door. That

was a hydrant I used for general ordinary purposes about the kitchen. I didn't use it for irrigation. I ran to the hydrant and put my hose on it. I had a 50-foot hose. I wanted to get on the building and put the fire out. I had a bucket there, but couldn't get any water. I turned the hydrant first, and thought the water would come on. I first went to the hydrant and turned it on. There was no water, and I screwed the hose on so if the water came on we could put the water on the fire and put it out. \* \* \* I don't remember what all Karmany said and what he didn't say. He sent a man up there to put in the meter. I think it was the day or the next day that I had the conversation with Karmany. It was a week or two after I talked to him that he put the meter in himself. I was at the house at the time the meter was put in. I went to tell Karmany about the meter and object to having the meter in there, and told him I wouldn't pay the rent on it, and he said, 'You will or I will cut you off from water,' and said 'It is better for you to have the meter in there, and you can use it for every purpose you want it for,' and I said, 'I want you to understand that I want the water there at all times when I want it for every purpose I want to use it for,' and he said, 'There will be plenty of water for any purpose you want to use it for. You can turn it out on the ground if you want to.' I didn't say sprinkling or stock water. I didn't have my mind on fire. I didn't know but what it was for fire. I didn't sign any written contract for a meter. I told Karmany I wouldn't pay the rent on the meter. When I had the last conversation he already had the meter in. He said he would cut me off if I didn't pay the rent. I suppose he meant to take the meter out. My mind wasn't resting on anything at all. Karmany said he would have water there for all purposes I wanted to use it for, and will state further he didn't have it there for all purposes. I said nothing about wanting the water for 24 hours, night and day. He said, 'It is better for you to have the meter, then you will have water for any purpose you want to use it for.' He said, 'At any time you want it.' \* \* \* It was some time after the house burned that it occurred to me that I had a contract with these people for fire protection."

M. S. Karmany, the local manager of the appellant company, testified that: "I told him (Thompson) we were having considerable amount of trouble in furnishing water, and my attention had been called to the fact that he was abusing the flat rate, and that it would be necessary for the company to put on the meter to protect them, and I explained the rate, that the rate would be 50 cents a thousand gallons and 25 cents on the meter, which made his meter rate \$1.25. If he used any amount over 2,000 gallons he would pay us at the rate of 50 cents a thousand on the

excess. That is the conference between myself and Mr. Thompson. I also stated that he could use his water for the purpose of sprinkling his lawns and garden or for whatever purpose he wanted to use it in the sprinkling of lawns or gardens or for domestic service and we wouldn't object to his using it on his garden or lawn or for domestic purposes. I don't recall his reply to that. I have no authority whatever to make contracts for fire protection on our service pipes. It was not in my mind at the time to do it. Whatever authority I did have I got from Mr. Stichter, the general manager. \* \* \* Beginning on the 1st of June, 1910, and for three months on, we were short on water. At nights we had to cut the valves in the mains to protect ourselves. The plaintiff never did tell me anything at any time in respect to fire protection. The first I ever heard of his making that claim was when I was advised by letter from Mr. Solomon, the 15th of this month."

We should also state that there was evidence tending to show that, on the night before the fire in question, appellee had been watering his yard, and for that purpose had attached the ordinary yard hose to the ordinary yard hydrant and left the hose attached to the hydrant during the night; that early the next morning he discovered the fire which destroyed his house soon after it began and immediately ran to the hose and attempted to turn the water on, but found none, and that had there been any water in the pipes, as was usual, he could and would have put out the fire in time to have saved his property. Regardless of the issue of whether appellant's general manager, Karmany, was authorized to make any such contract, as alleged by the plaintiff, we are of the opinion that the evidence quoted, which is substantially all there is relevant to the question, is wholly insufficient to sustain the verdict and judgment.

[2] It cannot be denied that an individual or company authorized to so do may contract so as to incur a liability for damages proximately resulting from a failure to furnish water sufficient to extinguish fires. *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.* (Civ. App.) 38 S. W. 357; *Harris & Cole Bros. v. Columbia Water & Light Co.*, 114 Tenn. 328, 85 S. W. 897. In the cases cited the contract to so furnish water was express, but in the case before us it is not so. It cannot be said that the appellant company expressly contracted to furnish water at times and in sufficient quantities to extinguish fires. The plaintiff himself testified that, at the time of the conversation and agreement upon which he relies as establishing the contract alleged, the word "fire" was not used, nor did he have his mind on that subject. To the same effect was the testimony of Karmany, the local manager. So that the contract, as plaintiff alleges it,

is one of inference only from the use of the very general terms that plaintiff was to have water "for all purposes."

[3] While as a general rule the terms of a contract are to be given their full effect and meaning, yet the ruling object is to ascertain the intention of the parties, and hence their situation, the subject-matter, and other circumstances, may be looked to in determining the meaning of the terms used, although the terms are not in themselves ambiguous, and a party will be bound by that meaning which he knew the other party to the contract supposed the words to bear. *San Jacinto Oil Co. v. Ft. Worth Light & Power Co.*, 41 Tex. Civ. App. 293, 93 S. W. 173. It seems evident to us that the purposes of the parties in mind at the time was that water was to be furnished for all ordinary domestic purposes, and that it was not intended as an agreement that water should be furnished for extraordinary purposes. Neither the service pipes, hydrants, hose, or other circumstance, tends to show that it was ever the purpose of the company, or the expectation of the plaintiff, that the water to be furnished to him should be at times and in quantities sufficient to prevent the destruction of his premises by fire. It seems that the city government had taken upon itself the burden of protecting its citizens, and that it was presumably at least supplied with appropriate hydrants, hose, and other apparatus for that purpose. The fact that the company had contracted with the city for the purpose of furnishing water for fire purposes, and that the residences were provided with no facilities for that purpose, nor charged a rate commensurate with the risk thereby necessarily incurred, seems conclusive, in the absence of express words to the contrary, against the plaintiff's contention in this case. See *Niehaus Bros. Co. v. Water Co.*, by the Supreme Court of California, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045, and cases therein cited.

In view of what has been said, other questions need not be determined. We conclude that the court should have given the peremptory instruction and that the judgment below should be reversed and here rendered for the appellant.

#### KANSAS CITY SOUTHERN RY. CO. v. CARTER. (No. 1248.)

(Court of Civil Appeals of Texas. Texarkana. Feb. 27, 1914. On Motion for Rehearing, April 9, 1914.)

#### 1. APPEAL AND ERROR (§ 966\*)—DISCRETION OF COURT—CONTINUANCE—ABSENCE OF WITNESS.

An application for a continuance because of the absence of a witness, who was a nonresident of the state, was not a statutory application under Rev. St. 1911, art. 1918, providing for continuances where testimony cannot be procured from any other source, and article 3649, allowing the taking of depositions, and there-

fore the discretion of the court will not be disturbed in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.\*]

**2. APPEAL AND ERROR (§ 1043\*)—REVIEW—HARMLESS ERROR—CONTINUANCES.**

If the court abused its discretion in refusing a nonstatutory application for a continuance, it was not ground for reversal, where the application was based on the absence of a witness, who testified fully on a former trial, which testimony was admitted by agreement and was to the same effect that the application stated he would testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

**3. MASTER AND SERVANT (§ 145\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RULES—CONSTRUCTION.**

A rule of a railroad that, "where there are no car inspectors, the conductors must, with the assistance of the trainmen," inspect the cars and see that the doors are closed, imposed on the conductor alone the duty of initiating an inspection, and a brakeman who was injured by an open door had no other duty than to assist the conductor when he initiated an inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.\*]

**4. EVIDENCE (§ 507\*)—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY—CAR DOOR FASTENER.**

The testimony of a brakeman that a car door came open because part of the lever used in fastening it had broken off, based on an inspection following an accident resulting from its being open, was a mere opinion upon a matter of which one man could judge as well as another, and did not call for the opinion of an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.\*]

**5. APPEAL AND ERROR (§ 1048\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

While an answer to an interrogatory not calling for expert opinion should be stricken on motion if the answers to cross-interrogatories show it to have been based on opinion and not knowledge, where the facts on which such opinion was based were brought out on oral cross-examination at the trial, any error in overruling a motion to strike the answer was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**6. MASTER AND SERVANT (§§ 276, 278\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action by a brakeman against a railroad company for injuries by being struck by an open car door, held sufficient to support findings that the door struck plaintiff as he claimed, that the fastenings on the door were so defective as to make it probable it would come open, that such defects were due to the railroad's negligence, and that the door was closed shortly before the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 956-972, 976, 977; Dec. Dig. §§ 276, 278.\*]

**7. APPEAL AND ERROR (§ 837\*)—REVIEW—SCOPE AND EXTENT—EVIDENCE TO BE CONSIDERED.**

Opinion evidence on a subject not requiring expert testimony, the admission of which was held harmless, could not be considered by the appellate court in passing on the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3280; Dec. Dig. § 837.\*]

**On Motion for Rehearing.**

**8. EVIDENCE (§ 595\*)—PERSONAL INJURIES—ACCIDENTS—SUFFICIENCY OF EVIDENCE—INFERENCES FROM EVIDENCE.**

Where it could be equally inferred that a car door which struck a brakeman came open because of a defective latch or because it had not been fastened, the jury could not choose the inference that it was because of the defective latch, as an inference of negligence cannot be adopted unless it is more reasonable than the inference of its absence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2444, 2445; Dec. Dig. § 595.\*]

**9. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.**

It could not be said as a matter of law that, if a railroad was not negligent in failing to inspect and repair a defective car door, which came open and struck a brakeman, it was negligent in failing to use due care to close and fasten the door when the train started on its trip.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 288.\*]

**10. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action by a brakeman for injuries resulting from being struck by an open car door, held insufficient to show that the door came open because of negligence on the part of the railroad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Action by C. W. Carter against the Kansas City Southern Railway Company for damages for personal injuries. From a judgment for plaintiff, the defendant appeals. Reversed and remanded for new trial.

See, also, 155 S. W. 638.

Glass, Estes, King & Burford, of Texarkana, for appellant. Wolfe, Wood & Haven, of Sherman, for appellee.

**WILLSON, C. J.** This is the second time this cause has been before us. The first appeal was by appellee from a judgment in favor of appellant on a verdict rendered by the jury in obedience to a peremptory instruction of the court. That judgment having been reversed by this court, the cause was tried again at the May term of the district court of Bowie county; the trial resulting in a judgment in appellee's favor for the sum of \$15,000. On the last trial the testimony as to the accident and the cause of same, resulting in the injury to appellee, was not materially different from that heard on the first trial, except in the respect herein-after shown, in connection with ruling made by this court in disposing of assignments complaining of the action of the trial court in overruling a motion made by appellant to strike out the answer of the witness John Bres to the twelfth direct interrogatory propounded to him. The full statement made in the opinion disposing of the first appeal,

which will be found reported in 155 S. W. 638, renders it unnecessary to here make a statement of the case further than to say that it sufficiently appeared from the testimony that as a result of the accident appellee suffered such injury to his neck and back as to produce in him a serious case of paralysis; and it is not contended, if appellee was entitled to recover at all, that the sum found in his favor is excessive.

It is insisted that the court erred when he overruled appellant's application for a continuance, based on the absence from the court of its witness Dr. T. F. Kittrell, the physician who first saw appellee after he was injured. It appeared from the application that appellant expected to prove by the witness that he saw appellee within a few hours after he was injured, and made a careful examination of his person, and "found no fracture or dislocated vertebra, and no other physical injuries except slight bruises"; and further expected to prove by him that he saw and treated appellee during the two weeks following the time when he was injured, and "made numerous examinations of him," and at the May term, 1912, of the district court of Bowle county again examined appellee, "and again found no evidence of any physical injury or other condition that could be attributed to physical injury or traumatism." It appeared from the application that the witness had attended the court and testified at a former trial of the cause, and several times during the two weeks preceding the time when the application was presented had promised appellant's attorneys to be present when the cause was reached for trial. It further appeared that said attorneys relied upon the promise of the witness, and did not know until the day before the application was presented to the court that the witness would not be present as he had promised to be. It further appeared from the application that the witness was not present because of illness of a member of his family, which he regarded as demanding his presence at his home. It further appeared that while the witness practiced his profession in both Texarkana, Tex., and Texarkana, Ark., he resided and maintained an office in the latter state. It appears from a qualification made by the court to the bill of exceptions presenting appellant's complaint based on the action of the court in overruling the application that he overruled it because it did not appear therefrom that appellant had used the diligence required of it by law to procure the testimony of the witness. It further appears from said qualification of the bill that the testimony of said witness given at the former trial of the cause was, by agreement, "introduced as evidence on this trial."

[1, 2] The witness not being a resident of the county where the trial was had, but instead being a nonresident of the state, it is clear the application was not a statutory one.

Articles 3649 and 1918, R. S. 1911. Therefore, before we should undertake to revise the trial court's action and declare it to have been erroneous, it should appear that he abused the discretion he was entitled to exercise in the matter. *Carver Bros. v. Merrett*, 155 S. W. 635. If, however, we thought—and we do not—that the court abused the discretion he had about the matter, we would not for that reason reverse the judgment, in the face of the fact that it appears from the statement of facts that the testimony of the witness given on the former trial was introduced as evidence and was before the court and jury for consideration by them. On the former trial the witness seems to have testified fully. His testimony on that trial, as introduced at the last trial, covers more than 16 pages of the typewritten matter in the statement of facts, and is to the effect the application indicated it would have been had he been present and testified again at the last trial. The assignment is overruled.

[3] On the last, as on the first, trial of the case, appellant offered in evidence one of its rules, as follows: "Where there are no car inspectors, conductors must, with the assistance of the trainmen, thoroughly inspect all cars offered, and be sure of their safe condition before taking them. They must see that side doors of empty cars are closed and securely fastened." It appeared that appellant did not have a car inspector at Myrtis, where the car in question was being switched for the purpose of making it a part of the train. With reference to this rule this court, on the former appeal, held that if the testimony presented a question as to its violation by appellee it was one of contributory negligence on his part, and not one of assumed risk. The correctness of that conclusion is strongly combatted in support of assignments complaining of the action of the court below, on the last trial, in refusing to give to the jury certain special charges requested by appellant whereby it sought to have issues as to assumed risk based on a violation by appellee, as asserted, of said rule, submitted to the jury. We have not thought it necessary to again consider the question for the purpose of determining whether the conclusion then reached was correct or not, because, if we should conclude we were wrong, and if it did not appear that the rule had been abrogated, on another ground, not set forth in the opinion on the first appeal, we nevertheless would feel bound to hold that the court below did not err when he refused the special charges. We are of the opinion that the effect of the rule was to impose on the conductor alone an absolute duty to inspect cars and see that the side doors of empty cars were closed and fastened before taking them, and on appellee only the duty to assist him when called upon to do so. The language of the rule is that "conductors must, with the assistance of the trainmen,"

etc. If the purpose had been to impose the duty of inspection, etc., on the conductor and trainmen alike, the language doubtless would have been: "conductors and trainmen must," etc. In other words, we think the rule imposed on the conductor alone the duty of initiating an inspection, and on the trainmen no other duty than to assist him when he initiated it. Therefore we overrule the seventh, eighth, ninth, twelfth, and twenty-fifth assignments. On the same ground we overrule the tenth, eleventh, thirteenth, and twenty-fourth assignments, based on the refusal of the court to give to the jury certain special charges requested submitting to the jury issues as to contributory negligence on the part of appellee in violating the rule in question.

John Bres was "swing" brakeman on appellant's local freight train to Shreveport, in which the defective car was carried to Myrtle on the day before the accident occurred, and on the same train on its return trip the next day, when said car was again made a part of it. He had been a brakeman on that train during the two years immediately preceding the accident. At the instance of appellee his deposition as a witness was taken March 4, 1912. In reply to the eleventh direct interrogatory he testified: "Just an instant before the door struck Carter, I saw the same standing open for the first time. \* \* \* I did not see the car door fly open, as I was facing the engineer, until after the engine passed over north passing track switch, and when I turned around the car was going in on passing track, and I saw one of the east doors standing open just before Carter was struck by said door. All I could say is that the door was right at Carter when I first saw it open; that is, he was struck by the door almost as soon as I saw it standing open." The twelfth direct interrogatory propounded to the witness was as follows: "If you have stated in your preceding answers that said car door was open, can you state what caused the same to come open? If so, please do so." The witness answered as follows: "This car door came open on account of the door being in bad order, due to the lower or bottom part of the lever with which a refrigerator car door is fastened being broken off." Before this answer was read to the court and jury, appellant objected to it on the ground that it appeared from the deposition of the witness "that he had not been in a position where he could see the car door," and on the further ground that the answer "was an opinion and conclusion." The objection was overruled. Afterwards, the witness Bres, being present in court, was called by appellant and testified as a witness for it. It appeared that at the time the accident occurred the witness was riding on the pilot of the engine as it moved on the main track towards the station. He testified that when the engine passed the switch appellee was at same prepared to

throw it so the car following the engine would take the passing track. He then testified that after the engine had passed by appellee at the switch he saw one of the doors on the east side of the car next to the commissary strike him. After the witness had stated that he had not been in a position to see the door before it struck appellee, Mr. Burford, one of the counsel for appellant, asked him this question: "Tell the jury whether or not you had been in a position where you could see the door before it struck Mr. Carter." The witness replied: "I stated to you before, Mr. Burford, that I had not; that I had never been on the east side of the car at all. I had not looked at the door. I acknowledged that to you and told you that in the other statement—that I didn't see the door until after Mr. Carter was injured and we were ready to go. Then is when I seen the door. I hadn't seen or looked at the door before that time." Counsel then asked the witness: "I will get you to tell the jury whether or not the door was standing open when you first saw it." The reply was: "I told you gentlemen that the first time I saw this door anyway open was when it hit Mr. Carter. I never seen the thing until it had hit him, as quick as he went around a little curve and as he threw the switchstand. I didn't know what hit him. I couldn't tell exactly. It was the door. I found out afterwards, is what hit him. I hadn't seen the door and didn't know anything about it prior to that time." The examination of the witness was then continued as follows: "Q. You say in your depositions here: 'Just an instant before the door struck Carter, I saw it standing open for the first time.' Mr. Bres, you say in answer to the twelfth direct interrogatory: 'This car door came open on account of the car door being in bad order, due to the lower or bottom part of the lever with which a refrigerator car door is fastened being broken off.' On what did you base that statement? A. After looking at Mr. Carter when he was hurt, after he was struck by this door, and we got our train coupled and ready to go, I said: 'Wait until I fix this door; better fix it, it is open, before it hurts some one else.' I went and closed this door and picked up a handle of some kind and drove it down in this clasp. I suppose it was a foot and a half long, and drove it down in this clasp at the bottom, after closing the doors, and tied it together. Q. Did you notice any part of the lever being gone before that time? A. No, sir; I did not. Q. You went up there close to it? A. I didn't know there was anything the matter with the car at all. Q. What do you base your statement on in these direct interrogatories that this door came open because the lever was gone? A. I said the door was jolted open. Q. You said: 'This car door came open on account of the door being in bad order, due to the lower or bottom part of the lever with which a refrigerator car door is

fastened being broken off.' A. Because it will not hold with the top lever, sir. Q. How do you know the top lever was fastened? A. I don't know. Q. How do you know but what the lever was pushed back against the car? A. I don't know that. Q. What makes you tell in this deposition that it came open because it was gone? A. If a door is closed with this latch broken it will not stay fastened on any refrigerator car. Q. If the door is closed with the bottom part fastened, it won't stay fastened? A. No, sir; it won't. Q. And that's why you base your statement on what you say there? A. Yes, sir. Q. You don't know whether it was closed or fastened? A. I don't know. Q. You don't know whether the door was pushed against the side of the car or not? A. No, sir; I don't." After the witness had testified as just set out above, appellant moved to exclude his said answer to the twelfth direct interrogatory, which also is set out above. The grounds of the motion, as stated in the bill of exceptions, were as follows: "The answer is an opinion and conclusion of the witness, in that he states positively that he never saw the door before the accident, never went near it, and wasn't in a position where he could see it; and because he further stated on the witness stand that his answer was based on an opinion formed some time after the accident, after he had finished the work at the station, and after the car had been set into the train; that from what he saw then he concluded that the door came open by reason of a part of a latch being gone, but that he never saw it prior to the accident. That the first time he ever noticed the door it was standing open." The court overruled the motion, and his action in this respect is assigned as error. In approving the bill presenting the matter, the court qualified it as follows: "The witness John Bres testified that he had been engaged as a brakeman for several years on different roads; that he was familiar with the fastenings on refrigerator car doors; that if that portion of the apparatus of a refrigerator car door was missing which was missing on the car door which struck Carter, the plaintiff, that the movement of the train would cause the same to come open, even though it be fastened at the top, because the movement of the train would cause the bottom part of the door to swing out, and this would pull the fastening at the top out; this would be caused by the jolt of the train. In this case it was shown that the front part of the car had just gone over the passing track switch; that is, had started in on the passing track. The car was subjected to the jolt caused by passing over this track. At this instant Bres saw the car door open. Bres examined the fastenings on the door, and then he was permitted to testify as shown in this bill."

[4] From the testimony set out it is clear, we think, that the witness did not know whether the door was closed and fastened or

not when the car was carried from the passing to the main track, nor, if it was, when it came open, nor what caused it to come open, and that, when he said in reply to the twelfth direct interrogatory that it came open because part of the lever used in fastening it had been broken off, he was stating his opinion merely. The statement made by the trial judge in connection with his approval of the bill of exceptions indicates that he thought the witness had qualified as an expert, and that as such his opinion was admissible. But we think the testimony showing the way the door and its fastenings were constructed indicated that the question as to what caused the door to come open was one which one man of sense was as competent to answer as another, and therefore one that did not call for the opinion of experts. The jury in such a case should be allowed to draw their own conclusions from the facts shown by the testimony, uninfluenced by the opinion of witnesses, expert or otherwise. *Shelley v. City of Austin*, 74 Tex. 612, 12 S. W. 753.

[5] If it had appeared from the witness' answers to the cross-interrogatories that his answer to the twelfth direct interrogatory, instead of being a statement of a fact within his knowledge, was a statement of his opinion merely, there is ample authority for saying his said answer should, on motion, have been stricken out. *Railway Co. v. Ryan*, 72 S. W. 72; *Railway Co. v. Inman*, 134 S. W. 277; *Railway Co. v. Renfro*, 83 S. W. 21; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 301. But we are not prepared to say that when it appeared from the oral examination he was subjected to more than a year after he answered the interrogatory, that he never saw the door on the occasion of the accident until just before or at the instant it struck appellee, and that his statement in reply to the interrogatory as to what caused the door to come open was based entirely on an examination he made of it after the accident, that his answer to said interrogatory therefore should have been stricken out. It is unnecessary, we think, to determine whether it should have been stricken out or not; for if it should have been, and if the trial court therefore erred in overruling the motion, it would not follow that the judgment for that reason should be reversed; for, as pointed out by appellee, it might very well be said that the jury, having before them the facts on which the opinion of the witness was based, predicated their verdict on those facts, and not on the opinion of the witness, and that therefore the ruling on the motion, if erroneous, should be treated as harmless. *Railway Co. v. Warner*, 60 S. W. 442; *Railway Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843; *Bond v. Railway Co.*, 55 Tex. Civ. App. 119, 118 S. W. 867; Rule 62a for the government of Courts of Civil Appeals (149 S. W. x).

For the reason just stated, the importance of the question as to the competency of the

testimony does not arise on the assignments complaining of the action of the court in refusing to sustain the motion to exclude it. It arises, instead, on assignments we will now consider, which attack the verdict and judgment as not supported by the testimony.

From the allegations in the petition and the charge of the court it appears that the theory on which the recovery was sought and had was that appellant had been guilty of negligence, in that it failed to inspect the car and discover and repair a defect in the fastenings for the doors thereof, in consequence whereof one of the doors came open after the car moved from the passing to the main track and struck appellee as the car moved back to again take the passing track.

[6] We think it should be said that the testimony was sufficient to support findings, involved in the verdict, that the door struck appellee as he claimed it did; that the fastenings for the door were so defective as to make it probable that the door, if closed, and fastened with same, would come open when the car was subjected to such movement as it was subjected to before the door thereof struck appellee; and that the defective condition of the fastenings was due to negligence on the part of appellant. If it should be said the testimony also was sufficient to support a finding, involved in the verdict, that the door was closed and fastened at the time the car was moved to the main track, we think the assignments now being considered should be overruled; for we think it sufficiently appears that appellee was without fault in the matter, and it would then appear that the injury he suffered was due solely and proximately to negligence on the part of appellant, as alleged in the petition.

Therefore, in order to dispose of the assignments last referred to, it is not necessary to do more than to answer this question: Was the testimony sufficient to support a finding that the door was closed and fastened as the car moved from the passing to the main track?

Appellee testified that if the door had been open it would have struck him as the car passed the switch, while moving from the passing to the main track, and that because it did not then strike him, and because he thought he would have noticed it had it been open, he thought it was not then open. It must, we think, be conceded that this testimony was sufficient to support a finding that the door was closed as the car moved to the main track.

So, the inquiry may be said to be further narrowed to this question: Was there testimony to support a finding that the door also was fastened at the time this car began its movement from the passing to the main track? If the door was closed and fastened, then the testimony was sufficient to support a finding that because the fastenings were defective it came open after the car passed

the switch stand where appellee was standing and before it again passed same as it moved back to the passing track. If the door was not fastened, then it is obvious the defective fastenings had nothing to do with its coming open, and therefore it could not be said that the negligence charged against appellant, in that it failed to discover and repair the defect in the car, was the proximate cause of the injury appellee suffered.

[7] Looking to the record, the only testimony we find which can be said to be directly to the point is the answer set out above of the witness Bres to the twelfth direct interrogatory propounded to him. If that answer, construed in the light of the oral testimony afterwards given by him, also set out above, should be treated as a mere opinion of the witness, and therefore not competent as evidence, under the ruling of the Supreme Court in *Henry v. Phillips*, 151 S. W. 537, we are not authorized to look to it in determining the question now being considered. In that case the Supreme Court held certain testimony admitted without objection to be hearsay and therefore incompetent, and with reference thereto said: "Such incompetent testimony can never form the basis of a finding of facts in an appellate court, notwithstanding its presence in the record without objection. When the appellate court comes to apply the law to testimony constituting the facts of the case, it can only base its conclusion upon such testimony as is under the law competent. That which is not competent testimony should be given no probative force."

There being no direct evidence on which a finding that the door was fastened can be based, the question arises as to whether there was testimony from which an inference that it was fastened properly can be drawn. Appellee insists that such an inference might have been drawn by the jury from testimony showing that the fastenings for the door were so defective that had the door been fastened with same it likely would have become unfastened by the movement the car was subjected to in switching it before the door struck appellee; from testimony showing it was closed when it passed the switchstand as it moved from the passing to the main track; and from the absence of testimony showing that any one saw the door open until the instant before it struck appellee. We agree that from the testimony referred to an inference might have been drawn that the door was fastened, but we think, with as much reason, an inference might have been drawn that it was not fastened. For, certainly, if it might be inferred that the door, though fastened with the defective appliances, came open as it did, it might be inferred that it came open as it did if it was not fastened at all. The question then is: The testimony admitting of an inference either that the door was or that it



was not fastened, did the jury have a right to choose between the inferences? While not entirely clear about it, it seems to us it should be answered that they had such a right; and especially so, in view of the fact that it sufficiently appeared that the injury to appellee, if not proximately caused by negligence of appellant in failing to use ordinary care to inspect the car and discover and repair the defect in the fastenings for the doors thereof before sending it out from Texarkana, was proximately caused by its negligence in another respect, to wit, in failing to use ordinary care to close and fasten the doors thereof before it directed that the car be placed in the train at Myrtis. In other words, in the light of the testimony, it seems that the only complaint appellant could be heard to make with reference to the finding of the jury that it was guilty of negligence is that, while it appeared from the testimony it was guilty in one of the respects stated above, it did not appear in which respect it was guilty. We do not think it should be heard to urge such a complaint against the finding.

The assignments not in effect disposed of by what has been said are believed to be without merit, and therefore are overruled.

The judgment is affirmed.

#### On Motion for Rehearing.

[8-10] In reaching the conclusion that the jury had a right to choose between inferences to be drawn from the testimony, we were not unmindful of the rule invoked by appellant in its motion, which denies to a jury such a right where the inference of negligence as charged is not more reasonable than that of the absence of such negligence. But we thought the rule ought not to be applied because it then appeared to us that, if the injury suffered by appellee was not due to negligence in the respect submitted in the court's charge, it was due to negligence on the part of appellant in another respect, and it seemed to us it would be unreasonable under such circumstances to set aside the verdict and judgment. On further consideration of the matter, however, we are convinced we had no right to say as a matter of law that, if appellant was not guilty of negligence in failing to use due care to inspect the car and discover and repair the defect in the fastenings for the doors thereof, it was guilty of negligence in failing to use due care to close and fasten the doors thereof before it directed that the car be placed in the train at Myrtis. Therefore we now think the rule referred to should have been given effect in disposing of the appeal. It follows that we think the motion should be granted; and, because the testimony was not sufficient to support the finding of the jury that negligence of appellant in the particular submitted to them was the proximate cause of the

injury to appellee, that the judgment should be reversed, and the cause remanded for a new trial. It will, accordingly, be so ordered.

#### BORSCHOW v. STEPHENSON et al. (No. 5312.)

(Court of Civil Appeals of Texas. Austin.  
March 18, 1914.)

#### VENDOR AND PURCHASER (§ 285\*)—LIEN—ENFORCEMENT—RIGHTS OF GUARANTOR OF NOTES—PROBATING SECURITY.

Where defendant guaranteed part of a series of vendor's lien notes, the whole of which plaintiff declared due upon nonpayment of the second, the judgment foreclosing the lien and finding against defendant on his guaranty need not prorate the proceeds of the sale of the land between the notes guaranteed and the others; plaintiff being entitled to judgment upon the guaranty without resorting to his security, and defendant being protected by the provision requiring the security upon the land to be exhausted before issuance of execution against him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 800-807; Dec. Dig. § 285.\*]

Appeal from District Court, Mills County; John W. Goodwin, Judge.

Action by W. H. Stephenson against Max Borschow and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

E. B. Anderson, of Goldthwaite, and Arch Grinnan, of Brownwood, for appellant. E. B. Hendricks and I. J. Rice, both of Brownwood, for appellee.

JENKINS, J. The evidence in this case shows that ——— Cornelius on February 20, 1911, executed his eight promissory notes to appellant, the first for \$100, due November 1, 1911, and the others for \$300 each, due November 1, 1912, 1913, 1914, 1915, 1916, 1917, and 1918, respectively, interest payable annually; that said notes were given in payment for a tract of land in Mills county, upon which a vendor's lien was retained to secure the payment of said notes. They provided that the failure to pay either of said notes, or the interest thereon, would, at the election of the holder of such notes, mature all of them. Appellant sold said notes to appellee, making a written transfer thereof, together with the vendor's lien and superior title, and guaranteeing the payment of the first and second notes; the others being indorsed without recourse. The first note was paid, but the second was not, and appellee elected to treat them all as due, and brought this suit against the maker of said notes and to enforce the vendor's lien, and also against appellant upon his guaranty of said second note. Judgment was rendered against Cornelius for the debt, interest, attorney's fees, and costs, foreclosing the lien upon said land, and also against appellant upon his guaranty of said second note, with judg-

ment over in his favor against Cornelius for any amount that he might pay upon said judgment.

Appellant assigns error, contending that the proceeds of the sale should have been prorated between said second note and the remainder of said notes, instead of first applying all of such proceeds to the payment of such other notes. We overrule this assignment. Appellant was liable upon his guaranty for any deficit from the sale of said land, and the court rendered a proper judgment in decreeing that the proceeds should first be applied to the other notes. *Hutches v. Threshing Machine Co.*, 35 S. W. 64; *God-dard v. Peeples*, 11 Tex. Civ. App. 615, 33 S. W. 314. In fact, the holder of said notes was entitled to judgment against the guarantor upon the failure of the maker of said notes to pay the same, without first resorting to his security upon the land. *Walker v. Collins*, 22 Tex. 193; 32 Cyc. 97, 98. He was fully protected by the judgment of the court herein, which required the security upon the land to be exhausted before execution should issue against him.

Finding no error of record, the judgment of the trial court is affirmed.

**Affirmed.**

**GLENS FALLS INS. CO. v. WALKER.**  
(No. 7842.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Jan. 31, 1914. On Rehearing,  
March 14, 1914.)

**1. INSURANCE (§ 233\*) — FIRE INSURANCE — WAIVER—MISTAKE.**

Although a fire policy on mortgaged property provided for an extension of time for the benefit of the mortgagee in case of cancellation, the insurer's agent in good faith represented that the institution of foreclosure proceedings had avoided the policy according to a stipulation which he stated was in the policy, and in reliance upon that representation the mortgagee consented to a cancellation. *Held* that, the mistake being one of fact, the cancellation was ineffective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 505; Dec. Dig. § 233.\*]

**2. INSURANCE (§ 228\*) — FIRE POLICY — WAIVER.**

Where a fire policy provided for an extension of time for the benefit of the mortgagee in case of cancellation, the mortgagee may waive that provision for his benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 498, 499; Dec. Dig. § 228.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by Herbert G. Walker against the Glens Falls Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Crane & Crane, of Dallas, for appellant. Charles Kassell, of Ft. Worth, for appellee.

DUNKLIN, J. Herbert G. Walker recovered a judgment against the Glens Falls In-

surance Company for the amount stipulated in a fire insurance policy issued by the company upon a house belonging to E. L. Day, and upon which Walker held a mortgage; the policy being payable to the mortgagee as his interest might appear. The company has appealed.

The only controverted issues submitted by the trial judge in his charge to the jury, and upon which a verdict was returned, were: First, whether or not the company delivered the policy to Walker; second, whether or not actual payment of the premium charged for the same was waived by the company; and, third, whether or not Walker agreed with the defendant before the fire that the policy should be canceled. The evidence was sufficient to sustain a finding in favor of Walker upon all of those issues except the one last mentioned. After a careful consideration of the record, we are of the opinion that the testimony of Walker himself shows conclusively that he consented to a cancellation of the policy before the fire which destroyed the building, and in pursuance of that agreement the policy was surrendered to the company.

[1, 2] Another issue, however, tendered in plaintiff's pleadings was that Walker's agreement to a cancellation of the policy was induced by a mutual mistake of himself and the agent of the company. It was alleged that, at the time the policy was issued, Walker had instituted foreclosure proceedings upon the mortgage given to him by Day; that, at the time Walker agreed to a cancellation of the policy, the company's agent represented to him that the pendency of the foreclosure proceedings at the time of the issuance of the policy did of itself render the policy void from the date of its issuance, and by reason of that representation Walker was induced to agree to a cancellation of the policy. It was further alleged that the representation so made by the company's agent was made in good faith, but in ignorance of the true conditions, namely, that the policy contained no such stipulation, and that Walker was likewise ignorant of that fact. We are of the opinion that, if this plea of mutual mistake be sustained by the evidence, it would render of no effect Walker's agreement to a cancellation of the policy, and that the case should be remanded for another trial upon that issue. The policy contained a provision that, unless otherwise provided by agreement indorsed thereon, it shall be void if, with the knowledge of the insured, foreclosure proceedings should be commenced or notice given of sale of any property covered by any mortgage. No such agreement was indorsed upon the policy. But the policy contained a further clause reading as follows: "This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this

policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice to cancel this agreement." The right given to Walker, by the stipulation last quoted, to require of the company ten days' notice before the cancellation of the policy could be waived by him, and that stipulation constituted no obstacle to the enforcement of the agreement made by Walker for the cancellation of the policy prior to the fire.

For the reasons indicated, the judgment is reversed, and the cause remanded.

#### On Rehearing.

We attached no importance to the finding that the policy contained no indorsement of any agreement by the insurance company with E. L. Day, the owner of the property, waiving the provision contained in the policy that the same would be void if, with the knowledge of Day, foreclosure proceedings should be instituted upon the mortgage outstanding against the property. The stipulation in favor of Walker, the mortgagee, that he should have ten days' notice of any intention by the company to cancel the policy was expressly recognized. We have carefully examined appellant's answer and are of the opinion that, although general in its terms, it was sufficient, in the absence of any special exception, to present the issue that, prior to the fire, Walker agreed with the company that the policy should be canceled. In its motion for rehearing appellant earnestly insists that it is apparent from the pleading of Walker that the mutual mistake alleged by him as having induced him to agree to a cancellation of the policy prior to the fire was a mistake of law and not a mistake of fact, and hence did not present any valid defense to an enforcement of such agreement. Many authorities are cited to support this contention, which we think are inapplicable. The mistake so alleged did not consist of an erroneous legal construction of the terms of the policy, but consisted of an erroneous supposition that the policy contained certain stipulations, and hence was a mutual mistake of fact, which, like any other mutual mistake of material facts, would present a valid defense to the enforcement of the agreement.

In our original opinion the cause was remanded for a new trial generally, and the expression used in a preceding portion of the opinion that it should be remanded for a trial of the issue of mutual mistake was not intended as any limitation of that conclusion.

With these observations the motions of appellant and appellee for rehearing are overruled.

#### GORMAN et al. v. GORMAN. (No. 7843.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 7, 1914. Rehearing Denied  
March 14, 1914.)

##### 1. MARRIAGE (§ 50\*)—VALIDITY—EVIDENCE.

Where a woman, believing a man to be divorced, in good faith celebrated a marriage with him, slight evidence will be sufficient to uphold the validity of the marriage after removal of the impediment.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.\*]

##### 2. MARRIAGE (§ 50\*)—VALIDITY—REMOVAL OF IMPEDIMENT.

Where a woman, mistakenly believing a man to be divorced, entered into a marriage without knowledge of the impediment, the continued cohabitation of the parties after removal of the impediment is sufficient to establish a good marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Petition by Josie Gorman against Jack Gorman, as administrator, and others, for a widow's allowance. From a judgment of the district court affirming an allowance by the probate court, the administrator appeals. Affirmed.

Leake & Henry, of Dallas, for appellant. P. G. Dedmon and Chas. E. Witt, both of Ft. Worth, for appellee.

SPEER, J. Josie Gorman, as the surviving widow of David Gorman, deceased, obtained in the probate court of Tarrant county an order for a widow's allowance in lieu of homestead and other exempt property to the amount of \$1,000, being the total amount of the estate of the deceased, and from that order Jack Gorman, the administrator, has appealed.

Briefly stated, the findings of fact, which we adopt in full, show that the deceased, David Gorman, and appellee, Josie, were regularly married November 7, 1905. Appellee was at the time an unmarried woman, but the deceased was at the time a married man, with a suit pending against his wife for a divorce. Appellee married the deceased in perfect good faith, in ignorance of the fact that he was undivorced. She knew of his former marriage and of the pendency of the divorce suit, but had been told and believed a decree of divorce had been entered. A few months after the marriage the decree was entered, and the parties continued to live together as husband and wife and to treat each other as such in all the ways usual to married persons. The deceased departed this life in May, 1908, and appellee never knew of the impediment to her marriage with deceased until long after his death, but at all times believed her marriage to be regular.

[1, 2] It is the contention of appellant that, since by force of the law the relation of appellee and the deceased was illicit, they were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not husband and wife, and that the relation, being unlawful in its inception, never became lawful, since there was no evidence of a change in that relation. It is true there is no finding, or evidence, as to that, of a conscious change of the relations, so far as the appellee is concerned, but in the nature of the case there could have been none. She acted in good faith from the first, believing at all times that her marriage to the deceased was lawful, and having no notice whatever at any time of the impediment which rendered it unlawful at its inception. Under such circumstances, we think slight evidence would be sufficient to uphold the validity of the marriage after the removal of the impediment. Under the Spanish law, which law our marital laws very much resemble, a putative marriage became a lawful marriage upon the removal of the impediment. *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121. Under our statutes, there is no reason to hold that a putative marriage may not become lawful upon the removal of the impediment, but there is every reason to hold, even upon slight evidence, that it may do so. *Edelstein v. Brown*, 95 S. W. 1126. In the very nature of the marriage relation, the continued living together of appellee and the deceased as husband and wife after the removal of the impediment which rendered the original marriage invalid was necessarily a constant offer and acceptance of the mutual relation of husband and wife between the parties, and their cohabitation under such circumstances constituted the lawful relation of husband and wife. There is no reason in law or fact why it should not do so, and every consideration demands that it should.

There is no error in the record, and the judgment of the district court, holding the marriage of appellee and the deceased to be good as a common-law marriage after the decree of divorce in favor of the deceased, is affirmed.

**Affirmed.**

**GULF, C. & S. F. RY. CO. v. GADDIS et al.**  
(No. 7840.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 14, 1914. Rehearing Denied  
March 21, 1914.)

**RAILROADS (§ 350\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.**

It cannot be said, as matter of law, that one who, at night, saw a passenger train, which was 60 or 70 feet from the crossing, and approaching at a speed two or three times the 6 miles per hour allowed by ordinance, when he was 15 feet from the crossing, was guilty of contributory negligence in increasing his speed and attempting to cross ahead of it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

Error to District Court, Tarrant County; James W. Swayne, Judge.

Action by Nancy Gaddis and others against the Gulf, Colorado & Santa Fé Railway Com-

pany. Judgment for plaintiffs, and defendant brings error. **Affirmed.**

Lee & Lomax and W. D. Smith, both of Ft. Worth, and Terry, Cavin & Mills, of Galveston, for plaintiff in error. Slay & Simon, of Ft. Worth, for defendants in error.

**SPEER, J.** Nancy Gaddis, in behalf of herself and her minor children, sued the Gulf, Colorado & Santa Fé Railway Company to recover damages for the negligent killing of the husband and father, Jack Gaddis. There was a trial before a jury resulting in a verdict and judgment for the plaintiffs in the sum of \$4,500, and the defendant prosecutes error.

A single assignment is presented, and that involves the question that, under the undisputed facts, the trial court should have instructed a verdict for the defendant upon the issue of the deceased's contributory negligence. The propositions submitted under plaintiff in error's assignment are as follows: "It is contributory negligence, as a matter of law, for one approaching a railroad track, with a train approaching on the track in plain view, who is warned by the whistle on the engine and the bell on the engine that the train is approaching, and by a crossing watchman, placed there to prevent parties from crossing the track when a train is approaching, that the train is coming, and who knows of the approach of the train, to attempt to beat the train across the track, and, if injury results to him from such attempt, neither he nor those claiming under him are entitled to recover."

The question of contributory negligence being one of fact to be determined by the jury under all the circumstances of the case, except in those rare cases where reasonable minds could not differ as to the conclusion to be drawn, it is obvious that this proposition cannot be sustained. It is stated too broadly. Whether or not it is contributory negligence for a pedestrian approaching a railroad track to cross over ahead of an approaching train depends largely, if not altogether, upon the distance the train is away and the speed with which it is approaching the crossing. In such a case the train might be seen approaching, but yet at such a distance and moving at such a low speed as that a most cautious or prudent person would undertake to cross ahead of it and feel that he was taking no risk whatever in doing so. But the next proposition submitted by plaintiff in error is more definite and more nearly raises the precise question to be determined in this case. That proposition is as follows: "The undisputed evidence in this case shows that Gaddis approached defendant's track on the south side of Elizabeth street between 9 and 9:30 o'clock at night, at a time when a regular passenger train of the defendant, going somewhere between 10 and 20 miles per

hour, was approaching Elizabeth street going south, and that the train whistled clear and distinct whistles, attracting the attention of other parties, at two different times when the train was a considerable distance from the crossing, the first time, under the estimate of the witnesses, about 500 feet away, and the second time about 300; and that on the sounding of the first whistle the watchman at the Elizabeth street crossing came out with his red lantern and began to signal by waving it, and turning to the west, the direction from which the deceased approached the track, he saw the deceased some 40 or 50 feet away from the track and waved his lantern, and the deceased continued on, approaching the track in an ordinary walk until he got within about 15 feet of the track, and, not checking his gait, the watchman called to him and expressly warned him, and he turned and looked in the direction of the train, and instead of stopping he quickened his pace at a time when the train was practically on him, only 60 or 70 feet way, and was then blowing an alarm whistle, and evidently undertook to beat the train across the crossing, and was struck by the train and killed. The deceased thus by his own gross negligence and recklessness contributed to and caused his own death."

If the facts stated in the proposition be admitted to be true, it does not follow, as a matter of law, that the deceased was guilty of contributory negligence in attempting to cross the track under the circumstances shown. It appears to be the well-settled rule in this state that, in order that an act shall be deemed negligence per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say without hesitation or doubt that no careful person would have committed it. *G., C. & S. F. Ry. Co. v. Gasscamp*, 60 Tex. 545, 7 S. W. 227. And it has been repeatedly held that it is not necessarily negligence for one to attempt to do a thing which he knows to be dangerous. *G., C. & S. F. Ry. Co. v. Gasscamp*, supra; *G., C. & S. F. Ry. Co. v. Grison*, 36 Tex. Civ. App. 630, 82 S. W. 671; *Tex. Cent. R. R. Co. v. Randall*, 51 Tex. Civ. App. 249, 113 S. W. 180; *T. & P. Ry. Co. v. Stoker*, 52 Tex. Civ. App. 433, 115 S. W. 910; *St. Louis S. W. Ry. Co. v. Shelton*, 52 Tex. Civ. App. 437, 115 S. W. 877. The facts shown in plaintiff in error's proposition do not put the deceased in the attitude of a person who goes into a place of known danger without taking any precaution whatever for his own safety. It is to this sort of case that the authorities cited by plaintiff in error are applicable. The case of *I. & G. N. Ry. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106, so much relied on, is thus referred to by our Supreme Court in *Boyd v. St. L. S. W. Ry. Co.*, 101 Tex. 411, 108 S. W. 813, and the reference is sufficient to illustrate the distinction between that line

of cases and those which we shall hereafter cite, which we think more nearly resemble the case under consideration: "In the *Edwards Case* the injured party, upon approaching a crossing over a railroad track with which he was perfectly familiar, and knowing that trains frequently passed, failed either to look or to listen, and testified that, if he had done either, he could have heard or seen the train before he stepped upon the track. Edwards took no precaution whatever to protect himself, and therefore was not entitled to a recovery, although the railway company was guilty of negligence in failing to blow the whistle." Many authorities might be cited to the proposition that a person who goes into a place of known danger without taking any care whatever to protect himself is necessarily negligent to such an extent that he cannot recover for injuries received in consequence of his act.

But here we have a different case. It is undisputed that the deceased did look and acquaint himself with the fact that the train was approaching, and in consequence quickened his pace when within a few feet of the crossing in order, as he thought, to cross the track before the train could reach him. Whether or not his act in thus attempting to cross ahead of the train was a negligent one, as matter of law, is the question we are called upon to decide. No authority has been cited, and we have found none which would require us to hold that it was. Whether or not the deceased, situated as he was, acted as a person of ordinary prudence in attempting to cross the track as he did we think became a question of fact to be determined by the jury, and the court committed no error in refusing the summary instruction to find for the defendant.

There is no assignment attacking the finding of the jury on the issue of plaintiff in error's negligence in the matter of speed at which the train was being operated at the time deceased was killed, and, even on the issue of contributory negligence, the fact that the train was being operated at such a high rate of speed, in violation of an ordinance of the city of Ft. Worth, which limited the speed of trains within its limits to six miles per hour, had a very material bearing in that the deceased may have assumed, although he saw the train was approaching, that it was nevertheless being operated in accordance with the ordinance, and he would thus have ample time to cross the track before it reached him. See *Boyd v. St. L. S. W. Ry. Co.*, 101 Tex. 411, 108 S. W. 813; *Texarkana, etc., Ry. Co. v. Frugla*, 43 Tex. Civ. App. 48, 95 S. W. 563; *F. W. & D. C. Ry. Co. v. Wyatt*, 35 Tex. Civ. App. 119, 79 S. W. 349, and authorities there cited.

Defendants in error have filed certain cross-assignments, but they are all overruled, since the only questions raised by them go to the matter of liability of plaintiff in error,

and, since under the charge the jury have found in favor of liability, the errors, if any were committed, could not have been harmful.

There is no error in the record, and the judgment is affirmed.

**WEINSTEIN v. ACME LAUNDRY.**  
(No. 7850.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 7, 1914. Rehearing Denied  
March 14, 1914.)

**1. APPEAL AND ERROR (§ 264\*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.**

Where no exception was taken to the special verdict, the court on appeal may not consider the sufficiency of the evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535; Dec. Dig. § 264.\*]

**2. TRIAL (§ 343\*)—VERDICT—CONCLUSIVE-NESS.**

A verdict is conclusive between the parties until set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.\*]

**3. MASTER AND SERVANT (§ 302\*)—NEGLIGENCE OF SERVANTS—INJURIES TO THIRD PERSONS—LIABILITY.**

A master is liable for injuries caused by the negligence of a servant while acting within the scope of his employment, and it is immaterial that the negligence of the servant co-operated with that of a volunteer or unauthorized person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by E. Weinstein, as next friend of Sol Weinstein, against the Acme Laundry. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

McLean, Scott & McLean, of Ft. Worth, for appellant. Wray & Mayer, of Ft. Worth, for appellee.

CONNER, C. J. E. Weinstein, as next friend of his minor son, Sol Weinstein, instituted this suit in the district court to recover damages for personal injuries inflicted upon the son and caused by the negligence of certain employes of appellee. It was charged that one Crawford and one Bingham, appellee's employes, were engaged in removing rubbish from a room in an upper story of a building owned by the appellee, and that while so engaged they negligently threw out of the window and upon the street below a barrel filled with refuse, which fell upon and seriously injured the passing boy. It was admitted in behalf of appellee that the act of Bingham and Crawford in throwing out the refuse as they did constituted negligence, and the case was submitted to the jury upon three special issues only. The first special issue was whether the witness Crawford was at the time acting within the scope of his employment, and the second issue was whether

the witness Bingham was so acting; the only remaining issue being the amount of the damages suffered by the boy. The jury by its verdict answered the first question, "No," and the second question, "Yes," and further assessed the damages at the sum of \$3,000. No exception to this verdict was taken by either party below; the parties severally presenting motions for the entry of judgment. The court granted the motion of appellee and rendered judgment in its favor, and hence this appeal.

[1-8] The simple question presented is whether the court properly entered judgment for the appellee upon the admitted facts and special verdict. We think the court erred in so doing and that the judgment should have been rendered for appellant. As before stated, no complaint of or attack upon the special verdict was made below. This precludes a consideration on our part of the sufficiency of the evidence to support it, and the express finding of the jury is to the effect that at least one of appellee's servants, to wit, Bingham, was acting within the scope of his employment at the time he negligently threw the barrel of refuse upon the street below. Until set aside the verdict is conclusive between the parties, and it is familiar law that the master is liable in damages for injuries proximately caused by the negligence of a servant while acting within the scope of his employment, and in such case it can make no difference that the negligence of the servant so acting co-operates with that of a volunteer or unauthorized person. This being true, it was immaterial that Crawford, the other employe, may not have been acting at the time within the scope of his employment. It is sufficient that Bingham was and that his acts of negligence proximately contributed to bring about the injury. See Revised Statutes 1911, arts. 1985, 1986; Waller v. Lillie, 96 Tex. 21, 70 S. W. 17; Scott v. F. & M. Nat. Bank, 66 S. W. 493; Casey-Swasey Co. v. Manchester Fire Assur. Co., 32 Tex. Civ. App. 158, 73 S. W. 864.

We conclude that upon the special verdict and the admitted and undisputed facts the judgment should be reversed, and here rendered for appellant, and it is so ordered.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. MITCHELL.** (No. 7856.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 14, 1914. Rehearing Denied  
March 14, 1914.)

**1. DAMAGES (§ 111\*)—FIRES—MEASURE OF DAMAGES—DESTRUCTION OF BUILDING.**

An instruction, on the measure of damages for the destruction by fire of plaintiff's building, which allowed recovery for the reasonable value of the building just before the fire, is not erroneous, although the plaintiff owned the lot, and the true measure of damages was the difference in the value of the lot before and after the fire,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

since the result under each rule would be the same if the value of the building was properly appraised.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 274-278; Dec. Dig. § 111.\*]

## 2. DAMAGES (§ 188\*)—FIRES—EVIDENCE.

In an action against a railroad company for the destruction of plaintiff's building and the fixtures therein by fire, evidence held sufficient to support a verdict for \$1,050, even though the plaintiff had rendered the lot and the improvements thereon for taxation at \$150.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 511; Dec. Dig. § 188.\*]

Appeal from District Court, Cooke County; G. F. Spencer, Judge.

Action by B. F. Mitchell against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for the plaintiff, and defendant appeals. Affirmed.

Garnett & Garnett, of Gainesville, for appellant. Culp & Culp and Granville Jones, all of Gainesville, for appellee.

SPEER, J. B. F. Mitchell sued the Missouri, Kansas & Texas Railway Company of Texas to recover damages for the destruction by fire through the defendant's negligence of a store building, together with certain store fixtures therein situated, in the village of Woodbine in Cooke county. There was a jury trial resulting in a verdict and judgment in plaintiff's favor for the sum of \$1,050, and the defendant has appealed.

[1] The charge of the court on the measure of appellee's damage is made the basis for appellant's complaint in the first five assignments of error. The charge is as follows: "If you find in favor of the plaintiff, you will assess his damage at such sum as you believe from the evidence was the reasonable value of the store building just immediately before the fire, not to exceed the amount sued for on account of the burning of the house, and what you believe from the evidence was the fair and reasonable market value of the fixtures burned, at Gainesville, at the time of the fire, less the cost of transporting said fixtures to Gainesville, not to exceed the amount sued for on account of the burning of said fixtures, together with 6 per cent. interest on such sums from September 9, 1911, to this date." It is the contention of appellant that since appellee alleged, and the evidence showed without conflict, that he was the owner, not only of the house, but of the lot upon which it stood, at the time of its destruction, the house therefore constituted a part of the land, and the measure of his damage was the difference in the value of said lot just before and just after the destruction of the house. Ordinarily this is the true measure of damages, especially where the plaintiff sues for the damage to his realty. But cases may arise in which the injured party may sue for

and recover the value of fixtures attached to the realty independently of the incidental damage to the realty. *Galveston, etc., Ry. Co. v. Warnecke*, 43 Tex. Civ. App. 83, 95 S. W. 600; *Tex. Mid. R. R. Co. v. Moore*, 74 S. W. 942; *Tyler S. E. Ry. Co. v. Hitchins*, 26 Tex. Civ. App. 400, 63 S. W. 1069; *H. & T. C. Ry. Co. v. Smith*, 46 S. W. 1046. Compensation for the loss sustained is the end sought by the law in all cases, and while a plaintiff undoubtedly would be entitled in a case like the present to recover the difference in the value of his land immediately before and immediately after the fire, and while this perhaps is the better and safer rule for all cases, yet there is no sound reason for denying him the right to recover the market value, or the real value in the absence of a market value, of the improvements or fixtures destroyed considered separate and apart from the realty; for, if such values be justly appraised by the jury, the damages when thus measured can by no possibility exceed the damages when measured by the rule first stated. A defendant in such a case has no just complaint that the plaintiff recovers only the value of such improvements, which loss he necessarily has sustained, and is not allowed to recover the additional depreciation of his land by reason of the severance of the fixtures from the realty.

The case of *Pacific Express Co. v. Lasker*, 81 Tex. 81, 16 S. W. 792, is in no wise contrary to this holding. There the charge permitted the plaintiff to recover the cost of restoring the burned building; whereas, as pointed out in that case, the cost of restoring a burned building might far exceed the market or real value of such building. In the present case the jury were limited to the reasonable value of the building immediately before the fire, and this meant, of course, considering its age, location, and all other circumstances bearing upon such value.

[2] While there is some conflict in the evidence, it is nevertheless sufficient to support the verdict and judgment in the amount of the recovery. Two or three witnesses, who appear to know, testified that appellee's building was worth some \$1,100 to \$1,200. Perhaps the strongest evidence against the verdict is that of appellee's admission that he rendered the lot and improvements for taxation for the years 1910 and 1911 at \$150, but this circumstance is by no means conclusive on appellee, especially in view of the known custom of property owners in this state to render their property for taxation at a sum very much less than its market value, as contemplated by the statutes. The rendition at most is only admissible as in the nature of an admission against interest.

There is no error in the judgment, and it is affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**SHEPHERD et al. v. MOTT.** (No. 7857.)  
(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 14, 1914. Rehearing Denied  
March 14, 1914.)

**1. BILLS AND NOTES (§ 245\*)—RIGHTS OF INDORSER AGAINST MAKER—"PRINCIPAL"—"SURETY."**

S. was surety on a note upon which judgment was recovered. He and the principal debtor executed a new note for borrowed money with which to pay the judgment under an agreement that the principal debtor would procure K.'s signature as a cosurety and give K. security for its payment. This agreement was not known to K. and no security was given him. The note when presented to K. by the principal debtor was signed by the debtor and S., and K. refused to sign it but agreed to and did indorse it on the back, stating that he would become responsible only as indorser. Held, that as between themselves K. was a surety for S. and entitled to judgment over against him for the amount of the judgment recovered by the payee against K., since, whatever their apparent relation to the paper, the one who receives the benefit of the execution of the note is the principal, and the one who receives no benefit, but simply signs it as an accommodation for the other, is the surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 558, 559; Dec. Dig. § 245.\*]

**2. EVIDENCE (§ 423\*) — PAROL EVIDENCE — BILLS AND NOTES—RELATION OF PARTIES.**

Whatever the apparent relation of parties to a note, their true relation as between themselves may be shown by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1958; Dec. Dig. § 423.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by W. N. Mott against J. N. Shepherd and others. Judgment for plaintiff and for the defendant E. N. Kirby against the defendant Shepherd, and Shepherd appeals. Affirmed.

J. M. Wagstaff, of Abilene, for appellant. Scarborough & Hickman, of Abilene, for appellee.

**SPEER, J.** W. N. Mott recovered judgment against J. N. Shepherd and E. N. Kirby, and E. N. Kirby recovered judgment over against J. N. Shepherd; the controversy arising over the liability of the respective parties on a promissory note signed by A. G. Britton and J. N. Shepherd and indorsed by E. N. Kirby. There is no complaint of the judgment in favor of Mott, but Shepherd appeals as against the judgment in favor of Kirby.

[1] The trial court, before whom the case was tried, made the following findings of fact, which we adopt: "(1) A. G. Britton, the principal on the note sued on, is insolvent and was not a necessary party to the suit. (2) The note sued on was dated July 20, 1911, and was signed by A. G. Britton and J. N. Shepherd, and was payable to the plaintiff, W. N. Mott, and was due six months after date, was for the sum of \$390, and bore interest from maturity at the rate of 10 per

cent. per annum, provided for 10 per cent. attorneys' fees in case of suit and was payable to W. N. Mott, at Abilene, Tex. (3) That said note was duly signed by A. G. Britton and J. N. Shepherd; the name of Shepherd appearing directly under the name of Britton. (4) On the back of said note appeared the following indorsement: 'Demand, notice and protest waived, E. N. Kirby.' And that said indorsement was made by the defendant E. N. Kirby before the delivery of said note to the plaintiff, W. N. Mott. (5) I find that A. G. Britton was instrumental, wholly, in procuring the loan of money from W. N. Mott, on said note, and that the defendant J. N. Shepherd had nothing to do with the negotiations for the same with W. N. Mott. (6) I find that the money procured from said Mott on said note was used principally to pay off a judgment in favor of the Farmers' & Merchants' National Bank of Abilene, Tex., against one W. T. Bolt, A. G. Britton, and the defendant J. N. Shepherd, and that said Bolt was the principal in the note on which said judgment was obtained. That A. G. Britton and J. N. Shepherd were equally bound in said judgment, and same was a 'default' judgment as to Shepherd. (7) I find that, as between A. G. Britton and the defendant J. N. Shepherd, the said Shepherd was to become surety on the note sued on, to said Mott, and that the said Shepherd also required the said Britton to procure the signature of the defendant E. N. Kirby, on said note, as a cosurety, and that the said Britton agreed with said Shepherd that he would give security for the payment of said note, said security to be given to E. N. Kirby, but such agreement and understanding between said Britton and said Shepherd was unknown to the defendant E. N. Kirby and no security was given him by said Britton. (8) The total amount of the note at the time of the trial including interest and attorneys' fees was \$448, and it was agreed in open court by all parties that W. N. Mott should have judgment against the said Shepherd and Kirby jointly and severally for the amount due thereon, but it was controverted as to whether the said Kirby had the right to recover judgment over against the said Shepherd. (9) I find that A. G. Britton applied to the defendant E. N. Kirby to sign the note herein sued on with him and the defendant J. N. Shepherd, and that said Kirby refused to do so. That the plaintiff, W. N. Mott, came also with A. G. Britton to see the defendant E. N. Kirby about signing said note with said Britton and Shepherd, and that said Kirby refused to sign the same, but agreed to indorse said note provided the same was signed by said Britton and the defendant Shepherd and stated to said Mott and said Britton that he would not become responsible on said note except as 'indorser,' and that he indorsed same with that understanding, after it had been signed by said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Britton and Shepherd. (10) I find that said note was brought to the office of the defendant E. N. Kirby by the plaintiff and A. G. Britton, duly signed by the defendant J. N. Shepherd and A. G. Britton, and that he then indorsed it as above stated. (11) I find that nothing was ever said to said Shepherd by said Kirby and nothing to said Kirby by said Shepherd in reference to said note, either before or at the time of signing the same."

[2] We affirm the trial court's conclusion of law that, as between themselves, defendant in error Kirby was a surety for plaintiff in error Shepherd, and as such entitled to judgment over against him. It seems to be well settled that as between the parties, whatever their apparent relation to the paper upon which they are sought to be held liable, their true relation to themselves may be shown by parol evidence, and that the one who receives the benefit of the execution of the note is the principal, and the one who does not receive any benefit, but simply signs it as an accommodation for the other, is the surety. *Stuart v. Altman*, 8 Tex. Civ. App. 657, 28 S. W. 461; *Dessar v. King*, 110 Ind. 69, 10 N. E. 621.

The findings above quoted bring this case well within the rule announced, and the judgment is affirmed.

Affirmed.

# CHICAGO, R. I. & G. RY. CO. v. CLARK. (No. 7893.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 14, 1914. Rehearing Denied  
April 18, 1914.)

**1. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.**  
Where plaintiff, suing a railroad company for injuries to animals frightened by a train, testified that the accident happened on a designated date and on the road alleged in the petition, and the company procured the testimony of its engineers running trains on that date, who all testified that they knew nothing of the accident, the error in overruling exceptions to the petition for failure to specify the date of the injury or identify the train and place of injury was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**2. DAMAGES (§ 113\*)—INJURIES TO ANIMALS—MEASURE OF DAMAGES.**  
Where animals negligently injured have a market value after the injury, the measure of damages is the difference between their value immediately before and immediately after the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.\*]

**3. DAMAGES (§ 113\*)—INJURIES TO ANIMALS—MEASURE OF DAMAGES.**  
Where one suing for injuries to animals showed that the animals died soon after the accident, and testified that he thought that at the time of the injury they had some value, the amount of which he would not estimate, he

was entitled to recover the full market value of the animals before the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.\*]

**4. DAMAGES (§ 116\*)—INJURIES TO ANIMALS—MEASURE OF DAMAGES.**

One negligently injuring animals, resulting in their death soon afterwards, is properly charged with the cost of hay and medicine used by the owner in a good-faith effort to prevent their death.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 116.\*]

Appeal from Montague County Court; Levy Walker, Judge.

Action by F. M. Clark against the Chicago, Rock Island & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John Speer, of Bowie, and Lassiter, Harrison & Rowland, of Ft. Worth, for appellant. H. F. Weldon, of Bowie, for appellee.

DUNKLIN, J. F. M. Clark recovered a judgment against the Chicago, Rock Island & Gulf Railway Company for damages on account of injuries to two mules, from which judgment the defendant has appealed.

In his petition the plaintiff alleged that on or about November 12, 1912, while he was driving the mules, together with other animals, along a public road adjacent to the defendant's right of way, and while one of the defendant's trains was passing him, the operatives of the engine negligently frightened the mules by blowing the locomotive whistle, which caused the mules to run and injure themselves upon a barbed wire fence. The evidence showed without controversy that the mules were injured as alleged, and that as result of those injuries they died, and no complaint is made of the insufficiency of the evidence to support the charge of negligence on the part of the operatives of the locomotive.

[1] Error has been assigned to the action of the trial court in overruling a special exception addressed to the petition on the ground that neither the exact date of the injury, nor any identification of the train, nor the exact place of the injury, was alleged. Plaintiff testified without controversy that the accident happened on November 12, 1912, and further that it occurred on the road alleged in his petition, which was about eight miles north of the town of Stoneburg and four miles south of the town of Ringgold. In the argument presented by appellant following the assignment now under discussion, it is stated that appellant "procured the testimony of its engineers covering November 12th," and the statement of facts contains the testimony of several of its employees who operated a train upon that date and who testified that they knew nothing of the accident of which plaintiff complained. The assignment is predicated chiefly upon the erroneous supposition, the error of which was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

later admitted in appellant's supplemental brief, that the accident occurred on November 11th. If, as stated in appellant's brief, it procured the testimony of its engineers operating trains on November 12th, we fail to perceive how the error, if any, in overruling the exception resulted in any harm to the company, for the only purpose of the pleading would be to enable the defendant to meet with proof the issue presented in plaintiff's petition. Rule 62a, 149 S. W. x.

[2, 3] In the court's charge the jury were instructed that in the event of a verdict for plaintiff the measure of his damages would be the reasonable market value of the mules at the time of their injury plus the reasonable market value of necessary hay and medicine used in the care of said mules after their injury. Error has been assigned to this charge upon the ground that there was testimony showing that the mules had a market value immediately after their injury, and that the true measure of damages was the difference between that value and their market value at the same time and place in an uninjured condition. It cannot be questioned that, if the animals had a market value after their injury, a correct measure of plaintiff's damages would have been the difference between their value immediately before and immediately after the injury, as announced in *G., C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, cited by appellant. While the plaintiff did testify that at the time of the injury he thought the animals had some value, the amount of which he would not undertake to estimate, yet it is quite apparent that he was mistaken in this, for the evidence shows without controversy that they were very badly injured and that on account of those injuries they soon thereafter died. Neither he nor any other witness testified upon the trial that the mules had any market value immediately after the injury, and the testimony of the plaintiff was to the effect only that at the time of the accident he then thought they had some value.

[4] It thus appears that plaintiff was entitled to recover the full market value of his animals before their injuries, and appellant cannot complain of being charged also with the cost of hay and medicine used by the plaintiff in a good-faith effort to avert their entire loss. *Ulit v. Biggs*, 53 Tex. Civ. App. 529, 116 S. W. 126; *T. & P. Ry. Co. v. Webb* (Tex. Civ. App.) 114 S. W. 1170.

The judgment is affirmed.

**WILLIAMS v. CITY NAT. BANK.** (No. 7845.)  
(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 7, 1914. Rehearing Denied  
March 28, 1914.)

**1. CONTRACTS (§ 71\*)—CONSIDERATION—FORBEARANCE.**

A promise by a purchaser of merchandise from a dealer indebted to the seller of the mer-

chandise to pay the debt if the dealer did not do so, made in consideration of the seller forbearing to attach the merchandise, was supported by a sufficient consideration passing from the seller to the purchaser.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 295, 296, 298, 316-324; Dec. Dig. § 71.\*]

**2. FRAUDS, STATUTE OF (§ 17\*)—COLLATERAL AGREEMENT TO PAY DEBT OF ANOTHER.**

A parol promise by a purchaser of merchandise from a dealer indebted to the seller thereof for the price to pay the debt if the seller did not do so, made in consideration of the seller forbearing to attach the merchandise, is a conditional promise to pay the debt of another, and is not enforceable within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 18, 16, 17; Dec. Dig. § 17.\*]

Appeal from Wise County Court; **E. M. Allison**, Judge.

Action by the City National Bank against **I. W. Williams** and others. From a judgment for plaintiff, defendant named appeals. Reversed and rendered for appellant.

**Chandler & Pannill**, of Stephenville, for appellant. **R. E. Carswell**, of Decatur, for appellee.

**DUNKLIN, J. I. P.** and **G. M. Cowan**, composing the partnership firm of **Cowan Bros.**, were engaged in the mercantile business in the town of **Bluffdale**, in **Erath county**; their stock in trade consisting of dry goods and groceries. While so engaged they purchased from the **Rhame Milling Company** flour, meal, and chops. The account held against them by the milling company showing a balance due of \$246.95 was transferred to the **City National Bank of Decatur** by the milling company.

This suit was instituted by the bank against **Cowan Bros.**, **I. W. Williams**, and the **Rhame Milling Company**. In plaintiff's original petition the alleged liability of the **Rhame Milling Company** was that of guarantor, while the cause of action alleged against **Williams** consisted in allegations that the flour, meal, and chops purchased by **Cowan Bros.** from the milling company and covered by the account sued on was sold to **Williams** by **Cowan Bros.** in violation of the bulk sales law of the state, and, further, that after said purchase **Williams**, for a valuable consideration, promised the milling company to pay said account.

In his answer, among other defenses, **Williams** pleaded that, if he promised to pay the account, there was no consideration to support such promise, that the promise was in parol, and, being a promise to answer for the debt of **Cowan Bros.**, was in contravention of the statute of frauds, and therefore he was not liable thereon. By supplemental petition the plaintiff alleged that the purchase of the goods from **Cowan Bros.** by **Williams** was for the purpose of hindering, delaying,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and defrauding the creditors of the latter, and without any consideration paid therefor; that, after Williams thus came into possession of the goods, the agent of the milling company demanded of Williams that he surrender the same to the milling company, or else pay the account, and threatened that, if the demand was not complied with, suit would be instituted against Cowan Bros. on said account, and the goods would be levied on by writ of attachment; that Williams, in consideration that the milling company would forbear resort to such proceedings, agreed with the agent of the milling company to pay the account; that, in consideration of such agreement by Williams, the milling company refrained from the institution of such proceedings.

In reply to the supplemental petition Williams specially denied that he purchased the goods with intent to hinder, delay, or defraud the creditors of Cowan Bros., further alleging that he purchased only \$76.65 worth of flour, that he purchased the same in retail in good faith and paid value therefor, and that the flour so purchased was sold to him in the ordinary course of trade; he also again invoked the statute of frauds as a defense to the alleged agreement set out in the supplemental petition.

Judgment was rendered in favor of the plaintiff against all of the defendants as prayed for the sum of \$246.95, and, from that judgment, Williams has appealed.

The court submitted the case to the jury upon special issues, three of which issues, together with the findings of the jury thereon, are as follows, to wit:

"(8) Did defendant Williams conspire or confederate with Cowan Bros., whereby any part of the property of said Cowan Bros. was received by said Williams and held and disposed of for the purpose and with the intent to hinder, delay, or defeat the creditors of said Cowan Bros.? In answering this question you will consider all the facts and circumstances in evidence before you.

"To the eighth issue we answer, 'Yes.'

"(9) Did defendant Williams receive and have in his possession any of the flour and meal sold by Rhome Milling Company to Cowan Bros., and did J. W. Malone, the agent of said milling company, know that fact, and demand of said Williams that he pay the balance due on said flour and meal by Cowan Bros., or that he (Malone) would sue and attach the same for said milling company?

"To the ninth issue we answer, 'Yes.'

"(10) Did said Williams agree with said Malone that he (Williams) would pay the balance due said milling company by Cowan Bros. if he (Malone) would not bring suit and attach said flour and meal then in the possession of said Williams? And in this connection state whether or not such promise, if you find the same made, was in writing or oral. In answering the foregoing question,

you will consider the evidence before you and be governed thereby.

"To the tenth issue we answer, 'Yes; orally.'"

Appellant insists that the court erred in overruling his motion for a judgment in his favor upon the findings of the jury upon issue No. 10, as shown above, considered in connection with the uncontroverted testimony of J. W. Malone himself, several times repeated, that the only promise Williams made was that he would pay the account "if Cowan Bros. did not do so." Malone further testified relative to the promise so made to him by Williams as follows: "I relied upon this promise, and did not bring this suit, and agreed to leave the stuff with him. If he had not so promised, I would have attached the property."

[1, 2] It thus appears that Williams' promise to pay the debt was supported by a sufficient consideration passing from the milling company. But it further appears that his contract to pay the debt was that of guarantor only. His promise was not unconditional, but was conditioned upon the failure of Cowan Bros. to pay, and therefore was collateral. The question, then, is whether or not a valuable consideration passing from the milling company to Williams would take the case out of the statute of frauds.

Our statute of frauds (Rev. St. 1911, § 3965) reads:

"No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized: \* \* \*

"No. 2. To charge any person upon a promise to answer for the debt, default, or miscarriage of another; or. \* \* \*"

In the suit of Hill v. Frost, 59 Tex. 25, our Supreme Court used the following language: "If the promise is merely collateral and auxiliary to the original debt, it would be nothing more than a verbal agreement to pay the debt of another, and is within the statute. The agreement to take the case out of the statute must not only be in writing, but, like any other promise binding in law, must be founded upon a sufficient consideration moving between the parties. Browne on Statute of Frauds, § 189. There is some doubt from the evidence whether there was any promise of any kind made by appellant. The utmost that can be said is that Mrs. Hill told appellee not to bother her son; that she would pay the debt on the 1st of April following. This was clearly a promise collateral to the existing liability of another, if it was a binding promise at all. In Warren v. Smith, 24 Tex. 486, 76 Am. Dec. 115, it is said, Judge Bell delivering the opinion of the court: 'If the promise to answer for the debt of another is collateral only, and if the origi-

nal liability continues to subsist, the collateral promise is within the statute; but if, by the new promise, the original liability is extinguished, then the new promise is not within the statute, but is regarded as an original contract on sufficient consideration, which need not be in writing." To the same effect are *Chauvin v. McKnight*, 132 S. W. 383; *Starr v. Taylor*, 56 S. W. 543. See, also, 2 *Elliott on Contracts*, § 1231.

In the case of *Porter v. Norman*, 136 S. W. 1173, *Norman*, a merchant, sought to hold *Porter* liable for certain goods sold to two of the latter's Mexican tenants, and, in disposing of that appeal, this court used the following language: "To take the case out of the statute, the oral promise must be an original one. The merchandise must have been advanced to the Mexicans upon the faith of a promise on appellant's part to himself pay for them, and not merely 'to secure the payments,' as authorized by the court's charge. See *Rentfrow v. Lancaster*, 10 Tex. Civ. App. 321, 31 S. W. 229; *Dabney v. Conley*, 65 S. W. 1124."

"Generally speaking, an oral undertaking by a person not previously liable for the purpose of securing the debt or performing the same duty for which the person for whom the undertaking is made remains liable is within the statute of frauds, and must be in writing." 20 *Cyc.* p. 164.

In *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291, a surviving wife was held liable upon her promise to pay the debt of her deceased husband due upon a stock of goods. In that case the court said: "This contract was one that was independent of that which plaintiff's husband had made with the defendant upon which his estate was indebted to the defendant; the plaintiff's undertaking to pay the debt was founded upon an agreement with defendant under which she should retain the stock of drugs, and continue to keep her stock replenished by obtaining additional supplies of drugs on the credit from the defendant. In consideration of such advantages to herself she promised to pay the debt. The rule is deduced by Mr. Roberts, in his treatise on the Statute of Frauds, 232: 'That, if the consideration of the new promise spring out of any new transaction or moved to the party promising upon some fresh and substantial ground of a personal concern to himself, the statute of frauds does not attach.' *Browne on Statute of Frauds*, § 212. This case seems to come within the above rule."

In that case the promise of the widow to pay the debt of the deceased husband was absolute and unconditional. It was not a promise to pay the debt if the administrator of the estate or some one else did not pay it.

Appellee has cited several authorities in support of the contention that, if *Williams'* agreement to pay *Cowan Bros.'* debt was supported by a valuable consideration passing to *Williams*, his agreement would not be

within the statute of frauds, including *Spenner v. Nalle*, 143 S. W. 991, by the Court of Civil Appeals for the Third Judicial District; *Blakeney v. Nalle*, 45 Tex. Civ. App. 635, 101 S. W. 875, by the same court; *Hilliard v. White*, 31 S. W. 553; *Eppstein v. Wolfe*, 35 S. W. 52; *Monroe v. Buchanan*, 27 Tex. 241; *Gay v. Pemberton*, 44 S. W. 400. In each of the cases cited it seems that a parol agreement to pay the debt of another, supported by a valuable consideration to the promisor, was held not to come within the statute of frauds. In some of those cases the agreements seem to have been mere contracts of guaranty, and in others the contracts were unconditional agreements to pay debts of others in part consideration for conveyances of property to the promisors. As said by our Supreme Court in *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291, the authorities in other states are hopelessly in conflict upon the question now under discussion. It seems, also, that the same might be said of the decisions of the Courts of Civil Appeals of our own state.

"To constitute the contract of suretyship or guaranty, the same things are necessary as to constitute any other contract, viz.: That the parties be competent to contract; that they actually do contract; and that the contract, if not under seal, be supported by a sufficient consideration." 1 *Brant on Suretyship and Guaranty*, § 3.

"Where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract." 1 *Brant on Suretyship and Guaranty*, § 17. To the same effect is *Baker v. Wahrmond*, 5 Tex. Civ. App. 268, 23 S. W. 1023.

It thus appears that whether or not the agreement of *Williams* to pay the debt of *Cowan Bros.* was a contract of guaranty simply, or whether he was liable thereon as an undertaking for his own benefit to be performed without regard to *Cowan Bros.'* liability therefor, is not to be determined alone by the simple fact that such promise was supported by a valuable consideration passing to him. In *Spann v. Cochran & Ewing*, 63 Tex. 240, it was held that one who, in part consideration for the purchase of property, assumes the payment of an outstanding mortgage indebtedness against the property cannot claim the benefits of the statute of frauds. In that case the following language is used: "The rule is thus stated: 'The general principle prevailing in all the cases under this branch of the statute of frauds is that, whenever the defendant's promise is in effect to pay his own debt to the plaintiff, though that of a third person may be incidentally discharged, the promise need not be in writing.' *Browne on Statute of Frauds*, 165. 'It contemplates a promise to answer

for another's debt, a promise for that purpose, a mere guaranty; and it never was meant that a man should set it up as a pretext to escape from the performance of a valid verbal obligation of his own, because, in performing it, the discharge of a third party's debt was incidentally involved.' Browne on Statute of Frauds, 212. The same rule is laid down by a late author. Reed on the Statute of Frauds, 115."

This case illustrates the distinction between what is usually termed an "original" agreement, not within the statute of frauds, and a "collateral" agreement, which is within the statute of frauds. The liability of a purchaser of property upon an indebtedness outstanding against it, and which he has assumed in part consideration for the sale, and thereby made the debt his own, is the same as if he had signed the obligation with the maker; in other words, his liability is absolute, and not conditional upon the failure of the maker of the note to pay the debt. In no sense is such a contract one of guaranty merely to the owner of the obligation.

In the present case no claim is made that the milling company sold to Williams any title in the goods. On the contrary, after Malone discovered the fact that the goods had been sold by Cowan Bros. to Williams with intent on the part of the vendor and vendee to defraud the creditors of the vendor, the milling company did not elect to rescind the sale and claim the goods, but continued to claim the indebtedness against Cowan Bros., transferred the account to the plaintiff bank, and procured the institution of this suit claiming the same liability, and procured a judgment against Cowan Bros. as well as against Williams. The only consideration alleged and proven to support the promise of Williams to pay Cowan Bros.' account to the milling company was the agreement on the part of the milling company to forbear the fixing of an attachment lien upon the goods.

For the reasons noted, the appellant's first assignment of error is sustained, the judgment of the trial court is reversed, and judgment is here rendered in favor of appellant, omitting as unnecessary any discussion of the other assignments contained in appellant's brief. In all other respects the judgment is undisturbed.

Reversed and rendered for appellant.

**GULF, C. & S. F. RY. CO. v. RIORDAN.**  
(No. 7860.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 21, 1914. Rehearing Denied  
March 28, 1914.)

**1. MASTER AND SERVANT (§ 286\*) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

In a railroad engineer's action for injuries caused by slipping on the running board, evidence that there was water, dirt, and grease on

the running board before the engine was taken to the shops shortly before the accident, and that it was the duty of the employes in the shops to remove oil from the running board, made a question for the jury as to the company's negligence in permitting oil to be on the running board at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 283.\*]

**2. TRIAL (§ 253\*)—ACTIONS FOR PERSONAL INJURIES—INSTRUCTIONS—IGNORING ISSUES.**

In a railway engineer's action for injuries caused by slipping on the running board, where plaintiff alleged negligence in permitting oil to be on the running board and in failing to install an equipment for opening the blow-off cock from the cab without going on the running board, an instruction that, if plaintiff was negligent in failing to discover the oil on the running board before he slipped and fell, he could not recover was properly refused, as it would have excluded a recovery upon the other issue of negligence in the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**3. MASTER AND SERVANT (§ 228\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.**

Under Rev. St. 1911, Art. 6649, providing that, in actions brought under the provisions of the preceding articles for personal injuries to a railroad employe, his negligence shall not bar a recovery, but that the damages shall be diminished in proportion to the negligence attributable to him, the negligence of a railway engineer in failing to discover oil upon the running board before he slipped and fell, co-operating with the company's negligence in permitting the oil to be on the running board, was not a complete bar to a recovery, and an instruction that if he was negligent he could not recover was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

**4. MASTER AND SERVANT (§ 278\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.**

Evidence, in a railway engineer's action for injuries caused by slipping on the running board, that it was the custom of many railway companies to use engines equipped with an appliance for operating the blow-off cock from the cab without going on the running board, that such appliance could be installed at a cost not exceeding \$1.50, and that plaintiff had requested the roundhouse foreman to have such equipment installed supported a finding of negligence in failing to equip the engine with such appliance, though there was evidence that many well-regulated and prudently managed railroads used engines without such equipment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**5. MASTER AND SERVANT (§ 291\*) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

In a railroad engineer's action for injuries caused by slipping on the running board, testimony that there was oil on the running board at the time of the accident, that there was no oil thereon when the engine left the roundhouse shortly before, and that, if the packing around the piston of the air pump had been in proper condition, no appreciable amount of oil would have leaked therefrom during the interval justified the submission of the issue as to a defect in the air pump, permitting oil to escape therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**6. MASTER AND SERVANT (§ 289\*) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

Under Rev. St. 1911, art. 6645, providing that, in actions for personal injuries to any railroad employé caused by negligence, assumed risk, where the ground of the plea is knowledge or means of the knowledge of the defect or danger, shall not be available, where the employé had an opportunity before being injured and did notify the employer within a reasonable time, where there was evidence that engines equipped for operating the blow-off cock from the cab were in common use, that such equipment could be installed at a trifling cost, and that the roundhouse foreman had promised an engineer that such equipment would be furnished, whether the engineer assumed the risk of injury in operating the blow-off cock from the running board was a question of his contributory negligence within the province of the jury, and the court properly refused to charge that the engineer assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

Appeal from District Court, Cooke County; C. F. Spencer, Judge.

Action by E. H. Riordan against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, Garnett & Garnett, of Gainesville, and A. H. Culwell and John G. Gregg, both of Galveston, for appellant. Stuart, Bell & Moore, of Gainesville, for appellee.

DUNKLIN, J. The Gulf, Colorado & Santa Fé Railway Company has appealed from a judgment in favor of E. H. Riordan, for damages for personal injuries. This is the second appeal prosecuted to this court; the decision on the former appeal being reported in 146 S. W. 711.

While engaged as a locomotive engineer on one of appellant's trains, Riordan descended from the engine cab and went out upon the running board of the engine for the purpose of opening the blow-off cock to let out sediment accumulating in the boiler, and thus to leave clean water in the boiler. A rod extended from the blow-off cock up to the running board, and the cock was opened by using a steel bar as a lever. In order to reach this bar, it was necessary to pass around an air pump which extended above the running board. When plaintiff stepped around this air pump, his foot slipped from the running board, causing him to fall, and thereby to sustain injuries. He alleged that grease and oil had accumulated upon the running board, and that this caused his foot to slip; that the oil escaped from the air pump as a result of improper packing between the cylinder and the piston of the pump; that the railroad company was guilty of negligence in furnishing him the engine in that condition; that the company was guilty of negligence further in not installing upon the engine an equipment for opening the blow-off cock from the cab of the engine, thus obviating the necessity

of going upon the running board for that purpose. He further alleged that prior to his injury he had requested the foreman of appellant's roundhouse at Gainesville to provide said engine with such equipment, and that such agent had promised him that his request would be complied with. In the court's charge to the jury plaintiff's right to recover was predicated upon those allegations of negligence. The evidence further shows that, a few days prior to the date of the accident, plaintiff had operated the engine in question, but that it had been sent to appellant's roundhouse in Gainesville for repairs, from whence it was taken to Ardmore, and plaintiff's injury occurred on the night next succeeding the day it was taken out of the shop. Plaintiff resumed charge of the engine at Ardmore on the night of his injury, other employés having operated it from the time it left the roundhouse until then, and had been operating it only for an hour or so when the injury occurred. The only use made of the engine from the time it left the shop until plaintiff took charge of it was to run from Gainesville to Ardmore, a distance of about 40 miles, and some switching done in the yards after its arrival at Ardmore.

[1] The court submitted both issues of negligence alleged in the pleadings and referred to above. Appellant insists that the evidence is insufficient to support a finding of negligence in permitting the presence of oil on the running board at the time plaintiff was put in charge of the engine. On the former appeal one of the reasons for reversal was the lack of testimony upon that issue, but the same cannot be said of the record now before us. E. D. Hudgins, one of defendant's employés, who was serving as a brakeman upon the engine in question shortly before it was taken to the shops, testified that he noticed a little water, dirt, and grease mixed together on the running board near the air pump. He said that he noticed this when he went out on the running board to operate the blow-off cock. It was further shown by the testimony of appellant's officials in charge of the roundhouse that it was the duty of employés there engaged to make an inspection of engines sent to the shop, and that if oil was discovered upon the running board to remove the same.

[2, 3] There was no error in refusing appellant's requested special charge No. 7, which was in effect that, if plaintiff was guilty of negligence in failing to discover the presence of the oil upon the running board before he slipped and fell, he could not recover. Such an instruction, if given, would have excluded any right of recovery upon the other issue of negligence alleged in the plaintiff's petition; furthermore, under Revised Statutes 1911, art. 6649, the negligence of the plaintiff in that respect, co-operating with the negligence of the defendant, would not be a complete bar to a recovery.

[4] By several assignments appellant insists that there was no evidence to sustain a finding of negligence on the part of the defendant in failing to equip the engine with an appliance for operating the blow-off cock from the cab of the engine, thus relieving the engineer of the duty to go out upon the running board to operate it. While appellant's evidence tended to show that many well-regulated and prudently managed railroads of Texas used engines without such equipment, yet there was further testimony tending to show a custom of many railway companies to the contrary. Furthermore, there was testimony which seemed to be undisputed that the cost of installing such an appliance upon the engine in question would not have exceeded one dollar and a half, and that prior to the accident plaintiff requested C. P. Barnhill, foreman of defendant's roundhouse at Gainesville, to have such equipment installed on the engine, and that Mr. Barnhill promised that his request would be complied with.

Error has been assigned to an instruction by the court that, if plaintiff requested C. P. Barnhill, foreman of appellant's roundhouse at Gainesville, to install the equipment, then the plea that plaintiff had assumed the risk would not be availing. The ground upon which this charge is challenged is the contention that the evidence showed without controversy that practically all well-regulated and prudently managed railway companies in Texas operated engines without such equipment, and that there was no law requiring engines to be so equipped. This assignment must be overruled, as two or three witnesses testified that it was customary with some railway companies to so equip the engines as to enable the blow-off cock to be operated from the cab of the engine.

[5] It is also insisted that there was no evidence authorizing the submission of the issue of a defect in the air pump which permitted the oil to escape therefrom to the running board. This contention must be overruled for the following reasons: Plaintiff testified that there was oil on the running board at the time of his injury; the testimony of some of appellant's witnesses tended to show that there was none on the running board at the time it left the roundhouse at Gainesville for Ardmore. Other witnesses testified in effect that, if the packing around the piston of the air pump was in proper condition, no appreciable amount of oil would have leaked therefrom from the time the engine left the roundhouse at Gainesville until the time of the accident.

[6] Complaint is made of the refusal of appellant's requested charge No. 3, which was in effect a peremptory instruction that plaintiff assumed the risk and danger of the injury in so far as it was necessary for him to operate the blow-off cock from the

running board instead of from the cab. The reason assigned for the refusal of this instruction is substantially that the engine in question was not designed for the operation of the blow-off cock from the cab; that it was proven beyond controversy that engines so equipped were largely in use upon other well-regulated and prudently managed railroads, and hence the defendant could not be charged with negligence in furnishing to plaintiff a locomotive of that make and design. A sufficient answer to this is the testimony referred to, to the effect that engines equipped for operating the blow-off cock from the cab were in common use; that at a trifling cost such equipment could have been installed upon the engine in question; and that the foreman of the roundhouse had promised the plaintiff that such an equipment would be furnished. Furthermore, under Revised Statutes 1911, art. 6645, the question whether or not the plaintiff assumed the risk would be a question of his contributory negligence vel non, a decision of which was the province of the jury and not that of the court.

The judgment is affirmed.

#### GILLESPIE v. STATE. (No. 2800.)

(Court of Criminal Appeals of Texas. Jan. 28, 1914. On Motion for Rehearing, March 18, 1914. Dissenting Opinion, April 23, 1914.)

#### 1. SEDUCTION (§ 50\*)—PROMISE OF MARRIAGE—CONDITIONS—EVIDENCE—INSTRUCTIONS.

In a prosecution for seduction under promise of marriage, evidence held to require a finding that the promise of marriage by which prosecutrix was induced to yield her person on the first occasion was not conditioned on her becoming pregnant from the intercourse, so that the court did not err in refusing to submit the question of such alleged conditional promise.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.\*]

#### 2. SEDUCTION (§ 50\*)—INSTRUCTION—CORROBORATION OF ACCOMPLICE.

In a prosecution for seduction, the court charged that prosecutrix was an accomplice, and that defendant could not be convicted on her testimony alone, unless the jury believed her testimony was true, and it showed that the defendant was guilty of the offense charged in the indictment, and not even then unless the jury further believed there was further testimony in the case corroborative of her testimony, tending to connect defendant with the offense charged; that corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect defendant with its commission, and then, from all the evidence, the jury must believe, beyond a reasonable doubt, that defendant is guilty, but that the corroborative evidence need not be direct and positive, independent of prosecutrix's testimony, but proof of such facts and circumstances as tend to support her testimony, and would satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense of seduction, and which tend to connect defendant with the commission of the offense, will fulfill the requirements, as it is for the jury to say, from all the facts and cir-

cumstances in evidence, whether she had been sufficiently corroborated. *Held*, that such instruction properly stated the law, and could not lead the jury to believe that the burden of proof was not on the state to corroborate prosecutrix.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.\*]

### 3. CRIMINAL LAW (§ 511\*)—ACCOMPLICE'S TESTIMONY—CORROBORATION.

Testimony may be sufficient to corroborate an accomplice, though it is not of itself sufficient to show defendant's guilt, exclusive of the accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.\*]

### 4. SEDUCTION (§ 46\*)—TESTIMONY OF PROSECUTRIX—CORROBORATION—EVIDENCE.

In a prosecution for seduction under promise of marriage, evidence of defendant's conduct toward her both prior and subsequent to the alleged seduction *held* sufficient to corroborate her testimony that she yielded to him solely because she loved him, and he loved her, and had promised to marry her.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

### 5. CRIMINAL LAW (§ 829\*)—TRIAL—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse a requested charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

### 6. CRIMINAL LAW (§ 811\*)—INSTRUCTIONS—REQUESTED CHARGE—PARTICULAR FACTS.

A requested charge that the jury should not find that there was a promise of marriage on the testimony of prosecutrix alone, but under the law her evidence as to the promise of marriage under which she claims she has been seduced must be corroborated (i. e., confirmed by direct and positive testimony, or by circumstances of such character as to convince the jury beyond a reasonable doubt that her testimony in that respect is true), was properly refused as singling out a particular fact and attempting to charge thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

### 7. SEDUCTION (§ 46\*)—PROSECUTRIX—CORROBORATION.

In a prosecution for seduction under promise of marriage, it is not necessary that the seduced woman be corroborated in each and every particular of the elements necessary to constitute the offense.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

### 8. SEDUCTION (§ 42\*)—EVIDENCE—CHARACTER OF PROSECUTRIX.

Where, in a prosecution for seduction under promise of marriage, prosecutrix's reputation for chastity became an issue, evidence that on one occasion, during the time in question, she had a difficulty with a young man in a church and called him "a damn son of a bitch" was admissible.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 73-75; Dec. Dig. § 42.\*]

### 9. CRIMINAL LAW (§ 361\*)—EVIDENCE—LETTERS—INTENT.

Where, in a prosecution for seduction under promise of marriage, defendant swore that he received a letter from prosecutrix, while he was absent in Colorado, soliciting him to return because she suspected she was pregnant, and on his return that she told him the reason why

she wrote the letter, she was entitled to testify as to the reason why she desired him to return.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802, 803; Dec. Dig. § 361.\*]

### 10. CRIMINAL LAW (§ 1109\*)—APPEAL—BILL OF EXCEPTIONS—MODIFICATION.

Appellant having accepted a bill of exceptions as modified by the court, he is bound by the modification.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897, 2898, 2900, 2902, 3204; Dec. Dig. § 1109.\*]

### 11. SEDUCTION (§ 40\*)—EVIDENCE—RELEVANCY.

In a prosecution for seduction under promise of marriage, evidence that prosecutrix's mother had been long dead at the time of the seduction was admissible.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. § 40.\*]

### 12. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY.

Where, in a prosecution for seduction under promise of marriage, it was shown that on one occasion O. was seen in prosecutrix's company by certain others, evidence that on the next day he requested those who saw him never to say anything about having seen him with prosecutrix the night before was hearsay and inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

Davidson, J., dissenting.

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Jeff Gillespie was convicted of seduction under promise of marriage, and he appeals. Affirmed on rehearing.

Woods & Morrow, of Kaufman, Nelms & Puckitt, of Dallas, Fred S. Rogers, of Kaufman, and W. F. Ramsey and C. L. Black, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of seduction; his punishment being assessed at two years' confinement in the penitentiary.

The record discloses that the judge called a special term of the court to meet on the 19th day of May. This seems to have been occasioned by reason of the fact that the Legislature changed the time of holding terms of the district court in that county. To avoid any possible or probable consequences, the judge called the special term to meet on the same day the regular term convened under the prior law. At the time of calling the special term, the new law was not in force and would not be until July. Under previous act of the Legislature, the court in regular term convened on that particular Monday, which happened to fall on the 19th of May. So we have, as a matter of fact, the special term called for the same day that the regular term should have convened. Had the judge not called the special term for that particular day, under the law the regular term would have convened. We are of opinion that there is no merit in appellant's proposition that the special term

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was unauthorized by law. It would make no difference that the judge issued his order calling the special term on that day. It would have been the regular day for the term anyway. It did not in any way interfere with the two regular terms required by the Constitution for the district court to be held in the county.

The indictment incorporated in the record fails to conclude "against the peace and dignity of the state," as required by the Constitution. It may be this was an omission on the part of the clerk in transcribing the indictment, but such is the record. This renders the indictment invalid, and for this reason the judgment must be reversed. We notice this question in passing, for by certiorari this defect might be cured by showing it was an omission by the clerk in transcribing the indictment.

There are other matters in the record that will have to be noticed, and which, in our judgment, require a reversal. The prosecutrix testified substantially that appellant and she had been going together since 1907, and became engaged to be married; that, when the first solicitation on his part was made, she agreed to and did have intercourse with him under this promise of marriage. She states also in substance that he told her if she became pregnant or anything happened he would immediately marry her, and too quick for it to be known. Some time in 1910 she says the first act occurred, and that it kept up with regularity as occasion presented until a few months before the birth of her child; and that on each of these occasions he promised to marry her. There is evidence also that she went with several other young gentlemen in the neighborhood on various and sundry occasions to different functions, church and other places. Some of these associations with other young gentlemen were shown to have been at night and when she was alone with them. The defendant also introduced evidence to the effect that she was caught in some bushes in a very compromising attitude with one Burton. This was denied on the part of the state, and there was evidence pro and con as to whether it was Burton that she was seen with, but the defendant's witness was pretty positive as to this fact. The defendant admits going with the girl and having intercourse with her, but denies there was any promise of marriage.

The court in a general way gave the jury a definition of seduction. Applying the law to the case, the jury was informed that if they should find from the evidence that appellant, "by a promise to marry her, made by him to Lela Hefington, did seduce and obtain carnal knowledge of her, and that she was at the time a chaste and unmarried female under the age of 25 years, and that she yielded her person to and had carnal intercourse with the defendant by reason of a promise of marriage made by him to her,

on which she relied," then he would be guilty. He also charged the prosecutrix would be an accomplice, and that the corroboration would not be sufficient if it merely shows the commission of the offense charged, but it must tend to connect the defendant with its commission, and then from all the evidence, the jury must believe, beyond a reasonable doubt, the defendant is guilty. He then charged them that it was not necessary that the evidence be positive and direct; that she could be corroborated by circumstances which tended to connect the defendant with the commission of the offense charged. Then he gave this clause in the charge: "It is for you to say, from all the facts and circumstances in evidence before you, whether she has been sufficiently corroborated, and, if you find there is an absence of such corroborative testimony, you must acquit the defendant." We notice this clause in passing, because of further matters suggested in connection with the court's charge and refusal to give special instructions. We desire to say that it hardly states the rule correctly to say it is for the jury to say from the facts and circumstances that she has been corroborated; the corroboration must tend to connect defendant with the offense, nor is it correct to require the jury to find there was an absence of corroboration in order to acquit. This changes the burden of proof and requires the jury, before they can acquit, to find an absence of corroboration. The rule is that she must be corroborated, and, unless she is so corroborated, the jury will acquit. It is not the absence of corroboration which requires acquittal, but it is the presence of corroboration that authorizes a conviction; and, unless she is corroborated, the state has no legal case. Under this rule laid down by the court, the jury could not acquit, unless they should find that there was an absence of corroboration. The rule is the reverse, that the state must show the corroboration in order to get a verdict.

The court further charged the jury that if they should believe from the evidence that appellant had carnal intercourse with prosecutrix one or more times, but believe that at the time of the first act of intercourse she was not a chaste woman, or if they had a reasonable doubt of that fact, they should acquit, even though the jury might find that such act of intercourse was produced by a promise of marriage; or if they should find that she was a chaste woman at the time of the first act of intercourse between her and defendant, but should find that she yielded to same, not because of a promise of marriage, but on account of her own amorous passion or sexual desires, or if they had a reasonable doubt, they should acquit; or if they believed that the first act of intercourse between defendant and prosecutrix was induced or brought about by any means other than by a promise of marriage made by defendant to her upon which she relied, or if they had

a reasonable doubt thereof, they should acquit; or if they had a reasonable doubt as to whether defendant promised to marry her, they should acquit. Various objections were urged to these charges at the time, and appellant asked, among other things, the following charge: "The jury are instructed that in this case you cannot find that there was a promise of marriage upon the testimony of the prosecutrix, Lela Hefington, alone, but, under the law, her evidence as to the promise of marriage must be corroborated; that is, confirmed by direct and positive testimony or by circumstances of such a character as to convince the jury, beyond a reasonable doubt, that her testimony in this respect is true." This charge was refused because, the court says, covered in the main charge. We are of opinion that it was not, and especially in view of the fact that the court charged the jury, as above mentioned, that, if the jury should find there is an absence of corroboration, they would acquit. The special charge should have been given, and, under the attitude of this record, the error in the court's charge, and refusal to give the special requested instructions, the judgment ought not to be affirmed.

Exceptions were also reserved to the charge because it failed directly and affirmatively to instruct the jury that, if the prosecutrix yielded her virtue under promise of marriage to appellant that if she became pregnant he would marry her, he should be acquitted. This was not pointedly given to the jury, and, under the testimony, we are of opinion it should have been affirmatively charged, and that this particular question should have been called to the attention of the jury in the charge. The testimony of prosecutrix indicates that this may have occurred, and that she yielded her person to him on a promise that if she became pregnant he would marry her.

There are several bills of exception reserved to the ruling of the court on the admission and rejection of testimony. The reputation of the prosecutrix became a leading question in the case. It was attacked for want of chastity and virtue. The appellant supported his theory that she was not a chaste woman, and introduced quite a lot of evidence showing she was out at night with other men, and at times and under circumstances which reflected upon her character for chastity, and tended to show that it was not good; that is, that such conduct was a reflection upon her chastity and good name. The state introduced evidence to support her reputation for chastity as being good, and to show that her conduct was ladylike in every respect. This was admitted, it seems from the bill of exceptions, because defendant had shown she had been out at night, at unseasonable hours, with other men, driving around the country. As before stated, to meet this the state introduced evidence of her general standing and reputation for lady-

like deportment. The defendant then proposed to prove and offered testimony to show that on one occasion she had a difficulty with a young gentleman at a church in which she called him "a damned son of a bitch." There are other bills of a similar nature. The court excluded this testimony, but qualifies the bills by stating that later during the trial he informed defendant he could introduce it, but he failed to do so. Under the wide range of testimony and the attitude in which the case was placed, this testimony was clearly relevant, and should have gone to the jury, and, but for the failure of appellant to avail himself of the offer of the court, it would be reversible error. There are two or three bills of this sort, which it is unnecessary to discuss seriatim.

Another bill recites that the prosecutrix was called back by the county attorney, and the following matters occurred: She was asked by the county attorney: "You told Mr. Woods this morning that you wrote to him (Jeff) to come back; tell the jury why you did that." Appellant excepted for various and sundry reasons, among others, that it was not proper to state why she wrote for him to return, unless the defendant knew of her reason; that he could not know of those reasons unless he had been informed. The court stated in the presence of the jury: "I do not know whether that is admissible or not. There is no way for me to know what the answer of the witness would be. If you gentlemen would indicate to me about it—" Counsel approached the court while on the bench, and they consulted privately. Counsel for both sides then returned to their places at the bar in front of the jury, and the following question was propounded by the county attorney: "Tell the jury why you wrote him to come back?" Mr. Woods, counsel for defendant, excepted because the letter would be the best evidence, and because her feelings and her education on the subject since this suit was begun would be in the nature of manufactured testimony. The court stated, "Very well," and Mr. Woods excepted to the question and the answer. Mr. Puckitt, for the defendant, remarked: "We want to get our bill of exception this way; the letter would be the best evidence; any reason she had of her own, not expressed to defendant, would not be binding on the defendant, and would be prejudicial, immaterial, irrelevant, and hearsay." And the court's answer was, "All right." The county attorney asked: "Tell the jury why you wrote him to come back?" The witness answered: "I was uneasy." The county attorney further propounded this question: "Why were you uneasy?" And the witness, Lela Hefington, proceeded to answer: "I had missed my sickness four or five days, and I was uneasy and wrote to him to come back." Various objections were urged to this, that it was immaterial, irrelevant, and had a tendency to prejudice the jury against defendant's rights, etc.

We are of opinion this testimony was not admissible, unless it was shown defendant received the letter, and that he was notified in some way of her reasons for wanting him to come back. Her undisclosed reasons would not affect the defendant, and could not be binding on him. Upon another trial, unless these matters are shown in some way to have been brought to the attention of the defendant, they would not be admissible.

Another bill recites that state's counsel asked prosecutrix, while on the stand as a witness for the state, if she told her mother. Counsel for defendant then said, "We asked her who she told, and she gave one party, Mrs. Wilson;" and the court remarked from the bench, "Go on and complete your question, Mr. Terry, and I will rule on it then." Whereupon Mr. Terry asked: "Want to ask you if your own mother was living?" Counsel for defendant objected to said question and manner of examining the witness as being irrelevant and immaterial and prejudicial to defendant's rights. These matters were overruled by the court, and the witness answered "in a grave and solemn manner of an actress, with tears in her eyes, before the jury, with her head hung down, meaning that her mother was not living at the time when this transaction took place." The mother of prosecutrix had been dead for years, and this question was not germane to what had been asked by defendant. His question was if she had told anybody, and she specified the only one told was Mrs. Wilson. It was not necessary, to an explanation of this question or answer, that she had or had not told her mother; it was not germane to this question that her mother was dead, and therefore that she had not told her, especially in view of the fact that she had been dead quite a number of years. The evidence shows that the girl was over 20 years of age, and had a step-mother. Under the Kearse Case, 151 S. W. 827, this evidence seems to be admissible.

Another bill recites that the state offered Oleson in rebuttal, who testified that he was acquainted with the general reputation of the prosecutrix, in the neighborhood where she lived in 1909 and 1910, for chastity, and it was good; that is to say, witness testified he never heard it questioned. He further testified he was acquainted with prosecutrix and frequently saw her out at parties and public gatherings in that neighborhood during the two years above mentioned, and that her conduct, as observed by him, was always that of a lady, and he never observed anything on her part as unbecoming a lady, and, after he had so testified, the defense asked the witness if Tom Eubank, who lived in that neighborhood during 1909, who had also testified for the defense, did not catch him and Miss Lela Heffington, prosecutrix, out on the public road, a public highway, in a buggy between Prairieville and Mabank one night in the early fall of 1909, about midnight or a little after, when he (Tom Eu-

bank) was passing coming from Mabank home to Prairieville; and the witness was also further asked, in view of what he had testified in behalf of the good character and conduct of prosecutrix, the question: "Is it not a fact that you went to Mr. Tom Eubank, the witness, next morning thereafter and privately requested him (Eubank) to never say anything about having seen him (Oleson) and Lela Heffington out together the night before on the public highway at that time of night?" This was objected to, but no reason assigned why, and the testimony was excluded. It was stated the witness would answer that he did go to Eubank and make the request the next morning, and that this would have been material, and, if witness had denied it, Eubank would have testified to the facts stated; that is, that he saw Oleson and prosecutrix on the public highway about midnight in the fall of 1909 between Prairieville and Mabank in a buggy, and that Oleson did come to him the next morning and ask him never to say anything about having seen him. We are of opinion this testimony, upon another trial, should go before the jury. The testimony in this connection took widest range; therefore the above was germane.

For the reasons indicated, the judgment is reversed, and the cause remanded.

HARPER, J. I concur in the reversal of the case, but do not think there is any error in the court's charge on corroboration of the witness, as it is clearly within the rule, in my opinion, announced in the case of Beeson v. State, 60 Tex. Cr. R. 39, 130 S. W. 1006, but the charge of the court was erroneous in not presenting the issue of whether or not she relied on a conditional promise, that if she became pregnant he would marry her.

PRENDERGAST, P. J. I agree with Judge HARPER.

#### On Motion for Rehearing.

PRENDERGAST, P. J., and HARPER, J. The state has filed a motion for rehearing herein. Appellant has filed a vigorous argument and brief resisting this. We have again reviewed the record and the questions raised and passed upon in the original opinion, and are satisfied that mistakes were made in the original opinion and in reversing and remanding this cause. We will therefore, in this opinion, again discuss and decide these various questions.

In the original opinion it was correctly held that there was no error in the court's action in calling a special term of the court. A properly certified copy of the indictment has been furnished this court and filed herein, showing that the indictment concluded properly "against the peace and dignity of the state," and that the omission of these words, in attempting to copy the indictment originally in the transcript, was a mistake.

The alleged seduced girl is named Lela

Heffington. Appellant's name is Jeff Gillespie. She testified appellant began to keep company with her in May, 1908. "He did not commence going with me regularly until the last of June or July, 1908. He commenced to talk love to me that summer in July, and he continued to go with me until he went away to school in September, 1908. From July to September of 1908 he called on me very often, once or twice a week. \* \* \* Defendant and I became engaged to be married the last of August, 1908. We were to be married the next fall." He said: "I saw her real often until 1908. In 1908 I went to the Alexander Collegiate Institute at Jacksonville to study a literary course. \* \* \* I first began going with her regularly, or a good deal, in 1909." It was shown by both of them that he started to this school in September, 1908, and attended it only some two or three months. She testified that at his solicitation and upon his professions of love for her they became engaged to be married in August, 1908. She said she loved him and thought he loved her. Such were his professions; that she trusted him and believed in him. Not only her testimony, but that of various other witnesses, shows that he was more attentive to her and took her back and forth to all of the social functions and to church and Sunday school in the neighborhood where they both lived from the latter part of the summer of 1908, until the fall of 1910, when it generally became known in their neighborhood that she was pregnant. It is true that other young gentlemen, during this time, from time to time occasionally waited upon her and accompanied her back and forth to these various functions, but none of them are shown to have been with her anything like as frequently or as continuously as appellant. Their going with her and waiting upon her occurred more particularly when he was away from her at school in 1908, and in the early spring of 1910, while he was absent in Colorado.

[1] In the original opinion it was stated: "Some time in 1910, she says, the first act (of sexual intercourse) occurred." This statement is a mistake. The statement of facts, in giving her testimony, shows that she positively and unequivocally testified again and again that the first act of sexual intercourse between them occurred in February, 1909. He swore positively to the same thing. Nowhere in the statement of facts does either of them testify that the first act occurred in 1910. This mistake in the original opinion occasioned another mistake therein to the effect that she stated in substance that when this first act occurred he told her if she became pregnant or anything happened he would immediately marry her and too quick for it to be known. The whole of her testimony, without doubt, was that whatever talk was had between them about her pregnancy, or his marrying her because thereof, occurred in the spring of 1910, and not when the

first act occurred, and that this talk was more than a year after he had seduced and debauched her. Her testimony, taken as a whole, as stated above, not only clearly shows that no such talk occurred between them when he first had sexual intercourse with her, but, on the contrary, excludes any such idea, and clearly shows that all such talk between them about marrying her in case she became pregnant occurred in 1910, and not before. Appellant did not dispute her in his testimony. So that this mistake, having been made in the original opinion, was followed up by sustaining appellant's contention that the court should have submitted in his charge the question of her yielding to him and he agreeing to marry her on condition that he got her pregnant. The evidence in no way raised such question, and the court clearly did not err in not submitting it.

Her testimony in chief shows that after he returned from school at Jacksonville in November, 1908, he was with her frequently until February, 1909; that there was no difference in his attentions to her after his return and his attentions before then. "He seemed just the same that he had been." That about two weeks, a short time, before this first act of intercourse, in taking her back home from church, he first solicited her to extend to him sexual favors. She declined and told him, "I could not do that;" that she was not willing. He said he did not see why; that, if she had any confidence in him, he had promised to marry her, and he did not see why she could not trust him; that on the next occasion, some two weeks later, when he talked to her about it and asked her to yield to him, she said: "I did not want to; he just insisted upon the ground that we were going to marry, and, if I loved him, why not then; that it (would) never be known and would be no harm anyway. We talked about the matter most all the way from there and back from the party. I finally yielded to him on that occasion; I did because I believed him and believed that he intended to marry (me) and loved him, and under that grounds I did, and no other reason." Unquestionably, by both her testimony and that of appellant too, this first act occurred in February, 1909. She reiterated this in her cross-examination distinctly and pointedly. Further, on cross-examination, she testified that from time to time after this first act when they had sexual intercourse, and practically every time they did, he promised to marry her or renewed or reiterated his promise of marriage. The statement of facts shows part of her testimony on cross-examination as follows: "When I yielded to defendant he said that we would marry. He said we would marry before anything like that happened; he said if there was anything of that sort that he would marry; he said that we were going to marry and there would nothing like that happen before it. He told me that he would marry me if I became pregnant but not then. It was in 1910

that he told me he would marry me if I became pregnant. It was after he came home from the West. Q. Did he make a solemn promise to you, Miss Lela, to marry you if you became pregnant? Did you believe that he would? A. Yes, sir. Q. Was that the reason then that you yielded to him—you relied on that promise, did you? A. Yes, sir; long before 1910. Q. Well, did you rely on it then? A. Yes, if I hadn't believed what he was saying I would not. Q. You believed that he would marry you if you became pregnant, didn't you? A. I believed that he was going to marry me anyhow. Q. Well, if you became pregnant, didn't you believe that he was going to marry you? A. Sure. Q. Did you believe that that would hurry up the wedding? A. No sir." After this testimony by her, on re-examination by the state, on this point she clearly and distinctly testified: "I yielded to defendant the first time because I believed he was true and believed that he loved me. I knew that I loved him. I believed that he would marry me, and he had promised to, and under them reasons I submitted. At the times I submitted after that he said it would never be known; he said we could marry too quick for anything like that to ever interfere. The first conversation I had with defendant about the possibility or probability of my becoming pregnant was after he returned from the West, after I had written him the letter, and what I have just stated is what defendant said in connection with that conversation."

Appellant objected to the state re-examining her after his long severe cross-examination of her and when the questions and answers above quoted occurred, because her testimony thereon would be a mere repetition, and took a bill thereto on that ground. In qualifying that bill, which was accepted by appellant and is in the record and presented by him as one of the claimed grounds of error in this cause, the court said: "The foregoing bill, in the shape which it is presented, is so incomplete that it cannot be approved in its present form, and, to make the matter plain to the higher court, it will be necessary to incorporate the entire cross-examination of the witness Lela Heffington upon the point involved in this bill. After a long and exhaustive cross-examination of the prosecuting witness, extending over 26 pages of stenographic question and answer report, an inquiry into the minutest detail of every movement of this witness, the following cross-examination was continued: 'Q. When you yielded to Jeff Gillespie, didn't he tell you that if anything got the matter with you that he would see you out? A. No, he said that he would marry. Q. Ma'am? A. No, sir; he said he would marry before anything like that. Q. He said if there was anything of that sort he would marry— Mr. Wynne: No. Mr. Puckitt: We will fix that; ask her what she said. Q. What did you say? A. He said that we were going to marry, and

there would nothing like that happen before it. Q. Didn't he tell you that he would marry you if you became pregnant? A. Yes, sir; he did, but not then. Q. When was it he told you that he would marry you if you became pregnant? A. In 1910. Q. What time? A. It was after he came home from west Texas. Q. Did he make a solemn promise to you, Miss Lela, to marry you if you became pregnant? Did you believe that he would? A. Yes, sir. Q. Was that the reason then that you yielded to him, you relied on that promise, did you? A. Yes, sir; long before 1910. Q. Well, did you rely on it then? A. Yes, if I hadn't believed what he was saying I would not. Q. You believed that he would marry you if you became pregnant, didn't you? A. I believed that he was going to marry me anyhow. Q. Well, if you became pregnant, didn't you believe that he was going to marry you? A. Sure. Q. Did you believe that that would hurry up the wedding? A. No, sir. Q. You did not think that would hurry up the wedding at all? A. No; I thought that we were going to marry; I never thought anything of that. Q. You say it commenced in 1909 and just kept on until 1910, over a year; how many different times were you going to marry? A. Well, we were to marry in 1909, and his trip West prolonged it, and then we each agreed not to marry when he came back. Q. You each agreed that you would not marry? A. We said we would wait a while. Q. Didn't you break up at that time? A. No, sir. Q. Didn't you postpone it indefinitely or to some fixed time, or what did you do, after he came back? A. We just agreed that we would wait a while and see what he could do. Q. You did not have any fixed time, then, just the exact day when you would marry, did you? A. No, sir. Q. Did you have a fixed day at any time that you and Jeff Gillespie would marry, when he was having this intercourse with you? A. No, sir; we did not have no day. Q. Did not have any fixed day? A. No, sir; no certain day. Q. He was loving you and you were loving him, was that the way of it? A. Well, I was loving him and thought he was loving me.' After the completion of the cross-examination of this witness she was asked on redirect examination by the state the following questions and gave the following answers: 'Q. They asked you this morning if the defendant promised to marry you in case you got pregnant; tell the jury why you submitted to him in the first instance and what promise, if any, he made you. (Objected to as being repetition.) The Court: I overrule the objection, in view of the cross-examination on that point. Mr. Woods: Defendant excepts. A. Well, I yielded to him the first time because I believed he was true and believed that he loved me. I knew that I loved him. I believed that he would marry me, and he had promised to, and under them reasons I sub-

mitted. Q. What promise did he make you at each and every time thereafter? A. He said it would never be known; he said we could marry too quick for anything like that to ever interfere. Q. When was the first conversation you had with him about the possibility or probability of your becoming pregnant from the relation that was being carried on between you and him? A. It was after he returned from the West. Q. After you wrote him that letter? A. Yes, sir. Q. What you stated to the jury is what he stated in connection with that? A. Yes, sir. The foregoing question and answer report shows what occurred and all that occurred with reference to this matter presented in the bill. The only objection urged by counsel for the defendant was it was a repetition, and as stated by the court, in view of the cross-examination on that point, it was overruled. The other ground of objection, as stated in the original bill, was not presented to the court. With this explanation this bill is allowed. F. L. Hawkins, Judge Fortieth Judicial District." So that it is perfectly clear that he never intimated any conditional promise to marry her when the first act between them occurred, and no such intimation or talk occurred between them on that subject until the spring of 1910, more than a year after he had debauched and ruined her under his solemn engagement and promise to marry her.

The consensus of the evidence, as a whole, clearly shows that, before her pregnancy became known and talked about in the community in the summer or fall of 1910, she went to all the social functions in the neighborhood and church and Sunday school, and was received by everybody in the neighborhood in precisely the same way that every other young lady was at the time, and that she went back and forth to these various functions and meetings all this time in the same way that all the other young ladies of the community did, and not otherwise; that whatever of her goings and comings in these respects, whether at night or day time, or both, were just like every other young lady in the community to the same functions and meetings went and came; and that she was out at night at various of these times with appellant and other young men, in precisely the same way that the other young ladies were, and to and from the same functions and meetings in the same way.

In the original opinion it is stated: "The defendant also introduced evidence to the effect that she was caught in some bushes in a very compromising attitude with one Burton. This was denied on the part of the state, and there was evidence pro and con as to whether it was Burton that she was seen with, but the defendant's witness was pretty positive as to this fact." Upon a careful review of the evidence on this point, we find this state of facts: Bob Stanfield, appellant's said witness, testified in sub-

stance that one Sunday evening the last of April, or the first of May, 1910, he was going with Mr. Wills from his son's house to that of Mr. Wills, and that, in doing so, they passed through a certain pasture where there was a skirt of timber, and that while doing so, some 75 yards off, he saw Miss Lela and some man getting up off of the ground. "They just got up where I could see; I saw them when they got up." He further said that he did not know for certain, but thought that fellow was True Burton; that that was his best judgment about it; that he did not think it was appellant, Jeff Gillespie; that he saw no other persons there except those two on that occasion; that said Mr. Wills was standing there with him and looking towards this man and woman at the time he saw them; that Mr. Wills testified in this case on the former trial, but since then has died. The state, in rebuttal on this point, introduced the testimony of Mr. Wills given on the former trial. On this point he testified in substance, that he was with Bob Stanfield at the time Stanfield testified about what he saw, and that on that occasion appellant, and not Burton, was with Miss Lela, and that also his own daughter and Bud Oleson were there together and only some 30 or 40 yards separated from appellant and Miss Lela; that he knew Bud Oleson was there at that time with his daughter because they came right on up to his house following him right on home. Bud Oleson swore positively that he was there with Mr. Wills' daughter on that occasion, and that he saw Bob Stanfield and Mr. Wills pass them in 50 yards or closer, and that the appellant was there at the time with Miss Lela. Neither of these parties, Wills or Oleson, pretended to testify to any improper attitude by the appellant and Miss Lela on this occasion or between Miss Lela and Burton, even if it could have been Burton. Burton swore positively he was not there with Miss Lela on said occasion. Mr. Wills' daughter, who was married at the time she testified in this case, and her name was then Mrs. Knull, testified to altogether a different occasion; she showing by her testimony that "in the fall of 1910" she, Bud Oleson, "and Miss Lela Heffington, who was with, as far as my knowledge was, True Burton," and a sister of Miss Lela, and Floyd Tedder. In other words, she says, that in the fall of 1910 three couples, she (the witness) and Bud Oleson, Miss Lela Heffington, and, she thinks, True Burton, and a sister of Miss Lela, and Floyd Tedder, were together, taking a walk, and that she and Oleson, when they got to the pasture where Stanfield had testified about, as shown above, separated from them and went on home, and that the other two couples continued their walk through the pasture; the three couples being together before she and her companion separated from them, and the other two couples continuing thereafter. Although appellant

testified fully, he never denied it was he with Miss Lela. So that Bob Stanfield was either mistaken about seeing Miss Lela and Burton in a compromising position, or his testimony was untrue. We make this statement and show the state of the evidence in order to remove whatever wrong impression is made in the original opinion as to Miss Lela and Burton being caught in a compromising position. Even if he was not mistaken that he saw some man there so with her, this was at least a year and two months after appellant had debauched her.

[2] The court's charge on accomplice's testimony is in full as follows: "You are instructed that under the law the witness Lela Heffington is an accomplice. Now you cannot convict the defendant upon her testimony alone, unless you first believe her testimony is true and that it shows the defendant is guilty of the offense charged in the indictment, and even then you cannot convict the defendant upon said testimony, unless you further believe there is further testimony in the case corroborative of her testimony, tending to connect the defendant with the offense charged; and the corroboration is not sufficient if it merely shows the commission of the offense charged, but it must tend to connect the defendant with its commission, and then, from all the evidence, you must believe, beyond a reasonable doubt, that the defendant is guilty. In this instruction you are instructed that corroborative evidence (need) not be direct and positive, independent of the testimony of Lela Heffington; but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense of seduction, as heretofore defined to you, and which tends to connect the defendant with the commission of the offense charged, will fulfill the requirements of the law as to corroboration. It is for you to say, from all the facts and circumstances in evidence before you, whether she has been sufficiently corroborated, and, if you find there is an absence of such corroborative testimony, you must acquit the defendant." As we held in the original opinion, this charge is in accordance with the statute and the uniform line of decisions in this state. It is unnecessary to cite either. The latter part of the above-quoted charge could in no way have misled the jury to believe that the burden was not upon the state to corroborate Miss Lela.

[3] In this connection appellant, in his reply to the state's motion for rehearing herein, earnestly contends that the evidence is insufficient to show that Miss Lela was corroborated as required by law. Some seem to have the idea that the evidence corroborating an accomplice, to be sufficient, must itself show appellant's guilt, without and exclusive of the accomplice's testimony. Why this impression seems to prevail with some

we cannot understand, because the reverse of this has always been held by this court and all standard text-book writers. In reviewing this question in the case of *Warren v. State*, 149 S. W. 135, this court said: "This court long ago laid down the correct rule on the subject of corroborating the testimony of an accomplice by other testimony tending to connect the defendant with the commission of the offense. In *Nourse v. State*, 2 Tex. App. 316, after quoting our statute on the subject, as follows: 'Art. 801. A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense' (Code Cr. Proc. 1911)—it was said: 'Before the adoption of our Code, the rules of evidence known to the common law of England, both in civil and criminal cases, governed in this state, and they still govern, except where they are in conflict with the provisions of our Code of Procedure, or some other statute of this state. Under the common law, the rule of evidence as to the corroboration of accomplices is somewhat peculiar. Says Mr. Roscoe: 'It has been repeatedly laid down that a conviction upon the testimony of an accomplice, uncorroborated, is legal. The point was considered by the 12 judges, and so decided in *Rex v. Atwood*, 1 Lea, 484, and again in *Rex v. Durham*, 1 Lea, 478.' Roscoe's Cr. Ev. 120, 121, and authorities cited. The evidence of an accomplice is altogether for the jury (under the common-law rules of evidence), and the jury, if they please, may act upon it without any confirmation of his statement; but it is held proper for the presiding judge to advise them not to convict, if the testimony of the accomplice is uncorroborated. Under article 3118 of our Code (Paschal's Dig.), the testimony of an accomplice must be corroborated to support a conviction. It has been decided both by the Supreme Court and the Court of Appeals in this state that the term "accomplice," as used in article 3118, applies, not only to accomplices in a technical or restrained sense, but to all witnesses who are *particeps criminis*, whether as principal or accessories. *Irvin v. State*, 1 Tex. App. 301, and authorities therein cited. It will be seen that, to justify a conviction on the testimony of an accomplice, there must be some evidence which, of itself and without the testimony of the accomplice, tends in some degree to connect the accused with the commission of the crime. The Supreme Court of California (in the case of *People v. Melvane*, 39 Cal. 614) say: 'The corroborative evidence may be slight and entitled to but little consideration; nevertheless, the requirements of the statute are fully fulfilled if there be any corroborating evidence which of itself tends to connect the accused with the commission of the offense.' This deci-

sion was rendered under a statute very similar to ours, in regard to the corroboration necessary to be had to the testimony of an accomplice to support a conviction. Section 1111 of the (Penal) Code of California is as follows: 'A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.' It is a mistaken idea to suppose that the corroborating evidence must conclusively of itself connect the defendant with the commission of the offense. If so, there would be no use for the testimony of the accomplice.' See, also, *Jones v. State*, 4 Tex. App. 531; *Tooney v. State*, 5 Tex. App. 193; *Simms v. State*, 8 Tex. App. 243; *Clanton v. State*, 13 Tex. App. 157; and *Moore v. State*, 47 Tex. Cr. R. 415, 83 S. W. 1117. See, also, the opinions of Judge Ramsey, and Judge Harper adopting the opinion of Judge McCord, in *Nash v. State*, 61 Tex. Cr. R. 264, 134 S. W. 714 to 716, and 718 et seq."

[4] Now as to the evidence corroborating Miss Lela. She testified positively, as shown above, that she and appellant, at his solicitation, and upon his professions of love for her and upon hers for him, in August, 1908, made an engagement to be married. He denied this and said he never at any time promised to marry her or became engaged to her. As shown above, she further swore positively that it was because of his said promise, and relying thereon, that she yielded to him. He admitted the act at the time she says it first occurred. He said that act was the first. He denied the engagement to marry. Miss Lela's father, C. C. Hefington, swore that Miss Lela told him she and appellant were to be married. She so testified too. Her father further testified that, after the time she said she and appellant were engaged to be married, on one occasion appellant protected her and took a drunken party who was annoying her out of her presence, and that he thanked appellant for this courtesy and favor shown to his daughter, and that appellant then and there replied to him, "That is all right; I expect to marry her;" or "I expect to make her my wife." He admitted this courtesy and favor shown by him to Miss Lela on said occasion and the fact that her father thanked him therefor, but denied that he told her father at the time that he intended to marry her or make her his wife. That question was for the jury to pass upon. After they were engaged, as Miss Lela says, he went off to school, and she swore, and he admitted, that while at school he had written her three cards. They were produced, identified, and introduced in evidence; they were all three addressed to Miss Lela by appellant. One of them was merely a Jacksonville scene. On the next he wrote her: "Didn't have time

to write before; will write you in a short time. Will be in Friday two weeks." On this card was printed, "To my sweetheart." On the other he wrote: "How is everything in dear old Prairieville by now? Say, I may not come Friday; I don't know yet. Hope I can come if I can get off." On this was printed, "To my darling." All this and the facts hereinbefore and hereafter recited, together with the fact of his practically continuous, although not exclusive, attentions upon her, was ample corroborative evidence of their engagement and of her testimony on the subject, and that by reason thereof he debauched and ruined her. *Bost v. State*, 64 Tex. Cr. R. 464, 144 S. W. 588. In her testimony, without reciting it, she gives a most reasonable explanation of why they did not marry before appellant succeeded in getting her pregnant. In effect it was that he was young, not then through school, and that, while they fixed the time for marriage, for these reasons, and the further reason that if he married her at the time at first agreed upon he would have to take her to his parents' house to live. Neither desired this. Both, or she at least, was advised against it. Then he was not settled to any business or occupation; she relying at all times upon the ultimate consummation of their agreement of marriage. He doubtless, through that means, having accomplished her ruin, and getting her to indulge him in his sexual passion practically whenever he desired, did not intend to consummate the agreement, and although, after she found that he had gotten her pregnant, she besought him to do so, he peremptorily refused. It is true that he testified to a state of facts which might show, if believed, that he might not be the father of the child she afterwards bore, yet her testimony, and all the facts and circumstances developed in the case with reasonable, if not absolute, certainty, shows that he and no other was the father of the child she had. He admitted that he had intercourse with her very soon prior to his trip to Colorado. He fixed that time as February 2, 1910, or prior thereto. She fixed it the latter part of February. In March, when she passed her menstrual period without it coming on, she at once wrote to him and besought his return because thereof. He admitted that he got that letter from her and that he soon thereafter returned and saw her. He admits having intercourse with her very soon, if not immediately, after his return and a continuation of such acts until he became certain that she was in that condition. He never claimed in his testimony that he was not the father of her child. She swore he was, and that no other ever had sexual intercourse with her. Burton, whom appellant tried to show might have been its father, swore positively he never had sexual intercourse with her. She told appellant of her condition as soon as he returned. He thought she must be



mistaken. When it became evident that it was the case, however, she says he advised her and insisted upon her taking some medicine to produce an abortion. He denied that he advised this, but the druggist, Mr. Jones, swears that, along about the time she claimed this occurred, appellant bought from him a bottle of ergot, and that he, at the time, pasted on the bottle a label "Fluid Extract of Ergot." She testified that appellant scratched this label off at the time or just before he delivered the bottle to her. He said he did not; that the druggist never put any label on the bottle. This bottle, without any label, was identified by Miss Lela on the trial and admitted by appellant to be the bottle, and it was introduced in evidence. It then showed no label on it. She testified that, shortly before she gave birth to this child, appellant advised her to go to a rescue home at Arlington, and that he gave her the address thereof, and that he furnished her money to go there on and promised more. He admitted this. Freddie Taylor and Bud Oleson both in effect testified that they saw appellant either the day of or the next day after it was known that Miss Lela had given birth to a child, and that the child was dead, and that, when told the baby was dead, he threw up his hat around in the air and said that let him out. He denied this. The other two witnesses, however, were unbiased and unprejudiced, and no one can doubt that the jury believed them and not him.

In the original opinion, just before quoting a special charge requested by appellant, which was refused by the court, to the effect that they could not find that there was a promise of marriage upon the testimony of the prosecutrix alone, but under the law her evidence as to this promise must be corroborated, etc., the substance of the fourth subdivision of the court's charge, wherein he told the jury the various things that they must acquit appellant on, unless they believed such things beyond a reasonable doubt, etc., the opinion states: "Various objections were urged to these charges at the time." Reviewing the record again, we find that this statement just quoted is incorrect, for appellant made no objections to this charge of the court. It was all clearly in his favor. He did request the court to give the said special charge quoted in the opinion, and the court refused to give it because, as he stated, it was covered in the main charge. In our opinion the action of the court was correct.

[5-7] The point was covered in the main charge, and amply so. Besides, it is not proper to single out any one fact, like was attempted in this instance, and charge thereon. Again, it is clearly decided by many decisions of this court that the seduced woman does not have to be corroborated in each and every particular of what it takes to constitute guilt of the accused. *Nash v. State*,

61 Tex. Cr. R. 269, 134 S. W. 709, in Judge Ramsey's opinion, and cases cited by him therein; *Williams v. State*, 59 Tex. Cr. R. 347, 128 S. W. 1120; *Beeson v. State*, 60 Tex. Cr. R. 39, 130 S. W. 1006; *Nash v. State*, 61 Tex. Cr. R. 281, 134 S. W. 709, in Judge McCord's opinion adopted by this court in said case; *Wright v. State*, 31 Tex. Cr. R. 354, 20 S. W. 756, 37 Am. St. Rep. 822, and other authorities cited by Judge McCord. The *Nash Case*, supra, as decided in the opinions of Judges Ramsey and McCord, have uniformly and many times been approved and followed by this court since then and down to this date. The court below correctly refused appellant's said special charge.

As stated in the original opinion, the reputation of Miss Lela, the prosecutrix, for chastity became a question. The appellant introduced some 14 witnesses, who in effect testified to her bad reputation in this respect. Some three of these were kinsfolks of appellant. The greater number of the others, taking their testimony as a whole, tend quite strongly to show that they were speaking of her reputation in this respect after it became known in 1910 that she was pregnant. This was more than a year after appellant had seduced, debauched, and ruined her. One cannot read their testimony without being impressed with the fact that their testimony as to her bad reputation was founded upon appellant's connection with her and long after he had seduced her. On the other hand, the state introduced a like number of witnesses of both sexes, young and old, one a young lady school-teacher, another a justice of the peace, all of whom swore that her reputation was good, and that it only became bad about the summer of 1910, after it became known and talked about that she was in a pregnant condition. In order to cast reflection on her, appellant also proved that she rode out at night and went back and forth to the various social functions, to church, etc., with young men at night, sometimes in a buggy, and sometimes walking. As stated above, taking the testimony as a whole, one cannot but be forced to the conclusion by the testimony of all of the witnesses that this young lady went back and forth with young men and appellant, just like every other young lady in the same neighborhood continuously did, and there is no instance of any indiscretion on her part in this respect that does not equally apply to every other young lady in the neighborhood during the same time.

[8] In the original opinion, after stating briefly and generally these matters, it is stated in effect that, under these circumstances, appellant offered to prove that on one occasion she had a difficulty with a young gentleman in a church in which she called him a damn son of a bitch, and that there are other bills of a similar nature; and it is stated therein that the court ex-

cluded this testimony but qualified the bills stating that later he informed the defendant he could introduce all this character of testimony, but he failed to do so. As stated in the original opinion, this testimony was admissible; but, taking the record on the subject, it shows either that the witnesses that he attempted to prove this by would not have so sworn or that the state would have disproved it, for, when the court repeatedly told appellant's attorneys that they could introduce such proof, they declined to offer it; and, under the circumstances, we take it this dispels any reflection upon the young lady attempted to be raised by said bills.

[8] In discussing another one of appellant's bills in permitting the testimony of Miss Lela, the prosecutrix, that she had written a letter to appellant while he was in Colorado, the bill is stated pretty fully. The original opinion, in concluding this subject, stated that this testimony by the prosecutrix was not admissible, unless it was shown defendant received the letter, and he was notified in some way of her reasons for wanting him to come back, and that her undisclosed reasons would not affect him and could not be binding on him, and concluded by stating that upon another trial, unless these matters are shown in some way to have been brought to the attention of the defendant, they would not be admissible. Upon a further review of the record, all these conditional statements in the original opinion of how and when this testimony would be admissible were fully and completely shown. The appellant himself swore that he received the said letter Miss Lela wrote him while in Colorado; that after he came back he saw her about it and she swore she then told him the reason she had written for him to come back and explained the matter to him fully. He did not deny it, but in substance admitted that she had told him, and told him the reasons, and it was at this time he procured for her the medicine to produce an abortion. So that, when we review the record, we find that the action of the court in permitting this testimony was correct.

In the original opinion one of appellant's bills is recited about Miss Lela, the prosecutrix, testifying that her mother was dead. The bill, as the opinion shows, tells about the grave and solemn manner, with tears in her eyes, and as an actress before the jury, with her head hung down, she told the jury that her mother was dead. Upon reviewing the record upon this question, we find, which is not stated in the original opinion, that the court qualified this bill by stating, "Approved as to the fact; manner of witness not." As we understand this qualification, it distinctly disapproved what the bill stated as to her manner of testifying.

[10, 11] The appellant accepted this bill this way and he is bound thereby. So that we conclude that, while she was asked the

question whether her mother was or not living, no such dramatic manner of question or answer occurred; but, as held in the original opinion, this evidence was admissible. *Kearse v. State*, 151 S. W. 830, 831.

[12] In another bill, and the only other one discussed in the original opinion, it is shown that the state offered C. Oleson, who testified to the good reputation of said prosecutrix for chastity, and that he never observed anything of unladylike conduct in the prosecutrix at any time, but, on the contrary, that her conduct was that of a nice lady. The complaint in this bill is that the court did not permit the appellant to ask this witness, on cross-examination, if he did not go to Tom Eubank the next morning and privately request Eubank never to say anything about seeing him and prosecutrix out together the night before on the public highway at that time of night. It is not stated in the original opinion that the court qualified this bill, but we find upon a review of the record that he did qualify it as follows: "Foregoing bill approved with explanation that Eubank's testimony and George Wells' testimony (the two being together in a buggy) was admitted as to meeting Christian Oleson and Miss Hefington, the circumstances and act, also Oleson's testimony on this point, but any subsequent (statement) of Oleson was not admitted. See statement of facts for testimony of Eubank, Wells, and Oleson on this point." By an examination of the testimony of this witness Oleson, as referred to by this qualification, we find that he testified in substance that he was out buggy riding with Miss Lela, prosecutrix, about the time inquired about, and that somewhere between 11 and 12 o'clock he met two gentlemen, one of whom he supposes was Mr. Eubank, and that another couple, Sam Jordan and Miss Mary Yates, in another buggy were along with him at the time. Tom Eubank testified that he and George Wells, the party who was with him in the buggy on this occasion, had to go to Mabank from Prairieville; that they left Prairieville after night, attended to their business at Mabank, and then returned to Prairieville, reaching Prairieville about midnight, or a little after. "As we came into town (evidently meaning Prairieville) near the turn of the road at a blacksmith shop, we were traveling pretty fast. I came very near running over a boy by the name of Christian Oleson and Miss Lela Hefington. Mr. Sam Jordan and Miss Mary Yates were just behind them. Christian Oleson and Miss Lela Hefington, the prosecuting witness in this case, were in a buggy to themselves. They were going towards Mabank on a road leading south from Prairieville. What I have detailed above took place long before this controversy between Jeff Gillespie and Miss Lela Hefington, now in court."

Said Wells testified that he and said Eubank, on this occasion, met said Oleson and

Miss Heffington right at the blacksmith shop just as he came into the Prairieville road. "We met two buggies, and just as we got in the middle of the street we met 25, 20, or 25, more people; I rather think they had been to a party, because they were all young people. They were just right in the middle of the street, you may say, right near all together." On cross-examination he testified: "I remember this meeting, because, as we came in, Tom says, 'Who were those?' I told him who they were; and, 'Hell, the whole town is up,' he said when we ran into the other bunch." The prosecuting witness, Miss Lela herself, testified substantially about taking this ride, the two couples of them, she and Oleson and Jordan and Miss Yates. They went along together. Certainly it cannot be contended, with any show of reason, that under such circumstances the appellant had the right to the purely hearsay testimony of Mr. Oleson to Eubank the next day, as claimed by this bill. There is no intimation in this bill or the testimony of any or either of these witnesses, or any other, that any improper relationship whatever occurred between Oleson and Miss Heffington on this ride in company with the other couple. Concede, for the sake of argument, that these two ladies taking a ride with these two young gentlemen, with whom they had gone to this party that night, as they returned home with them, was an indiscretion, the hearsay testimony of Oleson, proposed to be proved as to what he said to Eubank the next day, even if it occurred, was without doubt inadmissible on any theory in this case.

We have reviewed also all of appellant's complaints in this case. We have not discussed them all, and did not in the original opinion. It is unnecessary to do so. None of them show any reversible error.

The state's motion for rehearing is granted; the judgment of this court reversing and remanding this cause heretofore entered will be set aside; and the judgment of the court below will now be affirmed.

DAVIDSON, J. (dissenting). The state has filed a motion for rehearing. The original opinion states that the indictment was insufficient in that it did not conclude "against the peace and dignity of the state," but it was treated in the original opinion as if the clerk made an omission in transcribing the indictment. On rehearing it is shown that such was the case, and a certified copy of the indictment attached to the motion shows it did conclude "against the peace and dignity of the state."

Another ground of the motion is it is contended the writer of the opinion was in error in holding the charge on accomplice testimony with reference to corroboration erroneous, and it is insisted in the motion that the charge was sufficient, as found by the majority of the court qualifying the

opinion written by the writer. That part of the motion is disposed of by stating, inasmuch as the majority hold it was sufficient, this ground of the rehearing is superfluous. I did not agree with my Brethren about that, but the majority opinion controls. It is unnecessary to notice that further.

It is contended, also, the opinion is in error in holding the court erred in not charging the jury that, if the prosecuting witness yielded to the embraces of the accused and permitted him to have intercourse with her upon a conditional promise of marriage (that is, a promise of marriage if she should become pregnant), they would acquit, inasmuch as there is no evidence calling for such charge. The motion admits on cross-examination prosecuting witness testified that appellant promised her if she became pregnant he would marry her, but the motion contends: "Her evidence, taken as a whole, clearly discloses that she had carnal intercourse with the appellant the first time in February, 1909, and not in 1910, as stated in the opinion of the court, and that such first act of intercourse was upon a sole and unconditional promise of marriage," etc. An examination of the record rather tends to support the contention of the motion that the act of intercourse did occur in February, 1909, instead of 1910, as stated in the opinion. It may have been the fault of the writer in dictating the original opinion in calling the year 1910 instead of 1909, but that mistake was beneficial to the state. If the promise was conditional, or there was an issue on that question, the court should have charged that favorable to the defendant. That is an axiomatic rule. At least it has heretofore been the law in Texas. It is for the jury to say where there is an issue in the case as to whether the testimony, taken as a whole, leads to one conclusion or another; the jury should settle that, and not the court. Referring to the statement of facts, in order to be a little specific in the face of the criticism in the motion, I find she testified as follows: "The first effort of defendant to take any liberties with me occurred in February, 1909. I was not willing; he said he did not see why; if I had any confidence in him, he had promised to marry me, he did not see why I could not trust him, if ever, and I believed him. He talked to me about this just one time before I yielded to him. The improper relation began at the time of the first conversation, that night. Prior to this he mentioned the matter to me coming from church; this may have been two weeks before, a short time before. I told him at that time I could not do that. \* \* \* On the next occasion after the first conversation on this subject he just asked me to yield to him. I did not want to. He just insisted upon the ground that we were going to marry,

and, if I loved him, why not then; that it never would be known; there would be no harm anyway. We talked about the matter most all the way there and back from the party. I finally yielded to him on that occasion; I did so because I believed him and believed that he intended to marry and loved him, and on that ground I did and no other reason." Speaking further of this she testified: "He said we would marry before anything like that happened; he said if there was anything of that sort that he would marry; he said that we were going to marry, and there would be nothing like that happen before it. He told me that he would marry me if I became pregnant, but not then. It was in 1910 that he told me he would marry me if I became pregnant. It was after he came home from the West. Q. Did he make a solemn promise to you, Miss Lela, to marry you if you became pregnant? Did you believe that he would? A. Yes, sir. Q. Was that the reason then that you yielded to him; you relied on that promise, did you? A. Yes, sir; long before 1910. Q. Well, did you rely on it then? A. Yes, if I hadn't believed what he was saying I would not. Q. You believed that he would marry you if you became pregnant, didn't you? A. I believed that he was going to marry me anyhow. Q. Well, if you became pregnant, didn't you believe that he was going to marry you? A. Sure. Q. Did you believe that that would hurry up the wedding? A. No, sir."

Germane to this, and as shedding light upon it, the girl testified that the act of intercourse occurred in February, 1909. This indictment was returned in January, 1911. Under her statement of the evidence, intercourse occurred between them from February, 1909, to 1911. This should be viewed in connection with her statement on cross-examination to the effect that he would marry her if she became pregnant and all the facts in evidence. I am still of the opinion that the question of conditional promise of marriage was a grave issue in the case. If the issue is there, the jury must decide it. The strength of the testimony and weight of it, and the credibility of the witnesses, our law relegates to the jury. The testimony may not be very strong or cogent, or it may be; but, when the issue is in the case, the charge should submit it, especially when it is favorable to the accused. The girl is considerably older than the defendant and she was carrying on this intercourse with him for nearly two years before the indictment was found. She became pregnant, and the facts are in serious controversy as to whether defendant could be the father of the child. If his testimony is true, he could not have been, because the child was born about 10 months after he had intercourse with her. She says he had intercourse with her just before he left Texas for Colorado, and this, under

her testimony, was in latter part of February, but he says it was about the first of February. If he is correct about it, the child was born about 10 months after he had intercourse with her, and there is considerable testimony to the effect that she may have had intercourse with one or more other young men in the meantime; but those are all issues for the jury, under appropriate instructions from the court. Under her evidence, it was more than 9 months. It has been decided in Texas, and by this court, that where the prosecutrix consents to intercourse as soon as suggested, and promise of marriage appears to be but of slight inducement, evidence is insufficient. *Garlas v. State*, 48 Tex. Cr. R. 449, 88 S. W. 345; *Simmons v. State*, 54 Tex. Cr. R. 627, 114 S. W. 841. Now she states that on the first occasion she did not consent to it, but on the second occasion, about two weeks subsequent to the first conversation, she did agree to it; that they talked about it all the way to the party and back, and she finally agreed. This was a matter of a lengthy parley and conversation, and not upon a "sudden impulse." The amicable agreement was after mature deliberation and a promise to marry if pregnancy resulted. It is also held that continuous association and intercourse for about two years after the alleged promise of marriage is not sufficient to corroborate the promise of marriage, but rather serves to destroy the idea of marriage. *Spenrath v. State*, 48 S. W. 192; *Fine v. State*, 45 Tex. Cr. R. 291, 77 S. W. 806; *Nolan v. State*, 48 Tex. Cr. R. 438, 88 S. W. 242. Again it was said if defendant had no intercourse with prosecutrix for 10 months prior to the birth of her baby, it was very unlikely he was the father of her child. *Jeter v. State*, 52 Tex. Cr. R. 217, 106 S. W. 371. All these matters being in the record, certainly the court ought to have charged with reference to conditional promise. Nor will it do, as a legal proposition, to agree with state's counsel that a charge must not be given if, upon an inspection of the whole of the testimony, the charge ought not to have been given. That is rather a peculiar way to state the proposition. The rule is, if from the testimony of any one witness or the testimony as a whole, there is a favorable issue for the defendant, his side of the law must be charged applicable to that issue. In other words, the rule is fundamental in Texas, or has heretofore been held so to be, that the charge must be given to the jury so as to cover every favorable phase of the case for the defendant. If it should arise from the testimony as a whole, it ought to be given, if it should arise from the testimony of any one or more witnesses, it ought to be given; if it should arise from the defendant's own testimony, it ought to be given.

The motion for rehearing ought to be overruled.

**WEATHERFORD v. STATE. (No. 3074.)**

(Court of Criminal Appeals of Texas. April 8, 1914.)

**CRIMINAL LAW (§ 1001\*)—PUNISHMENT—SEPARATE DEFENSES — SUSPENDED SENTENCE LAW.**

Where, immediately after accused entered a plea of guilty in a prosecution for forgery, and the jury had returned a verdict, she entered another plea of guilty to another similar charge, and imprisonment in the penitentiary was assessed, she, having entered pleas of guilty to two felonies on the same day, was not entitled to a suspension of either sentence under Suspended Sentence Law (Acts 32d Leg. c. 44) § 4.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.\*]

Appeal from District Court, Dallas County; Robt. B. Seay, Judge.

Jessie Weatherford, alias Jessie Norton, was convicted of forgery, and she appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** This is a companion case of that of the same appellant, 165 S. W. 581, disposed of at the last session of this court. In this case, as in the other, she entered a plea of guilty, and the evidence is just about the same, and, under the authorities cited in that case, we hold that the evidence is sufficient to sustain the conviction on a plea of guilty; she receiving the minimum punishment for forgery. In no case other than where capital punishment may be assessed is the court required to appoint counsel for a person on trial, except it is provided in the suspended sentence law (Acts 32d Leg. c. 44), when a person is charged with a felony and has no counsel, the court shall apprise him or her of the fact that she may make application for a suspension of sentence, and, if the person on trial expresses a desire to enter such plea, the court shall appoint an attorney to prepare the plea. The affidavit of Judge Seay is in the record, wherein he states when appellant was brought into the courtroom the following took place:

"The Court: There are two cases of forgery against you, and I am informed that you have an idea of pleading guilty.

"The Defendant: Yes, sir.

"The Court: Do you understand the nature and consequences of what you are doing? You understand that the punishment is from two to seven years?

"The Defendant: I guess I do.

"Thereupon the court turned to Mr. Willis Pierson, an attorney who was engaged in another case, before the bar, and stated to Mr. Pierson that the law required me to appoint an attorney to prepare an application for suspended sentence, if the defendant desired, to which Mr. Pierson responded that the woman had been forging the name of some

of his kinsmen, and 'I don't care to have anything to do with it.' Thereupon the court turned to Judge M. M. Brooks, who was in the case with Mr. Pierson that was pending for trial, and appointed Judge Brooks to represent the defendant, as the stenographer's report shows. The court then took up the law of suspended sentence and told Judge Brooks that this was a new law, and, having examined it, the court would explain it to him, and that the court was required by law to appoint an attorney to find out if the defendant wanted to file the application, and, if so, to file one for her, and that the court had blanks prepared for that use. The court furthermore said something of trouble which arose in this case owing to the fact that the defendant intended to plead guilty twice, and I hardly knew how the suspended sentence law could be utilized, for, if the jury suspended the first sentence, then in the second she could not make application for a suspension of sentence, and the first suspension of sentence would be set aside. I turned to other matters while Judge Brooks talked to the defendant, and after a short time Judge Brooks said to the court: 'The defendant seems to understand clearly what she is doing, your honor.' After which remark Judge Brooks either walked out of the room or walked away to look after the Mills Case that he was engaged in."

This affidavit of Judge Seay is supported by the affidavit of Sheriff Brandenburg, A. C. Cason, Jr., stenographer, and M. J. Edling, clerk of the court. The affidavit of Judge Brooks is also in the record, in which he states that he did not explain to the woman her rights under the suspended sentence law, and did not know the judge relied on him to do so. The record also discloses that immediately after she entered the plea in this case, and the jury returned a verdict, she entered a plea of guilty to another charge of forgery, and her punishment was assessed again at two years in the penitentiary. Under section 4 of the suspended sentence law appellant would in no event be entitled to a suspension of either sentence, having entered pleas of guilty to two felonies on the same day, and the matter presents no error.

The judgment is affirmed.

**GOLDSTEIN v. STATE. (No. 2983.)**

(Court of Criminal Appeals of Texas. March 25, 1914. On Motion for Rehearing, April 29, 1914.)

**1. CRIMINAL LAW (§ 742\*)—QUESTIONS FOR JURY—ACCOMPLICES.**

On a trial for receiving and concealing stolen property, evidence held sufficient to require the submission of the question whether one of the state's witnesses was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. CRIMINAL LAW (§§ 507, 510\*)—TESTIMONY OF "ACCOMPLICE"—NECESSITY OF CORROBORATION.**

On a criminal trial, if a witness for the state was an accomplice, or if the jury had a reasonable doubt whether he was an accomplice or not, they could not convict upon his testimony, unless they believed that it was true, that it connected accused with the offense charged, and that there was other testimony corroborative thereof, tending to connect accused with the commission of such offense; and an "accomplice" in this connection was one connected with the crime charged as principal, accomplice, or accessory, and included all persons connected with the crime by unlawful act or omission before, at the time of, or after the commission of the offense, whether or not they were present and participated in its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096, 1124–1126; Dec. Dig. §§ 507, 510.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 75–79; vol. 8, p. 7561.]

**On Motion for Rehearing.**

**3. CRIMINAL LAW (§ 1090\*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—BILL OF EXCEPTIONS.**

In a felony case, it is not necessary to preserve a refused instruction by a bill of exception, where the record shows its presentation and request in ample time, and hence, where the record did so show, the insufficiency of the bill of exceptions was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803–2822, 2825–2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

**4. CRIMINAL LAW (§ 1064\*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.**

A motion for a new trial because the only incriminating testimony was that of accomplices, and was not corroborated, and because the court erred in refusing to give a special charge submitting the issue as to whether or not one of such witnesses was an accomplice, sufficiently raised the contention that the evidence made an issue as to whether the witness was an accomplice, and that the court erred in refusing to submit that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676–2684; Dec. Dig. § 1064.\*]

**5. CRIMINAL LAW (§ 824\*)—INSTRUCTIONS—NECESSITY OF REQUESTS.**

While the statute requiring the charge to be submitted to the attorneys, and requiring the attorneys to make their objections thereto before the charge is read to the jury, does not require special charges to be asked, the requesting of special charges is the better practice and to be commended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.\*]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Judge.

Dave Goldstein was convicted of receiving and concealing stolen property, and he appeals. Reversed and remanded.

W. W. Nelms, of Dallas, for appellant. Currie McCutcheon, Co. Atty., of Dallas, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of receiving and concealing stolen property.

[1] A number of bills of exception are presented in the record in regard to the introduction of testimony, but, as qualified and approved by the court, none of them present error. However, the appellant submitted a special charge requesting the court to submit to the jury the question of whether or not the witness Frank Barrett was an accomplice, within the meaning of our statutes governing accomplice testimony. Claude Rice is the self-confessed thief. He was staying with Barrett. He says Barrett knew he was a thief, yet kept him at his home. That on the night the property was taken he and Barrett went to Lake Cliff and went in swimming. That he (Rice) deposited his pocketbook with the manager of the swimming pool. That they remained in bathing about an hour, when Barrett first got out and went outside. That, when he (Rice) got out, the manager gave him the wrong pocketbook, and he discovered it when he got outside and called Barrett's attention to it. That they then went on to Barrett's and he, the next day, placed it with appellant to be disposed of. The property was found in appellant's possession. Barrett testified: "One night we went in swimming over at Lake Cliff, and I came out and dressed ahead of Claude and waited out there at the head of the hall, and then I went on to the automobile entrance and saw him there, and we went to Beckley avenue. When I got out, Claude said they had given him the wrong pocketbook out there, and he did not know what was in it; he first said there was a couple of dollars in it, and then said, 'I am not much better off;' and we went a little further, and he said there was some jewelry in it; and when we got home he taken this jewelry out and showed it to me. We left there and went to the confectionery store up on Marsilis and Jefferson avenue; and we came back by the way of Tenth street; and then Claude threw two of the rings on the ground and stamped them in the ground. That was on Tenth street in Oak Cliff, about opposite the telephone building. We came home, and I asked Claude to take them back, and he said he was scared to; said he was scared of getting into trouble. I saw the stuff before I left home to go to the drug store. We went from Lake Cliff to my home, and he took the jewelry out and showed it to me, and I began to get nervous and excited; mother was sitting on the front porch, and I was afraid she would hear us talking. In the morning Claude got up and took the stuff to town; took it to Dave Goldstein. I had a conversation with Dave Goldstein; one conversation I had with him I told him that I heard the people at Lake Cliff had mine and Floppy's description, and I said, 'Let's give the stuff up before trouble

overtakes us." While he testified he did not know Rice was a professional thief, he admits he knew he had been convicted of a misdemeanor theft, and he had paid his fine, and again took him to his home.

[2] The testimony, as a matter of law, does not make Barrett an accomplice; yet we think the facts and circumstances, and especially his own testimony, are such as to raise that issue, and the court erred in not giving the following charge requested by appellant: "An accomplice, as the word is here used, means any one connected with the crime charged, either as principal, accomplice, or accessory. It includes all persons who are connected with the crime by unlawful act or omission on their part transpiring either before, at the time of, or after the commission of the offense, and whether or not they were present and participated in the commission of the crime. Now, if you are satisfied from the evidence that the witness Frank Barrett was an accomplice, or you have a reasonable doubt as to whether he was or not, as that term is defined in the foregoing instructions, then you are instructed that you cannot convict the defendant upon his testimony, unless you first believe that the testimony of said Frank Barrett is true, and that it connects the defendant with the offense charged in the indictment, and unless you further believe that there is other testimony in the case, corroborative of the testimony of said Frank Barrett, tending to connect the defendant with the commission of the offense charged."

Reverse the case, and if Barrett was on trial, under the above testimony, together with the other facts and circumstances in evidence, we would hesitate long before reversing the case because of the insufficiency of the testimony. In fact, if the court properly charged on circumstantial evidence, and there was no error in the record, we would affirm the case, if the jury should adjudge him guilty, and under such circumstances the issue is raised with that force and cogency to require the matter to be presented to the jury.

The judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

[3] In the motion for rehearing, it is not insisted by the state that the evidence does not raise the question as to whether or not Barrett was an accomplice; but the state insists that the bill of exceptions taken to the refusal of the court to give this charge should not be considered because the 60 days first allowed had expired before the court made the order granting the additional time. The court, on motion of appellant, entered an order correcting this entry, stating that the time first allowed had not expired when he granted the second. This the state insists the court had no authority to enter at the time he did so. This we do not deem it necessary

to discuss, for in a felony case it has never been held that it is necessary to preserve a special charge requested by bill of exception, where the record discloses itself that it was presented to the court and requested to be given in ample time. This record discloses that two special charges were presented to the court asking him to submit to the jury, for their determination, the question of whether or not Barrett was an accomplice, and the court refused to give either of them. Again, it is said that in the bill of exceptions, if we consider it, it does not state any reason why the special charge was called for. If it was not necessary to take a bill of exceptions and have it entered of record, of course whether or not it is sufficient is immaterial.

[4] The next ground is that, in the motion for a new trial, this question is not sufficiently raised for us to review it. The motion for a new trial alleges: "Because the verdict of the jury is contrary to the law and the evidence, and is not supported by the evidence submitted on the trial hereof, because the only testimony against this defendant of an incriminative character was the testimony of Claude Rice, alias Floppy, and Frank Barrett, both of whom were accomplices and particeps criminis, and the testimony of said witnesses was not corroborated by the state by any evidence of any character, and because the court erred in refusing to submit to the jury special charge No. 4 requested by defendant; the said charge submitting to the jury the issue as to whether or not the witness Frank Barrett was an accomplice." This clearly notified the court that appellant's contention was that the evidence raised the issue that Barrett was an accomplice, and that the court erred in refusing to submit that issue to the jury.

[5] The object and purpose of the law passed at the last session of the Legislature, requiring the courts to submit their charges to attorneys, and the attorneys to make their objections thereto before it was read to the jury, was that the attorneys engaged in the trial of a case must call the court's attention to any omissions or errors in the charge that the charge might be corrected at that time; and, while the law does not require special charges to be asked, yet we think it the better practice and to be commended; and where the record discloses that the appellant not only called the court's attention to an omission to submit an issue raised by the testimony, but in addition thereto a special charge was prepared and presented curing the omission, if the court then refuses to submit the issue, and the appellant in the motion for new trial calls specific attention to his contention, as in this case, so as to direct the court's attention to the specific matter, if the omission was such an error as might and probably would injuriously affect the defendant, reversible error is presented.

The motion for rehearing is overruled.

**HART v. STATE. (No. 3010.)**

(Court of Criminal Appeals of Texas. March 4, 1914. On Motion for Rehearing, April 22, 1914.)

**1. PERJURY (§ 26\*)—INDICTMENT.**

While the truth of the alleged false statement must be negatived in an indictment for perjury, no particular language is required; it being sufficient if the language used in the indictment specifically negatives the truth of the false statement.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90-94; Dec. Dig. § 26.\*]

**2. PERJURY (§ 26\*)—INDICTMENT.**

The indictment for perjury, committed in a prosecution for theft, alleged that accused did falsely testify that W. was in a certain house from 9 o'clock to 11 o'clock on the night of the theft, and never left the house during that time, which statement was material to the issue, whereas, in truth and in fact, the said W. was, between 9 and 11 o'clock p. m. on that day, on or near the corner and intersection of East Fifth street and R. street, and did then and there commit the theft, and further alleged that the statement by accused that W. was in such house from 9 to 11 o'clock on the night of the theft "was false and untrue." *Held*, that the indictment sufficiently negatived the truth of the alleged false statement by accused.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90-94; Dec. Dig. § 26.\*]

**3. PERJURY (§ 29\*)—PROOF.**

In a prosecution for perjury for falsely stating that W. was in a certain house between the hours of 9 and 11 on a certain night, when in truth W. was at that time on a certain street corner and then and there committed the theft, it was not necessary to prove that accused was at the place of the theft, or that W. committed the theft.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 97-106; Dec. Dig. § 29.\*]

**4. PERJURY (§ 33\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—FALSITY OF TESTIMONY.**

In a prosecution for committing perjury in a theft case by testifying that the alleged thief was in a certain house at a certain time, when the thief was in fact on a certain street corner where the theft was committed, evidence *held* to sustain a finding that accused's testimony was false.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 117-124; Dec. Dig. § 33.\*]

**5. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—CREDIBILITY—"CREDIBLE WITNESS."**

An instruction that a credible witness was one who, being competent to give testimony, is worthy of belief was sufficient, in the absence of a requested charge further defining the words "credible witness."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1710, 1711.]

**On Motion for Rehearing.****6. PERJURY (§ 33\*)—PROOF—CIRCUMSTANCES.**  
Perjury may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 117-124; Dec. Dig. § 33.\*]

Appeal from District Court, Travis County; George Calhoun, Judge.

Lewis Hart was convicted of perjury, and appeals. Affirmed.

R. E. Masterson, of Beaumont, and Henry Faulk and John E. Rylee, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was prosecuted and convicted of perjury, and has appealed to this court.

The main attack is made on the sufficiency of the indictment, and we copy herein that portion to which the exception relates: " \* \* \* At and upon the trial of the said issue so joined between the parties as aforesaid, it then and there became and was a material question whether said Matilda Williams was on and near the corner and intersection of East Fifth street and Red River street in Austin, Travis county, Tex., on the 8th day of August, A. D. 1913, between 9 and 11 o'clock p. m., and did then and there commit theft from the person of one D. A. Patterson, and the said Lewis Hart, being so sworn as aforesaid, then and there, on the trial of said issue, upon oath as aforesaid, did falsely, willfully, and deliberately, before the said Hon. G. W. Mendell, judge as aforesaid, depose and state and testify, among other things, in substance and to the effect following: That said Matilda Williams was in Emily Hodge's house from 9 o'clock to 11 o'clock on the night of August 8, A. D. 1913, and never left said house during said time, which said statement so made by the said Lewis Hart was then and there material to the issue in said cause, whereas, in truth and in fact, the said Matilda Williams was, between 9 and 11 o'clock p. m. on the 8th day of August, A. D. 1913, on and near the corner and intersection of East Fifth street and Red River street in Austin, Travis county, Tex., and did then and there commit the offense of theft from the person of one D. A. Patterson, and the said statement by the said Lewis Hart that said Matilda Williams was in the house of Emily Hodge from 9 o'clock to 11 o'clock on the night of August 8, A. D. 1913, as hereinbefore stated, was false and untrue, and which said statement so made by the said Lewis Hart as a witness in said case in the manner and form as aforesaid was deliberately and willfully made, and was deliberately and willfully false, as he, the said Lewis Hart then and there well knew, against the peace and dignity of the state."

[1] The first criticism is that the alleged false statement must be negatived, and appellant cites a number of cases so holding, and it may be said that is the rule that has been adopted and followed in this court. *Gabrielsky v. State*, 13 Tex. App. 428; *Turner v. State*, 30 Tex. App. 691, 18 S. W. 792. These cases, in announcing the rule that the alleged false statement must be specifically negatived, have been followed; but in no case has any particular form of negation nor specific words been adopted. It is sufficient

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



if the language used in the indictment does specifically negative the truth of the false statement. *State v. Lindenburg*, 13 Tex. 28. And in the case of *Chavarria v. State*, 63 S. W. 313, an indictment almost in terms of this one is sustained, pointing out that in the case of *Ferguson v. State*, 36 Tex. Cr. R. 60, 35 S. W. 369, the earlier case of *State v. Powell*, 28 Tex. 627, was overruled. So it may be said that what has been held by this court is that a general statement that the person or persons "deliberately, willfully, and falsely" swore to a statement is insufficient; but in the indictment there must be a specific allegation that the statement so sworn to is untrue.

[2] Now, is there such an allegation in this indictment? We think clearly so, for, after stating that the defendant "did falsely, willfully, and deliberately state that Matilda Williams was in Emily Hodge's house from 9 o'clock to 11 o'clock on the night of August 8, 1913, and never left said house during said time, which said statement was then and there material to the issue in said cause, whereas, in truth and in fact, the said Matilda Williams was, between 9 and 11 o'clock p. m. on the 8th day of August, A. D. 1913, on and near the corner and intersection of East Fifth street and Red River street, and did then and there commit the offense of theft from the person of one D. A. Patterson," later in said indictment it alleges that "the said statement made by appellant that Matilda Williams was in the house of Emily Hodge from 9 o'clock to 11 o'clock on the night of August 8, 1913, as hereinbefore stated, was false and untrue." What more specific negation of the truth of the statement of appellant could have been made in the indictment? and all that was required at common law and the decisions of this state is that the truth of the statement must be specifically negated.

In the cases of *Wynne v. State*, 60 Tex. Cr. 660, 133 S. W. 682, and *McCoy v. State*, 43 Tex. Cr. R. 607, 68 S. W. 686, it was held by this court: "Where the alleged false statement was that defendant testified to an alibi for a third party—that is, that the defendant was at a certain place at a stated time—the assignment of perjury to be good must allege that the person charged with the crime was present when and where it was committed. An assignment that the party charged with the crime was not at the place testified to by the witness would be an immaterial allegation." So it is seen that the materiality of this defendant's testimony consisted in his swearing that appellant was not at the corner of East Fifth street and Red River street by testifying that at this particular time she was at Emily Hodge's house, and for this reason could not have been at the place where the robbery took place. So it was necessary under the *McCoy* and *Wynne* cases supra, to allege that she was at the corner of East Fifth and Red River

streets at the time the theft took place, and this the indictment in this case does allege by specific allegations.

[3, 4] Appellant then assigns that, to prove the offense of perjury as alleged, it is necessary to prove by two witnesses, or one witness strongly corroborated by circumstances, that appellant was at the place where the theft took place, and, if this is true, perhaps it might be said that she is shown to have been at such point and committed the theft by only one witness, Mr. Patterson. But the issue in this case was not whether Matilda Williams in fact committed the theft, but was she at the place where appellant testified she was? She might be acquitted of the crime, yet in her defense appellant swore to a state of facts material to her defense, and, if this state of facts is shown to be false, appellant would be guilty of perjury. Mr. Patterson not only swore that Matilda Williams was at the corner of Fifth and Red River streets and stole his watch during those hours, thus making it impossible for her to have been at Emily Hodge's house, but in addition to this Policemen Martin, Oyervides, and Grizzard swear that Matilda Williams was not at the house of Emily Hodge at the time appellant testified she was there; that they saw her at another and different place. Thus the fact of the falsity of his testimony was shown by four witnesses, all of whom are credible witnesses in so far as this record discloses.

[5] The court instructed the jury: "A credible witness 'is one who, being competent to give evidence, is worthy of belief.'" This definition was approved in the case of *Kitchen v. State*, 29 Tex. App. 46, 14 S. W. 392, and is the definition given in *Bouvier's Law Dictionary*. No special charge defining the words "credible witness" was requested by appellant, and under such circumstances the definition as given was sufficient. If appellant desired a more full and complete definition of those terms, he should have requested it to have been given. The only special charge requested by appellant was given: "You are further instructed if, from the evidence, you believe that D. A. Patterson is not a credible witness, you must disregard the whole of his testimony."

The only other ground in the motion alleges the insufficiency of the testimony. This was a question for the jury to determine, for, if the testimony offered in behalf of the state is believed, it supports the verdict.

The judgment is affirmed.

#### On Motion for Rehearing.

Appellant has filed a motion for rehearing in which he earnestly insists that we erred in sustaining the indictment in this case. In his motion he copies that part of the indictment wherein it is alleged that on the trial of Matilda Williams that appellant testified "that Matilda Williams was in Emily Hodge's house from 9 to 11 o'clock on the

night of August 8, 1913, and never left said house during said time, whereas, in truth and in fact, the said Matilda Williams was, between 9 and 11 o'clock p. m. on the 8th day of August, 1913, on and near the corner and intersection of East Fifth street and Red River street," claiming that both are affirmative allegations and neither one is a negative of the other, and, if this was all that was in the indictment, his position might be tenable; but he neglects to copy another portion of the indictment wherein it is alleged "*that the statement that the said Matilda Williams was in the house of Emily Hodge from 9 to 11 o'clock on the night of August 8, 1913, was false and untrue.*" This is a specific negative of the fact that Matilda Williams was at the house named, and then the indictment follows with the usual allegation, "and which said statement so made was deliberately and willfully made, and was deliberately and willfully false, as he then and there well knew." The rule is that the truth of the alleged false statement must be specifically negated; but no particular words are required to be used, but any language can be used that does negative the averment specifically.

Appellant also apparently is laboring under the impression that the testimony of D. A. Patterson that Matilda Williams was guilty of theft from his person must be corroborated; that was true when Matilda Williams was on trial for that offense, but appellant is not charged with that offense, but is charged with committing perjury on that trial by swearing to a state of facts that would render it impossible for Matilda Williams to have been the person who committed that theft, and the issue on this trial is not whether Matilda Williams was in fact guilty of that offense, but the issue is: Did appellant swear falsely to material facts on that trial? He swore that Matilda Williams was at the house of Emily Hodge from 9 to 11 o'clock on that night, and she did not leave that house during that time. The theft took place between 9 and 11 o'clock; in fact the time, as fixed by Mr. Patterson, was about 10 o'clock, and he swears that the theft was committed by Matilda Williams on the corner of Fifth and Red River streets. This is one witness who swears positively to the falsity of appellant's testimony on the trial of Matilda Williams.

Messrs. Martin, Overides, and Grizzard all swear they saw Matilda Williams at a place other than Emily Hodge's house between the hours of 9 and 11 o'clock on that night, thus showing the falsity of appellant's testimony by four witnesses. Appellant says that, as the time these latter witnesses saw Matilda was not the exact time when Patterson says the theft took place, this testimony would not be material. But their testimony would show and did show

that his testimony as to the hour he said appellant was at the Hodge house was false, and it was not necessary to show her exact whereabouts by them at the hour the theft took place; only those who saw her commit the theft, if she did, could swear to her then whereabouts.

[8] Appellant overlooks the fact that perjury can be proven by circumstantial evidence as well as positive testimony. *Beach v. State*, 32 Tex. Cr. R. 253, 22 S. W. 976; *Franklin v. State*, 38 Tex. Cr. R. 348, 43 S. W. 85; *Miles v. State*, 165 S. W. 567, recently decided, and cases there cited. In this case one witness, Mr. Patterson, swears positively that Matilda Williams was not at the Hodge house at the very time the theft took place, and swears she was the thief, and, if it should be that the exact time the other witnesses saw Matilda was not at this time, yet it was within the time fixed by appellant that he saw Matilda at the Hodge house, and would be strong circumstantial proof that he swore falsely in swearing that she was at the Hodge house the very hour the theft took place.

The motion for rehearing is overruled.

DAVIDSON, J., absent at consultation.

#### LOPEZ v. STATE. (No. 2923.)

(Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied April 29, 1914.)

#### 1. CRIMINAL LAW (§ 1093\*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

A bill of exceptions, complaining of the admission of testimony of certain witnesses some of whose testimony was competent, must point out the particular portion of the testimony claimed to be inadmissible, and objections to the whole of it are insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.\*]

#### 2. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ.

A statement by decedent, made a few minutes after he was shot, is admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

#### 3. WITNESSES (§ 268\*)—CROSS-EXAMINATION—EXTENT.

Where a witness for accused was not interrogated on cross-examination about any matter not brought out by accused, it was not error to permit the state, on the cross-examination, to ask the witness about a written statement she had made; the statement not being introduced nor offered in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

#### 4. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where accused was convicted of manslaughter, the error in a charge on murder in the second degree, arising from the use of the word

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"gun," instead of the word "pistol," was immaterial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

#### 5. CRIMINAL LAW (§ 1144\*)—APPEAL — PRESUMPTIONS.

Where the record does not show that the court did not submit its charge to the attorneys for both sides after the evidence was concluded and before the argument began, as required by law, the court on appeal will presume that the law was complied with.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

#### 6. CRIMINAL LAW (§ 1122\*)—INSTRUCTIONS—OBJECTIONS—BILL OF EXCEPTIONS.

A bill of exceptions, which complains of the refusal of a special charge, must show that accused at the proper time objected to the court's charge, and presented the special charge before the argument was begun, and where the bill of exceptions is silent as to the time of the presentation of the special charge, and it was not filed until nearly three months after the adjournment of the term, the question will not be reviewed, because the court will presume that the requested charge was not presented in time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.\*]

#### 7. CRIMINAL LAW (§ 1173\*)—APPEAL—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where the evidence of the state clearly showed that the confession of accused was voluntarily made and understood, and accused's testimony to the contrary was weak, the error, in refusing to charge that if the confession was not voluntarily made, or without a full understanding of the nature of it, it must be disregarded was not prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

#### 8. CRIMINAL LAW (§ 971\*)—VERDICT—SUFFICIENCY.

A verdict, "We the jury find the Defendant—Guilty of Man Slaughter and Assess his punishment at two years in the State Penitentiary," signed by a juror, followed by the word, "Fourman," is sufficient as against a motion in arrest.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2463-2468; Dec. Dig. § 971.\*]

#### 9. CRIMINAL LAW (§ 884\*)—PUNISHMENT—ASSESSMENT BY JURY.

In view of the invalidity of Suspended Sentence Act April 3, 1913 (Acts 33d Leg. c. 132), the court may direct the jury to assess the penalty, instead of merely finding accused guilty, and the court may then afterwards impose the punishment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2107, 2526; Dec. Dig. § 884.\*]

Appeal from District Court, Bell County; John D. Robinson, Judge.

Manuel Lopez was convicted of manslaughter, and he appeals. Affirmed.

W. K. Saunders, of Belton, Lewis H. Jones, of Rogers, and Mallory B. Blair, of Belton, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant appeals from a conviction of manslaughter with the lowest penalty assessed.

The court charged on murder in the first degree, and in the second degree, on manslaughter and self-defense. The evidence was amply sufficient to sustain a conviction of murder in the second degree if the preponderance of the evidence was not to that effect. The state's evidence would show this. The evidence for the defendant would have authorized an acquittal on the ground of self-defense.

[1] The state, by four witnesses, proved up the execution of the written confession of appellant. It was then introduced in evidence. Appellant has some bills to the introduction of the evidence by the four several witnesses who proved up the execution of said confession. They quote substantially, if not literally, the whole of each of the witnesses' testimony on the subject. All this testimony was admissible. Even if there had been any particular portion of the testimony of the respective witnesses inadmissible, none of appellant's bills point out any such matter. The objections are made to the whole of it. *Ortiz v. State*, 151 S. W. 1057, and authorities there cited. There are many other decisions to the same effect, both before and since the *Ortiz* Case, unnecessary to cite.

[2] Appellant objected to the testimony of Cypriano Godina, a son of the deceased, as to what the deceased told him, about appellant shooting him, very soon after the shooting. The court, in qualifying the bill states: "This evidence was admitted as *res gestæ*, the evidence showing that the conversation occurred a few minutes after the shooting." As the bill is qualified, this evidence was clearly admissible as *res gestæ*.

[3] The court properly permitted the state, in cross-examination of appellant's wife, to ask her about a written statement she had made concerning the killing, the court qualifying appellant's bill on the subject by stating: "The witness was not interrogated about any matter not brought out by the defendant. The state had the written statement of the witness, but it only related to the killing, which she had testified about on direct examination for the defendant." The written statement was not introduced nor offered in evidence, and not shown by this record.

[4] The indictment charged that appellant killed deceased by shooting him with a pistol. The court, in submitting murder in the second degree, used the word "gun" instead of "pistol." Even if the court's using the word "gun" instead of "pistol" was error, it was immaterial, as appellant was acquitted of murder in the second degree, and convicted of manslaughter only. In his charge submitting manslaughter he did not use the word "gun." Under our decisions a gun is a pistol and a pistol a gun. In no event was the court's charge error. *Douglass v. State*, 26 Tex. App. 109, 9 S. W. 489, 8 Am. St. Rep. 459; *Brown v. State*, 43 Tex. Cr. R. 296, 65

S. W. 529; *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460; *Johnson v. State*, 29 Tex. App. 152, 15 S. W. 647; *Hernandez v. State*, 32 Tex. Cr. R. 271, 22 S. W. 972.

[5, 6] Appellant requested, and the court refused to give, his special charge to this effect: "If you find the confession of defendant was not voluntarily made, or made without a full understanding of the nature of it, you will disregard such confession, and consider it for no purpose." This case was tried some time after the act of April 5, 1913 (Acts 33d Leg. c. 138), amending articles 735, 737, 743, and adding 737a to our Code of Criminal Procedure, was in force. These articles, as amended, in effect require the court to submit his charge to the attorneys for both sides after the evidence is concluded and before the argument begins. The record does not disclose that this was not done in this case, and we must therefore presume it was. The record further does not disclose that appellant, at the proper time, made any objection to the court's charge. Nor does his bill to the refusal of the court to give his said special charge show that it was presented to the court before the argument was begun. If such was the case, the bill should show it. His bill to the refusal of the court to give this charge was not filed until November 18, 1913. The term of court at which appellant was tried adjourned August 21, 1913. Judging by the record in this and other matters, we conclude appellant did not request this charge before the court's charge was read to the jury, and before the argument began. Under the circumstances we take it, the matter is not shown in such way as to authorize this court to review the question.

[7] But even if we could, the evidence was so overwhelming that appellant did voluntarily make said written confession and understood it that the court's refusal to give it is not of such grave importance as would authorize or require this court to reverse this case. The state proved positively and unequivocally by four witnesses, the district attorney, the sheriff, the court stenographer, and another witness, that appellant—after the proper warning, and the confession itself also so shows—voluntarily made and signed said written confession. That it was explained to him and read over to him several times before he signed it; that he understood English and, in addition, that an interpreter was had, and it was read and explained to him by the interpreter in Spanish, and that after all this he signed it. He admitted that he had made a statement to the district attorney, and that he signed it. He said in his testimony it was not read over to him and then he said it was read over to him. Taking all the testimony on the subject, it so overwhelmingly shows appellant made and understood it and voluntarily signed it as to make it unnecessary to give his special charge.

*Williams v. State*, 60 Tex. Cr. R. 455, 132 S. W. 345. Besides, if appellant's testimony raised the question at all, it was so weak, trivial, and light and its application so remote as that the court was not required to give his said special charge. *Davis v. State*, 28 Tex. App. 560, 13 S. W. 994; *Bishop v. State*, 43 Tex. 390; *Cunningham v. State*, 17 Tex. App. 89; *Elam v. State*, 16 Tex. App. 34; *Leeper v. State*, 27 Tex. App. 694, 11 S. W. 644; *Treadway v. State*, 144 S. W. 667, 668, and cases there cited. Other cases might also be cited, but we deem it unnecessary.

[8] Appellant asked 'some other special charges. It is unnecessary to state or discuss them. Wherever any issue was raised which was necessary to be submitted, the court sufficiently did so in his main charge. The verdict, "We the Jury find the Defendant—Guilty of Man Slaughter and Assess his punishment at two years in the State Penitentiary. [Signed] D. W. Bradford Fourman," was clearly sufficient, and the court did not err in not arresting the judgment as moved by appellant. *McGee v. State*, 39 Tex. Cr. R. 190, 45 S. W. 709, and cases there cited, and many other cases too numerous to cite.

[9] The Suspended Sentence Act of April 3, 1913, p. 262, was held void in *Ex parte Marshall*, 161 S. W. 112, and as has many times recently been held by this court, the court correctly told the jury to assess the penalty, instead of merely finding the appellant guilty, and the court then itself afterwards assessing the punishment. No reversible error is shown in this case and the judgment will be affirmed.

#### MULDREW v. STATE. (No. 2831.)

(Court of Criminal Appeals of Texas. April 1, 1914. Rehearing Denied April 29, 1914.)

#### 1. HABEAS CORPUS (§ 50\*)—TIME FOR APPLICATION.

Where accused was, on May 15th, indicted for murder and imprisoned under a capias issued upon the indictment, and on the same day his trial was set for June 2d, and a special venire ordered and issued, and subsequently, because of some defect in the indictment, a new indictment was returned, the trial of which was set for the same day as under the previous indictment, the court did not err in denying a writ of habeas corpus applied for on the morning of June 2d, after the venire had been summoned and were in attendance; no sufficient reason being shown why, if he desired a hearing on habeas corpus, he did not sooner apply therefor.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 48; Dec. Dig. § 50.\*]

#### 2. CRIMINAL LAW (§ 590\*)—CONTINUANCE — GROUND.

Where, on a trial for homicide, after the denial of a writ of habeas corpus applied for on the day the case was set for trial, defendant moved for a continuance on the ground that various attorneys had been employed, but had not had time to investigate the facts, that a large number of the witnesses for the state were related to deceased, and had agreed not to tell,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and would not tell, his attorneys what their testimony would be, that he had a right to bail, and that a hearing under habeas corpus was the only available method of finding out what such witnesses would testify, the court did not err in denying a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1816, 1817; Dec. Dig. § 590.\*]

### 3. CRIMINAL LAW (§ 1001\*)—SUSPENSION OF SENTENCE—PROCEDURE.

Under Act Feb. 11, 1913 (Acts 33d Leg. c. 7), requiring a defendant seeking to take advantage of the suspended sentence law to file his sworn plea before the trial begins, such a plea was filed too late, and the court was not required to submit it to the jury, where it was filed after the motion for a continuance was overruled, and the selection of the jury had commenced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.\*]

### 4. HOMICIDE (§ 169\*)—EVIDENCE—RES GESTÆ.

Accused, while attending a dance at a private house, stepped out on the gallery and urinated, and was seen by one of the ladies present, whose husband complained to him of his conduct. While subsequently dancing with deceased's sister, he attempted to take liberties which she resented, refusing to continue dancing with him. He asked one or two other ladies to dance, and cursed them for their refusal, whereupon a dispute and scuffle ensued, in which deceased jerked accused out of the door, whereupon accused knocked deceased off a porch and then shot him. Held that, on a trial for homicide, testimony as to what occurred on the gallery and in connection with that matter and as to what occurred while accused was dancing with deceased's sister was admissible, as it was a part of the transaction, and all of his misconduct was the cause of the others attempting to put him out of the room, and of the consequent killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 841-850; Dec. Dig. § 169.\*]

### 5. CRIMINAL LAW (§ 954\*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

A motion for a new trial complaining of the giving and refusing of instructions, which merely quoted them, without stating why the refused instructions should have been given, or pointing out any objection in the instructions objected to, was too general to require consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2241, 2363-2367; Dec. Dig. § 954.\*]

### 6. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

On a trial for homicide, an instruction that, if deceased struck accused, causing pain or bloodshed, and creating in accused's mind sudden passion rendering him incapable of cool reflection, and if he killed deceased under such influence of passion, to find him guilty of manslaughter, and that, if any act done by deceased or others acting with deceased or alone created a sudden passion rendering his mind incapable of cool reflection, to find him guilty of manslaughter, was not objectionable as requiring a conviction for manslaughter, though accused did not intend to kill, or acted in self-defense, where the court also charged that, if he, with a deadly weapon, or instrument reasonably calculated to produce death in a sudden passion, aroused by adequate cause, and not in defense of himself, shot or struck deceased thereby killing him, he was guilty of manslaughter; that, if an instrument by which a homicide was committed

was one not likely to produce death, it was not to be presumed that death was designed, unless, from the manner of its use, such intention appeared; that, where a homicide occurred under the influence of sudden passion, by the use of means not in their nature calculated to produce death, the killer was not guilty of homicide, unless there was an intention to kill, but might be guilty of assault and battery, and, in addition, charged as to reasonable doubt, both as to the offense and as to the grade of offense, and fully and completely charged self-defense in every way raised by the evidence, though such instruction alone would probably be subject to such objections.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

Appeal from District Court, Milam County; J. O. Scott, Judge.

Boyd Muldrew was convicted of manslaughter, and he appeals. Affirmed.

Robert Lyles and Henderson, Kidd & Gillis, all of Cameron, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. On a trial for murder appellant was convicted of manslaughter, and his punishment assessed at the lowest prescribed by law.

[1, 2] On Saturday night, May 10, 1913, appellant killed George Williams, and, as a part of the same transaction, and immediately thereafter, he also killed Curtis Bland. The killing occurred in Milam county, about 22 miles from Cameron, the county seat. The next day, Sunday, he went to Cameron, surrendered to the sheriff, and was placed in jail. On Monday following, complaint was duly filed against him before the justice court at Cameron, charging him with the murder of said Williams. The district court was then in session. On May 15th the justice entered an order admitting appellant to bail. It seems he did not then make bond. No reason is shown why he did not. On the same date the grand jury returned two bills of indictment against him, one charging him with the murder of said Williams, the other, of said Bland. Capiases in each case were duly issued and served on him, and he was then confined in jail under each capias. On the same day his trial for the murder of Williams was set for June 2, 1913, and a special venire of 100 men ordered and issued, returnable May 30th. Because of some defect in the first indictment against him, on May 21st, the grand jury preferred another in lieu of the first, charging the murder of said Williams. This case was set for trial for the same day as under the previous indictment, June 2, 1913, and a special venire of 100 men ordered and issued, returnable May 30th. The latter venire was duly executed by the sheriff, returned within the time, showing that 93 out of the 100 men ordered summoned had been summoned and were in attendance in obedience thereto on June 2, 1913. The case against him for the murder of

Bland had not been set for trial. Some time on the morning of June 2d, appellant presented his petition for writ of habeas corpus to Judge Scott, presiding judge, who, it seems, at once granted the application, and ordered the sheriff to produce him thereunder at 9:30 o'clock that morning. The district attorney at once made a motion, for various reasons, shown by it, asking the judge to deny said writ of habeas corpus and a hearing at that time on it, and proceed to the trial of the case before the jury. The court heard the matter and the evidence thereabouts, and on the same day rescinded his order granting the writ of habeas corpus and hearing thereunder and directing that the writ, or application for said habeas corpus, would be heard at some later date, as early as the business of the court would permit. Thereupon appellant duly excepted, and asked till next morning to file his application for a continuance, which was granted. On the next morning appellant made a motion to continue, claiming substantially, in effect, that, while various attorneys had been at once employed by appellant, some of them had been engaged in the trial of cases in said court, and did not have much time to investigate the facts of the case; that a large number of the witnesses for the state were the kinsfolk of the deceased, and that they had agreed, among themselves, not to tell, and would not tell, appellant's attorneys what their testimony would be, and that he had a right to bail and to be on bail while this case was being tried; and that the hearing, under the habeas corpus, was practically their only available method of finding out what the testimony of the said state's witnesses would be.

Under the circumstances and facts of this case, the court did not err in declining to hear the case on habeas corpus, when an application to him for that purpose was first made on the very day the case was set for trial, and a special venire had been duly ordered and were in attendance. No sufficient reason whatever is shown why, if appellant desired a hearing on habeas corpus, he did not sooner apply therefor. There was ample time for him to have done so and had a hearing if it was so important to him that he should. This case does not come within the rule in the case of *Streight v. State*, 62 Tex. Cr. R. 471, 138 S. W. 742. There the application for habeas corpus had been applied for some time before the trial, and as soon as it could reasonably have been done after indictment found, and no sufficient or good reason was shown why the habeas corpus hearing in that case was not had before the day the case was set for trial. In that case we said: "Of course, the court should not permit continuances to be secured by merely filing an application on the day set for trial of a case, or so short a time before that day as to render it impossible to hear it

before the day set for the trial." What we then said particularly applies to this case. The court's action in declining at the time to hear the case on habeas corpus and thereby continue the case was correct. Neither did the court err in not continuing it on appellant's said motion. *Creswell v. State*, 14 Tex. App. 1.

[3] When appellant's motion for a continuance was overruled on the morning of June 3d, the cause proceeded to trial, and the jury was duly selected and impaneled. After the case had thus gone to trial, some time the next day, and before the indictment was read, and appellant entered his plea of not guilty, he filed a sworn plea seeking to have his sentence suspended in the event he was convicted of manslaughter. This clearly was filed too late, and the court was not required to submit that plea to the jury for a finding. The statute itself (Act Feb. 11, 1913, p. 8) expressly requires that, when appellant seeks to take advantage of the suspended sentence law he shall file his sworn plea, and must file it "before the trial begins" in order to avail himself of it. It is too late if he waits till after the trial begins before he files such plea. *Williamson v. State*, 163 S. W. 435. See, also, *Roberts v. State*, 158 S. W. 1003; *Baker v. State*, 158 S. W. 998; *Potter v. State*, 159 S. W. 846; *Monroe v. State*, 157 S. W. 155; *King v. State*, 162 S. W. 890. Without question, the trial of this case began as soon as the court overruled appellant's motion for continuance and forced him to trial and the selection of the jury began. C. C. P. arts. 654, 673, 698.

It is unnecessary to give an extended statement of the evidence in this case, or of the testimony of the respective witnesses. In some matters the testimony was conflicting. Taking it all, it justified the jury to believe, and was amply sufficient to show, that there was a little neighborhood dance at the house of Mr. Farlett, a relative of the deceased, on said Saturday night, May 10, 1913. Appellant did not live in that neighborhood, but quite a distance away in another neighborhood, and was not invited to said party by anybody directly connected therewith. He heard of the party while he was at Rosebud, and left Rosebud in the night, went to his home, and after, or about 9 o'clock that night, started to the party, reaching it about 11 o'clock, and after the dance had ended and part of the guests had gone home. Before leaving Rosebud, he proceeded to provide himself with a bottle of whisky, and, when he got to his home, just before starting to the party, he further proceeded to load up with a large six-shooter, and took with him at the same time said bottle of whisky. While going from his home to the party, he proceeded further to "tank up" on the whisky. He was a stranger practically to Mr. Farlett and the whole company dancing. There were only three or four ladies in the

whole crowd who danced at all—perhaps not exceeding three. There were very few ladies at the party. All three of these ladies who danced were the sisters of the deceased. It seems that the party “broke up” at first because the musicians were not paid what they thought was agreed to. Appellant induced Mr. Farlett to let the dance be renewed, he (appellant) paying the musicians what they claimed, \$1.15, and appellant stated to Mr. Farlett he had come a long distance to the dance, and, under the circumstances, desired to dance. Mr. Farlett agreed to this. The room was thereupon cleared out, some of the guests, among them one of appellant’s sisters, who had returned home, was sent for, and she returned to the dance. After dancing awhile, appellant, it seems, desired to urinate, and proceeded to step out on the gallery of the very small house and urinated on the gallery very near the door of the room where the dancing occurred. While so urinating, Mr. Farlett took Mrs. Knouse, one of the deceased’s sisters, and a little girl out on this gallery to get a drink of water, the drinking water being kept out there. When they stepped out on the gallery, Mr. Farlett, and, it seems, Mrs. Knouse, too, saw appellant urinating on the gallery. She and the little girl at once returned in the room, and Mr. Farlett complained to appellant of his conduct. Appellant went back into the house, and the dance was resumed, and Miss Bettie, another sister of deceased, danced with him. During the dance with her, he attempted to take liberties with her person, which she resented, and, because of his conduct, she refused longer to dance with him, and took her seat. He tried to force Miss Addie Farlett, the sister of the host, and also a kinswoman of the deceased, to dance with him. She declined, telling him she didn’t dance at all, and hadn’t danced that night with any other. He took hold of her arm and tried to pull her out, and she had to hold to the door-facing to prevent his pulling her out on the floor, and, when he did not succeed, he said to her: “God damn you, there ain’t a damned decent girl in the house.” Appellant then tried to get another sister of the deceased to dance with him. Miss Bettie Williams testified: “I heard him when he asked my sister to dance with him. He asked her to dance with him, and she told him that she had four partners, and he says, ‘You have a hell of a lot of partners, take your damn partners and go to hell with them;’ and then Mr. Farlett asked him please not to be cursing the girls any more; and then Mr. Muldrew said he came to him like a white man and got him to let him dance, and he had paid \$1.15, and he would do as he damned please; and so then my brother-in-law, Mr. Knouse, told him, if he had paid \$1.15, to go ahead and dance, and not be cursing the girls. Mr. Muldrew then says, ‘You damn son of a bitch, you, if you take it

up, just follow me out,’ and Mr. Knouse rose up, and then my sister she stepped in—my sister was his wife—and she stepped in between them, and Mr. Muldrew hit Mr. Knouse over her shoulder, and then hit her twice, and then hit my grandma (an old lady about 90 years old) and knocked her under the table, and my brother George was standing at the mantelboard, and shoved Mr. Muldrew towards the door. My brother had not come up and said or done anything before my grandmother was struck, and then all the crowd rushed in that corner where they were having the scuffle, and then my brother stepped around the crowd, and Mr. Muldrew caught hold of him on the left arm and jerked him out of the door, and they went out of the door together, and I followed them outdoors, and I saw Mr. Muldrew knock my brother off of the porch, and then he jumped down and shot him. I could not tell what he hit him with when he knocked him off of the porch. My brother fell right at the corner of the porch, and Mr. Muldrew jumped off there at the edge where he knocked him off at.” Other witnesses testified substantially as did Miss Bettie Williams. The witnesses, even the doctor, differed as to whether any of appellant’s shots from his pistol at deceased after he knocked him down struck deceased. Some said one of the wounds on deceased’s head was caused by one of the balls striking a glancing shot. Others that all the wounds on deceased’s head and face were caused by some blunt instrument. It was reasonably shown none of the balls entered deceased’s body. The deceased never regained consciousness after being at least knocked in the head, if not shot by appellant. Appellant shot more than once at the deceased after he had knocked him in the head and knocked him down, and retreated to his buggy hitched immediately in front of the house, and, while getting in, or just after getting in, the young man Bland, whom appellant killed, and who was an associate of the deceased, and it seems lived with the deceased’s family, at the time ran out to intercept appellant, and thereupon appellant proceeded to shoot and kill him instantly.

[4] Appellant objected to the testimony of Mr. Farlett and several others about him urinating and what occurred thereabouts, and to the testimony of Miss Bettie Williams to the effect that, while she was dancing with appellant, he tried to take advantage of her, as shown above. There is no question but that all of this testimony was admissible in this case. It was a part of the transaction, and all of appellant’s said misconduct together was unquestionably the cause of the deceased and others attempting to put him out of the room and appellant killing deceased. *Stanley v. State*, 44 S. W. 519; *Elmore v. State*, 78 S. W. 520; *Moore v. State*, 31 Tex. Cr. R. 234, 20 S. W. 563; *Washing-*

ton v. State, 19 Tex. App. 521, 53 Am. Rep. 387; Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746; Means v. State, 10 Tex. App. 18, 38 Am. Rep. 640.

[5] Appellant requested several special charges, which were refused. He also excepted, in his motion for new trial, to some paragraphs of court's charge. The only way he attempts to raise these questions is by quoting the requested charges and quoting the paragraphs objected to, and not stating in any way why these special charges should be given, nor pointing out any objection to the portions of the court's charge objected to. It has been so long and well settled by the uniform decisions of this court that these matters only so raised and presented are too general to authorize or require this court to consider them that we deem it unnecessary to cite the authorities. But see Byrd v. State, 151 S. W. 1068, and cases therein cited; Ryan v. State, 142 S. W. 878; Berg v. State, 142 S. W. 884; Berry v. State, 163 S. W. 964.

[6] However, appellant does pick out one paragraph of the court's charge on manslaughter—(f), hereafter quoted—and complains that by it the court told the jury to convict appellant of manslaughter, regardless of whether or not he intended to kill the deceased, or whether he acted in self-defense. If this paragraph was taken by itself, it probably would be subject to appellant's objections. But it is elementary in this state that it is improper to single out and criticize separate paragraphs of a charge; that the whole must be taken into consideration; that in no case of murder or manslaughter can the charge of the court be given in one paragraph alone; it must necessarily and properly be given in many paragraphs, and this is universally the case. The court, in submitting manslaughter, correctly, and in accordance with the statute, told the jury what was manslaughter in every way applicable to this case, and charged:

"(e) If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon, or instrument reasonably calculated and likely to produce death, by the mode and manner of its use, in a sudden passion aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, did shoot with a pistol, and did strike, hit, beat, and wound with a pistol, and did strike, hit, beat, and wound with some blunt instrument, all or any of which said weapons or instruments were reasonably calculated and likely to produce death by the mode and manner of their use, and did thereby kill the said George Williams, as charged in the indictment, you will find the defendant guilty of manslaughter, and assess his punishment in the state peni-

tentiary for any term of not less than two nor more than five years.

"(f) If you believe from the evidence that the deceased struck the defendant a blow or blows which caused him pain or bloodshed, and the said blow or blows created in the mind of the defendant sudden passion which rendered his mind incapable of cool reflection, and that he killed deceased under such influence of passion, you will find him guilty of manslaughter. Or, if you believe from the evidence that, from any act or acts done by the deceased or by any others acting with deceased or acting alone, either in the house, on the gallery, or in the yard prior to or at the time of the killing, and that said act or acts, or any of them, if there were any such, created in the mind of the defendant sudden passion which rendered his mind incapable of cool reflection, you will find him guilty of manslaughter. And in passing upon the condition of the defendant's mind at the time of the killing, you may consider the evidence of such blow or blows, if any, heretofore submitted to you.

#### "IV.

"(a) The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears. So, in this case, if you believe from the evidence that the instrument or instruments used were not likely to produce death in the mode and manner of their use, then you are instructed that you could not presume that death was designed, unless you believe from the evidence from the manner in which said instruments were used such intention evidently appears.

"(b) Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of homicide, unless it appears that there was an intention to kill, but the party from whose acts death resulted may be prosecuted for and convicted of any grade of assault and battery. So, in this case, if you believe from the evidence that the defendant killed the deceased, but you further believe that the means as used were not, in their nature, calculated to produce death, then you will find the defendant not guilty of homicide, unless you believe from the evidence there was an intention on the part of defendant to kill; but you could, under this submission, find the defendant guilty of an aggravated assault and battery, and assess his punishment by a fine of not less than \$25 nor more than \$1,000, or imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment."



In addition to this, the court charged the reasonable doubt between murder in each degree and manslaughter, and also between manslaughter and aggravated assault, and told them that, if they had a reasonable doubt as to whether the offense, if any, was aggravated assault and battery, to give the defendant the benefit of the doubt, and find him guilty of no higher offense than aggravated assault and battery. He then gave a charge on reasonable doubt as applicable to the whole case, and fully and completely charged self-defense in favor of appellant in every way raised applicable to the evidence.

Under the circumstances of this case, and taking the charge of the court as a whole, it is our opinion that the criticism of the paragraph of the court's charge by appellant does not authorize or require this court to reverse. C. C. P. art. 743, before the recent amendment thereof; *Childs v. State*, 35 Tex. Cr. R. 573, 34 S. W. 939; *McGrath v. State*, 35 Tex. Cr. R. 426, 34 S. W. 1027, 941; *Smith v. State*, 48 Tex. Cr. R. 250, 89 S. W. 817; *Foster v. State*, 51 Tex. Cr. R. 77, 100 S. W. 1159. And see, also, *Puryear v. State*, 56 Tex. Cr. R. 231, 118 S. W. 1042; *Davis v. State*, 57 Tex. Cr. R. 548, 124 S. W. 104; *Pratt v. State*, 59 Tex. Cr. R. 172, 127 S. W. 827; *Pratt v. State*, 59 Tex. Cr. R. 640, 129 S. W. 364.

As stated above, appellant's penalty was assessed at the lowest prescribed by law.

The judgment is affirmed.

#### MORAN v. STATE. (No. 3059.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

#### 1. CRIMINAL LAW (§ 519\*)—EVIDENCE—CONFESSIONS—STATEMENTS AS TO STOLEN PROPERTY.

Under Code Cr. Proc. 1911, art. 810, providing that the confession of a defendant shall not be used if made while he was in jail, unless made in his voluntary statement before an examining court, or made in writing and signed by him, or unless, in connection therewith, he makes statements of facts, found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, where persons arrested for stealing a horse and buggy told the owner where to find the buggy, and it was found at the place stated, the statement was admissible, though made while in jail and not in writing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.\*]

#### 2. CRIMINAL LAW (§ 418\*)—EVIDENCE—STATEMENTS OF CONSPIRATOR.

On a trial for stealing a horse and buggy, where it appeared that accused and another traveled together in the buggy, were together when it was sold, that accused, at the time of the sale, stated that it was not stolen, and that they then went together to the place where they were arrested, while in possession of the stolen horse, and that while in jail they together talked to the owner, the statement of the other in accused's presence, and acquiesced in by him

by silence at least, as to where the buggy would be found was admissible against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 968-972; Dec. Dig. § 418.\*]

#### 3. LARCENY (§ 78\*)—INSTRUCTIONS—DEFENSE.

On a trial for stealing a horse and buggy, accused's defense that he was not a party to the original theft was fairly submitted by an instruction that if N. left accused and went off and himself hired or took the property without the knowledge or consent of the owner, and if accused was not present, or if the jury had a reasonable doubt as to whether this was true, to find accused not guilty.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 182; Dec. Dig. § 78.\*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Bart Moran was convicted of theft, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

[1, 2] On the night of the 20th of April J. M. Harkey had his horse and buggy stolen from him. Appellant and one John Nelson were found in possession of the horse in Ardmore, Okl., and were arrested and jailed. Mr. Harkey went to Ardmore, identified his horse, and talked to appellant and Nelson while in jail, and they told him where he would find his buggy; that it had been sold to Mr. Johnson at Denison, a newspaper man. He found the stolen buggy at the place stated by either appellant or Nelson. Mr. Harkey was not certain which one told him, but says they were both present engaged in the conversation, and he then and there was told where he would find his buggy, and they admitted they had taken it. This conversation in the jail was objected to by appellant on the ground that appellant was in jail; that the confession was not in writing and was not a *res gestæ* statement, and witness was not certain that appellant made the statement testified, as it may have been made by John Nelson, and appellant would not be bound by statements made by Nelson, even if the statement was admissible against Nelson. The stolen buggy having been found in pursuance of the confession or statement, the fact they were in jail and the confession not in writing would not render it inadmissible. Article 810, C. C. P., provides that if, in connection with such confession, he makes a statement of facts that are found to be true, which conduces to establish his guilt, such as the finding of stolen property, the confession is admissible, and in this instance the stolen buggy was found solely by reason of the statement or confession admitted in evidence. And it would be immaterial whether the statement was made by Nelson or appellant; they left Dallas together in the stolen buggy, were together in Denison when the stolen buggy was sold, and appellant stated, at the

time the sale was made to Mr. Johnson, that it was not stolen property; they went from Denison to Ardmore together, and were arrested in charge of the stolen horse; they together talked to Mr. Harkey in jail, and each would be bound by the statements made by each of them in this conversation in the presence of each other, which they each acquiesced in, by silence at least.

[3] The defendant testified to facts tending to show that he was not a party to the original theft, and the court fairly submitted this issue to the jury, instructing them: "You are further instructed that if one John Nelson left this defendant and went off and himself hired or took the property without the knowledge or consent of the owner, and this defendant was not present with him at the time he took it, then you will find the defendant not guilty, or, if you have a reasonable doubt as to whether this is true, you will give the defendant the benefit of such doubt and find him not guilty."

This submitted affirmatively the only defensive issue made by appellant's testimony; and the judgment is affirmed.

#### CREACY v. STATE. (No. 2945.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

##### 1. CRIMINAL LAW (§ 595\*)—CONTINUANCE—ABSENCE OF WITNESS.

It was error to deny a continuance of a trial for seduction because of the absence of a witness by whom accused expected to prove that he had sexual intercourse with the prosecutrix before and after the alleged offense, though the state introduced evidence that the witness did not have intercourse with the prosecutrix at any time, and would not swear to any act of intercourse before a time long subsequent to the offense, it appearing on the trial from the testimony of the prosecutrix and others that he at least had the opportunity to commit the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. § 595.\*]

##### 2. SEDUCTION (§ 40\*)—EVIDENCE—ADMISSIBILITY.

On a trial for seduction, letters written by the prosecutrix long after the offense, and of little importance, were not admissible.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. § 40.\*]

Appeal from District Court, Hopkins County; Wm. Pierson, Judge.

Jesse Creacy was convicted of seduction, and he appeals. Reversed and remanded.

D. Thornton, of Sulphur Springs, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. [1] Appellant was convicted of seduction. He was tried very soon after the indictment was found. He made a motion for a continuance on account of the absence of his witness Ed Sutton.

We think the diligence was amply sufficient. He swore in his motion for continuance that he expected to prove by said witness that he, the witness, associated with the prosecutrix in a familiar way, and on or about the night of January 28, 1911, and a number of times before and after that date, he had sexual intercourse with her. In hearing appellant's motion for new trial on said ground, the state contested what said witness would swear, and introduced evidence tending rather strongly to show that the witness would not swear that he had intercourse with said girl until June, 1912, and only twice thereafter. The state also introduced evidence tending, with more or less force, to show that said witness did not have intercourse with the girl at said times, even in June, 1912, and subsequently. The prosecutrix testified that the first act of intercourse with appellant was in January, 1911. By taking the testimony as a whole, without reciting it and without discussing it, we believe the appellant ought to have had an opportunity to have his witness Sutton present and testify in the case. The prosecutrix and others testified to such a state of facts as would show that the absent witness, at least, had the opportunity, if he did not commit the act.

Appellant vigorously contests the sufficiency of the evidence and of the corroboration of the prosecutrix. As the case must be reversed, we do not discuss these questions. It may be that on another trial, the state can introduce other facts and circumstances and other evidence to corroborate the prosecutrix.

[2] We think the letters of the prosecutrix proposed to be introduced were inadmissible. They were so long after the alleged offense and of not sufficient importance to justify their introduction in evidence.

There are no other questions raised in such a way that we can consider them. For the error in refusing a continuance, or rather, in not granting appellant's motion for new trial because of the refusal of a continuance, the judgment is reversed and the cause remanded.

#### BRAGG v. STATE. (No. 2963.)

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 6, 1914.)

##### 1. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.

In a prosecution of an accomplice to swindling, it was not error for the court to fail to charge specially that, in order to convict, the evidence must be sufficient to convict the principal as principal, where the main charge required them to believe beyond a reasonable doubt everything essential to show the principal's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. CRIMINAL LAW (§ 59\*) — PARTIES TO OFFENSES—ACCOMPLICES.

In order to make one guilty as an accomplice, it is not necessary that he and the principal should have entered into an agreement to commit the offense, but only that, before the act was done, he advised, commanded, or encouraged the principal to commit the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.\*]

## 3. CRIMINAL LAW (§ 1090\*) — NECESSITY OF BILL OF EXCEPTIONS.

The appellate court cannot review an exception when it is not shown by the bill of exceptions, but only in the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

## 4. CRIMINAL LAW (§ 1208\*) — ACCOMPLICE — PUNISHMENT.

Pen. Code 1911, art. 84, providing that if the accomplice stands in the relation of parent, etc., to the principal offender, he shall, in all such cases, receive the highest punishment affixed to the offense, was not applicable where the indictment did not allege that the defendant stood in the relation of parent to the principal offender.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.\*]

## 5. CRIMINAL LAW (§ 1165\*)—APPEAL—HARMLESS ERROR.

In the prosecution of an accomplice for swindling, defendant could not complain of the trial court's failure to authorize a higher penalty, since such, if error, was clearly in defendant's favor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089; Dec. Dig. § 1165.\*]

Appeal from District Court, Titus County; H. F. O'Neal, Judge.

E. W. Bragg was convicted of being an accomplice to a swindling scheme, and he appeals. Affirmed.

S. M. Long, of Mt. Vernon, and W. E. Ponder and Rolston & Rolston, all of Mt. Pleasant, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted as an accomplice to swindling, and his punishment assessed at two years in the penitentiary—the lowest prescribed by law.

[1] The evidence was amply sufficient to sustain the conviction. The case was tried in October, 1913. The appellant complains in some particulars of the court's charge. His first is, in effect, that the court failed to charge specially that in order to convict him as an accomplice the evidence must be sufficient to convict the principal as principal. It must be borne in mind that it was the accomplice and not the principal on trial. The court in his charge to which there is no complaint first stated substantially but succinctly the allegations in the indictment, then told the jury all of the requisites necessary for the state to establish before they were authorized to convict. Following this, in

submitting the case to the jury for a finding, he required the jury to believe beyond a reasonable doubt everything necessary and proper under the law and the indictment for them to believe, before they could convict, and, if they found all of these things beyond a reasonable doubt, then to convict. In this charge not only did he require them to believe beyond a reasonable doubt everything essential to show the principal's guilt as principal, but also the appellant's as an accomplice.

[2] The court, in his charge, required the jury to believe, beyond a reasonable doubt, as the statute requires that in order to convict him as an accomplice they must believe that he did unlawfully and willfully and fraudulently advise, command, and encourage the principal to do and commit said swindling, and that he was not personally present when the swindling, if any, was committed, before they could convict him. It is not the law and was not necessary for the court to charge, as contended by appellant, that in order to make him guilty as an accomplice the jury must believe beyond a reasonable doubt that he and the principal entered into an agreement to commit the offense of swindling. The law and the statute does not require that he shall enter into any such agreement, but it only requires, in order to make him an accomplice, that before the act is done he advised, commanded, or encouraged the principal to commit the offense of swindling.

[3] Appellant complains by his motion for new trial only that the court had the verdict of the jury corrected before he would receive it. Nothing is shown by any bill of exception on this subject, and we cannot review such matter stated only in the motion for new trial. It must be shown by bill of exception.

[4] As stated above, this cause was tried in October, 1913—some time after the Act of April 5, 1913, p. 278, amending articles 735, 737, and 743, and adding 737a, were in force. The court correctly told the jury that if they found appellant guilty and the value of the property of which the complaining witness had been swindled was worth more than \$50 to assess his punishment in the penitentiary at any term of years not less than two nor more than ten. This is the penalty prescribed by law. Appellant in no way complained of this at or before the trial. For the first time in his motion for new trial he complained that the court should have given the punishment prescribed by article 84, Pen. Code 1911. That article is: "If the accomplice stands in the relation of parent, master, guardian or husband to the principal offender, he shall, in all such cases, receive the highest punishment affixed to the offense, and the same may, in felonies less than capital, be increased by the jury to double the highest penalty which would be suffered in ordi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nary cases." That article of the statute is inapplicable to the offense alleged in this case. The indictment did not allege that the appellant stood in the relation of parent to the principal offender. This it is necessary to allege in the indictment before this article of the statute is applicable. Section 107, White's Ann. P. C.; Wilson's Form No. 739 (4th Ed.). Besides this, under the amended articles of the Procedure by said Act of April 5, 1913, it was too late to first make this complaint of the court's charge after the trial was concluded. *Barnett v. State*, 42 Tex. Cr. R. 302, 62 S. W. 765; *Manning v. State*, 46 Tex. Cr. R. 326, 81 S. W. 957, 8 Ann. Cas. 887, and cases cited; *Knight v. State*, 64 Tex. Cr. R. 569, 570, 578, 579, 144 S. W. 967, and cases therein cited; *Bills v. State*, 55 Tex. Cr. R. 543, 117 S. W. 835; *Williams v. State*, 53 Tex. Cr. R. 399, 110 S. W. 63; *Robbins v. State*, 57 Tex. Cr. R. 8, 121 S. W. 504; *Reyes v. State*, 51 Tex. Cr. R. 420, 102 S. W. 421; *Bell v. State*, 31 Tex. Cr. R. 521, 21 S. W. 259; *Work v. State*, 3 Tex. App. 233; *Gantt v. State*, 105 S. W. 800.

[5] Again, the court's failure to authorize the higher penalty, even if said article 84, P. C. 1911, had been applicable, was clearly in appellant's favor and not against him, and he cannot justly complain on that account. *Jones v. State*, 63 Tex. Cr. R. 413, 141 S. W. 953, and authorities there cited; *Coker v. State*, 160 S. W. 368.

As stated above, the evidence is amply sufficient to sustain the verdict. In fact, it occurs to us of the evidence in this case, as said by Judge Hurt of the evidence in *Graham v. State*, 28 Tex. App. 11, 11 S. W. 782, 19 Am. St. Rep. 809, "no honest jury under such proof could do otherwise than convict."

The judgment is affirmed.

#### COLEMAN v. STATE. (No. 3085.)

(Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied May 6, 1914.)

#### INTOXICATING LIQUORS (§ 146\*)—OFFENSES—SALE.

Defendant, who, at the request of one who had ordered whisky, made affidavit that it was his and was not intended for any illegal purpose, paying the notary with money furnished by the party ordering the whisky, took the affidavit to the express office, signed for and received the liquor and delivered it to the party who had ordered it, was guilty of a sale in violation of the misdemeanor prohibition law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

Appeal from Nacogdoches County Court; Geo. F. Ingraham, Judge.

Calvin Coleman was convicted of a sale in violation of the prohibition law, and he appeals. Affirmed.

King & Seale, of Nacogdoches, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Misdemeanor prohibition has been in effect in Nacogdoches county since May, 1906. In November, 1913, Edgar Moore, with the knowledge and consent of appellant, ordered a case of whisky from a whisky dealer in Louisiana to be sent by express to Nacogdoches. The liquor dealer so shipped the whisky. When the whisky arrived in Nacogdoches, Moore was informed thereof. He and two others then made up the money, \$12.75, for the whisky and paid it to the liquor dealer's collecting agent in Nacogdoches. Appellant, at his instance, then went to the express agent to procure the liquor. The express agent refused to deliver it to him unless and until he would make an affidavit that it was his whisky and that it was not intended for any illegal purpose. Moore and others then furnished him 25 cents for swearing to the affidavit. He went before a notary, made affidavit to the effect as above stated, paid the notary the 25 cents for swearing him thereto, took the affidavit, went to the express company, delivered the affidavit to the agent, signed for the whisky in the books of the express company, and received the whisky from the agent. He thereupon delivered it to Jim Johnson for Moore and the others, and it was so delivered to them.

The case was tried before the court without a jury. The court adjudged him guilty and assessed the lowest penalty. In our opinion the facts of this case bring it within the principles laid down and held by this court to constitute a sale in violation of the prohibition law, under the cases of *Ashley v. State*, 46 Tex. Cr. R. 471, 80 S. W. 1015; *Treadaway v. State*, 42 Tex. Cr. R. 466, 62 S. W. 574; *Dunn v. State*, 48 Tex. Cr. R. 107, 86 S. W. 326, 22 Am. St. Rep. 734; *Parks v. State*, 50 Tex. Cr. R. 165, 96 S. W. 329; *McElroy v. State*, 50 Tex. Cr. R. 14, 95 S. W. 541; *Bills v. State* (Cr. App.) 64 S. W. 1047; *Stokes v. State*, 49 Tex. Cr. R. 99, 90 S. W. 179; *Walker v. State*, 52 Tex. Cr. R. 329, 106 S. W. 376; *Cantell v. State*, 47 Tex. Cr. R. 522, 85 S. W. 18; *Hillard v. State*, 48 Tex. Cr. R. 314, 87 S. W. 821; *Silger v. State*, 48 Tex. Cr. R. 341, 88 S. W. 243; *Jackson v. State*, 49 Tex. Cr. R. 248, 91 S. W. 574, and other cases.

The judgment is therefore affirmed.

#### HUNTER v. STATE. (No. 2978.)

(Court of Criminal Appeals of Texas. April 8, 1914.)

#### 1. WEAPONS (§ 17\*)—DEFENSES—BURDEN OF PROOF.

The burden was upon one charged with unlawfully carrying a pistol to establish the defense that he was at the time a civil officer engaged in the discharge of his duty, and had a reasonable fear of an unlawful attack upon his person, and that the danger was so imminent as not to permit the arrest of the threatening party, which circumstances Penal Code 1911,

art. 476, provides shall relieve from liability for carrying a pistol, especially in view of article 52, requiring accused to establish the facts relied on to excuse or justify the prohibited act.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22-33; Dec. Dig. § 17.\*]

**2. CRIMINAL LAW (§ 829\*)—APPEAL—HARMLESS ERROR—INSTRUCTION.**

Any error in refusing requested charges by accused, or in particular expressions in the charges given, was harmless, where the charges given were substantially correct upon every issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**3. CRIMINAL LAW (§ 1091\*)—APPEAL—BILL OF EXCEPTIONS—IMPROPER ARGUMENT—SUFFICIENCY.**

A bill of exceptions to improper argument by the district attorney was insufficient, where it did not state the objections made to the argument, or the circumstances under which it was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

**4. INDICTMENT AND INFORMATION (§ 72\*)—DISJUNCTIVE ALLEGATIONS.**

The indictment, in a prosecution for unlawfully carrying a pistol, which alleged that accused did unlawfully carry a pistol on "or" about his person was fatally defective for using the disjunctive.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.\*]

Prendergast, P. J., dissenting in part.

Appeal from Terry County Court; Geo. W. Neill, Judge.

T. F. Hunter was convicted of unlawfully carrying a pistol, and appeals. Reversed, and case dismissed.

John Davenport, of Wichita Falls, and T. F. Hunter, of Wichita Falls, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant appeals from a conviction for carrying a pistol, with a fine of \$100 assessed—the lowest prescribed by law.

By the uncontradicted evidence for the state appellant is shown to have carried a pistol at the time and place charged in the indictment. This is not disputed. In addition, the appellant himself testified and swore that he carried the pistol at the time and place alleged in the indictment. So that, so far as this case was concerned, it was unquestionably shown and not contested that appellant carried the pistol at the time and place alleged. His defense was that he was not guilty of violating the law at the time because, first, he was a civil officer engaged in the discharge of his duty, and, second, that he had reasonable ground for fearing an unlawful attack upon his person, and the danger was so imminent and threatening as not to admit the arrest of the party about to make such an attack upon legal process.

The court substantially, if not literally, told the jury, in accordance with the statute (article 476, P. C.), the offense; and also told them, as shown by article 476, P. C., that the preceding article did not apply in either of the two events claimed by appellant as his defense. The charge of the court was not very artistically drawn; but it substantially and fully enough submitted these questions to the jury for a finding. The jury found all of them against appellant, and were justified by the evidence in so finding.

[1] Under the statute and the many decisions of this court, the court's charge, in effect, that the burden was upon appellant to establish his defense was correct. Besides, the article of the statute above noted, pertaining to this offense (art. 52, P. C.), prescribes: "On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." *Lewis v. State*, 7 Tex. App. 567; *Stilly v. State*, 27 Tex. App. 445, 11 S. W. 458, 11 Am. St. Rep. 201; *Skeen v. State*, 34 Tex. Cr. R. 308, 30 S. W. 554; *Blackwell v. State*, 34 Tex. Cr. R. 476, 31 S. W. 380, and other cases unnecessary to cite.

[2] Appellant has several complaints to different expressions of the court's charge, and to the refusal of the court to give his special charges asked. Even if any of these matters were so raised as to authorize or require this court to pass thereon, they present no reversible error, because the charge of the court, as given, including one of appellant's special charges given, presents substantially correctly every issue raised and necessary to be decided.

[3] Appellant has one bill of exceptions to the argument made by the district attorney to the jury. The bill states that he excepted to the argument "and made various objections to the same." What these objections were are not stated nor shown in the bill. Nor are the circumstances under which the claimed objectionable argument was made stated. No special charge is shown in the record to have been requested by appellant and refused for the jury to disregard the argument. The bill itself is insufficient to properly present the question, and it shows no error. *James v. State*, 63 Tex. Cr. R. 75, 138 S. W. 612; and *Conger v. State*, 63 Tex. Cr. R. 312, 140 S. W. 1112, and authorities there cited.

[4] The most material question in this case is appellant's claim that the indictment charging him with this offense is fatally defective. After the necessary preliminary allegations therein, it avers that appellant in said county on January 29, 1913, "did unlawfully carry on or about his person a pistol;" appellant claiming that the averment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that he carried "on or about" is fatally defective, that the indictment should have charged that he carried "on *and* about." The Assistant Attorney General also contends as does appellant. Appellant cites *Canterberry v. State*, 44 S. W. 522; *Lewellen v. State*, 54 Tex. Cr. R. 640, 114 S. W. 1179; *Harris v. State*, 58 Tex. Cr. R. 523, 126 S. W. 890. Each of these cases sustain his contention. There may be others to the same effect. The question is: Are they right, and shall they be followed?

It was unquestionably the common-law rule that such an allegation—"on or about"—was bad, and an indictment or complaint and information so charging insufficient. Many decisions of this court prior to 1881 correctly so stated and held. Some of these are cited and noted in the three decisions above cited and relied upon by appellant. But by the act of March 26, 1881, c. 57, p. 60, our Legislature expressly enacted the reverse of this rule. Said act is now articles 460 to 476, inclusive, in our Code of Civil Procedure. The Legislature unquestionably by that act intended that the old rule of the common law, as shown by said articles, should no longer be the law of this state, but that act, where it changed such rule, should be the law of this state. There can be no question that the Legislature had the power and the authority to so enact, and this court, and no other, can say it did not. The Legislatures of our state enact laws—not this court. This court can neither properly enact a law nor repeal one. It is, should, and must be bound by the Acts of the Legislature when constitutionally enacted. As said by this court, through Judge Willson, in *Leeper v. State*, 29 Tex. App. 72, 14 S. W. 400, so we here say: "We regard it as the imperative duty of this court, and of all other courts of this state, in the trial and determination of causes, to be guided and controlled by the statutes of the state whenever there is a statute applicable to the question presented. Our observation is that many errors have crept into the decisions of the courts of this state, especially in criminal cases, by following common-law rules and decisions of other states, overlooking our own statutes. These errors should be corrected whenever detected, and a strict adherence to statutes should be the rule governing courts in their decisions."

The purpose of the said rule at common law was, as stated by text-book writers and the decisions of this court, that an accused had the right to know by the indictment with what offense he was charged, and, when the indictment charged in the alternative, he could not and did not know this. But it is also the rule at common law that, when an offense may be committed in two or more ways, or by two or more means, an indictment is perfectly good which charges all of these things in the conjunctive, because

thereby an accused is charged with each and every one of them, but that the state is entitled to a conviction when it proves either one of the various means or ways, and that the state does not have to prove but one, although it alleged many. For instance, in this case, under the old rule, appellant could have been charged by the indictment with carrying "on *and* about"; but the state was entitled to a conviction by proving either that he carried the pistol "on" or that he carried it "about" his person, and the state did not have to prove both that he carried it "on" and that he carried it "about" his person. Then, so far as the accused was concerned, he knew that under the statute he could be convicted if the state proved he carried the pistol either "on or about" his person, and he had to meet the proof of both contingencies just as he would have had if he had been charged with carrying it "on *and* about" his person. No more, no less.

Then let us see what our statutes clearly and unequivocally enact. Said article 475 is: "If any person \* \* \* shall carry on or about his person \* \* \* any pistol, \* \* \* he shall be punished by a fine of not less than one hundred," etc. Said act of 1881 (article 460, C. C. P.) is: "An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment." Article 469, C. C. P., is: "An indictment under the laws regulating the carrying of deadly weapons may charge that the defendant carried about his person a pistol, \* \* \* without authority of law, without a further averment of a want of legal excuse or authority on his part." Then article 473, C. C. P., which is section 14 of said act of 1881, is: "*When the offense may be committed by different means, or with different intents, such means or intents may be alleged in the same count, in the alternative.*" (Italics ours.) Article 9, P. C., is: "This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects." In neither of the above decisions relied upon by appellant is this statute even indirectly referred to. It seems to have been overlooked or ignored. I have searched diligently and have been unable to find any decision of this court at any time since the enactment of said act of 1881 wherein it was held that said article 473 was not the law, or for any other reason in-

valid and inapplicable to this question. I therefore follow the plain and unequivocal enactment of the Legislature, and not said decisions relied upon by appellant, and hold that this indictment was perfectly valid. But the other members of this court do not agree with me and follow said decisions, and accordingly said indictment was bad, and in accordance with their holding this cause is reversed and dismissed.

CAIRO, T. & S. R. CO. v. BROOKS et al.  
(No. 240.)

(Supreme Court of Arkansas. April 6, 1914.)

1. RAILROADS (§ 479\*)—LIABILITY FOR FIRES  
—STATUTE—NECESSITY OF PROVING NEGLIGENCE.

Under act of April 2, 1907 (Laws 1907, p. 336), making a railroad liable for fires caused by the operation of its trains, regardless of negligence, a plaintiff may recover for loss by such fire without proof of negligence, even though he alleged negligence in his complaint.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1706-1708; Dec. Dig. § 479.\*]

2. COSTS (§ 280\*)—AFFIRMANCE ON APPEAL—PENALTY—APPEAL TAKEN FOR DELAY.

Where there is no contention as to the facts raised, and every question of law involved had been settled by decisions of the state and United States Supreme Courts, the court will impose damages for the delay; the judgment having been superseded.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 280.\*]

Appeal from Circuit Court, Poinsett County; W. J. Driver, Judge.

Action by J. O. Brooks and others against the Cairo, Truman & Southern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed, and a penalty of 10 per centum damages awarded.

Geo. B. Webster, of St. Louis, Mo., for appellant. Lamb, Caraway & Wheatley, of Jonesboro, for appellees.

MCCULLOCH, C. J. Separate actions were instituted by appellees against appellant to recover damages on account of destruction by fire of a barn, and personal property situated therein, located near appellant's railroad track, and the two actions were consolidated and tried together, resulting in a verdict in favor of each of appellees for the value of the property destroyed, and also for attorney's fee in each case.

It is alleged in each of the complaints, and the testimony tends to prove, that the fire was communicated to the barn by a passing engine operated by appellant's employes. The fire occurred in the daytime, and the evidence tends to show that it broke out about ten minutes after a train passed along, that there was a slight upgrade of the track near the barn, and that cinders were emitted from the smokestack. The evidence also tends to negative the existence of the origin of the fire from other causes.

A statute of this state imposes liability upon railroad companies for damage on account of fire caused by the operation of trains, regardless of the negligence of the employes of the company (Act No. 141, p. 336, April 2, 1907), and the constitutionality of that statute has been upheld (St. Louis & S. F. R. R. Co. v. Shore, 89 Ark. 418, 117 S. W. 515, 16 Ann. Cas. 939). The statute provides that, "if the plaintiff recover in such suit or action, he shall also recover a reasonable attorney's fee," and that feature of the statute is sustained by decisions of the Supreme Court of the United States. A., T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.

This court has held, in a long and unbroken line of decisions, that, where property near a railroad track is discovered to be on fire shortly after a train has passed, and the proof does not establish some other origin of the fire, an inference is justified that the fire originated in sparks from the engine of the train. Railway Co. v. Dodd, 59 Ark. 317, 27 S. W. 227; Kansas City Southern Ry. Co. v. Harris, 105 Ark. 374, 151 S. W. 992.

In St. Louis, Iron Mountain & Southern Ry. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27, we said: "It is not required that the evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause."

[1] It is insisted that the judgment in this case cannot be sustained without proof of negligence on the part of the appellant, for the reason that the complaint contains an allegation of negligence, and that the action is therefore not based on the statute. The complaint justifies recovery under the statute notwithstanding the allegations of negligence, for the rights of parties are determined according to the allegations of the complaint and the proof given in support thereof.

[2] The appeal in this case is without justification, and was evidently taken for delay. The only issue of fact presented in the case is whether or not the fire was set out by the engine, and it is not even contended in the brief that the proof is not sufficient to warrant a finding in favor of appellees on that issue. Every question of law involved in the case concerning the validity of the statute, and as to the right to recover damages and attorney's fee, has been settled by decisions of this court and of the Supreme Court of the United States. The case is therefore one which fairly calls for the exercise of the statutory authority of this court, and to award 10 per cent. damages for the delay; the judgment of the lower court having been superseded.

The judgment is therefore affirmed, and a penalty of 10 per centum damages is awarded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**BUSHMEYER v. McGARRY.** (No. 254.)  
(Supreme Court of Arkansas. April 13, 1914.)

**1. VENDOR AND PURCHASER (§ 16\*)—OFFER TO SELL—ACCEPTANCE.**

Where defendant by letter offered to sell land, plaintiff's reply, requesting defendant to send the abstract, and stating that he would have it examined and proceed to close the matter, constituted an acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

**2. VENDOR AND PURCHASER (§ 16\*)—OFFER TO SELL—ACCEPTANCE.**

Where defendant offered to sell land, agreeing to make a deed and deliver the abstract upon payment of the purchase price, plaintiff's request that the abstract be furnished immediately did not render his acceptance qualified, for, if defendant could not furnish good title, plaintiff would be entitled to a return of his money; it being presumed, in the absence of a stipulation to the contrary, that a vendor of land will give good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

**3. VENDOR AND PURCHASER (§ 16\*)—OFFER TO SELL—ACCEPTANCE.**

Where plaintiff had unqualifiedly accepted defendant's offer to sell land, the acceptance was not nullified by his proposal to change the mode of payment, for, if an offer is accepted as made, proposals to modify the contract will not affect its validity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

**4. VENDOR AND PURCHASER (§ 82\*)—CONTRACTS—MODIFICATION.**

Where defendant offered to sell plaintiff a tract of land which had been platted, plaintiff's demand, after his acceptance, that a new bill of assurance be executed, as the one executed when the property was platted as an addition, because of error in drawing, located the addition on the wrong piece of land, did not work a modification of the contract, for it was defendant's duty to correct the obvious mistake by the execution of a new instrument.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by J. W. McGarry against C. J. Bushmeyer. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Shubert, of Oklahoma City, Okl., and Johnson & Gray, of Little Rock, for appellant. Bradshaw, Rhoton & Helm, of Little Rock, for appellee.

**McCULLOCH, C. J.** This is an action to recover damages resulting from defendant's refusal to perform a contract which it is alleged he entered into with plaintiff to sell and convey to the latter certain lots in the city of Little Rock. Damages are laid in the difference between the contract price of the lots and the market value thereof. The case was tried before the court sitting as a jury, and the plaintiff recovered damages in the sum of \$550, found to be the difference

between the contract price and the market value of the lots, and the defendant appealed.

Plaintiff resided in Little Rock, and the defendant in Oklahoma City; negotiations being conducted by correspondence through the mails.

The question presented in the case is whether or not the correspondence establishes a contract between the parties; it being insisted on behalf of the defendant (appellant) that the correspondence only shows an offer on his part to sell the property, which was withdrawn before unconditionally accepted by the plaintiff. The correspondence was initiated by a letter of defendant to plaintiff, written from Oklahoma City, dated February 1, 1912, containing the following offer: "Now, I will sell to you my addition, twenty-six lots clear, not incumbered, abstract O. K. to me. It would cost about seventy-five cents per entry on abstract and taxes for 1912, which will be about \$21.00. Now, if you will send me draft for \$2,600.00, State National Bank, Oklahoma City, I will sign the deed and turn over to the bank the deed signed and abstract, and you pay taxes 1912, and if the seventy-five cent fee is any more I will pay it by sending my personal check to you." In reply to that letter, the plaintiff, through his agent in Little Rock, wrote the defendant a letter dated February 12, 1912, which it is claimed amounted to an acceptance of the offer and established a contract. That letter, however, was not received by defendant, and was returned to the writer. Defendant sent plaintiff, by letter dated February 15, 1912, a renewal of his offer and asking for immediate reply. That letter was received by plaintiff's agent in Little Rock on February 17th, and on that day the agent remailed to defendant the letter of February 12th, which reads as follows: "In reply to your letter of February 1, 1912, please send your abstract to me at once, at the address below. I will have same brought down to date and examined, and proceed to close up the matter with you. I will send you deed for your signature within a few days." In response to that letter defendant forwarded the abstract of title to a bank in Little Rock for delivery to plaintiff's agent, and on February 20th some one at the bank notified the agent of the receipt of the abstract of title and delivered it to said agent. Plaintiff's agent, Mr. Ratterree, after having caused the abstract of title to be brought down to date, sent the defendant a letter in plaintiff's name as follows: "We have received the abstract of title to your addition to this city; have had same brought down to date, and, after investigation, I find that in the bill of assurance executed by you when they platted this land as an addition, by error in drawing same the addition was located on the wrong piece of land. I have therefore, had prepared a new instrument to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



be signed by yourself and wife for the purpose of correcting the error in the bill of assurance, in order to get the plat located on the ground owned by you. It will be necessary to have this executed and placed on record. On further examination of the abstract, we find that Elizabeth McConnell owned the two acres on which is located your west block, and the next conveyance of same is made by William Ables and wife and James H. McConnell to T. W. and G. S. McConnell, and, being unable to find how Elizabeth McConnell parted with her title, I have presumed that these others mentioned are her heirs, and that she had died in the meantime. If this be true, we should have some information of some kind to establish this fact. Otherwise, there would be a broken link as to that block. Thinking that perhaps you had investigated this when you purchased, and have the necessary information, I have had prepared the deeds to be executed by you, conveying the property to me, which you can execute and send with the amended bill of assurance and draft attached for \$2,600.00 to me. If agreeable, would prefer that you send same to People's Savings Bank of this city. If you are unable to furnish information as to Elizabeth McConnell, perhaps you can advise me of some one in the city who knew these people and who could properly explain same. If you personally know about the matter, please make affidavit as to same and send with the other papers." On receipt of that letter, defendant wired plaintiff that the deal was off and that he had made other arrangements for the sale of the property. Further correspondence took place between the parties, but defendant adhered to his contention that his offer had not been unconditionally accepted and refused to proceed further with the negotiations of sale.

[1] The turning point in the case is whether or not the letter of February 12th, which was remailed to defendant on the 17th, constituted an unconditional acceptance of defendant's offer. We are of the opinion that it did, and that this letter establishes a contract which defendant may be compelled to perform or respond in damages for his failure to do so. The letter says: "I will have same (the abstract) brought down to date and examined, and proceed to close up the matter with you. I will send you a deed for your signature within a few days." Now, the words "close up the matter" refer to consummation of the contract of sale, and not the negotiations. The negotiations ended with this letter of acceptance, and the language of that letter implies an acceptance of the terms and an agreement to close up the details or to perform the terms of the contract as soon as the abstract could be brought down to date and the title examined.

[2] It is true the letter of acceptance in-

troduces a change in the details, in that, instead of sending the draft for the price and receiving the deed and abstract together, it is asked in this letter that the abstract be forwarded for inspection. Now, that was not a substantial change in the terms, but merely a detail which the defendant promptly acceded to by forwarding the abstract as requested. It was not such a change as amounted to a qualification of the original offer, but it was an acceptance of the offer with this immaterial change with respect to the examination of the abstract. Under defendant's original offer the draft was to be sent first and the deed and abstract forwarded together. But plaintiff was not bound to accept the conveyance if the title proved to be unsatisfactory, and, even if he had sent the draft and received the deed and abstract, he would not have been bound to accept it, but could have demanded a refund of the money paid if the title had been shown, upon examination, to be imperfect. This being so, the matter of furnishing the abstract was merely a detail which did not change the terms of the contract, and, as before stated, defendant promptly acceded to the qualification and forwarded the abstract. And even though the letter constituted a binding contract between the parties, the plaintiff was entitled to a reasonable time, before being called on to perform the contract, within which to examine the title. Defendant's proposal did not specify the kind of deed he was to execute, but the law implies an agreement to furnish a good title. "Where there is no stipulation to the contrary," said this court in *Tupy v. Kocourek*, 66 Ark. 433, 51 S. W. 69, "the law will presume, in a contract for the sale of lands upon a valuable consideration, that the vendor intended to convey a good title, and the vendee will not be compelled to pay his money and accept it, unless it is good."

[3] In the letter of February 29th plaintiff proposed another slight change in the terms of the contract by asking defendant to forward the draft to Little Rock for collection through a bank there, instead of his sending the draft to Oklahoma City. That, however, was a mere proposal of the plaintiff for this slight change in the details; but, even if it be deemed material, it did not constitute a breach on the plaintiff's part of the contract or justify a breach on the part of defendant. The rights of the parties were fixed by the contract embraced in the former correspondence, and either one of them might ask concessions or changes without giving legal cause to the other to refuse to perform the contract as originally established. "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries, whether the offerer will change his terms, or as to future acts, or the expression of a hope, or suggestions," etc. 9 Cyc. 269. After the contract was entered into the defendant had the right

to insist upon a literal compliance with its terms, but the fact that the plaintiff asked a change in some of the details did not justify defendant in breaking the contract.

[4] The same may be said with reference to the plaintiff's proposal in that letter that defendant accompany the deed by new bill of assurance. On that feature of the case, however, it may be said that plaintiff had the right to make that request of defendant, for the reason that there was an obvious error in the original bill of assurance and it was defendant's duty to correct that error as a part of the performance of his contract by the execution of a new instrument.

Our conclusion is that the evidence establishes a contract for the sale of the property, and defendant's breach thereof is undisputed. The evidence justified the assessment of the amount of damages awarded by the court, so the judgment is affirmed.

#### DAVIES v. CHICOT COUNTY DRAINAGE DIST. et al. (No. 251.)

(Supreme Court of Arkansas. April 6, 1914.)

##### 1. DRAINS (§ 67\*)—RATIFICATION OF ASSESSMENTS—LEGISLATIVE RATIFICATION.

Act March 13, 1913, p. 756, repealing Sp. Act 1911, p. 814, which created the Chicot county drainage district, and expressly validating the acts of the board of directors in theretofore levying and collecting assessments, and directing the tax collector to pay over the amounts collected to the board of directors, does not violate any constitutional requirement that such assessments shall be in proportion to the benefits; it being presumed that the Legislature determined that the assessments bore a just proportion to the benefits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. § 67.\*]

##### 2. DRAINS (§ 76\*)—ASSESSMENTS—NOTICE—EFFECT OF FAILURE.

The failure of the board of directors of the Chicot county drainage district to give notice of an assessment, as provided by Special Act 1911, p. 823, § 12, creating the district, would not make the assessment invalid and unenforceable, in view of Act March 13, 1913, p. 756, expressly validating all assessments, and repealing the act creating the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-81; Dec. Dig. § 76.\*]

##### 3. DRAINS (§ 91\*)—ASSESSMENTS—COSTS.

Where plaintiff, who sued to restrain the collection of an assessment levied by the Chicot county drainage district, filed his complaint before the enactment of Act March 13, 1913, p. 756, which abolished the district, but ratified assessments made, and was entitled to the relief prayed before its enactment, he was not liable for any costs incurred before that time.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 53, 82, 102, 103; Dec. Dig. § 91.\*]

##### 4. DRAINS (§ 86\*)—ASSESSMENTS—NONPAYMENT—PENALTIES—ABOLITION OF DISTRICT.

Since Act March 13, 1913, p. 756, repealed Special Act 1911, p. 814, creating the Chicot county drainage district, though it ratified assessments already made, a property owner

would not be liable for the penalty imposed by the repealed act; the repealing act only authorizing the collection of the assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 90; Dec. Dig. § 86.\*]

Appeal from Chicot Chancery Court; Z. T. Wood, Chancellor.

Action by Walter Davies against the Chicot County Drainage District and others. From a decree dismissing the complaint and entering judgment for defendants, plaintiff appealed, and the drainage district prosecuted a cross-appeal. Affirmed.

This cause was submitted upon an agreed statement of facts, from which it appears that the Chicot county drainage district was created by a special act of the General Assembly, approved May 26, 1911; the same being Act No. 299; section 12 of said act provided for the assessment of the drainage tax, and required that, upon the completion of said assessment, a notice thereof be published in some newspaper for three weeks, to the end that any landowner might file exceptions against his assessment; that said assessment should have been made at the meeting of the board of directors in September, 1912, but was not made until the 8th day of October, 1912, the same being an adjourned day of said September meeting; that the board assessed all the lands in the drainage district, including those of appellant at seven cents per acre, but the board gave no notice whatever of said assessment; that the survey of said district had been completed, plans and specifications for complete drainage of the district prepared, maps, profiles, and field notes of the same deposited with the district and are now held as its property, and that the said assessment was made for the purpose of repaying the money borrowed by said district from the banks of the county, which had been used in paying for the survey of the district and other necessary expenses of the board; that said Special Act No. 299 of the General Assembly of 1911 had been repealed by Act No. 181 of the Acts of 1913, which was approved March 13, 1913. It was further recited in the agreed statement of facts that the taxes had been extended upon the tax books, and that the collector was proceeding to collect, and would enforce the collection of, said taxes.

A temporary restraining order was granted, which was dissolved upon the final hearing, at which time the court dismissed the complaint, and entered judgment for the amount of the taxes, and declared the same a lien upon the lands described in the complaint.

This appeal is prosecuted from that decree. The court declined to assess the penalty of 10 per cent. imposed by the act of 1911 against landowners who failed to pay their taxes within the time limited by said act, and the drainage district has prosecuted

a cross-appeal from the court's refusal so to do.

J. R. Parker, of Lake Village, for appellant. W. G. Street and J. C. Gillison, both of Lake Village, for appellees.

SMITH, J. (after stating the facts as above). Appellant contends that the assessment and levy is void, because the board gave no notice of the assessment, as required by section 12 of the act under which they were operating, and because a flat rate of seven cents per acre was levied, when the act required the board to make the assessment according to benefits, and for the additional reason that said assessment was made for the purpose of paying for the survey and the expenses of the board, when they were only authorized to levy an assessment against the lands for the purpose of digging the drainage canals of said district.

Practically all of the questions involved here were considered and decided in the case of Board of Directors of Crawford County Levee District v. Dunbar, 155 S. W. 96. There an improvement district had been dismembered, here one has been abolished, and in both cases provision was made for the preliminary expenses of the district. The act of 1913 provided for the dissolution of the district, but it recognized that the district had incurred obligations which were then outstanding, and provision was made for their payment. That provision was contained in the following language: "Provided, that, whereas, the board of directors of said drainage district have levied an assessment against the lands, lots and railroad rights of way in said district, be it enacted that all of the acts of said board of directors in relation to the assessment, levy and collection of said assessment be, and the same are hereby validated; and the collector of taxes for said county of Chicot is hereby authorized and directed to pay over to said board of directors all such sums of money as he may collect under said assessment, when collected; and that said board of directors be, and the same are hereby, empowered and authorized to pay out of the moneys coming to their hands, from said assessment, in payment of all debts and obligations created by said board, and the surplus remaining, if any, in their hands, shall be covered by them into the general county fund of said Chicot county." The Legislature recognized that an assessment had been made by the board of directors, and in express terms validated that assessment.

[1] No attempt is made to show that the assessment thus validated contravened any constitutional requirement that such assessments shall be in proportion to the prospective betterments, and the presumption must be indulged that the Legislature determined that the assessment bore a just proportion to the prospective benefits of the improvement. The right of the Legislature to appor-

tion the preliminary expense of a dismembered improvement district in proportion to the anticipated or prospective benefits is asserted in the case of Board of Directors v. Dunbar, *supra*.

[2] Nor do we think appellant's position is well taken in regard to the effect of the failure of the board of directors to give notice of the assessment, as provided by section 12 of the act creating the drainage district. The validity of this assessment does not depend upon the action of the board of directors. The Legislature has reviewed that assessment and has validated it. The Act No. 181 of the Acts of 1913 is not a mere curative act, and we need not therefore consider the authority of the Legislature to cure an assessment made without notice. But this act expressly authorizes and directs the collector of taxes of that county to proceed with the collection of said assessment, and directs the disposition of the taxes to be made by him when the collection has been completed. In the case of Sudberry v. Graves, 83 Ark. 344, 103 S. W. 728, an act somewhat similar to this Act 181 of the Acts of 1913 was under consideration, and the court there said: "But it is broader than that (i. e., broader than a mere curative act) in its scope and effect. It is equivalent to a declaration that the amounts assessed by viewers and approved by the county court were proper according to the benefits to be received by each tract of land, and a legislative adoption of those amounts as a reassessment of the proportionate part of the cost of the improvement to be paid upon those lands. The Legislature had the power, in the first instance, not only to fix the boundaries of the district, but to determine the cost of the improvement, and to assess the cost proportionately upon the several tracts of land according to the legislative estimate of benefits, without delegating to any subordinate board or officers the duty and power of fixing the assessments. Coffman v. St. Francis Drainage Dist., 83 Ark. 54 [103 S. W. 179]; Parsons v. District of Columbia, 170 U. S. 45 [18 Sup. Ct. 521, 42 L. Ed. 943]. In other words, the Legislature could in the first place have levied the assessment itself, subject only to the right of the assessed landowner to have an arbitrary abuse of that power reviewed by the courts (Coffman v. Drainage District, *supra*), and it can therefore adopt as correct the assessment made by the viewers and county court, treating the act of adoption as a reassessment of the lands by the Legislature. We see no reason why the Legislature cannot, if it had the power in the first place to determine for itself the proportionate amounts to be assessed against the lands in the district, determine now that the apportionment made by the viewers and confirmed by the county court was correct, and assess them against the lands. Authority is not lacking to support this view."

[3] The complaint in this case was filed

on the 8th of February, 1913, which was prior to the passage of Act No. 181 of the Acts of 1913, and appellant, having been entitled to the relief prayed for at the time of filing his complaint, is not liable for any costs prior to the time this Act No. 181 became effective. *Sudberry v. Graves*, supra.

[4] And in no event would appellant be liable for a penalty. The only authority for the imposition of a penalty is found in the act creating the district, and that act was repealed, and the act of 1913 only authorized the collection of the assessment of the seven cents per acre.

The decree of the court below is therefore in all things affirmed.

**EUBANKS et al. v. FUTRELL et al.**  
(No. 264.)

(Supreme Court of Arkansas. April 13, 1914.)

**1. STATUTES (§ 161\*)—REPEAL.**

Where a statute covers the entire subject-matter of an existing statute, and it was evidently the legislative intention to enact a substitute therefor, the prior act is impliedly repealed, though some of the provisions of the prior act are not embraced in the subsequent act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 33\*)—CREATION—SPECIAL SCHOOL DISTRICTS.**

Special school districts may be established by the consolidation of common school districts as entireties, or by taking only parts of common school districts and consolidating such parts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 55; Dec. Dig. § 33.\*]

**3. STATUTES (§ 158\*)—REPEALS—REPEALS BY IMPLICATION.**

Repeals by implication are not favored, and will not be deemed to have been intended, unless that intention is clearly manifest.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 22\*)—REPEAL BY IMPLICATION.**

Acts 1911, p. 81, permitting any two or more school districts to be organized into a single consolidated school district with the powers specified, did not impliedly repeal Acts 1909, p. 948, section 1 of which provides that, when the people of any given territory in a county desire to avail themselves of the benefits of all of the laws for the regulation of public schools, they may be organized into a single school district, with the powers therein provided, except that Act No. 116 provides an exclusive method for consolidating school districts as entireties.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 41; Dec. Dig. § 22.\*]

**5. CONSTITUTIONAL LAW (§ 70\*)—PROVINCE OF COURTS**

The question of whether a law is wise or not is for the Legislature, and its action in that respect is not reviewable by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

Proceedings by A. M. Eubanks and others against J. D. Futrell and others, for the establishment of special school districts. From a decree setting aside the order of the county court establishing the district, petitioners appeal. Reversed and remanded.

The appellants are the regularly elected and qualified directors of special school district No. 33 of Greene county. It is admitted that they, with other legal petitioners, filed their petition, gave the required notice, held the required election, and secured a majority of the votes cast at the election, for the establishment of their special school district under the provisions of Act No. 321 of the Acts of Arkansas for the year 1909, and the county court made its order establishing said special district. It is conceded that appellants complied with the provisions of said Act No. 321, and that said district has been properly established, provided said Act No. 321 has not been repealed by Act No. 116 of the Acts of 1911. An appeal was taken to the circuit court from the order of the county court establishing appellant special school district, and the circuit judge held that the said Act No. 321 had been repealed by the Act No. 116 of the Acts of 1911, and the correctness of that decision is the only question involved on this appeal.

The learned trial judge accompanied his declaration of law with a review of the two acts in question, and held in effect that the act of 1909 had been repealed by implication by the act of 1911 because the last act involved the same subject-matter and was a complete enactment, and for the further reason that the said Act No. 116 was in conflict and inconsistent with the act of 1909. The opinion of the trial judge was that the Legislature of 1911 had undertaken to legislate generally upon the subject of the consolidation of school districts and school territory, and had enacted a complete law for this purpose, and he expressed the opinion that there was an irreconcilable conflict between the provisions of the acts in question, which resulted in the repeal by implication of the first act. The court vacated and set aside the order of the county court establishing this special school district, and appellants, as directors of that district, have duly prosecuted this appeal.

Block & Kirsch and Johnson & Burr, all of Paragould, for appellants. M. P. Huddleston, of Paragould, for appellees.

SMITH, J. (after stating the facts as above). Section 1 of the Act No. 321 reads as follows: "That when the people of any given territory in any county in this state, other than incorporated cities and towns, desire to avail themselves of the benefits of all laws of this state, for the regulation of public schools in incorporated cities or towns,

they may be organized into, and established as a single school district in the manner and with powers therein provided, with such modifications of said laws as are herein provided."

Section 1 of the Act No. 116 reads as follows: "Any two or more school districts in this state may be organized into and established as a single consolidated school district in the manner and with the powers hereinafter specified."

[1] The law is well established that where the Legislature takes up an old subject anew and covers the entire ground of the subject-matter of the former statute, and evidently intends a substitute for it, the prior act will be repealed thereby, although there are no express words to that effect, and although there may be in the old act provisions not embraced in the new. *Lawyer v. Carpenter*, 80 Ark. 411, 97 S. W. 662; *Western Union Tel. Co. v. State*, 82 Ark. 302, 101 S. W. 745.

Appellees say that Act No. 321 was an ill-advised piece of legislation, and has resulted in the dismemberment of the districts which have in part been incorporated into special school district No. 33, and show that portions of the old districts have been left without adequate school facilities; and it is shown that many other unhappy results are possible under the operation of this Act No. 321; and it is argued that these possibilities must have been and were apparent to the next Legislature which convened after its enactment, and that the subject was taken up anew and school districts were treated as entireties, and that therefore this last act repealed the first one.

We have set out the first section of each of these acts, and it is seen that the first act provided for the establishment of special rural school districts without regard to the boundaries of the common school districts out of which a special school district is established, and section 1 of the Act of 1911 shows the Legislature was dealing with school districts as entireties. It may be, and no doubt is true, that many individual hardships will result under the operation of this Act No. 321; but this suggestion was urged against it in the first case which arose under it, and which reached this court after its passage, and it was there said: "Of course, the act under consideration will have the effect, when put in operation in the manner designated in the act, to change the boundaries of common school districts within the territory organized into single school districts, and thus may work hardships in individual instances where the boundaries of common school districts are disturbed by the changes made; but with the policy or expediency of the legislation this court has naught to do, so long as the act does not violate constitutional limitations." *Common School Dist. No. 13 v. Oak Grove Special School District*, 102 Ark. 411, 144 S. W. 224.

[2] The two acts provide different methods for the establishment of special rural school districts, and if the first is not repealed by the last, the law is that special school districts may be created by the consolidation of common school districts as entireties, or by taking only portions of different common school districts, and it is competent for the Legislature to enact that these districts might be established in either manner.

[3] Repeals by implication are never favored, and this last act does not expressly repeal the first one; and we will not hold that this result is accomplished by implication, unless that result is clearly manifest. *C. R. I. & P. Ry. Co. v. McElroy*, 92 Ark. 600, 123 S. W. 771; *De Queen v. Fenton*, 100 Ark. 504, 140 S. W. 716.

[4, 5] But we do not think the intention of the Legislature was thus manifested; but that, on the contrary, the purpose of the last act was to provide another method for the creation of special school districts.

The Legislature evidently thought it proper to allow the electors to determine whether special rural school districts should be established by the consolidation of common school districts as a unit, or to establish special districts by taking only portions of the respective common school districts; and, while it may be true that one method is wise and the other unwise, this is a question of policy to be decided by the Legislature, and its action in that respect is not reviewable by the court. The procedure for the establishment of the districts is not the same under the two acts, but we do not deem it necessary to point out the difference, as the Legislature had the right to prescribe the manner in which either kind of district might be formed. The case of *Common School District No. 13 v. Oak Grove Special School District*, supra, and the cases of *Bonner v. Snipes*, 103 Ark. 298, 147 S. W. 56, and *Bunch v. Chaffin*, 153 S. W. 255, indicate the practice where districts are formed under the act of 1909; and, although this act of 1911 provides a different procedure, it does not follow, because of this difference, that the last act repeals the first, because the Legislature, for any reason satisfactory to itself, could have prescribed such procedure for the establishment of either kind of district as it saw fit to do. While we think there is no irreconcilable conflict between these acts, it is nevertheless true that the last provides the exclusive method by which common school districts, as entireties, may be consolidated, and to that extent the first act is repealed by the last. Under the first act, common school districts might be consolidated in whole or in part; but the last act provides how districts may be consolidated as entireties, and is exclusive when they are so formed, but it does not provide that special rural districts shall not be otherwise formed.

We conclude, therefore, that the acts relate

to different conditions, under which special rural districts may be formed, and that both acts are in force, except that the first act does not now govern the consolidation of common school districts as entireties.

Accordingly the judgment of the court below will be reversed, and the cause remanded.

**McCLURE v. TOPF & WRIGHT et al.**  
(No. 248.)

(Supreme Court of Arkansas. April 6, 1914.)

**1. CONSTITUTIONAL LAW (§ 26\*)—LEGISLATIVE POWERS—SCOPE.**

The Legislature has power to make such laws as are not expressly or by necessary implication prohibited by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.\*]

**2. CONSTITUTIONAL LAW (§ 48\*)—PRESUMPTIONS IN FAVOR OF VALIDITY.**

A statute must be plainly at variance with the Constitution before the court will so declare it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**3. CONSTITUTIONAL LAW (§ 206\*)—INTOXICATING LIQUORS (§ 15\*)—POWER TO REGULATE—CONSTITUTIONALITY OF ACTS.**

Acts 1913, p. 180, regulating the issuance of liquor license, does not violate Const. U. S. Amend. 14, since the right to engage in selling intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden to abridge, and the liquor traffic is wholly within the control of the state through the police power and may be regulated or restricted, even to the extent of total prohibition.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 206.\* Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. § 15.\*]

**4. ELECTIONS (§ 11\*)—SUFFRAGE—POWER TO REGULATE—EFFECT OF FEDERAL CONSTITUTION—"ELECTION."**

Acts 1913, p. 180, providing that, when a majority of the adult white inhabitants of a city or town sign a petition to the county court asking that license for the sale of intoxicating liquors be issued, the county court may issue such license, provided a majority of the votes cast at the last general election was in favor of license, does not violate Const. U. S. Amend. 15, forbidding any abridgment of the right of citizens of the United States to vote on account of race, color, or previous condition of servitude, since such a proceeding by petition to obtain license is not an "election," within the fifteenth amendment, which is intended to secure the right to vote in the elections contemplated by the fourteenth amendment.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 8; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2329-2336; vol. 8, pp. 7647, 7648.]

**5. CONSTITUTIONAL LAW (§ 205\*)—POWER TO REGULATE—CONSTITUTIONALITY OF ACTS.**

Acts 1913, p. 180, providing for the issuance of liquor licenses on petition of a majority of the adult white inhabitants of a city or town, does not violate Const. Ark. art. 2, § 18, providing that the General Assembly shall not grant to any class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens, since, while the right to vote is a privilege from which a person cannot be excluded on account of color, the procuring of signers to a petition and the pres-

entation thereof to the county court is not an election, and the statute does not give a privilege to white inhabitants, but only imposes a condition upon the traffic in intoxicating liquors.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

**6. INTOXICATING LIQUORS (§ 6\*)—POWER TO REGULATE—CONSTITUTIONALITY OF ACTS.**

Because of the serious effect on the health, morals, and general welfare of the people of the business of selling intoxicating liquors, the Legislature may impose on such business conditions so burdensome as to render the business unprofitable and amount in practical results to prohibition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Pulaski County; Geo. W. Hendricks, Judge.

Proceeding on a petition by Topf & Wright and others for the licensing of the sale of liquor in which I. D. McClure filed a remonstrance. From a judgment dismissing his appeal to the circuit court from the finding of the county court, the remonstrant appeals. Reversed and remanded.

Isgrig & Cannon, of Little Rock, and N. B. Scott, of Lake Village, for appellant. J. W. & J. W. House, Jr., and Morris M. & Louis M. Cohn, all of Little Rock, for appellees.

HART, J. The only issue sought to be raised by this appeal is as to the constitutionality of Act No. 59 of the last General Assembly, entitled, "An act to regulate the issuance of liquor license in Arkansas." Other questions might be discussed and determined; but, as said by the court in considering the local option act of 1881 (*Laws* 1881, p. 140) in the case of *Trammell v. Bradley*, County Judge, 37 Ark. 374, "in view of the grave public interests involved in the question, the court consents" to waive every point except that of determining the constitutionality of the act, and we proceed at once to a consideration and decision of that question.

So much of the act as is necessary for a determination of the issue raised by the appeal is as follows:

"Section 1. It shall be unlawful for any court, town or city council, or any officer thereof, to issue a license or permit, or any other authority to any corporation, person or persons, to sell, barter, or give away, any alcoholic, malt, vinous or spirituous liquors, or any compound or preparation thereof, commonly called tonics, bitters, or medicated liquors, within the state of Arkansas, except as provided in this act.

"Sec. 2. When a majority of the adult white inhabitants living within the incorporated limits of any incorporated town or city in this state shall have signed a petition to the county court of the county in which said town or city is situated, asking that license for the sale of intoxicating liquors be issued for that town or city, then the said county

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court may issue such license for a period already provided by law; provided, that the majority of the votes cast at the last general election in that county on the question of 'For License' and 'Against License' was in favor of 'For License.'"

[1, 2] It is not to be doubted that the Legislature has the power to make the written laws of the state unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution, and the act assailed must be plainly at variance with the Constitution before the court will so declare it.

[3] In regard to the objection that the act in question is in conflict with the fourteenth amendment to the Constitution of the United States, it may be said that it has uniformly been held by the Supreme Court of the United States that the right to engage in selling intoxicating liquors is not one of the privileges or immunities of citizens of the United States, which states are forbidden to abridge by the fourteenth amendment of the Constitution. *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129, 21 L. Ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

The courts generally treat the liquor traffic as being wholly within the control of the state through the exercise of its police power, and its sale may be regulated or restricted as the state sees fit, even to the extent of total prohibition. 23 Cyc. 81; 17 Am. & Eng. Enc. of Law, 211, 212.

In *Crowley v. Christensen*, supra, the Supreme Court of the United States, through Mr. Justice Field, said: "The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. \* \* \* It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. \* \* \* The manner and extent of regulation rest in the discretion of governing authority. \* \* \* It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state; nor is it one which can be brought under the cognizance of the courts of the United States."

Again, in the case of *Giozza v. Tiernan*, supra, Mr. Chief Justice Fuller, speaking for the court, said: "But it is contended that the act conflicts with the provisions of the fourteenth amendment that 'no state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129 [21 L. Ed. 929]. The amendment (fourteenth) does not take from the states those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all, under like circumstances, in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order."

The same principles have been reaffirmed by later decisions of the Supreme Court of the United States. See *Eberle & Carroll v. People of State of Michigan*, 232 U. S. 700, 34 Sup. Ct. 464, 58 L. Ed. —, opinion by Mr. Justice Lamar, delivered March 23, 1914.

Counsel for appellees rely upon the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, relating to the regulation of laundries. The court held the ordinance in that case void because the Chinese were arbitrarily forbidden to operate a laundry, a business harmless in itself, and in which on that account an alien had a right to engage on the same terms as citizens of the state for the purpose of earning a living. In that case, the distinction made clear in the subsequent case of *Crowley v. Christensen*, supra, was not discussed. That is to say, in the latter case it was pointed out that in the application of the police power of a state there is an essential difference between the business of selling liquor and other businesses which are harmless in themselves. This distinction has also been recognized by state courts which have sustained the validity of statutes limiting the granting of liquor licenses to residents of the state. *De Grazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059; *Austin v. State*, 10 Mo. 591; *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664.

In *Mette v. McGuckin*, 18 Neb. 323, 25 N. W. 338, a statute which limited the granting of liquor licenses to residents of the state was attacked on the ground that it was in violation of the fourteenth amendment to the Constitution of the United States, and the court held that the act was a proper exercise of the police power of the state and was valid. The case was affirmed by the Supreme

Court of the United States without a written opinion. *Mette v. McGuckin*, 149 U. S. 781, 13 Sup. Ct. 1050, 37 L. Ed. 959; 23 Cyc. 122.

[4] The fifteenth amendment to the Constitution of the United States declares that "the right of citizens of the United States to vote shall not be abridged by the United States or by any state on account of race, color, or previous condition of servitude." The evident purpose and object of the fifteenth amendment is to secure the right of citizens to vote in the elections contemplated by the fourteenth amendment. For the reasons hereinafter given, statutory proceedings to obtain license for the sale of intoxicating liquors such as the one under consideration are not elections, and are not, therefore, in conflict with the fifteenth amendment.

[5] But the principal reliance of counsel for appellees to uphold the judgment of the circuit court is that the act in question is in violation of article 2, § 18, of our constitution, which reads as follows: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." They insist that the proceeding required by the act as a prerequisite to the granting of license by the county court is an "election," and that to deny colored people the right to vote would be a violation of that clause of our Constitution just quoted.

Of course, if the position assumed by counsel is correct, the act contravenes our Constitution, because the right to vote is a privilege from which a person cannot be excluded on account of color. To support their position, counsel cite the case of *McCullough v. Blackwell*, 51 Ark. 164, 10 S. W. 261, and quote therefrom as follows: "The presentation of the petition is in the nature of an election. When the county court has acted, the votes have been cast and the election returns made, and an appeal does not invest the petitioner with the power to change his vote or to withdraw it except for good cause, as is indicated in *Williams v. Citizens*, 40 Ark. 290."

It is plain that the court did not mean to hold that the procuring of signers to the petition and the presentation thereof to the county court was an election; for the law, as it then existed, permitted adult females, as well as adult males, to sign a petition praying that the sale of intoxicating liquors be prohibited by the court. The court had already held the act constitutional. See *Blackwell v. State*, 36 Ark. 178; *Wilson v. State*, 35 Ark. 414; *Trammell v. Bradley*, County Judge, 37 Ark. 374. If such a proceeding was an "election," the court could not have held the act constitutional; for under our Constitution only male persons over the age of 21 years, with certain other qualifications as to residence, are allowed to vote. The court only said that the proceeding was conducted in like manner as an election, but

that is a very different thing from saying that it is an election. This is shown by the language of the court in *Bordwell v. Dills*, 70 Ark. 175, 66 S. W. 646, where, in reference to the language quoted above in *McCullough v. Blackwell*, 51 Ark. 164, 10 S. W. 259, the court said: "Treating the proceedings as analogous to that of an election, as is done in *McCullough v. Blackwell*, supra, the ballots are cast when the petition containing the signatures is filed with the clerk of the county court. Continuing the analogy, when the county court begins the investigation to determine the result, the polls are cleared, and the count of ballots has begun, and when the order is entered the returns are made."

To say that a proceeding is analogous to or like an election is quite a different thing from saying that it is an election. Moreover, such a holding would be contrary to the general trend of authority in the several states.

Mr. Black, the author, on the subject of Intoxicating Liquors, in 23 Cyc., at page 81, said: "A statutory provision that a license shall not be granted unless the applicant obtains the recommendation or consent of a certain number of persons residing in his neighborhood, or of a majority or other proportion of the citizens of the ward or district where he proposes to carry on business, is a lawful and proper police regulation, and is not objectionable on constitutional grounds." 23 Cyc. 81. See, also, 17 Am. & Eng. Enc. of Law (2d Ed.) pp. 211, 212. Again, at page 128, the learned author said that the signers to such a recommendation must be such as the statute requires, whether adults, freeholders, taxpayers, citizens, residents of the district, heads of families, or otherwise, according to the terms of the law. The same author states (and the decisions of this and other states generally hold) that the licensing authorities have no power to issue a license unless the statutory requirements are complied with. If proceedings to obtain licenses under local option statutes are to be regarded as elections, it is manifest that only legal voters could participate therein, and that statutory requirements that the applicant's petition should be indorsed or accompanied by a recommendation of a majority of adult inhabitants, including females as well as males, taxpayers, heads of families, property owners, etc., would all be invalid. The courts of the various states have uniformly upheld those statutes on the ground that, there being no inherent right in a citizen to sell intoxicating liquors, the business may be wholly prohibited, or it may be permitted under such conditions as the Legislature may prescribe. That is to say, under the statute under consideration, the petition is the jurisdictional condition upon which the court acts when satisfied that it contains the names of a majority of the white adult inhabitants in the city in which the applicant seeks a license to sell intoxicating liquors. This seems to



have been the view taken by this court in its previous decisions.

In the case of Trammell v. Bradley, County Judge, *supra*, the court said: "The mode of information prescribed for townships is by vote of electors at a general election. We understand that no objection is made to that. With regard to institutions of learning, the court derives its information from the expressed wishes of a majority of the adult inhabitants residing within three miles. If the petitioners made the law for the district, or were required to express their views and feelings at the regular legal polls, it would be fatal that females and others, not qualified electors, might participate. But considered simply as a condition upon which the county court must decline to issue license, and as a prescribed means of information, the provision for the voice of women is neither unreasonable nor unconstitutional. They are not beings wholly ignored by the Constitution and the laws, and there is much reason to believe that their womanly instincts and keen foresight of demoralizing influences are truer than the often careless judgment of electors. It is undoubted everywhere that men and children are safest under the moral influences and social surroundings which are approved by women."

Counsel for appellees rely upon the case of *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550, as conclusively sustaining their petition that the act under consideration denies to adults of the colored race privileges and immunities that are granted to adult white inhabitants, and is therefore violative of the clause of our Constitution above quoted. The language of a decision must be read with reference to the facts before the court and the principles of law which they present for consideration and determination. Levy had applied to the county court for license to retail liquors in the city of Pine Bluff and had fully complied with all the requirements of the law in that regard. At the last preceding general election, a majority of the voters of the county and of each ward in Pine Bluff had voted in favor of liquor license. The county court granted the license to other applicants but arbitrarily refused to grant license to Levy. The court held that, while the court might have refused him license for good cause, it could not adopt the policy of granting license to others and arbitrarily refuse him, for such action would deny him a privilege given to others and would be in violation of section 18, art. 2, of our Constitution, which provides that the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equal-

ly belong to all citizens. In the act under consideration, members of the colored race are not excluded from engaging in the business of selling intoxicating liquors upon the same terms as members of the white race. The act under consideration provides that the county court may issue license when a majority of the adult white inhabitants of any incorporated town or city shall have signed and presented a petition asking that license be issued, provided that a majority of the votes cast at the last general election were, "For License." It will be noted that the county court is not required even then to grant license, but it may do so if the conditions prescribed by the statute are complied with. As we have already seen, statutes requiring that license should only be issued on the recommendation of property holders, taxpayers, and heads of families, etc., have been sustained. If the position assumed by counsel for appellees is correct, such statutes would be open to the objection that the class of signers which are designated are given privileges and immunities which are not granted other citizens. The lawmakers are presumed to be familiar with moral conditions as they exist in this state, and to know what class of citizens could best give proper information as to the evils that might result from the liquor traffic. The lawmakers doubtless thought that the class designated in the statute knew best whether the granting of license to sell intoxicating liquors would be dangerous to the morals of the community and likely to result in injury. Such action on the part of the Legislature did not give the persons designated in the statute a privilege, but only imposed a condition upon the traffic in intoxicating liquors.

[6] We are of the opinion that it is well settled by the courts of the country that statutes imposing conditions on the business of retailing intoxicating liquors, though such conditions may be more onerous than those imposed upon another business, and though such conditions may be so burdensome as to render the business unprofitable, and on that account amount, in its practical results, to prohibition, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the people than another business. Therefore we are of the opinion that the act under consideration is not unconstitutional, but is a valid exercise of the legislative power.

It follows that the judgment of the circuit court must be reversed, and the cause will be remanded for further proceedings according to law.

KIRBY, J., not participating.

# TYLER v. WOERNER.

(Court of Appeals of Kentucky. May 5, 1914.)

## 1. APPEAL AND ERROR (§ 544\*) — REVIEW — WANT OF BILL OF EXCEPTIONS.

Where a case is in the Court of Appeals without a bill of exceptions, it will be presumed that the verdict is authorized by the evidence and instructions, and the court will review only the sufficiency of the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

## 2. PRINCIPAL AND AGENT (§ 189\*) — ACTION AGAINST PRINCIPAL—PLEADING—AUTHORITY OF AGENT.

In an action to recover a broker's commission for the sale of land, a petition alleging that plaintiff was employed to sell land by defendant through her agent and husband, without separately averring the agent's authority, sufficiently averred his authority, under the rule that, in actions against a principal on contracts executed by his agent, the contract may be declared on either as made by the principal or by him through an agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. § 189.\*]

## 3. PLEADING (§ 165\*)—JUDGMENT—PLEADINGS TO SUPPORT JUDGMENT.

In a broker's action for a commission, a petition alleging that he was employed to sell realty by defendant's husband and agent, and an answer denying that he was so employed, or that defendant's husband was authorized to employ him, were sufficient to support a judgment for plaintiff, although the allegation of want of authority was not denied by reply, since it added nothing to the answer and did not require denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321, 323; Dec. Dig. § 165.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by John Woerner against Belle J. Tyler. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin F. Gardner, of Louisville, for appellant. Wallace A. McKay, of Louisville, for appellee.

CLAY, C. Plaintiff, John Woerner, brought this action against defendant, Belle J. Tyler, to recover the sum of \$355 alleged to be due for his services in effecting a sale of her real estate. The jury returned a verdict in his favor for \$200. Judgment was entered accordingly, and defendant appeals.

[1] The case is here without bill of exceptions. That being true, it will be presumed that the verdict is authorized by the evidence and instructions, and the court will review the sufficiency of the pleadings only. *Gambrell v. Gambrell*, 130 Ky. 714, 113 S. W. 885.

[2] The petition alleges that plaintiff "was employed as a broker by the defendant, Belle J. Tyler, through her agent and husband, T. C. Tyler, to sell for her a certain tract of land in Jefferson county, Kentucky, owned by said defendant and briefly described as

follows." The answer denies that "plaintiff was employed as a broker, or otherwise, by the defendant, through her alleged agent and husband, T. C. Tyler, or at all, to sell for her the tract of land described in the petition, or any part thereof." Immediately after the above denial is the following: "Denies that T. C. Tyler, her husband, had any authority to employ plaintiff for said purpose."

It is first insisted that the petition is defective, in that it fails to allege authority on the part of the defendant's husband to employ plaintiff to make the sale. It is a well-settled rule of pleading that, in actions by or against the principal on contracts executed by his agents, the contracts may be declared on either as having been made by the principal, or by him through an agent, and that authority in the agent to execute the contract is sufficiently averred by the use of the general allegation, and need not be affirmed in express terms. 16 Ency. Pleading & Practice, 899, 900. Although it may be technically more accurate to aver that the principal, by his agent in that behalf duly authorized, committed the act pleaded, yet such averment is not indispensable. *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705. Where the fact of agency is alleged, the allegation of authority is an unnecessary repetition of a fact already stated. *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Call v. Hamilton Co.*, 62 Iowa, 448, 17 N. W. 667. In the case of *McGeever v. Harris*, 148 Ala. 503, 41 South. 930, it was held that the complaint in an action to enforce a mechanic's lien, alleging that the sum claimed to be due was for materials furnished, etc., pursuant to a contract between the plaintiff and defendant, through and by her husband, sufficiently alleged that defendant's husband was her authorized agent. See, also, 31 Cyc. 1627, and cases cited. True, there is an exception to the above rule, where one seeks to hold a principal for the acts of a subagent. In such a case he must set up and prove the power of the agent to make such a delegation of his authority. 31 Cyc. 1628; *Johnson v. Cunningham*, 1 Ala. 249; *Kellogg v. Norris*, 10 Ark. 18; *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488; *McCormick v. Bush*, 38 Tex. 314. In this case, however, there is nothing in the petition to show any delegation of authority. It is not alleged that plaintiff's husband was appointed her agent to make the sale, and that he then employed plaintiff. On the contrary, it is alleged that "plaintiff was employed as a broker by the defendant, Belle J. Tyler, through her agent and husband, T. C. Tyler, to sell," etc. Under these circumstances, the case falls within the general rule, and not within the exception. We therefore conclude that the petition is sufficient.

[3] 2. But it is insisted that the pleadings do not support the judgment, because the al-

legation, "denies that T. C. Tyler, her husband, had any authority to employ plaintiff for said purposes," was not denied by reply. The allegation in question was in no sense an affirmative plea. It was simply a denial in another form of the fact of agency, which had been previously denied. It therefore added nothing to the answer, and did not require any denial by plaintiff.

Judgment affirmed.

# CHESAPEAKE & O. RY. CO. v. WARNOCK'S ADM'R.

(Court of Appeals of Kentucky. May 1, 1914.)

RAILROADS (§ 348\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for the death of a pedestrian struck by a train, evidence held to support a finding that decedent was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

Appeal from Circuit Court, Greenup County.

Action by Fred Warnock's Administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Proctor K. Malin, of Ashland, and Worthington, Cochran & Browning, of Maysville, for appellant. S. S. Willis, of Ashland, for appellee.

TURNER, J. This is the second appeal of this case; the opinion on the former appeal will be found in 150 Ky. 74, 150 S. W. 29. Upon the first appeal the judgment was reversed because of the failure of the lower court to give an instruction in substance that if the plaintiff knew of the approach of the train, and was injured in attempting to cross the track ahead of the same, then the law was for the defendant, and the jury should so find, even though they might believe that the defendant and its employes were negligent. Upon the return of the case to the circuit court, another trial was had which resulted in a hung jury, but upon a third trial a verdict for \$7,000 was returned against the defendant, and, from a judgment on that verdict, this appeal is prosecuted.

The only ground presented for a reversal is that under the instruction given, as directed in the opinion upon the former appeal, the evidence of contributory negligence upon the part of the decedent was so clearly established as that the present verdict is flagrantly against the evidence. The determination of that question involves an analysis of the evidence on that issue.

As recited in the former opinion, the decedent was employed in a general merchandise store at Fullerton, in Greenup county, and the store faced Ferry street on the east

side of the railroad track, while the railroad platform faced Ferry street on the west side of the track. A shipment of cowpeas had been received that day for this store, and a shower having come up, and the cowpeas being on the platform unprotected, the decedent, who was employed at the store, started across the track for the purpose of covering up the cowpeas and was struck by the train while crossing the track. Immediately before starting across the track he had been standing near the store talking to Willard Boyle, who testifies that he was facing down the railroad in the direction from which the train came, and Warnock was looking toward the cowpeas; that, when the shower came up, Warnock started towards the cowpeas; that he (witness) saw the train coming, but the train did not whistle for the crossing, in fact did not whistle at all until the engine was right on Warnock as he was crossing the track, when it gave the danger signal, and just as it gave the signal Warnock jumped in an effort to escape, and as he jumped the train struck him; that he did not have any idea that Warnock was going to cross the track, and, if he had thought so, he would have stopped him.

L. Morgan testifies that he saw Warnock start across the track from where he had been talking with Boyle, and just as he got in the center of the track the train overtook him, and when it struck him he was just outside of the rails; that just before it struck him it whistled several short blasts, and just as it whistled Warnock looked down the track, but did not have time to get out of the way; that no bell was rung or whistle sounded except these short blasts before the train struck Warnock. One or more other witnesses testify that Warnock did not look towards the train until the danger signal was given.

The engineer testified that when he first saw Warnock he was 50 or 60 feet from the tracks (that is, 50 or 60 feet from where he undertook to cross the track), and that he was running, not directly across the tracks, but in a kind of a circle, as if he was trying to get across ahead of the train.

The conductor testified that he saw him start from the store, and the engineer commenced to whistle at him, and that he ran in the same direction with the train and tried to get in front of it.

Miss Braden says that Warnock was running across the track from the time he left the store until struck.

Up to this point the evidence was in substance the same as it was on the first trial, but on the last trial, in addition to the foregoing evidence, the defendant introduced its agent, Griffin, who testified that, between the date of the accident and the death of Warnock, Warnock had told him that he saw the train coming up but thought that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he could get across ahead of it. The defendant also introduced one Swearer, who testified that Warnock said that he had seen the train coming but thought he could get across, but missed his calculation; but on cross-examination he materially qualified that statement by saying what Warnock said was, "After I saw the train I did not have time to get off." While it may be admitted that the weight of the evidence seems to be that Warnock knew of the approach of that train, we are unwilling to usurp the functions of the jury by declaring from this evidence that they might not have found that he did not know of it. The fact that Griffin, defendant's agent at the time of the accident and ever since, failed to give this most important testimony upon the first trial, or to disclose same to the attorneys of his employer, might well have caused the jury to look upon his evidence on this point with suspicion; and the fact that Swearer, on cross-examination, so qualified and weakened his original statement as to make it practically worthless was doubtless taken into the estimate by the jury.

The fact that Warnock never looked toward the approaching train until after the danger signal was given is certainly strongly persuasive that he had not previously seen the train. We are unwilling to say that the verdict is flagrantly against the evidence.

Judgment affirmed.

#### RICE et al. v. BLAIR.

(Court of Appeals of Kentucky. May 1, 1914.)  
TIME (§ 4\*)—TIME FOR TAKING APPEAL—  
STATUTE—"YEAR."

Under Civ. Code Prac. § 745, requiring an appeal to be taken within two years after the right accrued, and Ky. St. § 452, providing that the word "year" shall mean a calendar year, an appeal may be taken on November 17, 1913, from a judgment rendered on November 18, 1911, notwithstanding the fact that 1912 was leap year, and that, therefore, two periods of 365 days each had elapsed after the right to appeal had accrued.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 4; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7551-7554, 7839.]

Appeal from Circuit Court, Johnson County.

Action between George Rice and others and A. J. Blair. From a judgment for Blair, Rice and others appeal. Motion to dismiss the appeal overruled.

J. F. Bailey, of Paintsville, for appellants. Vaughan, Howes & Howes, of Paintsville, for appellee.

HOBSON, C. J. The judgment appealed from was rendered November 18, 1911; the appeal was sued out November 17, 1913. A plea of limitation has been filed, on the ground that the year 1912 was leap year and

that more than two periods of 365 days elapsed from the judgment to the granting of the appeal.

But section 452, Ky. Stats., provides: "The word 'month' shall be construed to mean a calendar month, and the word 'year' a calendar year." By section 745 of the Civil Code "an appeal shall not be granted except within two years next after the right to appeal first accrued."

As the word "year" means a calendar year, it is immaterial that the year 1912 was leap year. The fact that a prior appeal was dismissed does not affect the right to prosecute this appeal, sued out in due time.

The motion to dismiss the appeal is therefore overruled.

#### RUST et al. v. CARPENTER.

(Court of Appeals of Kentucky. May 1, 1914.)

1. VENDOR AND PURCHASER (§ 176\*)—DEFICIENCY IN ACREAGE—RIGHT TO RELIEF—"MORE OR LESS."

Where a tract of land, conveyed as 60 acres, more or less, contained only 41½ acres, the grantee was entitled to relief to the extent of the value of the deficit, whether the sale was in gross or by the acre, and whether the grantor was guilty of fraud or was ignorant of the deficiency, since the grantee is entitled to such relief where there is a deficit of 10 per cent. or more in quantity, and the words "more or less" relieve only from the necessity of exactness and not from gross deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. § 176.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4582-4595.]

2. VENDOR AND PURCHASER (§ 318\*)—ACTIONS FOR DEFICIENCY IN ACREAGE—JUDGMENT—CONFORMITY TO PLEADINGS.

In an action on a note given in part payment of land, conveyed as 60 acres, more or less, where defendant alleged a deficiency of 18½ acres and asked judgment for the difference between the value of the deficiency and the amount of the note, but alleged that if plaintiffs so desired he was willing to rescind and reconvey upon a return of the purchase money with interest, the court erred in rescinding the sale, as the grantee asked no such relief, and should have canceled the note and given the grantee judgment for the excess of the value of the deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 938-942; Dec. Dig. § 318.\*]

Appeal from Circuit Court, Ballard County.

Action by Emma Rust and others against J. L. Carpenter. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

Henry F. Turner, of Wickliffe, for appellants. J. B. Wickliffe, of Wickliffe, for appellee.

SETTLE, J. Jake Rust and his wife, the appellant Emma Rust, sold and, by deed of general warranty, conveyed to the appellee,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

J. L. Carpenter, two small tracts of land in Ballard county, described in the deed as containing, together, 60 acres, "more or less." The consideration was \$2,000, of which \$110 was paid in cash, \$1,890 in three land notes of \$463.33 $\frac{1}{3}$  each, assigned by the grantee to Jake Rust, and for the remaining \$500 the grantee, by direction of Jake Rust, executed to his son, Will Rust, a note payable four months after date, bearing interest from date until paid and secured by a lien on the lands conveyed. After the maturity of the last-mentioned note, suit was brought thereon and to enforce the lien retained in the deed to secure its payment, in the court below, by Jake Rust, Emma Rust, and Will Rust; it being averred in the petition that although the note sued on was payable to Will Rust it was, in fact, the property of Jake Rust. The appellee, J. L. Carpenter, by answer admitted the execution by him of the note sued on, but alleged that it was without consideration, for which reason he should not be required to pay any part thereof. It was also alleged in the answer that the note was given for a part of the consideration he had agreed to pay for the two tracts of land conveyed him by Jake Rust and wife, described in the petition; and that at the time of selling and conveying the same to him the grantor, Jake Rust, owner of the land, represented and warranted the two tracts to contain between 60 and 65 acres, saying, however, that it would be described in the deed as containing 60 acres "more or less"; that appellee believed and relied on this representation, was induced thereby to purchase the land, and would not have done so but for same; but that the representation as to there being 60 acres in the two tracts was false, known to Jake Rust to be false, and was made by him with the intent to deceive and defraud appellee. It was further alleged in the answer that the two parcels of land in question contain only 41 $\frac{1}{2}$  acres, which is 18 $\frac{1}{2}$  acres less than the quantity mentioned in the deed, and that the grantor warranted them to contain; that appellee purchased the land by the acre and agreed to pay therefor \$33.33 $\frac{1}{3}$  per acre, making the aggregate sum of \$2,000; that the deficiency of 18 $\frac{1}{2}$  acres in the two tracts is more than 10 per cent. of the whole, and by reason thereof entitled appellee to an abatement or reduction of \$615.55 from the full purchase price paid and to be paid for the two tracts, or \$115.55 more than the amount of the note sued on. In the prayer of the answer it was asked: "That the plaintiffs be required to make their warranty on said land in acreage good; that is, that the plaintiffs be charged with the shortage of 18 $\frac{1}{2}$  acres; or rather that defendant have a credit of 18 $\frac{1}{2}$  acres of land at the price of \$33.33 $\frac{1}{3}$  per acre and the sum deducted from the purchase price of \$2,000; and when same is done it will show that this defend-

ant has paid plaintiffs \$115.55 more than he should have paid them in addition to the note sued on, or, including the note, defendant paid plaintiffs the sum of \$615 more than he should have done, and for which there was no consideration; and he now asks that the plaintiffs be made and required to make their warranty to the defendant as to the acreage good, and in this settlement the plaintiffs be charged with the 18 $\frac{1}{2}$  acres shortage, amounting to \$615.55, and that the note sued on be canceled and returned to defendant; and that defendant recover judgment against the plaintiffs, Jake Rust and Will Rust, for the sum of \$115.55, with interest from June 22, 1912, and his costs herein expended; or, if the plaintiffs desire, he is willing to rescind the contract and convey the land back to the plaintiffs and plaintiffs return him the purchase money and interest thereon; and he asks for all general and special relief." Upon the hearing the circuit court rescinded the contract by which appellee became the purchaser of the two parcels of land, canceled the deed conveying him the land and also the \$500 note sued on, and gave appellee judgment against Jake Rust and Will Rust for the \$1,500 which he had paid on the land, with interest from the date of the judgment, and costs of the action. For this amount and costs the judgment gave appellee a lien upon the land and directed its sale in satisfaction thereof. Jake Rust, Emma Rust, and Will Rust, being dissatisfied with the judgment, have appealed.

The death of Jake Rust having occurred since the granting of the appeal, and the appellant Will Rust having qualified as the administrator of his estate, by a proper order of revivor he, as such administrator, has been permitted to join in the prosecution of the appeal.

The evidence is conflicting as to whether Jake Rust, in making the sale of the two parcels of land to appellee, represented the quantity to be 60 acres, and also as to whether the sale was in gross or by the acre. He and his son, Will Rust, who seems to have taken some part in effecting the sale, both testified that Jake Rust did not represent the two parcels to contain 60 acres, but told appellee he did not know whether they would amount to as much as 60 acres, and that he would have the deed say the quantity was 60 acres more or less, which would convey to appellee the excess, if any, over 60 acres, yet compel him to accept a less quantity if under 60 acres. These witnesses were equally positive in testifying that the sale of the land was made in gross and not by the acre.

It was, however, testified by appellee and five or six other witnesses, neighbors of the Rusts, that Jake Rust in numerous conversations, at the time of the sale and prior and subsequent thereto, declared that the two parcels of land contained between 60 and

65 acres; and appellee and one or two of these witnesses further testified that at the time of the sale he represented to appellee that they contained not less than 60 and perhaps as much as 65 acres. Appellee and one or more of his witnesses also testified that the land was sold to him by the acre and at the rate of \$33.33 $\frac{1}{3}$  per acre.

[1] The deficiency or shortage in the quantity of the land is undoubtedly 18% acres, as claimed by appellee, this fact being established by a survey made of the land after the institution of this action; and in view of the amount or extent of this shortage it is not material whether appellee purchased it in gross or by the acre. It is a well-known rule in this jurisdiction that where, in the sale of a tract of land, there is a deficit of as much as 10 per cent. or more in the quantity, the purchaser will be entitled to relief to the extent of the value of the deficit, and this is so whether the sale be made in gross or by the acre. The words "more or less" in a deed relieve only from the necessity for exactness, and not from gross deficiency.

This rule obtains, too, whether the relief on account of the deficiency be based upon a claim of fraud or mistake; so, if the deficiency be as much as or more than 10 per cent., relief against the same will be granted if at the time the parties are ignorant of the deficiency or the vendee is deceived by the misrepresentations of the vendor as to the quantity. The above rule has been announced by this court in the following cases: *Harrison v. Talbot*, 2 Dana, 286; *Smith v. Smith*, 4 Bibb, 81; *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 504; *Hall v. Ely*, 76 S. W. 848; *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220, and other cases. In some of the cases involving this question, relief to the vendee has been granted by rescinding the contract, restoring to him the consideration paid for the land, and giving him a lien on the land for its repayment. But these were, in the main, cases in which the deficiency was gross and there was actual fraud in the sale, or there was no other adequate means of relief. And even in such cases the vendee was allowed the right to elect whether he would claim a rescission or compensation in money for the loss occasioned by the deficiency.

[2] In the instant case the circuit court properly found that there was a deficiency in the lands purchased by appellee of Jake Rust, but erred in rescinding the sale. The rescission was not claimed or prayed by appellee. On the contrary, it was his claim, sustained by the evidence, that the loss he sustained by reason of the deficiency in the lands conveyed him is \$615.55, which exceeds in amount by \$115.55 the note sued on by appellants. The judgment of the court should therefore have canceled the note and given appellee judgment over against appellants

for \$115.55, with interest from the date of the judgment, and his costs.

For the reasons indicated, the judgment is reversed, and cause remanded for the entering of a judgment that will conform to the opinion.

#### SMITH v. THOM et al.

(Court of Appeals of Kentucky. May 1, 1914.)

WILLS (§ 498\*)—DESIGNATION OF DEVISEES—"DESCENDANT."

Where a testator devised real property to a daughter for her sole and separate use for life, with remainder to her descendants, and she left surviving her two sons and three grandchildren, children of one of such sons, the sons took the entire estate, and the grandchildren had no interest therein, since the testator used the word "descendants" as indicating those who would take under the law of descent, and did not intend to create a perpetuity or make an unequal distribution of the remainder between his daughter's unborn children.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.\*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2014-2017; vol. 8, p. 7635.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action between William Smith and J. Pembroke Thom and another. From a judgment against him, Smith appeals. Affirmed.

R. W. Hunn, of Louisville, for appellant.  
E. L. McDonald and Wm. Brown Paynter, both of Louisville, for appellees.

HOBSON, C. J. Catherine G. Thom, née Reynolds, was an infant at the time her father, William B. Reynolds, made his will, and remained so until after his death. After his death, she married and had two children, J. Pembroke Thom and H. P. Mayo Thom, both of whom married during the lifetime of their mother. J. Pembroke Thom has no children, but H. P. Mayo Thom has three children, all born in the lifetime of their grandmother, Catherine G. Thom, who died in the year 1907, being survived by her two sons and three grandchildren. Her two sons sold to William Smith a store on Fourth street, and, he being in doubt as to their title to the property, this litigation followed. The circuit court upheld their title, requiring Smith to accept the deed which they tendered him. He appeals.

The controversy turns upon the construction of the will of William B. Reynolds. The first clause of the will directs the testator's debts to be paid; the second and third clauses provide for certain pecuniary legacies; the fourth, fifth, and sixth clauses are in these words:

"Fourth. I devise my three stores on Main Street at and near the corner of 6th Street my house and lot on Broadway at the corner of 2nd Street, and all my bank, Railroad and other stocks to my son J. W. Hunt Rey-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

nolds—the rents and dividends are to be collected by my executor and so much thereof as may be sufficient for a liberal support and education for my son are to be appropriated in that way until he becomes of age, and the residue if any reinvested for his benefit.

"Fifth. I devise my five stores on Fourth Street sometimes called Wall Street, to my daughter Catherine G. Reynolds for her life for her sole and separate use for her life with remainder to her descendants—they are to be rented out by my executor as is provided as to the devises to my son, and the rents and the income from all the residue of my estate is to be appropriated to furnishing her a liberal support until she arrives at the age of twenty-one and I devise to her all the rest and residue of my estate real and personal and mixed of every description for her sole and separate use.

"Sixth. My property and all my interest in same situated west of 12th street I direct my executor to sell and the proceeds to be paid to my daughter when she attains full age."

This is the whole of the will, excepting the clause appointing the executor. The property in contest is one of the five stores referred to in the fifth clause. It is insisted for Smith that the three grandchildren took jointly with the two sons under the words "with remainder to her descendants." The circuit court held that the two sons, at the death of their mother, took the entire estate. The will was made July 9, 1860. The son and daughter were then both infants. No limitation was placed upon the devise to the son after he became of age; but the property devised to the daughter was devised for her sole and separate use, the purpose being to create in her a separate estate and protect the property from any husband she might have. The five stores were devised to her "for her life for her sole and separate use for her life with remainder to her descendants"; but the testator did not have in mind, in using the word "descendants," to create a perpetuity or to make an unequal distribution of the remainder. Under Smith's contention, H. B. Mayo Thom and his three infant children take four-fifths of the remainder, and his brother, J. Pembroke Thom, only one-fifth. This is not what the testator intended; he intended the remainder to go to her descendants as it would pass under the law of descent. To give the will any other construction would be to defeat the testator's intention. The circuit court properly held the title of the two sons to be good. 40 Cyc. 1412.

There is no devise over. The testator's primary purpose was to provide for his daughter as long as she lived; but he had had no purpose to make a distinction between her unborn children, or to give one an ad-

vantage over another. He used the word "descendants" to indicate those who would take under the law of descent.

Judgment affirmed.

#### LARKIN v. HEILMAN MACH. CO.

(Court of Appeals of Kentucky. May 1, 1914.)

#### 1. APPEAL AND ERROR (§ 1033\*)—QUESTIONS REVIEWABLE—ERROR PREJUDICIAL TO APPELLEE.

An error prejudicial to appellee, who does not complain thereof, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

#### 2. SALES (§ 441\*)—ACTION FOR PRICE—WARRANTY—EVIDENCE—SUFFICIENCY.

In an action for the unpaid price of machinery, evidence held not to show a warranty of the machinery by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

Appeal from Circuit Court, Muhlenberg County.

Action by the Heilman Machine Company against S. B. Larkin. From a judgment for plaintiff, defendant appeals. Affirmed.

Doyle Willis, of Greenville, for appellant. Newton Belcher and Belcher & Sparks, all of Greenville, for appellee.

SETTLE, J. This is an appeal from a judgment whereby appellee recovered of appellant the following amounts: \$78.75, with interest from January 1, 1913; \$443.53, with interest from January 1, 1913; and \$41.95, due on account, with interest from January 1, 1913. Two of the amounts thus recovered, \$78.75 and \$443.53, were balances due upon certain notes executed by appellant to appellee in March and September, 1903, and secured by mortgage liens on certain machinery described in the mortgages, respectively. The judgment enforced these liens and directed the sale of so much of the property embraced in each mortgage as might be found necessary to pay the debt it secured.

It appears from the averments of the petition that, beginning as far back as 1906, the appellant at different times purchased of appellee a sawmill, separator, wheat thrasher, steam traction engine, and other machinery, for which he gave the various notes referred to, upon which divers payments were subsequently made; that for the purpose of adjusting a disagreement between them as to the amount of this indebtedness, and a complaint of appellant as to the inefficiency of the engine he had purchased of appellee, appellant, at appellee's request, February 16, 1909, went to its chief office and place of business in Evansville, Ind., and on that date a settlement was made between them, whereby, in consideration of appellee's furnishing, as it immediately did, certain necessary repairs for the engine it had sold appellant and a

man to attach them, and of its releasing appellant from the payment of \$330 of his indebtedness to it, the latter agreed and promised, by early and frequent payments, to discharge the remainder of his indebtedness to appellee; and that, after then crediting on the several notes evidencing such indebtedness what had been previously paid thereon, and subsequently crediting them with such payments as were made by appellant following the settlement, there was due on them at the time of the institution of the action the sums recovered by appellee first mentioned in the judgment and, in addition, the \$41.95 last mentioned therein; the latter sum being due on account for repairs sold by appellee to appellant in 1912.

[1] The judgment fails to state the court's reason for allowing interest on the sums recovered by appellee from January 1, 1913, instead of from the date of the settlement made between appellant and appellee February 16, 1909, but, as this, though prejudicial to appellee, is not complained of by it, the error, if it be such, will not be considered.

[2] The answer of appellant, which was made a counterclaim, denied the settlement of 1909, also denied any indebtedness to appellee on the part of appellant, and alleged a breach of the warranty in the sale of the machinery to him by appellee, particularly as to the engine, which, it was further alleged, had never done efficient work, as appellee had warranted it would do. For the breach of the warranty the prayer of the answer and counterclaim asked a judgment for damages against appellee in favor of appellant in an amount in excess of the debts sued for by the former.

In giving his testimony, appellant substantially admitted that the settlement of February 16, 1909, in so far as it ascertained and fixed his indebtedness to appellee, was made as claimed by the latter, and that appellee then surrendered and released him from the payment of \$330 of his indebtedness to it; but it is his contention, and such was his testimony, that in this settlement appellee not only agreed to furnish certain repairs for the engine, but that it then guaranteed or warranted that the repaired engine would perform the work, and serve every purpose for which appellant had purchased it; and that this engine, though repaired by appellee, did not thereafter perform its work according to the terms of the guaranty, by reason of which appellant was damaged in the manner and to the extent alleged in his answer and counterclaim. The testimony of appellant as to the alleged guaranty is uncorroborated by any other evidence in the case, and is contradicted by the testimony of four witnesses who were present at the time the settlement was made, namely: William Weintz, appellee's president and treasurer, who made the settlement with appellant, Edward J.

Weintz, his brother, M. C. Gibson, and Miss C. J. Schulte, a stenographer in appellee's office. It is true that these persons were all in the service of appellee, but they substantially agree as to what occurred at the time of the settlement.

The account of what then occurred is thus stated in the deposition of William Weintz: "As nearly as I can recall, he (appellant) owed us approximately \$1,400 or \$1,500 at that time. We agreed to credit his notes with all the interest accrued to that date, and to accept \$300 as payment of an account of \$317.39 \* \* \*. The accrued interest to that time was about \$312; so, with the excess of the account which he did not pay, we gave him approximately \$330 on that date. We were also, at his request, to furnish him a new and larger countershaft for his traction engine, he to send the gears and old shaft to us so the gears might be bored and fitted for the larger shaft. We were also to furnish him some new journal boxes for the countershaft, of a corner, bracket design, and to send our man to put these on. He was to pay the man's fare, and care for him while there doing the work. All of this was agreed to, and he expressed himself as most pleased and satisfied, and glad to get this matter finally and definitely settled. There was no warranty or guaranty whatever, because we, in making this concession, all understood this to be a final settlement and disposition of matters between us. On that day he paid us \$300 on the account, thus closing that; we credited him with the excess, and he also paid \$225, the balance of the principal of one of his \$350 notes; and he also agreed and stated that he would pay the balance of his notes within a very short time, meaning some time during the spring of 1909. As I said before, he left somewhat hurriedly, it being near traintime, but with the very best of feeling, and stating that he would not ask for anything more thereafter." In answer to the question, "Did your company comply with the agreement, furnishing the parts of machinery that were to be furnished?" the witness said: "Yes; all and every."

According to the further testimony of William Weintz, appellant did not comply with his undertaking to make early payment of his indebtedness as ascertained in the settlement of February 16, 1909. He did, however, more than a year thereafter, namely, May 25, 1910, pay thereon in a car load of lumber \$100, for which he received credit, but thereafter bought numerous repairs for machinery of appellee, for some of which he paid, but leaving unpaid on this account \$41.95, this being the last amount for which appellee obtained judgment against him. It also appears from the testimony of William Weintz that, of the several sums for which appellee obtained judgment against him, the two first were balances on his notes of long standing.



and the third amount was the balance of their account against him.

In addition to the corroboration of the testimony of William Weintz furnished by the three persons present at the settlement, it is also corroborated by the circumstances attending the various transactions between appellant and appellee. The latter had indulged him upon his indebtedness to it from the latter part of 1903 down to the time of the settlement. He had made payments as it suited his convenience, and often failed to comply with requests of payment made him by appellee; and, even after the liberal settlement in which it released him from the payment of \$330 of his indebtedness, he was still indulged thereon more than three years, as suit was not brought against him by appellee until December 23, 1912. Moreover, there are two letters appearing in the record written by appellant to appellee, the first of date October 29, 1909, and the last of date May 16, 1910, in each of which he promised to pay his indebtedness to appellee, explained why he had not done so, made requests for repairs for machinery having no connection with the engine, and in neither of these letters did he make any complaint of the failure of the engine to properly do its work or claim that appellee had made any guaranty as to the engine when the settlement was made or at any other time.

Opposed to all this evidence is the testimony of appellant alone, and, while he testified in positive terms that there was a guaranty by appellee of the engine at the time of the settlement of February 16, 1909, his statements are utterly at variance with all the circumstances usually connected with and surrounding such transactions as he had with appellee and inconsistent with what would reasonably have been expected from the business relations existing between them. The engine in question was purchased by appellant in 1903, and it is beyond belief that, following six years' use of it by appellant, appellee should have given a guaranty that it would after that time properly perform its work. It is doubtless true, as claimed by appellant, that there were times after the settlement of February 16, 1909, when it was out of repair and would not perform its work as desired by him, but no complaint of it was made by him to appellee for more than a year, and it was to be expected from its age and the wear and tear resulting from its long use that, even with frequent repairing, it would fall short of doing the work of a first class engine.

The evidence leaves no doubt of the correctness of the several amounts recovered by appellee, and, as the conclusion of the circuit court that appellant was entitled to no part of the damages claimed by him is sustained by the weight of the evidence, the judgment is affirmed.

# WIEDEMANN v. CRAWFORD.†

(Court of Appeals of Kentucky. May 1, 1914.)

## 1. ESTATES (§ 10\*)—CONVEYANCE TO CREDITOR—MERGER OF INDEBTEDNESS.

Plaintiff and defendant being creditors of an insolvent hotel company, plaintiff instituted suit to administer the company's affairs, in which the property was sold to W. acting for both plaintiff and defendant. Thereafter, most of the price having been paid, the court directed a conveyance to W. reserving a lien for the unpaid portion. W. thereafter conveyed to plaintiff in fee, reserving the same lien, whereupon defendant sued plaintiff to establish defendant's interest in the property, in which it was again sold and purchased by defendant; the deed again reserving the same lien. *Held*, that the conveyance of the property by W. to plaintiff did not merge plaintiff's interest in the unpaid purchase money as a general creditor of the insolvent, both because there was no intention that a merger should exist, and because defendant's action in asserting his interest in the property and causing another sale thereof was effective to revive plaintiff's claim to his share of the fund represented by the lien.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9-13; Dec. Dig. § 10.\*]

## 2. ESTATES (§ 10\*)—OUTSTANDING INTEREST—MERGER.

There can be no merger of estate where there is an outstanding or intervening interest or equity.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9-13; Dec. Dig. § 10.\*]

Appeal from Circuit Court, Campbell County.

Action between Charles Wiedemann and Leonard J. Crawford. Judgment for defendant, and plaintiff appeals. Reversed with directions.

Ramsey Washington, of Newport, and Dolle, Taylor & O'Donnell, of Cincinnati, Ohio, for appellant. James C. Wright, of Newport, and O'Rear & Williams, of Frankfort, for appellee.

TURNER, J. About January, 1909, appellant, Wiedemann, being a large creditor of the Highland Hotel Company, instituted an action in the Campbell circuit court alleging it to be insolvent, and asking for the sale of its property and the payment of its debts. The cause was referred to the master commissioner for the proof of claims, and, among others, appellee, Crawford, who was also a large creditor, proved his claim. There were numerous other claims proved which were allowed as valid claims against the company. A judgment of sale was entered in the cause, and at the sale one Widrig, acting for Wiedemann and Crawford, under an agreement previously made by them, became the purchaser, and Wiedemann became his surety on the purchase money bonds. Thereafter, all of the purchase price having been paid except about \$9,000 with interest from the 8th of March, 1909, subject to a credit of something over \$1,000, the court entered an order directing its master commissioner to convey the property to Widrig, and reserve a lien

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 19, 1914.

for the said unpaid purchase price, which was done accordingly by the commissioner. Some time later Widrig, desiring to avoid being involved in certain controversies which had arisen between Wiedemann and Crawford, conveyed the same property in fee simple to Wiedemann, expressly reserving, however, the same lien which had been reserved in the master commissioner's deed to him under the order of the court. Thereafter Crawford, learning of the conveyance from Widrig to Wiedemann, instituted an action against Wiedemann asserting his interest in the property, and such proceedings were had as resulted in another sale of the property under a judgment of the court. At this sale Crawford became the purchaser, and the court subsequently had the master commissioner to make him a deed for the same property, but subject, however, to the same lien which had been previously reserved, and the master commissioner, accordingly, made such a deed. After this deed was made and Crawford was in possession of the property, certain creditors of the Highland Hotel Company entered motions to require the original purchaser, Widrig, to pay into court the original unpaid purchase money for which the lien had been reserved. Thereupon Widrig filed his intervening petition setting up the above facts, and that while he had been nominally the purchaser at the first sale he had never had any beneficial interest in the property, and was at all times acting for Wiedemann and Crawford. To this intervening petition Crawford filed an answer, which he made a cross-petition against Wiedemann, wherein he claimed that, by reason of the conveyance from Widrig to Wiedemann, any interest which Wiedemann may have had in the unpaid purchase money as a general creditor of the Highland Hotel Company was merged into the greater estate taken by him under said deed. To that cross-petition Wiedemann answered denying the merger, and alleging that it was not his purpose or intention, or the purpose or intention of any of the parties to the transaction, that his interest as a general creditor in the unpaid purchase money should be merged into the greater estate taken by him under the deed referred to. To this answer the lower court sustained a demurrer, and, Wiedemann declining to plead further, it was adjudged by the court that Crawford pay to the master commissioner in full discharge of the lien retained all that remained unpaid thereof except such part as would, if paid in, be distributable upon the claims allowed to Wiedemann and Crawford, and directing the master commissioner, upon the making of such collection, to cancel the lien so retained. The effect of this judgment was to declare that appellant no longer had any interest as a creditor of the Highland Hotel Company in the fund arising from this lien that had been reserved, and to adjudge that any interest which he

had previously had therein was merged in or had been extinguished by the greater estate subsequently acquired by him. From that judgment he prosecutes this appeal.

For two reasons this judgment cannot be sustained: (1) Because no merger will result where it is the expressed intention of the one acquiring the greater estate that his acquisition thereof shall not operate to extinguish the lesser estate held by him, or where in the absence of such expression the circumstances surrounding the transaction show that it was not his purpose that the merger should result; (2) because, if a merger had resulted by the acquisition of the greater estate, the subsequent action of Crawford in asserting his interest in the property, and causing another sale thereof, had the effect to revive and give new life to the claim of Wiedemann to his share of the fund represented by the lien.

[1] Running throughout all the text-books and the authorities is the prevailing idea that where it is against the expressed intention, or it is apparent that it was not the intention of the owner, or where it is manifestly against his interest, no merger will be declared. For instance, Perry on Trusts, § 347, says: "Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separate from the whole. But in order that this may be true, the two estates must be commensurate with each other; or the legal estate must be more extensive or comprehensive than the equitable. The equitable fee cannot merge in a partial or particular legal estate. And there will be no merger, if it is contrary to the intention of the parties."

Jones on Mortgages, § 848, says: "It is a general rule that when a legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping this title distinct, or if there be an independent right between the mortgage and the equity, there is no merger. To effect a merger under law, the right previously held, and the right subsequently acquired, must coalesce in the same person and in the same right without any other intervening right."

Washburn on Real Property thus states the rule: "It sometimes happens that the estates of the mortgagor and the mortgagee come together in one and the same person, and the question often arises whether the two have become merged in one, or remain still distinct interests. It is generally true that where a legal and equitable estate in the same land come to the person in the same right, without intervening interest outstanding in a third person, the equitable merger

in the legal estate, and the latter alone remains subsisting."

Pomeroy's Equity Jurisprudence, § 788, says: "Where the legal estate, for example, the fee, and an equal coextensive equitable estate unite in the same person, the merger takes place in equity, in the absence of acts showing an intention to prevent it, as certainly and as directly as at the law. Under these circumstances, merger is *prima facie* the equitable as well as the legal rule." And in section 790: "When the owner of the fee becomes absolutely entitled in his own right to a charge or incumbrance upon the same land, with no intervening interest or lien, the charge will at law merge in the ownership and cease to exist. Under like circumstances, a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party; and a presumption in such a case arises in favor of the merger." And in section 791, says: "The equitable doctrine concerning the merger where the owner of the fee becomes entitled to the charge or incumbrance may be stated as follows, substantially in the language of most eminent judges. Sir William Grant says: 'The question is upon the intention, actual or presumed, of the person in whom the interests are united.' Sir George Jessel says: 'In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. \* \* \* If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. In short, where the legal ownership of the land and the absolute ownership of the incumbrance becomes vested in the same person, the intention governs the merger in equity.'"

[2] Under these authorities, not only will there be no merger where the intention is that there shall be none, but it seems to be the further rule that where there is an outstanding or intervening interest or equity the merger will not be declared.

In this case, at all times after the purchase by Widrig for the benefit of Wiedemann and Crawford, Crawford had an equity in this property, and Wiedemann knew of and recognized that interest, and it is inconsistent with the situation and relations of the parties to say that he, knowing of that interest of Crawford, intended by his purchase either at the first decretal sale through Widrig, or by accepting the deed from Widrig, intended to extinguish his rights or equities in the fund arising from the lien which had been retained.

The United States Supreme Court, in *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582, thus states the

rule: "Where an incumbrancer by mortgage or otherwise becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest."

In addition to the above authorities, there is in the notes to *Pugh v. Sample*, 39 L. R. A. (N. S.) 834, an exhaustive and instructive note dealing with the subject of "merger," and gives a number of authorities sustaining the view we have expressed.

But, if it had been the purpose in this case that a merger should result, and the interest of Wiedemann in the lien fund should be extinguished, the subsequent action of Crawford in having set aside the deed from Widrig to Wiedemann would have operated to revive the lost equity of Wiedemann in the lien fund. It would have been inequitable to permit Crawford to assert title to Wiedemann's interest in that fund (for that is the effect of it) by reason of a condition which he himself brought about. Crawford when he bought this property knew of the lien, and bought it with that charge upon it; the property having been sold subject to this lien, it was necessarily a part of the purchase price, and there would be no equity in permitting him to get this property for a less price than he had agreed to pay for it by reason of some innocent mistake or careless business methods upon the part of one of the creditors of the hotel company to whom part of the lien fund might be adjudged.

The case of *Pugh v. Sample*, 123 La. 791, 49 South. 526, 39 L. R. A. (N. S.) 834, was where a creditor holding a first mortgage on real estate for more than its value became the owner of the fee, whereupon the holder of a second mortgage asserted his claim upon the idea that the first mortgage had been merged upon the acceptance of the conveyance to the fee. The court in considering this question said: "Even, however, were it conceded that the Light judgment survives and operates as a judicial mortgage, the most that plaintiffs could claim would be that the property be sold, subject to Sample's mortgage as it existed at the date of the conveyance to him, as in such case his mortgage, which had been in a condition of suspended animation, would revive, and, as it seems to be understood that the property would fall considerably short of satisfying it, plaintiffs would get nothing." And, after quoting authorities, said: "Which means that, whilst one cannot be, at the same time, owner and mortgagee of the same property, if the title which, apparently conveying perfect ownership, is supposed to destroy the mortgage by confusion, turns out to be no title or an imperfect title, the mortgage, which was suspended and apparently destroyed, upon the assumption of perfect ownership in the mort-

gaged, is revived; the cause of the supposed destruction no longer existing."

Strictly speaking, a merger only occurs when the holder of the lesser estate or interest, by becoming the owner of the greater estate or interest, perfects in himself the full, legal, and equitable title, and when it may be gathered from all the facts and circumstances surrounding the transaction that such was his purpose, and that it was to his interest.

There is nothing in this case to indicate, or even suggest, that it was the intention of Wiedemann to waive or extinguish any claim he may have had in the \$9,000 lien bond as a creditor of the Hotel Company. He accepted the deed from Widrig fully recognizing the rights of Crawford in the property conveyed, and did not deny these rights in the suit instituted by Crawford (142 Ky. 303, 134 S. W. 495); he accepted that deed, which clearly recited the reservation of the \$9,000 lien which he knew was for the benefit of the creditors of the Hotel Company of whom he was one; it could not have occurred to him that he was perfecting the title to the property in himself, because the record in the suit instituted by Crawford shows he recognized the interest of Crawford in the property. If he had denied the interest of Crawford, a very different aspect might be put upon the matter, and a different motive ascribed to him; then it might well have been said he was seeking to perfect the title in himself, and the merger might have followed. But it appears he was still holding the property for himself and Crawford under their agreement, just as Widrig had been holding it for them, and in equity and good conscience there was no more merger by the deed from Widrig to Wiedemann than there was by the deed from the master to Widrig for Wiedemann and Crawford's benefit.

To adjudge at the instance of Crawford, under these conditions, that Wiedemann could not participate as a general creditor of the Hotel Company in this lien fund, and thereby permit him to acquire the full title to the property at the partial expense of Wiedemann, and for a less sum than he (Crawford) agreed to pay for it, would be most inequitable and unjust.

The judgment is reversed, with directions to overrule the demurrer to Wiedemann's answer to Crawford's cross-petition.

#### PRESTON et al. v. TOWN OF PAINTSVILLE.†

(Court of Appeals of Kentucky. May 5, 1914.)

#### 1. CONTINUANCE (§ 17\*)—GROUNDS—SUFFICIENCY.

An application for continuance, in proceedings to remonstrate against the annexation of territory to a town, filed by plaintiff's attorneys on the ground that they did not have time to prepare the case for trial, was properly de-

nied in the court's discretion in absence of further excuse, especially where defendant at the close of its proof notified plaintiff's attorneys that the case would be pressed for trial at the next regular term.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 14; Dec. Dig. § 17.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 33\*)—ANNEXATION OF TERRITORY—PROCEEDINGS—TIME OF TRIAL.

In view of Civ. Code Prac. § 367a, subsec. 5, providing that suits in equity shall stand for trial at the first term of court after the issue shall be completed, or by the provisions of the act shall have been completed 30 days before the commencement of the term, and of Ky. St. § 3665, requiring the answer in proceedings to remonstrate against annexation of territory to a town, etc., to be filed within 20 days after service of summons, the fact that a demurrer to the petition was filed with the answer on September 10th, in an action to remonstrate against annexation, would not postpone the case for trial until the November term.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81-97; Dec. Dig. § 33.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 33\*)—ANNEXATION OF TERRITORY—REMONSTRANCE—TIME OF TRIAL.

It is the policy of the law to dispose of proceedings remonstrating against the annexation of territory to a town, etc., as promptly as the circumstances permit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81-97; Dec. Dig. § 33.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 83\*)—ANNEXATION OF TERRITORY—SUFFICIENCY OF EVIDENCE—PROPERTY OF ANNEXATION.

Evidence, in a proceeding to remonstrate against the annexation of territory to a town, held to show that annexation would be for the best interest of the town, and cause no material injury to property owners within the annexed territory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81-97; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Johnson County.

Action by George W. Preston and others against the Town of Paintsville. From a judgment for defendant, plaintiffs appeal. Affirmed.

Vaughan & Howes, of Paintsville, for appellants. Fogg & Kirk and J. K. Wells, all of Paintsville, for appellee.

HANNAH, J. Paintsville is a town of the sixth class. On August 7, 1913, its board of trustees enacted an ordinance preparatory to the annexation of certain territory adjacent to the corporate limits of the town. This ordinance was published according to law, and on September 4, 1913, and within the 30 days allowed by the statute, appellant George W. Preston, a resident and owner of real estate in the territory proposed to be annexed, together with eight other persons who were the owners of real estate within said territory, but not residents therein, instituted this action in the Johnson circuit court remonstrating against the proposed annexation.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 19, 1914.

Pursuant to the statute governing such proceedings (section 3685, Kentucky Statutes), the answer of the town was filed on September 10, 1913. Notice of the filing thereof was served upon the attorneys for the plaintiffs. On September 16, 1913, the defendant town began the taking of its proof in the case, and continued such taking until September 24th, on which date it notified the attorneys for the plaintiffs that the case would be pressed for trial at the next regular term of the court in November; the attorney for the town offering and agreeing to waive formal notice of the taking of depositions, and to be present upon the slightest notice. The plaintiffs failed to take any proof, and on November 6, 1913, the fourth day of the regular November term of the court, defendant town entered a motion to submit the cause for trial. On the next day plaintiffs moved the court to continue the case, and filed in support of said motion the affidavit of one of the attorneys for the plaintiffs. The court overruled the plaintiffs' motion for a continuance, sustained defendant's motion to submit the case, and upon a trial thereof adjudged the ordinance valid, approved same, and authorized the board of trustees to proceed with the annexation of the territory in question. From that judgment, the plaintiffs appeal.

1. Appellants first contend that the court erred in overruling the motion for a continuance, and they rely upon the case of *Gaskin v. Georgetown*, 118 Ky. 251, 80 S. W. 821, 28 Ky. Law Rep. 89, in support of their contention in this respect.

Georgetown is a city of the fourth class, and the proceedings in such cases are controlled by section 3483, Kentucky Statutes. Under this section the proof is produced orally in court, and in that case the continuance was sought upon the ground of absent witnesses. Those opposing the proposed reduction were defendants; the city having instituted the action as plaintiff, under the provisions of the statute mentioned. The affidavit was in the usual technical form, showed diligence, stated what the absent witnesses would testify, if present, and the truth as well as the materiality of such testimony, and was verified by one of the parties defendant, and in fact constituted a perfect showing for a continuance; and this court held it was error to refuse the continuance.

But such a state of facts is not here presented. The statute governing this proceeding provides that the proof shall be taken by deposition, and the case shall be tried according to the rules and practice prescribed for the trial of equity causes, but without the intervention of a jury.

[1] The affidavit for a continuance filed herein was that of one of the attorneys for the plaintiffs. It offered, as ground for the continuance sought, the fact that counsel for plaintiffs had been unable to find time to prepare the case for trial, and that one of

the nine plaintiffs had suddenly become insane. Here a continuance is sought, not, as in the *Georgetown Case*, upon the affidavit of the parties showing in what manner they expected to be benefited by a continuance, but upon mere want of preparation. If employed counsel did not have time to prepare the case for trial, other counsel should have been engaged, or some reason shown by the affidavit of the parties themselves that would excuse their failure to employ other counsel. The affidavit was insufficient, and the court did not abuse a sound discretion when it overruled the motion for continuance. *Higgins v. Gose*, 144 Ky. 123, 137 S. W. 1038. And especially is this true in the light of the fact that defendant took its proof without waiting for the plaintiffs to take theirs, and at the close of its taking notified the attorneys for the plaintiffs that the case would be pressed for trial at the next regular term of the court.

[2, 3] 2. It is also contended by appellants that the case did not stand for trial at the November term. Section 387a, subsec. 5, of the Civil Code of Practice provides that suits in equity shall stand for trial at the first term of the court after the issue shall be completed, or by the provisions of the act shall have been completed 30 days before the commencement of the term. Appellants contend that, because a demurrer to the petition was filed with the answer, the issues could not be completed until the November term of the court, when the demurrer to the petition could be passed upon. There is no such provision in the Code, nor does the statute governing the proceeding here involved contemplate any such delay. The statute provides that the answer shall be filed within 20 days after service of the summons, and it is the policy of the law that cases of this character should be disposed of as promptly as the circumstances will permit.

3. Appellants also contend that the judgment is unauthorized and void because there is no order filing the answer. The record contains the following order: "The defendant town of Paintsville, previous to the expiration of 20 days from the filing of the petition in this cause, and on this the 10th day of September, 1913, produced, which is ordered to be filed, general demurrer to plaintiffs' petition, and, without waiving any of the benefits of said demurrer, defendant produced, which is ordered to be filed, its answer herein." We are therefore unable to understand upon what the appellants base their contention in this respect.

4. Appellants further contend that the description of the territory sought and proposed to be annexed to the town of Paintsville, as set out in the ordinance, is ambiguous, indefinite, and inaccurate. The evidence for the defendant town shows that the description is sufficiently definite, and there is nothing in the record to contradict this evidence.

5. Finally, appellants contend that the

town failed to show that less than 75 per cent. of the freeholders of the territory sought to be annexed are remonstrating.

According to the testimony for the town, the number of persons owning real estate within the territory in question is not less than 51; but how many of these are resident freeholders is not shown. However, 7 persons testified that they were resident freeholders of said territory, and that they approved its annexation, and it was alleged in the petition that only one of the plaintiffs is a resident freeholder. So there are at least 8 resident freeholders of the territory proposed to be annexed, only one of whom is remonstrating. It is apparent, therefore, that less than 70 per cent. of the resident freeholders are remonstrating against the proposed annexation.

The statute provides that, if the court shall be satisfied that 75 per cent. or more of the resident freeholders of the territory sought to be annexed have remonstrated, then the annexation shall not take place, unless the court shall find that a failure to annex the territory will materially retard the prosperity of the town and of the owners of property within the territory in question; but, if less than 75 per cent. have remonstrated, and the court shall find the proposed annexation to be for the interests of the town, and that it will cause no material injury to the persons owning real estate within such territory, the annexation shall be approved.

[4] It is abundantly shown by the record, and of course by uncontradicted evidence, as the only evidence in the case is that of the defendant, that less than 75 per cent. of the freeholders residing within the territory sought to be annexed have remonstrated against the proposed annexation, and that it will be for the best interests of the town of Paintsville, and will cause no material injury to those owning real estate within said territory. The Chesapeake & Ohio Railway is the only railway near the town. Part of, if not all, the territory sought to be annexed lies between the town of Paintsville and the depot. The people of the town are dependent upon this depot for the shipping of their freight, passenger travel, and mail. The proper conduct of business requires that a proper roadway for vehicles, as well as sidewalks for foot passengers, shall be provided through the territory sought to be annexed. It is in substance a part of the town now, for it is inhabited largely by people who do more or less business in the town. And the territory in question will be benefited by the extension of the street lighting system, and police supervision, and improved sanitary conditions. This evidence amply sustains the finding of the chancellor. *Collins et al. v. Town of Crittenden*, 70 S. W. 183, 24 Ky. Law Rep. 899.

The judgment is affirmed.

## LOUISVILLE, H. & ST. L. RY. CO. v. ARMES.

(Court of Appeals of Kentucky. May 1, 1914.)

### 1. MASTER AND SERVANT (§ 198\*) — FELLOW SERVANTS—WHO ARE.

The engineer and brakeman operating a train are not fellow servants of a car cleaner, whose sole duty it is to sweep out passenger coaches on the arrival of the train at destination.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 493-514; Dec. Dig. § 198.\*]

### 2. MASTER AND SERVANT (§ 202\*)—INJURY TO SERVANT—ORDINARY NEGLIGENCE OF MASTER—LIABILITY.

In an action by a servant for injuries caused by the negligence of a servant in a different department, it is not necessary to prove gross negligence, but proof of ordinary negligence is sufficient.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 535-537; Dec. Dig. § 202.\*]

### 3. MASTER AND SERVANT (§ 204\*)—INJURY TO SERVANT — ACTIONS — ISSUES — INSTRUCTIONS.

Though a servant, suing for a personal injury, alleged gross negligence, but proved only ordinary negligence which justified a recovery, the court properly authorized a recovery for ordinary negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 204.\*]

### 4. APPEAL AND ERROR (§ 1066\*) — HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for injuries to a car cleaner, caused by the coach on which he was at work colliding with a car while negligently placed on a siding, the railroad company insisted that he was not expected to enter the coach until it had been located on the siding, while his evidence showed that it was customary for all car cleaners to enter the coaches on the arrival of the train at the station, the error in a charge that if the car cleaner by his own negligence so contributed to the injuries, and but for such contributory negligence he would not have been injured, there could be no recovery was not prejudicial, for if it was negligence to be on the coach before it had been properly located, such negligence necessarily contributed to the injuries, and, if he was not negligent, the company alone was responsible for the injury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

### 5. MASTER AND SERVANT (§ 3\*)—EXISTENCE OF RELATION.

Where plaintiff, who could, under his contract, work for defendant whenever he desired, had a private arrangement with a third person, who acted as his substitute and looked alone to him for compensation, plaintiff, while at work, was an employé of defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

### 6. DAMAGES (§ 134\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where an injury to a car cleaner impaired his earning capacity about one-half, a verdict for \$1,750 would not be disturbed as excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 368, 380-394; Dec. Dig. § 134.\*]

Appeal from Circuit Court, Breckenridge County.

Action by Minor W. Armes against the Louisville, Henderson & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Skillman, of Louisville, and R. A. Miller and Miller, Sandidge & Malin, all of Owensboro, for appellant. Claude Mercer, of Hardinsburg, for appellee.

CLAY, C. In this action for damages for personal injuries against the defendant, Louisville, Henderson & St. Louis Railway Company, plaintiff, Minor W. Armes, recovered a verdict and judgment for \$1,750. The railroad appeals.

At the time plaintiff was injured, a mixed train, containing both passenger and freight cars, ran daily from Fordsville to Irvington, and returned to Fordsville in the afternoon. On October 31, 1912, this train arrived at Irvington. On its arrival, plaintiff, who was a car cleaner, went into the passenger cars with another car cleaner for the purpose of sweeping out the cars. While the plaintiff was doing this the coaches were uncoupled from the remainder of the train and moved onto a siding near by. As they entered the siding they were cut loose from the engine and, having some momentum, ran against a box car standing on the siding. It was not customary to cut the cars loose from the engine. When the coaches were uncoupled from the engine, the engineer blew one blast of the whistle, which was a signal for brakes. The brakeman who had uncoupled the coaches failed to ride them into the siding. Another brakeman, whose duty it was to be on the train, had left and gone to his home. When the signal for brakes was given, the other car cleaner, who was in the car with plaintiff, came out on the platform and set the brakes. This caused the car to slow down, but did not prevent the collision. When the collision occurred, plaintiff was thrown to the floor of the car and injured.

[1] One of the principal contentions for defendant is that both the engineer and brakeman, whose duty it was to ride the cars into the siding, and plaintiff were fellow servants. In this connection it is insisted that they were working for a common master and in the same field of labor. In this state not all employes of a common master engaged in a common pursuit are fellow servants. To this general rule there are two well-recognized exceptions: (1) Where the servant is injured by the gross negligence of another servant superior in authority to him; (2) where the servant is injured by the negligence of another servant in a different department. *Milton's Adm'x v. Frankfort & Versailles Traction Co.*, 139 Ky. 53, 129 S. W. 322. Following this rule, it has been held that the crew of one train are not fellow servants of the crew of another (Ky. Central Ry. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky.

Law Rep. 170, 12 Am. St. Rep. 480; C. N. O. & T. P. Ry. Co. v. Hill, 89 S. W. 523, 28 Ky. Law Rep. 530); that a switchman is not a fellow servant of an engineer (*L. & N. R. Co. v. Sheets*, 13 S. W. 248, 11 Ky. Law Rep. 781); that a conductor of a freight train and a car inspector are not fellow servants (*I. C. R. Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75, 18 Ky. Law Rep. 505); that employes on different street cars are not fellow servants (*Louisville Ry. Co. v. Hibbett*, 139 Ky. 43, 129 S. W. 43, 139 Am. St. Rep. 464; *Milton's Adm'x v. Frankfort & Versailles Traction Co.*, 139 Ky. 53, 129 S. W. 322); that an employe of an interurban railroad engaged in loading and handling crushed stone, and who was required to ride from the place where the stone was loaded to the place where it was to be distributed, was not a fellow servant of the motorman operating the car (*Central Ky. Traction Co. v. Smedley*, 150 Ky. 598, 150 S. W. 658). In the case under consideration the engineer and brakeman were engaged in operating the train. Plaintiff had no duties to perform in connection with its operation. His sole duty was to sweep out the cars on their arrival. The department in which he was employed was entirely different from that in which the engineer and brakeman were employed. Their duties did not require immediate co-operation, or bring them into such relations that they could exercise influence upon each other promotive of proper caution. That being true, they were not fellow servants.

[2] Another contention is that plaintiff predicated his whole case on the gross negligence of an employe superior in authority to him, and that the evidence failed to show gross negligence. We have repeatedly held that, in an action by a servant against a master to recover damages for the negligence of a servant in a different department, it is not necessary to prove gross negligence, but that ordinary negligence is sufficient. *Greer v. L. & N. R. Co.*, 94 Ky. 178, 21 S. W. 649, 14 Ky. Law Rep. 876, 42 Am. St. Rep. 345; *Railway Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486; *L. & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135.

[3] Instruction No. 1 is criticised because it authorizes a recovery for ordinary negligence on the part of those in charge of the car, whereas plaintiff predicated his case on gross negligence alone. The instruction is not erroneous for this reason. Notwithstanding the fact that plaintiff alleged greater negligence than he was required to prove, it was the duty of the trial court to give the law applicable to the case, and therefore to authorize a recovery for ordinary negligence. Instruction No. 1 is also complained of on the ground that it assumes that the car was run with unreasonable and unnecessary force against other cars. The language called in question is as follows: "By reason of negli-

gence on the part of defendant's agents or servants in charge of said car, running same with unreasonable and unnecessary force against other cars." While doubtless it is true that the instruction is not verbally accurate, we do not believe that the language was such as to mislead the jury.

[4] The instruction on contributory negligence is as follows: "If you believe from the evidence that, at the time and place mentioned in the petition, plaintiff, by his own carelessness and negligence, so contributed to all the injuries he received, and but for such contributory negligence on his part, if any, plaintiff would not have been injured, then you will find for the defendant." The clause "so contributed to all the injuries he received" is vigorously attacked. While improper, we do not regard it as prejudicial error under the facts of this case. It is not contended that plaintiff was guilty of any contributory negligence other than being on the car at the time of the accident. In this connection it is insisted that he was not expected to enter the car until it had been properly located on the siding. Plaintiff's evidence, however, shows that it was customary for all the car cleaners to go in the coaches on their arrival at the station. If it was negligence for him to be on the car at the time, such negligence necessarily contributed to all the injuries he received. If he was not negligent in being on the car, then defendant alone was responsible for his injury.

We find no prejudicial error in the other instructions.

[5] While defendant attempted to show that plaintiff was not in its employment, its foreman admitted that he was still carried on the pay roll. Plaintiff and those working with him say that he was at work from the 15th to the 31st of October. Even if he was absent, it was under a private arrangement between him and Totten, whom he had secured to take his place. Defendant was not concerned in any way with this arrangement. It did not undertake to pay Totten, the substitute. Totten looked alone to plaintiff. Under his contract with the company, plaintiff had the right to work whenever he desired. Being in the employ of the company, and the evidence conclusively showing negligence on the part of those in charge of the car, we are not disposed to be hypercritical in construing the instructions.

[6] While it is true that plaintiff was seriously injured several years ago, yet there is substantial evidence to the effect that the injuries for which he sued were of a permanent character, and such as to impair his earning capacity about one-half. Under these circumstances, the verdict of \$1,750 was not excessive.

Judgment affirmed.

**WILLIAMSBURG CANNING CO. v. DE  
LANEY et al.**

(Court of Appeals of Kentucky. April 30,  
1914.)

**1. CORPORATIONS (§ 513\*)—NOTES—MORTGAGE  
— EXECUTION — ACTION — PLEADING — DEMUR-  
RER.**

In an action on a corporate note and mortgage executed by the vice president, it was not necessary that plaintiff should allege in his petition that the instruments were executed by any particular officer, or that he had authority to sign the name or affix the seal of the corporation, or to incur any indebtedness on its behalf, since the fact that he had no authority was matter of defense, and could not be raised by demurrer, but could only be pleaded by answer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017-2027, 2031-2034, 2036-2045; Dec. Dig. § 513.\*]

**2. CORPORATIONS (§ 18\*)—ARTICLES—AUTHORITY OF OFFICERS—STATUTES.**

Ky. St. § 539, subsec. 7, requiring corporate articles to state by what officers or persons the corporation's affairs are to be conducted, merely means that, if the corporation shall have a president and vice president, or board of directors, or other officers, the articles shall so state; the board of directors, after the articles are filed, being authorized by section 542 to prescribe by-laws for the government of the corporation, which ordinarily include the execution of writings, obligations, and conveyances on the corporation's behalf, and the fixing of the duties of the several corporate officers in relation thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 53-59, 66-68; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Whitley County.

Action by George N. De Laney and others against the Williamsburg Canning Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. S. Rose, of Williamsburg, for appellant.  
Tye & Siler, of Williamsburg, for appellees.

NUNN, J. Appellees sued the Williamsburg Canning Company, appellant, to recover on a \$1,500 note, and to enforce a mortgage given to secure its payment. The canning company demurred to the petition, and, the demurrer being overruled, it refused to plead further. The court thereupon entered a judgment against the canning company for the amount of the note, and adjudged a sale of the mortgaged property for its payment.

[1] The only question here is whether the petition is sufficient to support the judgment, or, rather, whether the court erred in overruling the demurrer. The petition in apt terms sets up the facts that the Williamsburg Canning Company is a corporation under the laws of Kentucky, and that it executed and delivered to the plaintiffs the \$1,500 note sued upon, as well as the mortgage, and it is therefore indebted to the plaintiffs in that sum. The note and mortgage are filed as exhibits, with the corporate seal affixed.



It does not allege that either the note or mortgage was executed by any particular officer, or that any officer had authority to sign the name, or affix the seal of the company to the obligation, or to incur any indebtedness on behalf of the corporation. The appellant insists that the absence of such allegations is fatal, and particularly so when the note and mortgage show that the name of the corporation was signed by W. T. Smith, vice president. These questions cannot be raised on demurrer. They are clearly matters of defense, and, if there was no authority for the execution of the note or mortgage, or if it was in any sense *ultra vires*, it should have been shown by answer. They are facts peculiarly known to the corporation, and allegations with respect to them should come from that side. A pleader is not bound to anticipate matters of defense; and is not therefore compelled to notice and remove in his petition every possible exception, answer, or objection which may exist, and with which the defendant may intend to oppose him. If appellant's vice president had no power to execute the writings on behalf of the corporation, or was under disability to bind the corporation, it is just as necessary for the corporation to plead that fact as it is for any other person when relying upon a plea of disability or *non est factum* to show it. Newman's Pleading and Practice, § 212.

[2] Appellant relies upon section 539, subsec. 7, of the Kentucky Statutes, requiring articles of incorporation to state by what officers or persons the affairs of the corporation are to be conducted. This merely means that, if the corporation shall have a president, vice president, treasurer, or board of directors, or other officers, for the conduct of its business, the articles shall so state. After the articles are filed, as required by law, then the board of directors may prescribe by-laws for the government of the corporation. Section 542, Kentucky Statutes. Ordinarily these by-laws regulate the execution of writings, obligations, and conveyances on behalf of the corporation, and fix the duties of the several officers in relation thereto. Any limitations upon the power of officials are certainly known to the corporation, and, if there are such, they are matters of defense for it. There is no rule requiring the plaintiff to anticipate them by his pleading.

Appellant next relies upon the case of *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370. The case is not in point. The litigation is between a corporation and its secretary and treasurer, while here it is between the corporation and an apparent stranger. While the case, *supra*, is a question of *ultra vires*, there is no attempt to raise it by demurrer. Answer was filed, and all the questions were thus brought in issue.

We are of opinion that the lower court was abundantly justified in overruling the demurrer, and the judgment is therefore affirmed.

## MITCHELL TAYLOR TIE CO. v. WHITAKER.

(Court of Appeals of Kentucky. April 30, 1914.)

### 1. SALES (§ 1\*)—CONTRACT—CERTAINTY.

Where both plaintiff and defendant understood with reasonable certainty the boundary covered by a contract for the manufacture and sale of ties, which plaintiff undertook and agreed to deliver to defendant "at certain places or yards along and near the Rockcastle river from the mouth of Sinking creek where it enters into the river up to Evans Ferry" the contract was not fatally defective for failure to definitely define the country from which the ties were to come.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.\*]

### 2. SALES (§ 150\*)—MANUFACTURE AND SALE OF TIES—CONSTRUCTION.

Where plaintiff contracted with defendant to deliver to it at certain places all the merchantable railroad ties that he could make from his own lands, or purchase or acquire from others for one year, at specified prices, plaintiff was bound to exercise reasonable diligence to produce and deliver to defendant all the ties manufactured or purchased by him in the territory specified, and defendant was bound to receive all such ties so delivered; the contract being mutually binding on both parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 350, 351, 354-356; Dec. Dig. § 150.\*]

### 3. CONTRACTS (§ 117\*)—VALIDITY—MONOPOLY—RESTRAINT OF TRADE.

A contract for the manufacture and sale of ties by plaintiff to defendant, to be acquired from a certain district for the period of one year, and binding defendant not to purchase ties from any other person within the territory described, was not invalid as an unreasonable restraint of trade, or an effort to create a monopoly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-559; Dec. Dig. § 117.\*]

### 4. SALES (§ 370\*)—CONTRACT—BREACH—DAMAGES.

Where defendant under a contract for the purchase and sale of ties was required to receive a certain lot at the time they were delivered, but refused to receive them and they were lost by reason of a rise of the river some months afterwards, plaintiff was entitled to recover their value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1085; Dec. Dig. § 370.\*]

### 5. SALES (§ 384\*)—CONTRACT—REFUSAL OF BUYER TO ACCEPT—MEASURE OF DAMAGES.

Where a contract bound defendant to receive all the ties from a certain district which plaintiff could manufacture or purchase on specified terms, the measure of plaintiff's recovery for defendant's failure to take such ties as he could deliver was the difference between the contract price and the market price at the place of delivery, and not the market value of the ties less the cost of manufacture and delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*]

Appeal from Circuit Court, Pulaski County.  
Action by H. M. Whitaker against the Mitchell Taylor Tie Company. Judgment for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff, and defendant appeals. Reversed, with directions.

O. H. Waddle & Son, of Somerset, for appellant. Wm. M. Catron, of Somerset, for appellee.

CARROLL, J. The appellee, Whitaker, brought this suit against the appellant tie company seeking to recover something over \$5,000 that he alleged it was liable to him on account of a tie contract. On a trial before a jury there was a judgment in his favor for \$500, and the tie company appeals.

The contract between these parties was not in writing, and the substance of it, as set out in the petition, was that in 1911 Whitaker entered into a contract with the tie company by which he undertook and agreed to deliver to it "at certain places or yards along and near Rockcastle river from the mouth of Sinking creek where it enters into said river up to Evans Ferry on said river, all good, sound, merchantable white-oak railroad ties that he could make from his own lands or purchase or acquire from others for a period of one year." It was further averred that under the contract the tie company agreed to receive the ties every two weeks and pay for all delivered at the rate of 35 cents for first-class and 12 cents for second-class. There was a further stipulation in the contract that the tie company should not purchase ties from any other person north of Sinking creek where it emptied into the river. It seems that in pursuance of this contract a large number of ties were delivered and paid for, and the chief ground of controversy between the parties, as developed on this appeal, relates to the failure of the tie company to pay Whitaker \$333.85 for 973 ties which he claimed to have delivered to it, and its refusal to receive all the ties that he was ready and willing to deliver. Among the grounds for reversal relied on are: That the contract was too indefinite and uncertain to be enforceable; that it was in restraint of trade, and therefore void; that the instructions submitted an erroneous measure of damages.

[1] The evidence shows that Whitaker had been for some time engaged, in the territory spoken of in the contract, in the manufacture and sale of ties, and the tie company had likewise been engaged in this territory purchasing ties; so that both of them understood with reasonable certainty the boundary covered by the contract, and we do not think, under the circumstances, that this boundary was so indefinite and uncertain as to deny Whitaker the right to recover damages for a breach of the contract. The tie company, according to the evidence, knew where the ties furnished by Whitaker would come from, and Whitaker, under his contract, obligated himself to sell and deliver to the tie company all the ties that he could make from his own land or purchase or acquire from others.

[2] A fair interpretation of this contract is

that Whitaker was bound to exercise reasonable diligence, under all the circumstances, to produce and deliver to the tie company all the ties manufactured or purchased by him in the territory specified in the contract, and the company was bound to receive all of the ties so delivered. There was no number of ties specified, and it was not known exactly the number of ties that could be secured from the land described in the contract or purchased from others. But whatever could be made or whatever could be purchased was covered by the contract. If Whitaker had declined to furnish any ties or had furnished a less number of ties than he should have furnished by exercising reasonable diligence, we have no doubt the company would have a cause of action against him for breach of his contract. In other words, we think this contract was mutually binding upon both of the parties and that each of them was obliged to perform it in a reasonable manner. *Louisville & Nashville R. Co. v. Coyle*, 123 Ky. 854, 97 S. W. 772, 99 S. W. 237, 8 L. R. A. (N. S.) 433, 124 Am. St. Rep. 384.

[3] Nor do we think the contract was objectionable on the ground that it was an unreasonable restraint of trade or an effort to create a monopoly. It was in every respect a limited undertaking both in regard to time and the territory embraced. We see no reason why it was not a valid contract.

The principal controversy between the parties grows out of the issue between them as to whether the contract was made or not. The tie company denies that it made the contract set up by Whitaker, although it admits that it purchased from him, in the ordinary course of business, a large number of ties; and it also denies that he sustained any damage or loss by reason of its failure to comply with any contract made with him. The testimony of Whitaker tended to show that under his contract the tie company was to take all of his output of ties for one year at the prices mentioned in the contract, and that they did take from him about 5,000 ties under this contract; that, for the purpose of complying with this contract, he purchased a mill and installed it on his premises, and had cut down a lot of timber with a view of manufacturing it into ties. He further described the number of ties he could have made from the timber and the profit he could have made on the ties, and also showed that the tie company, after observing the contract for some time, finally broke it, and refused to take from him any other ties. He further said that 973 ties that he had purchased and put in the yard were washed out by a rise and lost on account of the failure of the tie company to take possession of them and remove them to a safe place, as it should have done.

[4] If there was, as Whitaker testified, a contract, and he did in fact deliver at the place appointed 973 ties, and the company failed and refused to receive these ties at

the time they should have been received, and they were lost to Whitaker by reason of a rise that came in the river some months after the ties should have been accepted and removed by the company, we think Whitaker was entitled to recover from the company the value of the ties which, according to his testimony, were lost by the failure of the company to perform its part of the contract.

[5] Upon this point we find no objection to the instructions submitting the issue in reference to this number of ties. Under the evidence and instructions, the jury found for Whitaker on account of these 973 ties, \$329.50, and they were so authorized to find by the evidence. In addition to this, they found in his favor "for damages" \$170.49. Evidently this finding "for damages" was based on the evidence of Whitaker tending to show that the tie company had committed a breach of its contract in refusing to take and pay for a large number of ties that he claimed to have been able, ready, and willing to furnish the company. If the contract was as Whitaker claimed, the measure of his recovery for the failure of the tie company to take such ties as he could deliver was the difference, if any, between the contract price and the market price of the ties at the place of delivery. *Indiana Tie Co. v. Landrum*, 137 Ky. 769, 127 S. W. 141.

The court, however, instructed the jury that if they found for plaintiff they should award him for the ties agreed to be delivered from his land the reasonable and fair market value of them less the cost of manufacturing and placing them on the bank of the river, and, if they found for him anything on account of the ties which he agreed to purchase from other parties, they should award him the reasonable profit, if any, which he would have made on the ties that he could have delivered during the continuation of the contract. This instruction submitted an erroneous and prejudicial measure of damage, as was decided in the *Landrum Case*. The measure of damage to which Whitaker was entitled, if the jury found in his favor anything on account of ties which he could have manufactured from his own land or bought from others, was the difference between the contract price and the market price at the place of delivery.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

# FOWLER v. CITY OF OAKDALE.

(Court of Appeals of Kentucky. April 29, 1914.)

## 1. MUNICIPAL CORPORATIONS (§ 867\*)—FISCAL MANAGEMENT—ELECTIONS—NOTICE.

Ky. St. § 3637, subsec. 3, providing that the notice of an election in cities of the fifth class, to determine whether an indebtedness which cannot be paid by the annual authorized levy shall

be incurred, must be published at least two weeks in some newspaper in or of general circulation in the city, or by posting written or printed notices at three or more public places therein, authorizes the board of councilmen to publish such notice either in a newspaper or by posting in their discretion, and the posting of three or more notices at public places within the city for two weeks before the election is sufficient, though there be a newspaper in or of general circulation in the town.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

## 2. MUNICIPAL CORPORATIONS (§ 867\*)—FISCAL MANAGEMENT—ELECTIONS—CONSTRUCTION OF STATUTE.

Const. § 157, providing that no city may become indebted beyond the authorized annual levy "without the assent of two-thirds of the voters thereof," and Ky. St. § 3637, subsec. 3, using in the same connection the words "two-thirds of all the qualified electors in such town," mean two-thirds of the electors whose votes are cast on the question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

## 3. MUNICIPAL CORPORATIONS (§ 867\*)—FISCAL MANAGEMENT—ELECTIONS—STATUTE.

Where 196 of 228 votes cast at an election under Const. § 157, and Ky. St. § 3637, subsec. 3, to determine whether the city should incur an indebtedness greater than its annual revenue, were for the proposition, it carried by much more than the required two-thirds vote, though 488 votes were cast for mayor and councilmen at the same election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

## 4. MUNICIPAL CORPORATIONS (§ 868\*)—FISCAL MANAGEMENT—LEVY OF TAXES—TIME OF LEVY.

Under Ky. St. § 3637, subsec. 3, providing that if an election to determine whether an indebtedness beyond the city's annual revenue may be incurred shall carry, then the council shall pass an ordinance providing for the creating of such debt and for paying the same, and shall also provide therein for the levy and collection of an annual tax sufficient to pay the interest and create a sinking fund to pay the principal within 20 years, and shall levy such a tax "each year thereafter at the time at which other taxes are levied," the first levy for such purpose may be made at any time after the result of the election is known, and before the issuance of the bonds, and the fact that such levy was not made at the time the other levies were made did not affect its validity, though it might have been made at the same time; the words quoted having reference only to levies for subsequent years.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1842; Dec. Dig. § 868.\*]

## 5. MUNICIPAL CORPORATIONS (§ 868\*)—FISCAL MANAGEMENT—LEVY OF TAXES—TIME OF LEVY—"INDEBTEDNESS."

Under the direct provisions of Const. § 159, it is obligatory upon a municipality creating an authorized "indebtedness" to provide an annual tax to pay the interest and create a sinking fund at the time the "indebtedness" is created, the word "indebtedness," as used in section 157, authorizing the incurring of an "indebtedness" by a two-thirds vote, meaning a debt created by contract, and the debt not being created until assented to by a two-thirds vote and the issuance of bonds, it was sufficient that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the council provided for the annual tax after the election and before the issuance of the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1842; Dec. Dig. § 868.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3528-3536.]

**6. MANDAMUS (§ 115\*)—SUBJECTS AND PURPOSES OF RELIEF—ACTS AND PROCEEDINGS OF PUBLIC OFFICERS—LEVY OF TAXES.**

The holders of city bonds could resort to mandamus to compel the council to levy an annual tax for the payment of interest and the creation of a sinking fund for the ultimate payment of the principal, if the council should fail to do so, as required by law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 242, 244-246, 248; Dec. Dig. § 115.\*]

**7. MUNICIPAL CORPORATIONS (§ 105\*)—ORDINANCES—FORM—STATUTE.**

That the language of the enacting clauses of certain ordinances did not literally follow Ky. St. § 3638, providing that the form shall be, "The city council of the city of — do ordain as follows," did not invalidate them, where every word of the prescribed form was used, though in a different arrangement; the form adopted being substantially the same as prescribed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 223, 224; Dec. Dig. § 105.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by J. W. Fowler against the City of Oakdale. From a judgment for defendant, plaintiff appeals. Affirmed.

W. S. Sanford, of Louisville, for appellant. Chapeze & Crawford, of Louisville, for appellee.

**SETTLE, J.** The appellant, J. W. Fowler, a resident, citizen, and taxpayer of the city of Oakdale, Jefferson county, by this action sought to enjoin the issuance and sale, by its mayor and board of councilmen, of \$25,000 of bonds, the proceeds of which are to be used in constructing sewers in that city. Oakdale is an incorporated city of the fifth class. The bonds are 50 in number, for the principal sum of \$500 each, bearing 5 per cent. interest from March 1, 1914, until paid, and payable semiannually, according to the terms of the coupons attached to each bond. All the bonds mature 20 years from March 1, 1914. The question whether the indebtedness evidenced by these bonds should be incurred and bonds issued by the city of Oakdale was, by proper ordinance duly passed by its board of councilmen, submitted to an election by the qualified voters thereof, held November 4, 1913, at which election 196 votes were cast in favor of incurring such indebtedness and 32 cast against it. The grounds alleged in the petition against the right of the city of Oakdale to issue or sell the bonds in question were as follows: (1) That the publication of the ordinance submitting the question of incurring the indebtedness and issuing the bonds to the voters of Oakdale

for their approval or rejection was improperly made, such publication and the calling of the election having been by typewritten notices posted in three or more public places in the city, instead of in a newspaper published or of general circulation therein; (2) that the persons voting at the election in favor of incurring the indebtedness and issuing the bonds were less than two-thirds of all the qualified voters in the city; (3) that the levy of the tax to provide for the payment of interest on the bonds and a sinking fund for the redemption of the bonds, was not made at the time or in the manner required by law; (4) that the ordinances calling the election, making the tax levy, and directing the issuance of the bonds, do not, as to their enacting clauses, comply with section 3638, Kentucky Statutes. The city of Oakdale filed a demurrer to the petition, as amended, which was sustained by the circuit court, the injunction refused, and the petition dismissed, and from the judgment manifesting these rulings this appeal is prosecuted.

[1] It is not claimed by the appellant that the ordinance requiring the holding of the election fails to specify the amount of the indebtedness proposed to be incurred, the purpose of the same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund. On the contrary, it is admitted that in these particulars the ordinance conforms to section 3637, subsec. 3, Kentucky Statutes, which provides for the holding of such an election and the manner of conducting same. The complaint is that notice of the ordinance and election to be held thereunder was not published for at least two weeks in some newspaper published, or of general circulation, in the city, but admitted that such publication was made by three typewritten notices, posted at public places within the corporate limits of the city of Oakdale for more than two weeks before the election. The statute (section 3637, subsection 3) provides: "Such notice shall be published for at least two weeks in some newspaper published in or of general circulation in such town, or by posting written or printed notices at three or more public places in such town." The publication admittedly made by posting typewritten notices at three or more public places in the city was sufficient. As the statute delegates to the discretion of the board of councilmen of cities of the fifth class authority to publish such a notice either in some newspaper published in or of general circulation in the town, or by posting written or printed notices at three or more places in such town, in the exercise of the discretion thus conferred the council had the right to make the publication in either manner allowed; consequently it acted according to law, and no one has the legal right to complain. It is also admitted that there was no newspaper published in

the city of Oakdale, although newspapers of the adjacent city of Louisville have a general circulation therein. This admission, however, is not material, for the council, even if there had been a newspaper published in the city of Oakdale, had the right to make the publication as was done.

[2] The second contention has been too frequently overruled by us to require an extended discussion of it here. In brief, it is the meaning of section 157 of the Constitution, as well as of section 3637, subsection 3, Kentucky Statutes, that the assent of two-thirds of the electors whose votes are cast on the question of incurring the indebtedness is all that is necessary. As said in Board of Education of Winchester v. City of Winchester, 120 Ky. 594, 87 S. W. 768, 27 Ky. Law Rep. 995: "Every provision of the Constitution is mandatory. When it is provided that indebtedness to a certain amount shall not be incurred without the assent of two-thirds of the electors voting at an election to be held for that purpose, it necessarily follows from the constitutional provision that such an indebtedness may be incurred with the assent of two-thirds of the voters. The Legislature can neither subtract from nor add to the constitutional requirement. The constitutional provision regulates the subject and removes it entirely from legislative control." Cooley, Constitutional Limitations, p. 64.

In *Render v. City of Louisville*, 142 Ky. 409, 134 S. W. 458, 82 L. R. A. (N. S.) 530, we said, in commenting upon the provision of the Constitution in question, and the discussion of it in the opinion of the case, *supra*: "It is proper to add in this connection that we also held in the case, *supra*, that the meaning of section 157 of the Constitution is that the assent of two-thirds of the electors whose votes are cast on the question of incurring the indebtedness is all that is necessary; otherwise the section of the Constitution, *supra*, would have required the Legislature to indicate, by statutory enactment, some means of ascertaining the entire number of legal voters in the municipality. *Montgomery County Court v. Trimble*, 104 Ky. 629 [47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738]; *Tipton, etc., v. City of Shelbyville, etc.* [107 S. W. 810], 32 Ky. Law Rep. 1123)."

[3] It appears from the petition that there were 228 votes cast on the question whether the indebtedness of \$25,000 should be incurred for the construction of sewers in the city of Oakdale and an issue of bonds made therefor. Of these, 196 votes were cast for the proposition and 32 against it. Thus it will be seen that not only two-thirds but about 85 per cent. of the voters voting upon the question gave their assent to the proposition, which met the requirements of the Constitution and the statute. It is claimed, however, that as at the time of this election was held there was also held an election for mayor and members

of the council of the city of Oakdale, in which election 438 votes were cast, this fact makes it apparent that but little more than half of the entire vote of the city of Oakdale was cast in the election involving the question of incurring the indebtedness. The fact that a much larger vote was cast in the election for city officers is not material. Our inquiry into the election need go no farther than to determine whether two-thirds of the voters voting upon the question of incurring the indebtedness voted in favor of the proposition; and that this was done is admitted.

[4] The third contention must likewise be overruled. It rests upon the theory that, as the tax of 22 cents on each \$100 worth of taxable property in the city fixed by the council for paying the semiannual interest on the bonds, and providing a sinking fund for their redemption at their maturity, was not levied or apportioned at the time of the levy of taxes by the council for running the city government, this made the levy invalid and gave cause for enjoining the issuance and sale of the bonds. The statute, section 3637, subsec. 3, provides: "If, upon a canvass of the votes cast at such election, it appears that two-thirds of all the qualified electors in such town shall have voted in favor of incurring such indebtedness, it shall be the duty of the city council to pass an ordinance providing for the creating of such indebtedness, and of paying the same; and in such ordinances provisions shall be made for the levy and collection of an annual tax upon all real and personal property subject to taxation within such town, sufficient to pay the interest on such indebtedness as it falls due; and also to constitute a sinking fund for the payment of the principal thereof within a period of not more than twenty years from the time of contracting the same. It shall be the duty of the city council in each year thereafter, at the time at which other taxes are levied, to levy a tax sufficient for such purposes, in addition to the taxes by this chapter authorized to be levied. Such tax when collected shall be kept in the treasury as a separate fund, to be inviolably appropriated to the payment of the principal and interest of such indebtedness."

It appears from the petition and exhibits filed therewith that the city council, by an ordinance passed in December, 1913, made a levy of a tax for paying all other expenses and indebtedness of the city, but did not then levy a tax for the purpose of providing for the payment of the semiannual interest upon the bonds in question and a sinking fund for their redemption at maturity. A levy for this purpose, or apportionment of the tax previously levied, was, however, made by the council at a regular meeting, and by an ordinance duly passed, in January, 1914, such tax being fixed at 22 cents on each \$100 of taxable property in the city of Oakdale. We

are unable to see that the validity of the last levy or apportionment was in any way affected by the failure of the council to make it at the time of the levy of other taxes for paying the current expenses of the city government and its other indebtedness. The original ordinance requiring the holding of the election for determining whether the indebtedness should be incurred, as well as the published notice of the time and manner of holding the election, specified the amount of the indebtedness to be incurred, the purpose of the same, and the amount of money necessary to be annually raised by taxation for an interest and sinking fund to pay it; and the required tax for paying such interest and creating a sinking fund to retire the bonds could not be levied until after it had been determined at the election whether the additional indebtedness should be incurred. This levy might have been made when the levy of taxes was made by the council in December, 1913, but the council was not then compelled to make it, and could do so at any time before the bonds were issued, which was, in fact, the course pursued. It will be observed from the language of the statute, last above quoted, that it does not impose upon the city council the duty to make the first levy of a tax for providing money to pay interest on the bonds and a sinking fund to retire them, at the time at which other taxes are levied for the city by it. The duty imposed upon the council of making the levy for the payment of interest on the bonds, and providing a sinking fund to retire them, at the time at which other taxes are levied, applies to each year after the first levy of a tax is made to pay the interest on the bonds, and create a sinking fund to retire them; therefore the first levy of the tax for the payment of interest on the bonds and creating a sinking fund to retire them can be made by the council either before or after the time at which other taxes for the same year are levied by it, and can, in fact, be made at any time after the council ascertains that the election has gone in favor of incurring the indebtedness, and before the bonds representing such indebtedness are issued.

Substantially this question was before us in *Iglehart v. City of Dawson Springs*, 143 Ky. 140, 136 S. W. 210, and we then held that, although the initial ordinance providing for an election to vote an issue of bonds to construct a system of sewers did not provide for raising annually by taxation an amount necessary to pay the interest on the bonds and provide a sinking fund to retire them at maturity, the adoption of such an ordinance subsequent to the election, and before the issue of the bonds, was a substantial compliance with the law. In the opinion it is said: "In *O'Bryan v. City of Owensboro*, 113 Ky. 680 [68 S. W. 858, 69 S. W. 800, 24 Ky. Law Rep. 469, 645], a vote had been

taken upon the question whether bonds should be issued by that city, but the ordinance providing an annual tax for the payment of the interest and the creation of a sinking fund for the ultimate extinction of the debt was not adopted by the city council until after the election; and we held in that case that the adoption of the ordinance subsequent to the election was sufficient, inasmuch as section 159 of the Constitution under which the city derived the power to hold the election and issue the bonds, was self-executing, and therefore the legislative authority conferred by section 3637, subsection 3, statute, *supra*, was unnecessary."

[5] Section 159, Constitution, provides: "Whenever any city, town, county, taxing district or other municipality is authorized to contract an indebtedness, it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness, and to create a sinking fund for the payment of the principal thereof, within not more than forty years from the time of contracting the same."

[6] Under this section of the organic law of the state it is obligatory upon the municipality creating an indebtedness which is authorized to provide for the collection of an annual tax sufficient to pay the interest on such indebtedness, and to create a sinking fund for the payment of the principal thereof. This must be done at the time the indebtedness is created, and the word "indebtedness" as used in section 157, Constitution, refers to indebtedness created by contract. *O'Bryan v. City of Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. Law Rep. 469, 645. In the instant case the indebtedness was not created until the city of Oakdale, by means of the election obtained the assent thereto of two-thirds of its qualified voters voting on the question, and issued the bonds evidencing same; therefore it was sufficient that its council at any time before issuing and selling the bonds provide for the collection of an annual tax sufficient to pay the interest on the bonds and to create a sinking fund for the payment of the principal thereof when due. In making all subsequent annual levies for this purpose, section 3637, subsection 3, Kentucky Statutes, seems to make it the duty of the council to make the levy at the time at which other taxes are levied, and this it may do. But suppose it should refuse to do so at any time of levying other annual taxes? It could not be contended that such failure would affect the validity of the bonds, relieve the municipality of the payment of the interest thereon, or of the duty of providing a sinking fund for their ultimate retirement. In such a state of case the bondholders could resort to the remedy afforded by the writ of mandamus.

It further appears from the averments of

the petition that the assessed value of all property, real and personal, in the city of Oakdale subject to taxation is \$1,200,000, and that it will be necessary to raise by taxation each year the sum of \$1,250, to pay the annual interest on the \$25,000 of bonds, and \$1,250, to create a sinking fund with which to redeem the bonds at the expiration of 20 years from their date; and as, in addition to the \$25,000 thus to be appropriated, \$8,000 will have to be raised in like manner annually to pay all expenses of the city of Oakdale, and the amount collectible on \$1,200,000 of property at a tax rate of 75 cents per hundred would create a fund of \$9,000, after appropriating therefrom the \$8,000 necessary to defray the expenses of the city government, there would be left a surplus of \$3,000, only \$2,500 of which would be required to provide for the payment of the annual interest of 5 per cent. per annum on the bonds, and create the sinking fund with which they are to be redeemed at maturity.

It is not altogether clear from the averments of the petition that it will require as much as, or more than, the full rate of 75 cents on each \$100 worth of the city's taxable property to raise the several amounts required for the purposes above enumerated; but we gather from the petition as a whole and copies of the ordinances filed as exhibits, that the levy of 22 cents specifically appropriated to the paying of the interest on the bonds and producing a sinking fund for their redemption, together with the levy to pay the expenses of the city government, will not altogether exceed 75 cents on each \$100 of the city's taxable property. Assuming this to be the meaning of the petition, it would follow that the entire tax rate of the city will not exceed the constitutional limit of indebtedness, which section 157 of that instrument declares shall not be more than 75 cents on each \$100 for a city of the fifth class, to which Oakdale belongs.

[7] Appellant's fourth contention is purely technical, and, in our opinion, without merit. It is true that the language of the enacting clauses of the ordinances in question do not literally follow the form contained in section 3638, Kentucky Statutes, but every word required by the form set out in that section is found in the enacting clause of each of the ordinances. The position of the words are not the same, but, in meaning and arrangement, the form of the enacting clause of each ordinance and that of the statute is substantially the same, and, this being true, it can properly be said that by the language actually employed in the enacting clauses of the ordinances the object of the statute has been accomplished.

The record furnishing no reason for declaring invalid the bonds which are to be issued and sold by the appellee city, the judgment is affirmed.

## LOUISVILLE & N. R. CO. v. TAYLOR'S ADM'X.

(Court of Appeals of Kentucky. April 30, 1914.)

### 1. RAILROADS (§ 367\*)—INJURIES TO PERSONS ON TRACKS—DUTY TO MAINTAIN LOOKOUT.

It is incumbent upon those operating trains in yards where the presence of persons on the tracks should reasonably be anticipated to maintain a lookout.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 367.\*]

### 2. MASTER AND SERVANT (§ 137\*)—INJURIES TO PERSONS ON TRACKS—FLAGMAN—LOOK-OUT.

While ordinarily those in charge of a train are not bound to maintain any lookout for flagmen, yet, when a flagman is sent from a point on the track where it is being repaired to stop trains and compel them to detour, he has the right to assume that no trains will come from the rear, and those in charge of a train following him must maintain a lookout for his safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

### 3. MASTER AND SERVANT (§ 286\*)—INJURIES TO FLAGMAN—EVIDENCE—QUESTION FOR JURY.

In an action for the wrongful death of a flagman, run down by a train proceeding over a track supposed to be out of commission, evidence of the negligence of those in charge of the train held sufficient to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1038, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

### 4. NEGLIGENCE (§ 136\*)—ACTIONS—JURY QUESTION.

When the question is one of negligence vel non, the case should not be submitted to the jury, if the evidence is equally consistent with the existence or nonexistence of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

### 5. NEGLIGENCE (§ 121\*)—PRESUMPTIONS.

While negligence is not presumed, it may be inferred from the circumstances surrounding an accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Oldham County.

Action by John T. Taylor's administratrix against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield, of Louisville, and D. H. French, of La Grange, for appellant. Robt. T. Crowe, of La Grange, for appellee.

HANNAH, J. This is an appeal from a judgment of the Oldham circuit court in favor of appellee, John T. Taylor's administratrix, against the Louisville & Nashville Railroad Company, for \$2,500 damages for the death of appellee's husband, a colored section hand, who was run over and killed by one of appellant's trains in the yards at La Grange.

There are in these yards two parallel and

adjoining main line tracks, one known as the Cincinnati main and the other as the Lexington main. On the morning when deceased was killed, the section crew of which he was a member was engaged in making repairs to a crossover connecting the two main line tracks, and also to a part of the Lexington main next to the said crossover. The work being done on this crossover and on the Lexington main necessitated a temporary discontinuance of the use of the Lexington main until such repairs were completed; and the foreman of the section crew sent deceased, John Taylor, up the Lexington main with instructions to flag all trains coming south thereon, but he was not to interfere with any trains on the Cincinnati main, as the repairs being made at the crossover and on the Lexington main next to the crossover would not affect the Cincinnati main. Whether a man was sent in the opposite direction to flag trains coming north on the Lexington main is not shown by the evidence. Taylor proceeded up the Lexington main a distance of about 400 feet from the crossover to a grade crossing, passed over this crossing, and, when he was about 289 feet beyond the grade crossing, he was struck by a train from the rear, and dragged a distance of about 129 feet to the point where his body was discovered after the train had passed. The train which struck him was a freight train known as No. 28, which was switching in the yards at the time Taylor left the crossover. It was then on the siding of the Cincinnati main; but, after Taylor started up the track, it crossed over the crossover upon which the section crew was working, got on to the Lexington main, and proceeded north on that track.

There was no eyewitness to the accident, and the engineer and all trainmen on No. 28 denied all knowledge of it.

The court gave the following instructions, which are complained of by appellant:

"No. 1. The court instructs the jury that, if they believe from the evidence that plaintiff intestate was killed by one of defendant's freight trains moving over defendant's tracks in the yards at La Grange, and that, at the time he was killed, he was on defendant's tracks in said yard in the usual course of his employment, and that defendant's agents and servants in charge of the train that killed him, if it did so kill him, negligently failed to ring the bell or give other signals of its approach, or negligently failed to stop said train after they saw his peril, or after they might have seen it by the exercise of ordinary care, they should find for the plaintiff, unless they believe from the evidence that deceased, by his own negligence, contributed to such an extent to the injury that caused his death that, but for his negligence, it would not have happened, and, in that event, plaintiff cannot recover, unless defendant's agents in charge of said train

knew, or could have known by the exercise of ordinary care, of the peril in which deceased's negligence, if he was negligent, had placed him, and thereafter failed to observe ordinary care to avoid the injury and death that followed."

"No. 8. It was the duty of decedent to keep a lookout for defendant's trains in the yards while on the way to the point he was directed to go, and to use ordinary care to keep out of their way, and, if the jury believe from the evidence that deceased failed to do this, and, as a result thereof, he was injured, he was guilty of negligence, and the jury should find for the defendant, unless they believe from the evidence that the defendant's employes and agents in charge of its engine saw, or, by the exercise of ordinary care, could have seen, decedent's peril in time to have stopped the train and avoided the injury."

[1, 2] Appellant complains of these instructions, insisting that it owed to deceased no lookout duty. As to flagmen generally, the rule is that stated in *Ellis' Adm'r v. L. H. & St. L.*, 155 Ky. 745, 160 S. W. 512: "When a flagman is sent out to watch for trains and warn them of danger, the company and its trainmen have a right to presume that he will not only watch for trains, but also for his own safety, and his failure to do this is his own negligence, and he cannot recover \* \* \* for an injury which he received by reason of his neglect, unless his presence and peril were discovered by those in charge of the train in time to avoid striking him by the exercise of ordinary care." See, also, *Coleman v. P. C. C. & St. L. R. Co.*, 139 Ky. 559, 63 S. W. 39, 23 Ky. Law Rep. 401; *Conniff v. L. H. & St. L. R. Co.*, 124 Ky. 763, 99 S. W. 1154, 30 Ky. Law Rep. 982; *Wickham's Adm'r v. L. & N.*, 135 Ky. 288, 122 S. W. 154; *L. & N. v. Hunt's Adm'r*, 142 Ky. 778, 135 S. W. 288; *C. N. O. & T. P. v. Harrod's Adm'r*, 132 Ky. 445, 115 S. W. 699.

But the facts in this case at bar are not similar to the facts in the cases cited. Here the flagman was sent out to flag trains coming south on the track, upon which he was walking north. At his back was a defective track undergoing repairs, which repairs made it necessary to stop trains from running on said track and were the cause of his being sent out to flag trains coming south on said track. Justified, as he was, in believing that, for the time being, the track upon which he was walking was out of commission, he was charged with no expectation of any train coming up behind him on that track.

On the other hand, the company was using a track which its servant had a right to believe was not going to be used for the passage of trains for the time being. Under these circumstances, was the duty of the company to the flagman, in the operation of a train over that particular track, any less



than its duty to its other servants? This court does not so believe.

Under the evidence, the place where Taylor was killed in the La Grange yards was a place where the presence of persons on the track should reasonably be anticipated, and it was incumbent on those operating the engine to maintain a lookout for persons on the track. *L. & N. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122. And, while it is true that, as to flagmen, a train may be operated over a track which is in active service without the keeping of a lookout for flagmen, although it may owe a lookout duty to others; yet, in operating a train over a track which has been temporarily withdrawn from service with notice to a flagman, in a place where a lookout duty is owed to others, a train owes a lookout duty to flagmen also, unless there has been notice to such flagman of the resumption of traffic on such track, or until an ordinarily prudent person might reasonably expect traffic to be resumed on such track.

It follows, therefore, that the lower court properly instructed the jury.

[3-5] 2. But it is insisted by appellant that it was entitled to peremptory instruction upon the ground that there was no evidence of negligence upon its part.

It was shown in evidence that Taylor went up the Lexington main; that train No. 28 went up that track behind him; and, after it passed, the dead body of Taylor was discovered between the rails of that track. The character of the injuries upon his body, the marks upon the ties, and the condition of the cinders between the ties, upon a fair-minded consideration of the evidence, create an undeniable inference that he was struck by the train from behind.

The engineer testified that he was keeping a lookout forward, and that he did not see deceased at any time anywhere. But this testimony is contradicted by all the physical facts. John Taylor was seen going up the track just before the train pulled out; his body was found between the rails after it had passed. It cannot be true that the engineer maintained a lookout forward, and also that he did not see John Taylor at all, either beside the track or on it; for he was there. One of two things must be true; either the engineer was not keeping a lookout, or else he saw John Taylor. And, as it was shown in evidence that the engineer was leaning out of his cab, looking back instead of forward, until after the engine passed the grade crossing, the jury had a right to believe that he continued to look back and for that reason did not see John Taylor on the track. It is true that plaintiff produced no direct evidence to show that the engineer was not keeping a lookout forward at the time Taylor was killed; but the evidence which was introduced is such as to justify undeniable inference.

This is not a case where a dead body is found on the track, death having resulted from an unexplained cause, as in *Caldwell's Adm'r v. Ches. & Ohio Ry. Co.*, 155 Ky. 609, 160 S. W. 158. In the case at bar, the deceased was seen passing over the grade crossing walking up the track; a train follows up the track behind him; the engineer is observed to be looking back until after he passes the grade crossing and as long as he is within the vision of the witnesses; at a point 289 feet beyond the crossing, the deceased is struck from behind, as shown by the injuries on his body, and the marks on the ties made by the nails in the heels of his shoes; and the condition of the track shows the distance he was dragged. The engineer denies having seen deceased on the track; but nevertheless he was there, and the only reasonable inference to be drawn is that the engineer was not keeping a lookout. All the facts in the case point to this except the statement of the engineer that he was looking; and that he was looking is contradicted by his statement that he did not see Taylor, and by all the facts proven in the case.

It is suggested that Taylor may have been killed in an attempt to board the train. He was an old man and crippled. It is not reasonable to believe that he would attempt to board a train moving 8 or 10 miles an hour to ride about 800 feet, especially in view of the fact that, by the time it should have arrived at the place where he was going, its speed would have considerably increased, and made it extremely difficult to alight therefrom.

All the evidence points to but one explanation of this accident. Train No. 28, when Taylor left the crossover, was on the Cincinnati main. The crossover and the Lexington main where it connected therewith were being repaired. He was being sent out on the express errand to flag trains coming from the north, in order to keep them from coming in on the Lexington main, for the reason that that track and the crossover were being repaired. He believed that train No. 28, which struck him, could not and would not be permitted to pass over the defective crossover onto, or to pass along, the Lexington main track. And, when he heard the noise or signals, if any were given, of the train behind him, because of his faith, the fact of temporary withdrawal from service of the Lexington main, he believed the train was on the parallel track, the Cincinnati main, and, lulled in the security of that belief, he failed to leave the track in time to escape injury.

When the question is one of negligence or no negligence, it is well-settled law that, where the evidence is equally consistent with either view—the existence or nonexistence of negligence—the court should not submit the case to the jury. *Louisville Gas Co. v.*

Kaufman, 105 Ky. 131, 48 S. W. 484, 20 Ky. Law Rep. 1069. But such is not the state of fact here presented.

Negligence is not to be presumed, but it may be inferred; and the inference here is absolutely justified under the proven facts. There is no equilibrium of proof involved. The only question in the case, in the ultimate analysis of it, is whether the statement of the engineer that he was keeping a lookout forward is true, contradicted as it is by all the other evidence in the case; and that question was one for the jury.

The judgment is affirmed.

### TOWN OF ERLANGER v. CODY.

(Court of Appeals of Kentucky. April 30, 1914.)

#### 1. EMINENT DOMAIN (§ 101\*)—CHANGE OF GRADE—ORIGINAL CONSTRUCTION.

When a public highway is taken into a city, it becomes a street of the city; but the construction of a street upon it is not a reconstruction of a street, but an original construction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

#### 2. EMINENT DOMAIN (§ 101\*)—TAKING PROPERTY—CHANGE OF STREET GRADE.

While a city is not liable to an abutting owner for damages resulting from the establishment of the original grade of a street, yet under Const. § 242, prohibiting injury of private property without compensation, it is liable for damages caused by a change of an established grade.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

#### 3. EMINENT DOMAIN (§ 101\*)—STREETS—ESTABLISHMENT OF GRADE.

Where a macadamized road was taken into a city, the city, by requiring the construction of sidewalks in accordance with the grade of the road, established the old grade of the road as that of the street, so as to entitle abutting owners, injured by a change of grade, to damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

#### 4. EMINENT DOMAIN (§ 293\*)—"SPECIAL DAMAGE"—"GENERAL DAMAGES"—PLEADING.

In an action for damages to plaintiff's land because of a change in the grade of a street, evidence of injuries caused by water cast upon the land, which flowed into his cellars, is inadmissible, where the petition only alleged that the elevation of the grade made access very difficult and rendered it impossible to rent the property, for the damage from surface water must be specially pleaded, being a "special damage" not necessarily flowing out of the wrong, as do "general damages."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 797-802; Dec. Dig. § 293.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6572, 6573; vol. 8, p. 7802; vol. 4, pp. 3059, 3060; vol. 8, p. 7669.]

Appeal from Circuit Court, Kenton County, Common-Law and Equity Division.

Action by R. J. Cody against the Town of Erlanger. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Hall & Adams and S. W. Adams, all of Covington, for appellant. O. M. Rogers and S. D. Rouse, both of Covington, for appellee.

MILLER, J. When the town of Erlanger was incorporated as a town of the sixth class in 1897, the street known as Erlanger Road, and running through the town, was a turnpike or macadamized public highway, of many years' existence. The appellee, Cody, was then the owner of a lot fronting 75 feet on Erlanger Road, upon which there stood two frame dwelling houses. He still owns the property.

It is conceded that in 1899, after the houses had been built, the town of Erlanger established the grade of Erlanger Road, for the purpose of constructing sidewalks, by making the crown or center of that road the established grade therefor. Shortly thereafter, in 1899, the town graded certain portions of the sidewalk section of the street, including that in front of Cody's property, so as to make the sidewalks conform to the grade of the macadamized portion of the road. It also required Cody to construct a brick sidewalk in front of his property, and at his own expense. The drive or carriage way of the road was in no way disturbed. The crown or center of the road was merely taken and used as the basis or standard of establishing the grade for the sidewalks of the town.

In 1911, the town of Erlanger, by an ordinance, ordered the reconstruction of Erlanger Road by grading the entire surface thereof to conform to a new grade established by an ordinance passed April 1, 1911. That work was done as required by the ordinance; but up to that time the grade of the road had remained as it existed before the town was incorporated. In reconstructing the street in 1911, a fill or embankment was made in front of Cody's property, ranging from 1 foot 7 inches to 2 feet 9 inches higher than the crown of the old macadam road. Upon this new grade Cody was also required to build a new concrete sidewalk, at a cost of \$70. Cody thereupon brought this suit against the town of Erlanger for damages; and, having recovered a verdict and judgment for \$750, the town appeals.

[1-3] 1. Appellant first insists that Cody cannot recover, because his improvements were made before the grade of the street was established, and that, in buying his lots and erecting his buildings thereon while Erlanger Road was a county road, he did so subject to the subsequent right of the town, after it had been incorporated, to reconstruct the road, and thus make it a street of the town according to a grade to be established by ordinance.

It is well settled in this jurisdiction that, when a public highway is taken into a city, it becomes ipso facto a street of the city, and that the construction of a street upon such a

highway is not a reconstruction of it, but an original construction. *Gernert v. City of Louisville*, 155 Ky. 591, 159 S. W. 1163.

Furthermore, in such a case, a city is not liable to the owner of abutting property for damages resulting from the establishment of the original grade of a street, which was a county highway constructed on a different grade, before the territory was taken into the city. *City of Owensboro v. Hope*, 128 Ky. 529, 108 S. W. 873, 15 L. R. A. (N. S.) 996; *City of Owensboro v. Singleton*, 111 S. W. 284, 33 Ky. Law Rep. 775; *Philpot v. Town of Tompkinsville*, 148 Ky. 511, 146 S. W. 1093; *Gernert v. City of Louisville*, 155 Ky. 589, 159 S. W. 1163.

But, ever since the adoption of the present Constitution, this court, in construing section 242 of that instrument, has held that cities are liable for injuries caused to abutting property by the changing of the grade of a street. *City of Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700, 19 Ky. Law Rep. 1450, 39 L. R. A. 349; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 123; *Cassell v. Board of Councilmen of City of Nicholasville*, 134 Ky. 103, 119 S. W. 788.

Applying these rules to the case before us, appellant insists that the ordinance of April, 1911, fixed the original grade of the street, and that, the street having been reconstructed upon that grade, and not negligently, appellee has no case. On the other hand, appellee insists that the original grade of the street was fixed in 1899, when the town established the grade for making the sidewalks, as above stated, and that the subsequent establishment of a new grade by the ordinance of April, 1911, was a change of the grade within the rule heretofore announced, and makes the city liable for any damage thereby caused to appellee's property.

The sidewalk being a portion of the street and subject to the control of the town, it was as necessary to establish a grade for the construction of the sidewalk at the expense of the property owner, as it was for the construction of the street. The one necessarily included the other; and the act of the town in establishing the grade in 1899, by designating the crown of the roadbed as the grade of the street, was as much the establishment of a grade as if it had been fixed by a stake driven by an engineer. In either case the grade was fixed by the city and with reference to some permanent line which was to control the construction of sidewalk and street, respectively.

We are of opinion that when the town thus fixed the grade of the street, and required Cody, at his own expense, to construct a sidewalk in compliance therewith, it thereby established the grade of the street, and that the grade of 1911 was a change of grade under the rule above referred to. The trial court so ruled.

[4] 2. It is insisted, however, by appellant,

that the court erred in admitting testimony, over its objection, tending to show that Cody's houses had been dampened and damaged by water flowing over his lot and into his cellars, and that this was caused by the change of grade. The objection to this testimony is that it relates to special damages, which, it is claimed, were not alleged in the petition.

The allegations of the petition, upon this subject, read as follows:

"In making said improvement to conform to said grade, said defendant caused and procured said street in front of plaintiff's property to be raised from 3 to 4 feet above the grade of the street theretofore existing, and caused and procured a fill from 3 to 4 feet high to be made along and in front of plaintiff's property, then and there and thereby rendering the ingress to and egress from his property very difficult, and thereby rendering the same undesirable for either residences or business purposes; and that said lots and the buildings thereon have, by reason of the change of the grade of said street and the making of said improvement to conform to said grade as changed, been left from 3 to 4 feet below the level of the street; that said street in front of plaintiff's property is incomplete and unfinished, and plaintiff has, by reason of the acts hereinbefore complained of, been unable to rent said property, and has lost and been deprived of rental and income of the same to the extent of \$200, and the market value of said property has been thereby impaired in the sum of \$2,000, in all to the damage of the plaintiff in the sum of \$2,200."

It will thus be seen that the petition contains no allegation whatever of damage to the houses by water, or dampness caused by water flowing into the cellars. The trial court, however, admitted the proof upon the theory that it was relevant to the question of loss of rents. This, however, is hardly a fair interpretation of the petition, since it expressly rested Cody's inability to rent his houses "by reason of the acts hereinbefore complained of," and he had only complained of the change of grade and the resulting "fill" or embankment, which affected the ingress to and egress from his property.

In *Newman on Pleading*, page 438, the rule as to when the petition should allege special damages is stated as follows:

"It is a general rule that such damages as may be presumed necessarily to result from the breach of a contract need not be stated with any great particularity in the petition; but if the damages be not necessarily implied, nor the extent of them, it will be requisite for the plaintiff to state the injury specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, so that he may be prepared to dispute them, or else the plaintiff will not be permitted to give evidence of such damage

on the trial. If the damages result necessarily from the injury or wrong complained of, they are called general damages, and will be embraced by the general statement of the facts and the demand of relief; but if such damages be the natural, although not the necessary, result of injury or breach of contract, they are termed special damages, and must be specially stated in the petition."

In 13 Cyc. page 175, the distinction between general and special damages, and the necessity of alleging special damages, is stated as follows:

"Of General Damages. Where by reason of a certain wrong or from the breach of a contract the law would impute certain damages as the natural, necessary, and logical consequences of the acts of the defendant, such damages need not be specifically set forth in the complaint, but are, upon a proper averment of such breach or wrong, recoverable under a claim for damages generally. Hence, where a willful wrong is committed, evidence of matters tending to aggravate the damages, when necessarily or legally arising from the act complained of, is admissible without special averment."

"Of Special Damages. If the damages sought to be recovered are those known as special damages, that is, those of an unusual and extraordinary nature, and not the common consequence of the wrong complained of or implied by law, it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered; and an omission to so plead cannot be supplied by statements in a bill of particulars. But an allegation of general damages for a breach of contract does not preclude an allegation of special damage incurred in preparing to execute the same."

The rule is well settled that the damages recovered must be warranted by the pleading, and that a defendant is entitled to know from the petition the character of the injury for which he must answer. Evidence of damages from injury not mentioned therein, or for which no claim for damages is alleged, or for which the claim has been abandoned, cannot, therefore, be admitted. So, in an action for personal injury, where the plaintiff describes in his petition the different parts of his body which he claims have been injured, it is presumed that this specification covers the whole cause of action, and an injury to a wholly different part of the body, or of a different loss, cannot be shown. *L. & N. R. Co. v. Reynolds*, 71 S. W. 516, 24 Ky. Law Rep. 1402; *Maysville & Big Sandy R. R. Co. v. Willis*, 104 S. W. 1016, 31 Ky. Law Rep. 1251; *L. & N. R. Co. v. Roney*, 108 S. W. 343, 32 Ky. Law Rep. 1326; *Louisville Railway Co. v. Gaugh*, 133 Ky. 473, 118 S. W. 276; *Blue Grass Traction Co. v. Ingles*, 140 Ky. 494, 181 S.

W. 278; *I. C. R. R. Co. v. Beeler*, 142 Ky. 778, 135 S. W. 305. An analogous rule has been applied to allegations of damages to property, or to a breach of contract. 13 Cyc. 184; 28 Cyc. 1099.

Under this familiar rule of practice, the court should have rejected the testimony of the plaintiff relating to the damage claimed to have been caused by water, in the manner above stated.

For this error, the judgment is reversed, and the cause remanded for further proceedings.

#### BASSETT v. ALLISON.†

SAME v. DEPOSIT & SAVINGS BANK.

(Court of Appeals of Kentucky. April 30, 1914.)

#### BILLS AND NOTES (§ 520\*) — EXECUTION — FRAUD.

In an action on notes given by the maker to the president of a bank, and transferred to it as part of the purchase price of a portion of the bank's stock sold by the president to the maker, evidence held to warrant a finding that the sale was induced by fraudulent representations by the bank's president as to its condition, warranting a recovery over against him for the amount of the maker's liability to the bank.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.\*]

Appeals from Circuit Court, Warren County.

Actions by the Bank of Woodburn and by the Grayson County Bank against R. E. Allison and R. R. Bassett, in which Allison filed a cross-petition against Bassett. Also action by the Deposit & Savings Bank against R. R. Bassett. The actions were consolidated, and there was judgment in favor of the Deposit & Savings Bank and Allison against Bassett, from which Bassett appeals. Affirmed.

M. M. Logan, Ora E. Hazelip, and Hazelrigg & Hazelrigg, all of Frankfort, and Wright & McElroy, of Bowling Green, for appellant. T. W. & R. C. P. Thomas and Galloway & Milliken, all of Bowling Green, for appellees.

HANNAH, J. The facts in each of these two cases being closely connected, the cases were consolidated in the lower court, and the evidence was taken as a whole. They have been consolidated and heard together in this court, and will be considered in one opinion.

On February 13, 1909, appellant, Bassett, sold to appellee Allison 50 shares of the capital stock of the Deposit & Savings Bank of Bowling Green for the price of \$5,000, the par value of the shares. He received in payment therefor four notes, each in the sum of \$1,250, and due in 6, 12, 18, and 24 months, respectively. The note due in 6 and the note due in 24 months were paid about the time the first note matured. The note due in 12

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 16, 1914.

months was transferred by Bassett to the Bank of Woodburn, and that due in 18 months was assigned by Bassett to the Grayson County National Bank. The said banks sued Allison and Bassett upon said notes when same were not paid at maturity, and recovered judgment against Allison thereon. In that action Allison filed a cross-petition against Bassett, alleging that the notes sued upon, as well as the two notes theretofore paid by him to Bassett, were obtained by false and fraudulent representations in the sale of the 50 shares of the capital stock of the Deposit & Savings Bank, and upon his cross-petition Allison recovered a judgment against Bassett in the sum of \$5,000. Bassett appeals.

The record in the case is voluminous. Within the limits of this opinion, it will be possible only to touch upon the salient facts.

The Deposit & Savings Bank was a comparatively small institution. On December 31, 1908, according to the report made by it to the secretary of state, its loans and discounts amounted to \$39,363.27; its furniture and fixtures were valued at \$3,441; its real estate at \$1,365.24; and it had in cash on hand and due from other banks \$9,144.94. Its deposits amounted to \$38,044.70, and its capital stock was \$15,000. The bank had no surplus. Bassett, its president, had been in active charge of the bank for several years. He was an experienced banker, being at the same time president of the Grayson County National Bank at Leitchfield, and a director in the Bank of Woodburn, the two banks to which he had assigned the notes sued upon in this action; and he was also connected with other banks. As examples of his banking methods, the following instances, disclosed upon an examination of the books of the Deposit & Savings Bank by an expert, are given:

It was shown that in the individual deposit account of Bassett upon the books of the bank an error of \$1,000 in his favor was made in bringing down his balance, that the balance was originally \$2,071.32, and that this was changed to \$3,071.32, and that this change was made in his own handwriting. This was done on October 11, 1906; on October 13, 1906, the books show that a check was drawn by Bassett and paid by the bank in the sum of \$3,000.

It was also shown that Bassett gave to the Grayson County National Bank a check for \$500, drawn upon the Deposit & Savings Bank, and that this check was charged to Bassett's individual account as \$5; also that a check drawn by Bassett for \$250 was charged to his account as \$2.50. These and many other intricacies and irregularities in the individual account of Bassett with the bank were the subject of an action by the bank against him to recover an amount due by him to the bank, which is not here involved.

Another example of his banking methods is shown in the case of Bassett v. Deposit & Savings Bank, in the latter part of this opinion.

It was also shown that at one time Bassett borrowed a cashier's check from the Bank of Woodburn, and deposited same to his credit in the Deposit & Savings Bank in order to increase the amount of cash on hand for the purpose of making a report or statement of the condition of the bank; that he gave in exchange to said Bank of Woodburn a cashier's check of the Deposit & Savings Bank, but that this was not taken into account, and afterwards both of the checks were destroyed.

Allison, to whom Bassett sold the 50 shares of the capital stock of the Deposit & Savings Bank, had had no banking experience. At the time of said transaction Bassett represented to Allison that the condition of the bank was practically the same as on December 31, 1908, when the above-mentioned statement was made; that there was no "bad" paper in the bank, and only \$200 or \$300 of slow paper. Yet it was shown that at this time the report was padded with a \$3,200 note given by Bassett to the bank, and credited to his account, which was charged back to him after that report was made.

Allison, upon his purchase of the shares, became president of the bank, and took charge of its affairs. There were no losses incurred from loans made after Allison took charge, the expenses were greatly reduced, and every effort was apparently made to effect the rehabilitation of the bank; but, despite such efforts, within a year it was found that liquidation was inevitable, and that it was necessary, in order to conserve the interests of all concerned, to transfer the deposit accounts to the Warren State Bank, securing said bank by a transfer of such cash as there was on hand, and by a transfer of the loans and discounts in so far as they were acceptable to the Warren State Bank, and guaranteeing the latter bank against loss by the individual undertaking of the shareholders of the Deposit & Savings Bank, whereupon the latter ceased to do business.

In the process of liquidation, it developed that the real estate carried on the books of the bank as of the value of \$1,365.24 was in fact worth only about \$750; that the furniture and fixtures carried on the books of the bank as of the value of \$3,441 was in fact worth \$2,000; that the loans and discount carried on the books of the bank as of the value of \$39,363.27 were in fact not worth to exceed \$30,000; while the deposits shown on the statement as \$38,044.70 were in fact \$4,000 in excess of that amount. There were also items of loss and depreciation; but those mentioned are sufficient to annihilate the capital stock of the bank. In short, despite a prudent and conservative management of the affairs of the bank until liquidation became inevitable, and despite a prudent and

conservative liquidation, the shareholders have lost practically every dollar which they had invested in the shares of said bank. The sworn testimony of those in charge of the liquidation as to the necessity for such action is absolutely uncontradicted, and their good faith in that transaction is not open to any serious criticism. There was ample proof in the record that at the time of the sale of the shares by Bassett to Allison the shares of the bank were worthless. The chancellor so found and held, and in that holding this court concurs.

Relative to the case of *Bassett v. Deposit & Savings Bank*, it appears that, before Bassett sold the aforesaid shares to Allison, he was the owner of 86 out of 150 shares of the capital stock of said bank, and on December 1, 1908, he made a pretended sale to each of four persons of 5 shares of said stock, taking their notes therefor in the sum of \$500 each, payable to the bank, which notes he placed with the notes of said bank, with the shares attached as collateral, taking credit upon his individual account for the proceeds of said notes. It developed that these sales of shares were not bona fide, and that they were made with the understanding and agreement with the makers of said notes that the same should not be enforced or attempted to be collected from them. The bank sued Bassett to recover the \$2,000 which he obtained from it by this transaction and converted to his own use out of the funds of the bank. Upon a trial of the action, the court held that Bassett wrongfully took credit for the proceeds of said notes, and gave the bank judgment against him for the amount so obtained, and Bassett appeals from that judgment.

The four parties to whom the shares were transferred, and whose notes were taken with the shares as collateral, were unanimous in testifying that the transaction was had at the solicitation of Bassett, and for the sole purpose of obtaining the use of their names as directors, and upon the understanding that the collection of said notes would not be enforced; and it appears from the proof that the makers thereof were not able to pay said notes, and that Bassett knew of such financial condition.

The cashier of the bank thus naïvely tells the story of this remarkable banking transaction: "There was something said about making a report, and I says, 'We have got to have somebody sign this report;' and he [Bassett] says, 'All right, I will get some directors;' and I didn't know anything about what he was going to do, and he brought these notes back, and attached the stock, and said, 'Now, we have directors.'" Of the four, one frankly told Bassett he was insolvent, two have, since failed, and the other appears to be of doubtful solvency.

The shares attached as collateral to these notes were Bassett's own shares; but the

notes were made payable to the Deposit & Savings Bank, this being done evidently in order that Bassett would not be compelled to indorse them himself in order to discount them to the bank. Nevertheless the notes were Bassett's notes in point of fact, and, having fraudulently obtained their value from the bank, the bank was entitled to recover from him reimbursement for the amount he so obtained. The chancellor so held.

Being of the opinion that the conclusions reached by the chancellor in each of the consolidated cases are supported by the facts, the judgment in each of said cases is affirmed.

#### CAMPBELL v. THOMPSON.

(Court of Appeals of Kentucky. May 5, 1914.)  
BOUNDARIES (§ 3\*) — ESTABLISHMENT — CONTROL OF COURSES BY FIXED OBJECTS.

Compass courses must yield to fixed objects, and this is especially true when a line controlled by fixed objects was agreed to and has been acquiesced in for over 30 years.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

Appeal from Circuit Court, Nelson County.  
Action between Thursa V. Campbell and Thomas Thompson. Judgment for Thompson, and Campbell appeals. Affirmed.

Roscoe Vanover, of Pikeville, for appellant.  
Stratton & Stephenson, of Pikeville, for appellee.

NUNN, J. This is a controversy between Thompson and Campbell, involving a boundary line. Since 1845, at least, the land adjacent to this boundary line has belonged to, and been in the possession of, Thompson on the one side, and Campbell on the other, and their respective forbears. Thompson's chain of title goes back to the Seminary patent issued in 1825, while Campbell's goes back to the Cecil patent in 1845. There is not much difference in the calls of the two patents, and there is still less difference in the amount of land in controversy, or rather the value of it. Only one witness attempts to estimate the quantity, and he fixes it at from one-half to one acre, and no witness ventures an estimate on its value, for it must be inconsiderable. Variation of the magnetic needle accounts for some of the difference, and ignorance of the old owners as to the exact location of the line accounts for the balance.

The location of a poplar tree and haw bush, called for in both patents, is undisputed. The next call is a white oak, and its location, while not agreed to by the parties here, is established by the proof, and the subsequent title papers of both parties fix it with almost absolute certainty. To follow the compass calls, however, this white oak is out of line some hundred feet. There is less certainty as to the location of the third

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and final corner involved in the dispute. It is further shown that the line, as governed by these fixed objects, has been recognized as the true one for at least 30 years, and that all the parties and their predecessors in title have acquiesced in it for all these years. The testimony shows that, about 30 years ago, the then owners, not being certain as to the location of the line, had a surveyor to run it, and these corners were located, and a partnership fence was then built along most of it. This fence has been maintained by the adjacent owners without any real interruption from that time until this.

The appellant, Thursa Campbell, acquired title from her husband by deed in 1906. The calls in this deed plainly recognize the fixed objects above referred to, and the agreed boundary line established by them. A short time before 1910 the appellant had a surveyor to run the old patent calls, and, discovering a discrepancy between them and the agreed line, her husband then made her another deed, and the boundary is set up in it to conform to the patent calls. This is the first evidence in the case, and there is little else in it, to indicate that she or her predecessors ever claimed other than the agreed boundary line.

It is too plain for argument or citation of authority that compass courses must yield to fixed objects, and this is especially true when a line controlled by fixed objects was agreed to and has been acquiesced in for so many years. The lower court properly took this view of it, and entered a judgment fixing the old agreed line, as controlled by the fixed objects, as the real line between the parties. But appellant claims that the judgment rendered by the court gave appellee more land than he claimed in his petition. A reference to the disputed line, as set up in the petition, shows that it is fixed in the judgment of the lower court by identical description, so it appears that this objection of appellant is not well taken.

The judgment of the lower court is therefore affirmed.

#### SCHOOLFIELD et al. v. PROVIDENT SAVINGS LIFE ASSUR. SOCIETY.

(Court of Appeals of Kentucky. May 5, 1914.)

##### 1. LIMITATION OF ACTIONS (§ 37\*)—ACTIONS FOR FRAUD.

Under Ky. St. § 2515, limiting actions for relief on the ground of fraud to five years next after the cause of action accrued, and section 2519, providing that such cause of action shall not be deemed to have accrued until the discovery of the fraud, but no such action shall be brought ten years after the perpetration of the fraud, a cause of action to obtain relief from fraud is not barred until five years after the discovery of the fraud, but in no event can suit be brought more than ten years from the time the fraud was perpetrated.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. § 37.\*]

##### 2. LIMITATION OF ACTIONS (§ 37\*)—RELIEF FROM FRAUD.

An action to rescind an insurance contract and recover the payments made, because of the agent's misrepresentations as to what insurer would receive under the policy, was barred within ten years after the alleged misrepresentations were made, under Ky. St. § 2515, providing that no action for relief from fraud shall be brought more than ten years after the perpetration of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. § 37.\*]

##### 3. LIMITATION OF ACTIONS (§ 100\*)—ACTIONS FOR FRAUD—SUSPENSION OF LIMITATIONS.

The payment of annual premiums would not suspend the running of the statute of limitations against an action against an insurance company for rescission of contract of insurance on the ground of misrepresentations as to what insured would be entitled to receive under the policy; the misrepresentations, and not the payment or receipt of premiums, being the fraud complained of.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by A. W. Schoolfield, Sr., and others, against the Provident Savings Life Assurance Society. From a judgment for defendant, plaintiffs appeal. Affirmed.

S. D. Rouse and Jno. L. Rich, both of Covington, for appellants. Ernst, Cassatt & Cottle, of Cincinnati, Ohio, and J. C. W. Beckham, of Frankfort, for appellee.

CARROLL, J. In May, 1891, the appellee insurance company issued a policy of insurance on the life of A. W. Schoolfield, Sr., for \$2,000, payable to A. W. Schoolfield, Jr. In May, 1900, by agreement between the company, the insured, and the beneficiary, the policy issued in 1891 was taken up and a new policy issued in its place. In 1912 the insured and the beneficiary brought this suit against the company, charging that, as an inducement to procure the surrender of the old policy and the acceptance of the new in its place, through its agent acting therefor, the company represented that in 1911, if the insured continued to promptly pay the premiums, he would be entitled to a paid-up policy of \$2,000, or, in lieu of the paid-up policy, to \$1,544, the cash value of the policy, and \$2,656 cash in addition thereto, profits and dividends accrued on the policy, less the amount of a note due by the insured. They alleged that the company in 1911 failed and refused to perform either of these representations, and sought judgment against it for the amount to which, according to the representations of the agent, they were entitled. In short, they sought to recover on the contract as the agent represented it, and not on the policy contract as it was written.

In an amended petition the plaintiffs waived their right to the relief sought in the petition, and, upon the ground that a fraud was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

practiced, asked that the contract of insurance be canceled, and that they have judgment for the amount of the annual premiums that had been paid on the new policy from 1900 to 1911, amounting in the aggregate to some \$1,600. The cause of action was rested, and relief sought, upon the ground that, induced by the fraudulent and false representations of the agent as to the benefits that would accrue under the new policy, and which representations the company would not perform, they were induced to accept it, and surrender the old one, and pay the premiums from 1900 to 1911.

The lower court decided that the plaintiffs' cause of action was barred by limitation, and dismissed the petition as amended.

Stating the plaintiffs' cause more fully, the amended petition averred, in substance, that the agent falsely and fraudulently represented to plaintiffs that the policy contract provided, and the company would pay, at the maturity of the policy in 1911, provided all premiums were paid thereon as therein stipulated, the sum of \$1,544, the cash surrender value thereof, and in addition thereto the sum of \$1,249, also canceling a note for \$867; that they relied upon and believed these false and fraudulent representations of the agent, and did, on the 4th days of May, August, and November, in the year 1901, and on the 4th days of February, May, August, and November of each year thereafter, for a period of ten years from the date of May 4, 1901, pay to the company the sum of \$41.66 on each of said dates during all of said years as a premium, paying in all to the defendant company on this account the sum of \$1,666.40; that these several sums were paid to the company under the belief and in full confidence that the company would, at the maturity of said policy, if the insured should so long live, issue to August W. Schoolfield, Jr., a paid-up policy for life upon the life of the insured for \$2,000, or pay to him the cash value thereof, to wit, \$1,544, and pay to him the additional sum of \$1,249, and cancel the note the company held against him for \$867; that when they made demand upon the company for the payment of the sums due on the policy, and for the fulfillment of the provisions thereof as they were represented by the agent, they were for the first time informed that the company contended for a material and different construction of the terms and conditions of said policy from that represented by the agent. They prayed for judgment against the defendant for the sum of \$1,666.40, with interest on each of the several sums paid defendant, as aforesaid, from the date of the payment thereof, and for all proper and equitable relief.

In other words, the plaintiffs abandoned their cause of action for an enforcement of the contract, and elected to prosecute the cause of action set up in their amended petition, which sought a rescission of the con-

tract and the recovery of the annual premiums paid, upon the ground that the insured was induced to accept the new policy and pay the premiums from 1900 to 1911 by the false representations of the agent as to the terms and conditions of the policy and what the company would do.

It seems that the company was willing to perform the contract according to its terms as written in the policy, but was not willing to perform its terms as they were represented by the agent who secured the exchange of the policies; while the insured insists that the company should carry out the contract as the agent represented it, or else return the premiums that had been paid on the faith of these representations. It will further be noticed that the cause of action is based on the alleged false and fraudulent representations made by the agent in 1900 that induced the surrender of the old and the acceptance of the new contract.

Section 2515 of the Kentucky Statutes provides in part that "an action for relief on the ground of fraud or mistake \* \* \* shall be commenced within five years next after the cause of action accrued"; and section 2519 provides: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

[1] Under these statutes a cause of action to obtain relief from fraud or mistake is not barred until five years after the discovery of the fraud or mistake, but in no state of case can an action to obtain relief be brought after the expiration of ten years from the time the contract was made that is sought to be avoided or the fraud was perpetrated from which relief is sought. The fraud relied on in this case to authorize a rescission of the contract was perpetrated in 1900, when the agent, by the alleged false representations, induced the insured to accept the new contract, and this action was not brought for more than ten years thereafter; so that the action is plainly barred by the statute, unless it be, as argued by counsel, that the statute was not put in motion until 1911, at which time it is said the insurance company first refused to execute the contract alleged to have been made with its agent, and which, according to his representations, was to have been performed by the company in 1911.

We had before us in *Provident Savings Life Assurance Society v. Withers*, 132 Ky. 541, 116 S. W. 350, a case that cannot well be distinguished from this, and it seems to us controlling authority in support of the judgment of the lower court, holding that the statute presented a bar to the recovery of the relief sought by the plaintiff. In the



Withers Case it appears that Withers took out two policies in the company in 1889. In 1894 he exchanged these policies for two other policies that expired in 1899. Shortly before 1899 he made another contract with the agent of the company, by which two other policies were issued to him in place of the old ones, and in October, 1906, about seven years after the last policies were delivered to him, he brought suit against the company, charging that the policies he then had did not express the contract as it was represented to him by the agent, and that the agent, by fraud and misrepresentation, had induced him to accept policies materially different from those agreed upon, and he sought to require the company to deliver to him policies such as the agent represented had been delivered to him. It further appears that in the Withers Case, as in the case we have, the agent made representations not contained in the policy contract, and that upon the faith of these representations Withers was induced to accept the contract, although the contract on its face did not support the representations. In other words, in the Withers Case, as in this case, the insured relied on representations made by the agent, independent of and not contained in the written contract of insurance. And in the Withers Case, as in this case, an effort was made to obtain relief from the fraud practiced by the agent.

But in the Withers Case the court said: "He kept the policies until he brought this suit on October 17, 1906, or about seven years after the policies were delivered to him. He cannot now say that he has not accepted the policies, for he kept the policies and regularly paid the premiums. By the statute the policy is the sole measure of the company's liability. We have held in several cases that nothing outside of the policy, such as the application or other prior contract, can be pleaded by the company to modify its liability under the contract. The statute is for the protection of both the company and the policy holder. Preliminary contracts previous to the issue of the policy can be shown by neither to defeat its operation."

\* \* \* The plaintiff cannot have relief under the special contract relied on, because that was merged in the policies; and he cannot now have the policies corrected for fraud or mistake, because the action is not brought within five years after the perpetration of the fraud or the making of the mistake, and after he knew or by ordinary diligence should have known it. He had the policies. He could have looked at them at any time. He cannot accept them, and, after keeping them for seven years, and after the time has expired within which he might have had the policies corrected for fraud or mistake, have relief in equity. To do this would be to encourage or reward supineness; and it would be to establish a rule that would destroy the value of written contracts."

It is conceded that the Withers Case would be controlling here, if it were sought to require the company to perform the contract as represented by the agent; but it is insisted that the relief here sought is not a performance of the contract, but a rescission, and a return of the premiums that were paid. It is further argued that the fraud in this case was not discovered until 1911, at which time the representations made by the agent were to be performed, and therefore, as the action was brought in 1912, the statute does not present a bar to the recovery of the premiums paid within ten years prior to the institution of the action.

[2] The fault of this argument is that it overlooks or ignores the fact that the alleged fraudulent transaction, from which it is sought to obtain relief, occurred when the representations of the agent were made in 1900. It was in 1900 that the fraud, if any, was practiced. It was then that the false representations, if any, were made that induced the insured to surrender the old and accept the new contract. No misleading or fraudulent representations of any kind were made after 1900. It was the fraudulent representations then made that induced the insured to continue until 1911 to make the payments he now seeks to recover, and we think his cause of action accrued in 1900, and was peremptorily barred in ten years thereafter, and before the institution of this suit. Whether it was barred in five years it is not necessary to decide, as the ten-year statute is certainly applicable.

[3] We do not think the payment of the annual premiums had the effect of suspending the running of the statute as long as they were paid, or until the company refused to perform the written contract as it was represented by the agent. It was the representations of the agent, and not the payment or receipt of the premiums, that constituted the fraud complained of. The premiums paid were those that the contract provided for, and the agent did not attempt to make any representations concerning them, except to say that, if they were paid as stipulated in the written contract, the insured would receive certain benefits in excess of those provided for in the written contract. Under these circumstances, the payment of the premiums, according to the averments of the petition merely followed the fraud as a result of it.

In *Fox v. Hudson*, 150 Ky. 115, 150 S. W. 49, we had a question very similar to this. In that case it appears that in 1893 Mrs. Fox, who had a note for \$2,000 against the Hudsons, was a party to an agreement with them by which their property was turned over to a trustee for the payment of their debts, and acting under this contract the trustee disposed of the property and distributed it among the creditors, including Mrs. Fox. In 1905 Mrs. Fox brought this

suit against the Hudsons to recover the amount of her note, less certain credits that had been paid by the trustee. To this suit the Hudsons answered, relying on the contract made in 1893 and its full performance. Mrs. Fox sought to void this defense on the ground that she was induced to enter into it by the false and fraudulent representations made to her, upon which she relied, that all of the property of the Hudsons would be turned over for the benefit of their creditors, when in fact it was not, and that within five years before the institution of her suit the Hudsons had received several thousand dollars insurance money, to a part of which she was entitled. To this pleading the statute of limitation was interposed, and in holding that the statute presented a good defense it was said: "Appellant's pleadings show that the fraud, if any there was, was perpetrated in 1893, when the contract of that date was entered into, and this action to obtain relief for that fraud was not instituted until more than eleven years afterwards. \* \* \* Counsel for appellant seeks to avoid the effect of this statute by showing that the insurance money was not actually collected by Hudson until 1903, or some two years before the institution of the action. But this circumstance does not help appellant. It is not at all material when the money was paid; the only question is, when was the fraud practiced? and this question is answered by the pleading, averring that it was practiced in 1893, when the contract was made."

The case of Metropolitan Life Ins. Co. v. Blesch, 58 S. W. 436, 22 Ky. Law Rep. 530, is relied on by counsel for appellant, but we do not think it applicable. The Blesch Case was an action to recover money paid under a mistake of law. It seems that the beneficiary, under a mistake of law, was induced to and did take out insurance upon the life of her father, which contract of insurance was void from the beginning, but that in ignorance of this fact she continued to pay the premiums on it for a number of years, until she discovered the fact that the policy contract was void, and upon making this discovery she brought suit to recover back the premiums paid. In holding that she could recover, the court said: "It is admitted and abundantly proven that appellee took out the policy of insurance in appellant's company on the life of her father without his knowledge or consent. It is equally well established that she was induced to do so by the representation of appellant's agent that in no contingency would she lose the money paid thereon, and there is no evidence that she was aware that this character of insurance was against public policy, and that it was one of the rules and regulations of appellant's company that such insurance would not be issued, and

that premiums paid thereon would be forfeited to the company. \* \* \* It has been repeatedly announced that 'no principle is more conclusively settled in this state than that, when money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor, or conscience was not due and payable, and which ought not to be retained by the party to whom it was paid, it may be recovered back.' \* \* \* It is perfectly clear from the evidence that appellee paid the weekly premiums upon the policies issued to her upon the life of her father each week for 12 years, under a conviction that she held an enforceable contract against appellant, and this brings her claim within the rule announced in these decisions."

The radical difference between that case and this consists in the fact that in the Blesch Case the plaintiff was allowed to recover back premiums paid under a mistake of law upon a policy that was void from the beginning, and upon which the company was at no time bound to pay anything, while in this case there was at all times a valid and subsisting contract between the parties. It is not claimed here that the policy contract was void or nonenforceable, or that the insured would not receive the benefits stipulated in the policy. The relief is sought solely on the ground that in the policy contract the company did not agree to do all that the agent, independent of the written contract, represented that it would do. The fraud was not in the written contract of insurance, but in the representations made by the agent; and we think that this action to obtain relief on account of this fraud was barred before the action was instituted, and therefore the judgment of the lower court should be affirmed.

#### THOMPSON v. McATEE'S ADM'X.

(Court of Appeals of Kentucky. May 7, 1914.)

APPEAL AND ERROR (§ 782\*) — DISMISSAL —  
 GROUNDS—WANT OF JURISDICTION.

Under Ky. St. § 950, providing that no appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy be less than \$200, exclusive of interest and costs, an appeal will be dismissed where the record shows that the principal sum claimed to be due from an administratrix is less than \$200; the appellant's remedy being an action to enforce the award or to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3123, 3124; Dec. Dig. § 782.\*]

Appeal from Circuit Court, Mason County.  
 Action between J. J. Thompson and A. B. McAtee's administratrix. From a judgment for the administratrix, Thompson appeals. Appeal dismissed.

J. M. Collins, of Maysville, for appellant. Worthington & Cochran, of Maysville, for appellee.

CARROLL, J. Section 950 of the Kentucky Statutes provides that: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest and cost \* \* \*."

According to the scanty record before us, taking the exceptions filed to the award as a basis, it appears that the principal sum alleged to be due by the appellee to the appellant is only \$137.47. Therefore the amount in controversy is not sufficient to confer jurisdiction on this court.

The appellant must obtain whatever relief he is entitled to in an action to enforce the award or to set it aside.

The appeal is dismissed.

### ALLEN v. ALLEN.†

(Court of Appeals of Kentucky. May 7, 1914.)

#### 1. HUSBAND AND WIFE (§ 43\*)—ADVANCES BY HUSBAND—SUPPORT OF WIFE'S CHILDREN.

A husband cannot recover from his wife, in a divorce action by her, for sums paid during the marriage for the maintenance of the wife's small children by a former husband, and for medical attention and funeral expenses for one of them, and for the maintenance of the wife's live stock, in absence of a contract by the wife to pay for such services.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 226; Dec. Dig. § 43.\*]

#### 2. WORK AND LABOR (§ 7\*) — IMPLIED CONTRACTS—SERVICES BETWEEN RELATIVES.

Personal services, as well as board and lodging and other necessities, rendered and furnished to near relatives are deemed gratuitous, in absence of an express contract to pay therefor.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½–22; Dec. Dig. § 7.\*]

#### 3. CONTRACTS (§ 28\*)—PROOF—CONTRACTS BETWEEN RELATIVES.

Stricter proof is required of a contract between near relatives to pay for personal services, etc., rendered in the family than is required to prove ordinary contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133–140, 1755, 1782–1784, 1785½, 1820, 1821; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Magoffin County.

Action by Samantha Allen against William Allen, in which defendant filed a counterclaim. From a judgment for plaintiff, and against defendant on his counterclaim, defendant appeals. Affirmed.

D. D. Sublett, of Salyersville, for appellant.

HANNAH, J. Samantha Allen, then a widow with two small children, was married to William Allen in 1909. On September 13, 1912, she instituted in the Magoffin circuit court an action against William Allen seek-

ing a divorce, and asked the court to require the defendant to restore to her a light bay horse, a mare and colt, a cow, an organ, and some furniture, which she claimed as her separate estate. The defendant filed an answer and counterclaim, alleging fault upon the part of the plaintiff, and asking himself for a divorce from her, and seeking to be adjudged a lien upon the property of plaintiff in his possession in satisfaction of a sum alleged to be owing by plaintiff to him for the care and maintenance of the plaintiff's two small children and certain other expenditures made by him during the existence of the marriage relation in the way of payments for medical attention and burial expenses of one of plaintiff's said children; and for the maintenance of plaintiff's live stock. The chancellor awarded the defendant a divorce, but ordered that he restore to plaintiff the property mentioned and claimed by her as her separate estate; and, from that judgment, defendant appeals, insisting that the chancellor erred in allowing him no recovery upon his counterclaim for the expenditures mentioned.

[1] While, under the evidence shown in the record, the chancellor no doubt would have been glad to have granted to the defendant some of this relief, yet it is a well-established rule of law that, where there is no proof of a contract to pay for services and disbursements such as constitute the claim of defendant against plaintiff herein, there can be no recovery thereof.

[2, 3] In the case of near relatives or members of the same family living together as one household, the law regards personal services rendered and board and lodging and other necessities and comforts furnished as gratuitous, and no recovery therefor can be had, unless an express contract be proved; and, to establish such a contract, stricter proof is required than in the case of an ordinary contract. *Bolling v. Bolling's Adm'r*, 146 Ky. 313, 142 S. W. 387, Ann. Cas. 1913C, 306, and cases therein collected.

There was no such contract proven in this case, and the chancellor, therefore, properly declined to adjudge defendant anything upon the claim mentioned.

Judgment affirmed.

### SHIELDS v. NEAL.

(Court of Appeals of Kentucky. May 5, 1914.)

#### 1. DEATH (§ 104\*)—ACTIONS FOR CAUSING—INSTRUCTIONS—SELF-DEFENSE.

In a civil action for the wrongful killing of plaintiff's husband, evidence that there had been trouble between the deceased and the defendant, that they had an altercation in a bank shortly before the killing, at which time deceased had threatened to kill defendant and had asked him to come outside to shoot it out or fight it out in any way he chose, that shortly thereafter deceased and defendant met on the street and deceased, after applying a vile epithet to defendant, started toward him with his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 9, 1914.

cane upraised in a striking position, and was still advancing upon him at the time the shot was fired, not only justifies but requires the court to give an instruction on the right of self-defense.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.\*]

**2. DEATH (§ 21\*)—ACTIONS FOR CAUSING—DEFENSES—SELF-DEFENSE.**

One is not justified in taking human life in order to defend himself against slight violence, but there must be a reasonable apprehension of death or great bodily harm.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 23, 30-32; Dec. Dig. § 21.\*]

**3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—IMMATERIAL ERRORS.**

In a civil action for the killing of plaintiff's husband, an instruction that if the defendant in good faith believed, and had reasonable grounds to believe, that his life was then in danger or that "his person was in danger of violence" at the hands of deceased, he was justified in killing the deceased, was not prejudicial as authorizing the taking of life in defense against a slight violence, since it could not have given the jury to understand that defendant was justified if he reasonably believed the deceased was going to inflict only a slight or inconsequential injury upon him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Nelson County.

Action by Dora Shields against Preston Neal. Judgment for the defendant, and plaintiff appeals. Affirmed.

O'Doherty & Yonts, of Louisville, for appellant. John A. Fulton and Nat. W. Halstead, both of Bardstown, for appellee.

HANNAH, J. [1] On September 29, 1911, Preston Neal shot and killed Dr. A. M. Shields in Chaplin, Nelson County. His widow thereupon instituted this action in the Nelson circuit court to recover damages from Neal for said killing, under section 6, Kentucky Statutes. Upon a trial of the action, a jury returned a verdict in favor of the defendant; and from the judgment thereon entered this appeal is prosecuted, the only ground presented by the record for a reversal of the said judgment being error of the court in instructing the jury.

The instruction complained of is as follows: "No. 2. The court instructs the jury that if they believe from the evidence that, at the time the defendant shot and killed A. M. Shields, he then in good faith believed, and had reasonable grounds to believe, that his life was then in danger, or that his person was then in danger from violence at the hands of said Shields, and that defendant had no apparent and safe means of protecting his own life and person but by shooting said Shields, then the law is for the defendant, and the jury should so find." Appellant insists that this instruction is not authorized by the evidence, and that it is not in proper form.

It appears from the evidence that appellee, Neal, and Rev. P. C. Eversole were trustees

of the estate of Elliott Houtchens, which estate consisted of real and personal property and was a large one. Previous to the killing, Eversole and Neal, under an order of court, sold one farm and some personal property thereon, at public auction on November 15, 1910, at which sale Dr. Shields became the purchaser of said farm for the sum of \$17,995. Appellee, Neal, either for the protection of the estate or as a bona fide bidder, under an arrangement with the auctioneer, made secret bids at this sale of the farm. Shields afterwards discovered this, and claimed that by such action of Neal's he was forced to pay for the farm much more than he would otherwise have been compelled to pay therefor; and he seems to have become incensed at Neal, and made disparaging remarks about him in regard to it. At said sale, Shields also became the purchaser of some corn, which had not then been gathered, but which was to be afterwards gathered and delivered. The price was fixed, but no settlement could be then made, as the quantity was not then known. There was on the farm a large iron kettle, on a platform near the cistern, which had been used for watering stock, though it was not a fixture thereon. This kettle was not sold or offered for sale separately, and, after the sale, Shields claimed that, on account of the use which had theretofore been made of it, it was included in his purchase and went with the farm. Eversole had this kettle removed from the farm, and Shields spoke to Neal about it, claiming it should be returned or that he should have a credit in the sum of \$5 for it upon the amount he owed the estate. Neal would neither agree at the time to return the kettle, nor to allow the credit of \$5, but told Shields he would see Eversole, and they would arrange to settle the matter in some way.

Eversole lived at Richmond; Neal lived at Shakertown, in Mercer county; and Dr. Shields lived in Chaplin, in Nelson county. On the morning of the killing, Neal and Eversole went to the home of Dr. Shields, for the purpose of making a settlement concerning the corn, which had theretofore been delivered. They drove to Chaplin in Neal's buggy, hitching same at a telephone pole near where the killing was later done. After some preliminary talk at Shields' house, the three started for the bank, which was a short distance around the corner from Shields' residence. On the way to the bank, in passing Neal's buggy, Neal stopped to arrange the storm apron; Shields and Eversole proceeding on to the bank. On arriving at the bank, Eversole requested the cashier to give him a note which he had previously requested the cashier to make out, saying in the presence of Shields that Shields was going to sign the note, and that when John Shields or John Cheatham, either one, signed it, it would be considered an accepted

note, to be held there until he (Eversole) called for it. Shields then said that he should not be required to pay any interest, and that he ought to have credit for the kettle. Eversole replied that he was in a hurry, having an engagement to meet a man at Mrs. Houtchens', and did not have time to discuss the matter, but said that if it should develop in the future that Shields was entitled to the credit of \$5 for the kettle he would indorse such credit upon the note. Shields said, "No, I want it settled now," and went to the door and called Neal. When Neal arrived, Eversole informed him of the conversation just had between him and Shields concerning the kettle, but seems to have misunderstood the proposition made by Shields concerning the kettle; and when Neal said, "Well, let him have it," Shields said, "No, I will give \$1 or take \$5," and again said he ought not to have to pay interest and that he had tried to get a settlement and could not get it. Neal replied that he and Eversole had wanted a settlement and could not get it. Shields insisted on being relieved from the payment of interest; and Neal then said: "Well, Doctor, let's drop this matter; there is no use saying anything more about it." Shields again repeated that he should not be required to pay interest, and then Shields and Neal got into a warm dispute; and Eversole went out in front of the bank to call for help to quell the disturbance.

One witness, a clerk in the bank, says that Shields commenced cursing and said Neal was trying to rob him, and that Neal had torn up the farm house in different places, and that Shields threw up his cane and told Neal he would knock hell out of him. Just then, the president of the bank stepped in, and he told Shields to go on out. Shields said to him, "I guess you are taking sides in this," to which the president of the bank replied that the bank was a place of business, and that he had a right to protect it, and he told Neal to go on into the rear room, and told Shields to go on out. Shields went out, and, as he did so, he told Neal to come out there and he would shoot it out with him or fight it out with him, any way he wanted to. Neal told Shields he was unarmed, and, obeying the request of the bank president, went into the rear room of the bank. In this room was kept a revolver, and it was this revolver with which Neal shot Shields. As Shields passed out of the bank, Eversole, who had preceded him, took Shields by the arm and walked with him across and down the street. Shields, as they walked along, was talking loudly and calling Neal vile names. Eversole requested him to go on home, saying that they could not settle then, but could settle some other time. They walked on down to the telephone pole near where Neal's horse was hitched, where Shields stopped; Eversole still urging him to go on home, again saying that he had an engage-

ment and would be unable to remain in Chaplin any longer. While the two were standing there, and some 15 or 20 minutes after Shields left the bank, Neal came out of the bank walking in the direction of where Eversole and Shields were standing and of where his horse was hitched; and Eversole says that, as Neal approached them, Shields slipped his hand down about a fourth of the way on his cane and started in the direction of Neal. Eversole then turned away and seems unable to clearly narrate what immediately followed.

One witness states that Shields and Eversole stopped close to Neal's horse, and Shields was abusing some one and calling some one all kinds of vile names. Witness listened to find out who it was that Shields was abusing. He did not see Neal at that time. He heard Shields say that "he is" or "you are a lying son of a b——"; and then heard Neal say, "Don't call me a lying son of a b——." Then Shields started in the direction of Neal with his cane grasped in both hands in striking position. This witness then testified as follows: "Q. How far did he go towards Neal? A. He was down somewhere about the telephone pole, something like 20 or 25 feet, maybe 22 feet. He was down here, and he advanced to the corner of the store when he was shot. Q. Did he still have the cane uplifted at the time he was shot? A. Yes, sir; still held the cane in that position. Q. Just tell the jury, when the shot was fired, if Dr. Shields stopped, come on any further, or just what he did. A. He might have come a step after he was shot, for he was going pretty rapid. I think he threw his hand up against the corner of the store, and that stopped him, left hand, and he turned and went back." The cane which Shields had on the occasion was offered in evidence by the defendant and admitted, and we presume that because it was before the jury there is no evidence describing it.

All the witnesses on both sides, except appellant herself and a physician of whom the inquiry was not made, say that Shields bore the reputation of being a violent and dangerous man.

The evidence directly connected with the shooting is somewhat contradictory, and we will not attempt to reconcile or weigh it, or to say whether appellee was justified in the killing, as this question is not before us. We are merely stating the evidence upon which the court based the instruction on self-defense. It seems clear to us that such an instruction was not only justified by the evidence, but that it would have been a reversible error to have refused it.

[2, 3] 2. Objection is also made to the form of the instruction, appellant claiming that under it the jury were authorized to find for the defendant if they believed from the evidence that, at the time the defendant killed

Shields, he (the defendant) had reasonable grounds to apprehend any violence to his person, however slight, at the hands of said Shields. Appellant contends that the use of the words, "that his life was then in danger, or that his person was then in danger from violence at the hands of said Shields," was error. It is suggested by appellee that the words complained of were used by the trial court upon the authority of *McClurg v. Igleheart*, 33 S. W. 80, 17 Ky. Law Rep. 913, in which case this court indicated that an instruction using the language in question would be proper.

Appellant contends, and in that contention this court concurs, that a reasonable apprehension of death or great bodily harm is the true and proper standard for the guidance of the jury in cases involving the right of self-defense. The phrase "death or great bodily harm" has become so thoroughly imbedded in the law of self-defense and so well expresses the measure of danger necessary to justify the exercise of the right in question that in criminal cases its use is required, and, while we think it the safer phrase to use in civil actions also, the court is unwilling to hold that the failure to use it in this case was prejudicial. We do not believe that the jury was misled, or that they could have received the impression, from the instructions as given, that they should find for the defendant if they believed from the evidence that, at the time defendant killed Shields, he (the defendant) believed or had reasonable grounds to believe that Shields was merely going to inflict upon him some slight or inconsequential injury.

An instruction on self-defense was justified by the evidence; and, under the evidence, the one given was not prejudicial to appellant.

The judgment therefore is affirmed.

#### GLASGOW ELECTRIC LIGHT & ICE CO. v. CLARK'S ADM'X.

(Court of Appeals of Kentucky. May 6, 1914.)

##### 1. TRIAL (§ 296\*)—INSTRUCTIONS—CURE.

Where, in an action for death by electric shock by contact with a guy wire bracing a pole carrying wires for the transmission of electric power to decedent's mill, where defendant was installing a motor, the court charged that, if defendant informed decedent that the wire would not be charged, and thereafter, without giving notice to decedent, permitted the wire to become charged, the verdict must be for plaintiff, the refusal to charge that, if decedent was notified that the current was turned on, the verdict must be for defendant was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

##### 2. TRIAL (§ 133\*)—IMPROPER ARGUMENT—OBJECTIONS—CORRECTION BY COURT.

Where the court sustained an objection to the argument of counsel for plaintiff, suing as administratrix for the death of her husband, that a third of the damages should be given plaintiff as compensation for the loss of her hus-

band, and directed the jury to disregard the argument, and to follow the measure of damages stated in the instructions, the improper argument was not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

##### 3. TRIAL (§ 133\*)—IMPROPER ARGUMENT—OBJECTIONS—CORRECTION BY COURT.

Where the court sustained an objection to the argument of counsel for plaintiff, suing as administratrix for the death of her husband, wherein comment was made on plaintiff's personal appearance, and directed the jury to disregard the language used, the argument was not ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Barren County. Action by Mattie B. Clark, administratrix of Selby Clark, deceased, against the Glasgow Electric Light & Ice Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Barret, Allen & Attkisson and E. R. Attkisson, both of Louisville, and Baird & Richardson, of Glasgow, for appellant. Allen Sandidge, C. H. Hatchett, and Porter & Sandidge, all of Glasgow, for appellee.

HANNAH, J. Mattie B. Clark, as administratrix of the estate of Selby Clark, instituted this action in the Barren circuit court against the Glasgow Electric Light & Ice Company to recover damages for the death of her husband, who was killed by coming in contact with a wire charged with electricity. The jury returned a verdict for plaintiff in the sum of \$6,000, and defendant appeals.

The Glasgow Milling Company, a corporation, was owned jointly by the decedent and his two brothers. Shortly before the death of Clark, the milling company arranged with the Glasgow Electric Light & Ice Company for the installation of an electric motor and the furnishing of electric power to operate the mill. Appellant company thereupon extended its power line to the plant of the milling company, and, in doing so, it erected a pole near the mill, and braced the same with guy wires, one of which was fastened to an old and partly decayed chestnut post, and wires for the transmission of the electric current were extended into the mill. About a week after the installation of this pole and wires, Selby Clark was killed. The motor had not yet arrived, but current was turned in on the line.

On his arrival at the mill on the morning of his death, Clark was informed by the engineer that the old chestnut post above mentioned was burning. He went out to look at it, accompanied by the engineer, and, while inspecting it, his hand came in contact with the guy wire attached to the burning post, and he was instantly killed. This guy wire, by contact with which he was killed, was connected with the other guy wire by which the transmission pole was braced; and in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

interval between the erection of said pole and Clark's death the pole had leaned out of its original position, causing the guy wire to come in contact with the wire carrying the current, and the insulation on the wire carrying the current had become worn so as to permit the current to be transmitted to the guy wire on that side of the post, and, of course, to the guy wire with which Clark came in contact. The light company had exclusive supervision and control of the installation of the motor, pole and wires; and plaintiff alleged: First, that the pole was not properly erected, and that this caused it to lean out of its original position, and thereby permitted the guy wire to become charged with the electric current; and, second, that the manager of appellant company, after the installation of the pole and wires, informed Clark that the current had not been and would not be turned on the wires until the motor arrived; and proof was produced by appellee on both of these allegations sufficient to authorize an instruction thereon.

[1] The court instructed the jury on negligence in the installation of the pole and wires, and also told the jury, that, if the defendant company informed decedent that the wires were not and would not be charged with electricity, and thereafter, without giving notice to decedent, permitted said wires to become charged with electricity, they should find for plaintiff.

Appellant company then asked the court to instruct the jury that, if it or its servants informed decedent that the electric current was turned in on said wires, after having informed him that it was not and would not be turned on until the motor arrived, they should find for defendant, or, if plaintiff saw, or could have discovered, by the exercise of ordinary care, that the current was on said wires, they should find for the defendant. And of the failure of the court to so instruct the jury appellant company complains.

The instruction which was given by the court on this phase of the case required the jury, before they could find for plaintiff, to believe that the current was turned on without giving notice to Clark, after having informed him that it was not and would not be turned on until the motor arrived; while the instruction asked by appellant company required the jury to find for defendant if the current was turned on after giving such notice. It was merely the converse of the instruction given by the court, and appellant company's substantial rights were not on this account prejudiced by the refusal to give the instruction asked. That part of the instruction asked, having reference to the negligence of decedent, was already covered by a proper instruction on contributory negligence.

[2, 3] 2. Appellant company also complains

of language used by counsel for plaintiff in argument to the jury. Plaintiff, the widow of Selby Clark, was present at this argument, and counsel used the following language: "The third is, if you find for plaintiff, the amount that you should give her as compensation for the loss of her husband." The court sustained an objection to this, and informed the jury that the true criterion of damages was that stated in the instructions, and directed the jury to disregard the language used. Counsel also said in argument: "Selby Clark is now silent in death. Nobody knows what he said but Selby Clark, and how could we prove it? It is evidence that contradicts itself to this jury, and speaks in mighty terms to this jury; that is, that Selby Clark walked out there, a young man, with this good woman as his wife, yes, good-looking woman, with every reason to live—yes, had a wife, and this is his wife, here before the jury." Appellant company's counsel objected to this language, and asked the court to discharge the jury. The court sustained the objection, and admonished the jury to disregard the language used, but refused to discharge the jury, and of this ruling of the court appellant company complains.

The fact that the plaintiff was the widow of Selby Clark was in evidence; and, while comment upon her personal appearance was superfluous, under the circumstances, as the court sustained defendant's objection and admonished the jury to disregard the language, we do not think that the appellant company was prejudiced by the ruling of the court in denying its motion to discharge the jury.

The judgment is affirmed.

#### THOMPSON v. M. BOYD & SON et al.

(Court of Appeals of Kentucky. May 7, 1914.)  
CONTRACTS (§ 176\*)—BUILDING CONTRACTS—  
ACTIONS—EVIDENCE.

In an action on a building contract, evidence held sufficient to go to the jury on the question whether certain items were extras not included in the original contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.\*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by M. Boyd & Son and others against Ada Thompson. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. E. Stricklett and Myers & Howard, all of Covington, for appellant. B. F. Graziani, of Covington, for appellees.

CARROLL, J. The appellees contracted in writing to build a house for the appellant at the agreed price of \$4,894, according to plans and specifications furnished by Lyman Walker, an architect. During the progress of the work some extras were added, and this suit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

grew out of a difference between the parties as to whether a rear porch, a pantry, and other things were included in the original plans and specifications or were extras.

The appellant contended that they were included in the original plans and specifications and covered by the original contract price, while the appellees insisted that they were not a part of the original plans and specifications, but were extras agreed on by the parties during the progress of the work. As a result of this and other differences between the parties, this suit was brought by the appellees to recover the price of the porch and pantry, as well as other extras; but the only matters in dispute on this appeal are the charges for the porch and pantry, for which the jury allowed appellees some \$270.

Counsel for appellant in their brief refer to the plans and specifications; but the plans are not a part of the record, although the specifications are. As the plans, which were used on the trial in the lower court and referred to by witnesses, are not a part of the record, we are unable to say whether they showed that the original contract called for the porch and pantry or not. The architect testified that they were extras not included in the contract, and so did the appellee contractors, while the appellant and other witnesses said they were a part of the plans and specifications and included in the contract price. With the evidence in this condition, the court instructed the jury, in substance, that if they believed from the evidence that the porch and pantry were included in the original plans and specifications, and covered by the contract price, they should find for the defendant; but if they believed from the evidence that they were not embraced in the contract, but were extras agreed on by the parties, they should find for the plaintiffs their value.

This fairly submitted to the jury the issue between the parties in respect to the porch and pantry, and counsel for appellant do not complain of the instruction. Indeed, the only ground of reversal relied on is that, as the plans and specifications, which were a part of the contract, included the porch and pantry, the jury should have been peremptorily instructed not to allow appellees anything on account of these two items. It is not charged that there was any mistake in the plans and specifications, or in the contract, and so, if the plans and specifications included the porch and pantry, the contention of counsel for appellant would be well taken, as, in the absence of any mistake in the written contract, it would be conclusive on the parties.

As before stated, the plans are not a part of the record; but the architect who drew the plans and specifications testified that the porch and pantry, for which appellees sought to recover, were not included in the original

contract or in the plans and specifications, and the contract testified to the same effect. Asked if Mrs. Thompson and Mr. Boyd said anything to each other with reference to the porch and pantry, and, if so, to tell what they said, the architect replied: "They added porch and pantry, and Mr. Boyd reminded Mrs. Thompson that was to be extra, and Mrs. Thompson agreed to the extra cost of the porch and pantry; was not anything said about what it would cost, but Mr. Boyd said it would cost her just what it cost him. To the best of my knowledge, after the contract was signed up, they both came to my office and had me change the rear part of the house and add on a porch and pantry."

In the specifications, under the head of "Concrete Work," it is written: "This includes the entire cellar floor; also the rear pantry and porch floor and steps, front porch floor and steps, floors to porches and pantry only to be reinforced." And the architect testified that probably the reference to a porch and pantry in the specifications may have been an error, or the original contract may have provided for a smaller and different style porch and pantry than was afterwards constructed by agreement; but he was very clear in his evidence that neither the plans nor specifications provided for the character of porch and pantry that were built, and that the ones that were built were agreed on as extras, and we think the court, under the evidence, properly submitted this matter to the jury. If it should be assumed that the plans called for a porch and pantry, the parties had the right, after the contract was made, to agree that a different porch and pantry from that described in the plans should be built and charged for as extras, and this it appears from the evidence they did.

Upon the whole case, we perceive no error in the judgment; and it is affirmed.

#### AYLOR et al. v. AYLOR et al.

(Court of Appeals of Kentucky. May 6, 1914.)

##### 1. EVIDENCE (§ 236\*)—DECLARATIONS OF DECEASED PERSONS—ADMISSIBILITY.

The statement of a parent, since deceased, who had executed an instrument reciting that he had permitted his son to occupy and improve a tract in his possession, and that he intended to convey the same to the son, to the effect that the son was not paying any rent, made after the son had taken possession, was insufficient to charge the son with rent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 876-882; Dec. Dig. § 236.\*]

##### 2. DESCENT AND DISTRIBUTION (§ 82\*)—FAMILY SETTLEMENTS—REPUDIATION—EFFECT.

The repudiation by two children of their agreement, made with the widow and the other children for the settlement of the estate of the deceased father and husband, which fixed the advances to the two children, did not invalidate the agreement, and in a distribution of the estate in court the two could not be charged with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



greater advancements in the absence of evidence thereof.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318-321; Dec. Dig. § 82.\*]

### 3. EQUITY (§ 297\*)—PLEADING—SUPPLEMENTAL PLEADING—DISCRETION OF TRIAL COURT.

In a suit in equity to adjust the rights of the heirs of a decedent, the chancellor may in his discretion allow an amended and supplemental petition to enforce the judgment rendered on the original petition, instead of requiring a new suit for that purpose.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 588; Dec. Dig. § 297.\*]

### 4. DESCENT AND DISTRIBUTION (§ 82\*)—PETITION—SUPPLEMENTAL PETITION—NECESSARY PARTIES.

Where, in a suit in equity to adjust the rights of the heirs of a decedent, it appeared that two of the heirs, to whom real estate had been conveyed pursuant to a private settlement between the heirs, had mortgaged the same, the mortgagees were necessary parties to a supplementary proceeding to enforce the judgment establishing the rights of the parties and thereby subject the land conveyed to the payment of debts due the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318-321; Dec. Dig. § 82.\*]

### 5. APPEAL AND ERROR (§ 959\*)—PLEADING (§ 236\*)—AMENDMENTS—DISCRETION OF TRIAL COURT.

Civ. Code Prac. § 134, authorizing the court at any time, in furtherance of justice, to permit a pleading to be amended, gives the trial judge discretion in allowing or rejecting pleadings, and its ruling will not be disturbed when the ends of justice have been promoted and the parties have had a fair trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. § 959; Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

### 6. JUDGMENT (§ 736\*)—RES JUDICATA—MATTERS CONCLUDED.

Where in a suit by the administrator, the widow, and some of the children against two other children, the petition alleged a private settlement between the heirs and a repudiation thereof by defendants, and alleged that advancements had been made and that defendants were indebted to the estate for rent of lands which they had occupied, a judgment establishing the rights of the heirs was not res judicata in proceedings by supplemental petition for the enforcement of the judgment against the lands received by defendants pursuant to the private settlement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.\*]

Appeal from Circuit Court, Boone County.

Action by E. J. Aylor and Huey Aylor, as administrators of Jemison Aylor, deceased, and others, against John T. Aylor and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Castleman & Murphy, of Covington, for appellants. S. W. Tolin and S. Gaines, both of Burlington, for appellees.

MILLER, J. Jemison Aylor, of Boone county, died intestate on February 10, 1908, leaving a widow, Sarah J. Aylor, and six sons and two daughters surviving him. His

estate consisted of 254 acres of land, and about \$2,000 in personalty. His widow, Sarah J. Aylor, also owned 23 acres of land, in fee. Shortly after Jemison Aylor's death, his widow and children held a conference for the purpose of dividing the estate without proceedings in court; and to that end the children, except a daughter, Clara Craven, signed acknowledgments showing the amount of advancements made to them respectively by their father. These acknowledgments showed advancements as follows: To John T. Aylor \$500; to E. J. Aylor \$510.35; to Huey Aylor \$150; to Alice Rouse \$200; to Harvey Aylor \$800; to B. E. Aylor \$463; and to Perry L. Aylor \$350. The daughter, Clara Craven, had received no advancement, and, of course, made no acknowledgment. For the purpose of equalizing the advancements, John T. Aylor executed his note to his sister Clara for \$147.00; E. J. Aylor executed one note to his sister Alice for \$109.15, and another to his brother Huey for \$92.03; B. E. Aylor executed one note for \$9.16 to Harvey, a second for \$77.84 to Clara, and a third for \$67.15 to Huey; while Perry L. Aylor executed his note for \$40.84 to his sister Clara. These agreements and notes, in so far as they were executed by the appellants John T. Aylor and Perry L. Aylor, respectively, read as follows:

"Mch 7, 1908. I hereby make my statement for advancement, to the Jemison Aylor estate for the sum of five hundred dollars (\$500.00). John T. Aylor."

"March 7, 1908. At the settlement of the estate of Jemison Aylor I promise to pay to the order of Clara D. Aylor one hundred and forty-seven 9/100 dollars (\$147.00). John T. Aylor."

"Mar. 7, 1908. I hereby make my statement for advancement, to the Jemison Aylor estate for the sum of three hundred fifty dollars (\$350.00). P. L. Aylor."

"Mch. 7, 1908. \$40.84. At the settlement of the estate Jemison Aylor, for value received, I promise to pay to the order of Clara D. Craven forty 84/100 dollars. P. L. Aylor."

At the same time the heirs agreed to divide the land equally between them, the widow releasing her dower and agreeing that her 23 acres might, for the purposes of division, be treated as a part of Jemison Aylor's estate, in consideration of the heirs agreeing to pay her a stipulated annuity during her widowhood. To carry out this agreement three commissioners were agreed upon, who divided the land, including the 23 acres, between the eight children. Deeds were made on May 16, 1908, carrying this division into effect. It was understood that these agreements fixing the advancements, the execution of the notes to equalize the heirs out of the personalty, and the equal division of the realty, would divide the entire estate of Jemison Aylor and his widow among the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

eight children, without any court proceedings; all the parties being of age.

About a year thereafter, however, John T. Aylor and Perry L. Aylor repudiated their notes, by which John T. had agreed to pay his sister Clara \$147.09, and Perry L. to pay her \$40.84. Consequently, on March 9, 1910, E. J. Aylor and Huey Aylor, as administrators of their father's estate, joining with them the widow and the other children, sued John T. Aylor and Perry L. Aylor setting up the foregoing acts of division, and their repudiation of their notes, and asked that the estate of their father be settled, and that the several heirs be charged with whatever advancements they had received from their father. The petition charged that John T. had used a tract of 11 acres of land, with the house thereon, which belonged to his father, for a period of 21 years, for which he had paid no rent; that Perry L. had in like manner occupied the "Hicks Farm," of about 7 acres, with the house thereon, for about 10 years; that the rental value of each of said tracts was \$100 a year; and it asked that they be charged rent at that rate. The petition also set up the advancements made to the other heirs, as shown by the agreements above referred to. The answers traversed the petition; and, the action having been referred to the commissioner to take proof and settle the question of advancements, the commissioner filed his report on August 8, 1910, charging John T. Aylor with 20 years' rent at \$85 a year, aggregating \$1,700, less credits for taxes, insurance, and improvements, amounting to \$296.69 leaving a net charge against John T. Aylor of \$1,403.31. The report charged Perry L. Aylor with rent for 8 years, at \$75 per year, aggregating \$600. The supplemental report charged the other heirs with the amounts which they had acknowledged, as above shown. John T. Aylor and Perry L. Aylor filed exceptions to the commissioner's report charging them with advancements as above stated; but their exceptions were overruled, and the report was confirmed on August 12, 1910, thus fixing the indebtedness of John T. Aylor to the estate for advancements at \$1,403.31, and Perry L. Aylor's indebtedness, on the same account, at \$600.

It having been ascertained upon the master's final report of distribution that each child was entitled to \$542.83 of the personalty, that sum was credited upon the indebtedness of John T. Aylor and Perry L. Aylor, respectively, leaving the former's indebtedness at \$860.48, and the latter's at \$57.17. No exceptions having been filed to the report of final distribution, it was confirmed on August 16, 1911. To recover these two sums, the administrators, the widow, and the other heirs, on the same day tendered their amended petition, which was subsequently filed, reciting the facts as above

related, and asked that the conveyance of May 16, 1908, to John T. and Perry L. Aylor, by which they received their portions of the lands of their father and mother, be canceled, and so much of the land, as might be necessary in each case, be sold to pay the debts of \$860.48 and \$57.17, respectively, theretofore established by the commissioner's report. The amended petition also alleged that John T. and Perry L. Aylor had fraudulently signed the statements and notes covering the advancements for the purpose of misleading the other heirs, and thereby secure an equal division of the land, and that the other heirs had relied and acted upon the signed statements and notes of John T. and Perry L. Aylor, in good faith, in agreeing to the equal division of the land. The petition further recited that John T. Aylor had, in the meantime, mortgaged his property to the People's Deposit Bank of Burlington, and that Perry L. Aylor had likewise mortgaged his land to the Covington Savings Bank & Trust Company. These two corporations were joined as defendants and called upon to set up their respective interests, which they did by proper pleadings.

The final judgment shows, however, that one of these mortgages had been satisfied, and that the other did not include any of the land in controversy. So that neither of said mortgagees were interested in either tract of land at the time the final judgment was entered. By their joint answer to the amended and supplemental petition, as amended, John T. and Perry L. Aylor denied they had ever agreed to pay any advancements from their father, and repudiated their written agreements to that effect. They admit the question of advancements was discussed at the conference of the heirs when the equal division of the land was agreed upon, but that it was agreed the personal estate in the hands of the administrators should alone be looked to for the satisfaction of any and all advancements claimed by, or charged against, any heir. They further say that if they did make any agreement concerning advancements, or committed a fraud in doing so, the other heirs cannot complain of the defendants' repudiation thereof, because they failed to set up the repudiation and the fraud in the original petition for a settlement, and that those questions were res judicata. The reply made an issue upon those questions. The circuit court sustained the charge of fraud, and granted the prayer of the petition, by adjudging a lien upon, and ordering a sale of the respective tracts of land to pay the debts as above indicated; and from that judgment John T. Aylor and Perry L. Aylor appeal.

As grounds for a reversal they insist: (1) That there was no competent evidence to sustain the commissioner's report charging them with rents; (2) that the amended and supplemental petition should not have

been filed over their objection, since this action had proceeded to judgment, and any proceeding for the purpose of subjecting the land, as was sought by the supplemental and amended petition, could have been brought only in a separate and independent suit; (3) that the Covington Savings Bank & Trust Company and the People's Deposit Bank of Burlington were improperly joined as defendants to the amended and supplemental petition; and (4) that the judgment rendered pursuant to the original petition, whereby the indebtedness of John T. Aylor and Perry L. Aylor to the estate was fixed, was *res judicata* and disposed of all the questions between the parties, including the liability of the land for the debt, which question should have been asserted in the original petition.

[1] 1. The first objection is well taken, since there is no evidence in this record which even tends to show that Jemison Aylor ever charged either of the appellants with rents, or that he ever intended to do so. On the contrary, he and his wife executed and delivered to the appellant John T. Aylor a paper which reads as follows: "I, Jemison Aylor of near Hebron Boone county Kentucky have permitted my son J. T. Aylor to occupy and improve the tract of land on which he now lives near Hebron Boone County Ky., called the Hicks place containing ten acres and I have always intended to convey said land by deed to my said son J. T. Aylor but have not done so. Now should I die without making my said son such deed I want him to have this particular tract and parcel of land in the division and settlement of my estate. Jemison Aylor. Sarah T. Aylor." The judgment of the circuit court was based alone upon the evidence of several witnesses who testified that Jemison Aylor had said to them that the appellants were not paying him any rent; but all of these statements were made after appellants had taken possession of their respective tracts of land.

In *Bailey's Admr. v. Barclay*, 109 Ky. 639, 60 S. W. 377, Sam and Dock Bailey, sons of the decedent, were each charged \$300 as an advancement made them by their father, upon the testimony of several witnesses, who testified to conversations had with their father during his lifetime, in which he told them he had given each of his married children \$300, and had set them up housekeeping; and, as Sam and Dock were married, these statements were taken as a basis for fixing the advancements against them. There was no other proof to sustain these advancements against Sam and Dock Bailey. In disapproving the charge as an advancement, the court said: "In passing upon the competency of declarations made by an ancestor as to the intention with which the gift was made, it was generally held that declarations of the donor prior to the transfer or contempora-

neous with it were competent, but that subsequent declarations are inadmissible, unless a part of the *res gestae*, or against the interest of the donor. See 1 Am. & Eng. Ency. L. (2d Ed.) p. 776; Gillett, Ind. & Col. Ev. § 155. Under this rule we are of the opinion that evidence of declarations made by intestate is not sufficient to charge appellants, Sam and Dock Bailey, with advancements." *Hill's Guardian v. Hill*, 122 Ky. 681, 92 S. W. 924, is to the same effect.

Under this rule the evidence in this record does not sustain the charge of advancements fixed by the commissioner against the appellants.

[2] While the repudiation by the appellants of their agreements fixing the advancements to John T. Aylor at \$500, and to Perry L. Aylor at \$350, made this settlement suit necessary, there was no good reason for charging them for advancements different from the sums originally agreed upon by all the heirs. That agreement was binding upon all the parties, and the refusal of the appellants to carry it out did not, in any way, invalidate it. Under the proof the commissioner should have reported the net advancements against John T. Aylor at \$500, and against Perry L. Aylor at \$350, and with these sums they should have been charged in the distribution; and, in the event there should have been insufficient personalty going to appellants to discharge these obligations, the interest of appellants in the land should have been subjected to the payment of their respective debts.

[3] 2. To sustain the second objection, appellants rely upon *Brown v. Van Cleave*, 86 Ky. 388, 6 S. W. 25; *Johnson v. Johnson*, 88 Ky. 275, 11 S. W. 25; and *Meadows v. Goff*, 90 Ky. 540, 14 S. W. 535. We do not agree, however, that the rule announced in these cases is conclusive of appellants' contention in this settlement suit, where the supplemental proceedings were necessary to effectuate the purpose of the original petition—the division of the entire estate between the heirs. It is not an ordinary suit where a money judgment is the only relief originally sought; but it is an action in equity for the final adjustment of the rights of all the heirs. In such an action the chancellor has a broad discretion in permitting amended and supplemental pleadings in the furtherance of justice. Excepting the bank and trust company, the parties to the amended pleadings were precisely the same as the parties to the original petition; and, as the amended and supplemental petition was solely for the purpose of satisfying the original judgment between the same parties, we fail to see that appellants have been in any way prejudiced. No good reason existed, under the circumstances, for requiring the administrators to bring a new suit. The later proceedings being essential to the relief asked in the original petition for a settlement of the

estate, they were not improperly taken in the same action.

[4, 5] 3. The bank and trust company being mortgagees of the land which John T. and Perry L. Aylor had received from their father's estate, they were necessary parties to the supplementary proceeding which sought to subject those lands to the payment of the debts due the estate. The statute requires that all lienholders shall be made parties in actions of this character. Certainly, the appellants were not prejudiced, since the supplemental petition making their mortgagees defendants followed precisely the same course that would have been taken if a new suit had been brought by the administrators. Section 134 of the Civil Code of Practice gives the trial judge a broad discretion in the matter of allowing or rejecting pleadings, and its ruling will not be disturbed when the ends of justice have been promoted, and the parties have had a fair trial. *Taylor v. Moran*, 4 Metc. 127; *Barron v. City of Lexington*, 105 S. W. 395, 32 Ky. Law Rep. 92; *Staton v. Byron*, 105 S. W. 928, 32 Ky. Law Rep. 246; *Vaught v. Hogue*, 107 S. W. 757, 32 Ky. Law Rep. 1061. There was no error here.

[8] 4. We see no merit in the plea of res judicata. This defense is based upon the well-known rule that a plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment; but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward. *Francis v. Wood*, 81 Ky. 16. The rule, however, does not apply here.

The question presented by the amended petition was not required to be presented, and was not concluded by the original proceedings. The fallacy of appellants' contention in this respect is well shown by the decision in *Honaker v. Cecil*, 84 Ky. 206, 1 S. W. 392, relied upon by appellants in support of their view. In that case appellants had mortgaged their land, and the mortgage lien had to be enforced by a sale of the land. Both the husband and wife were before the court, although neither had answered. Afterwards the husband and wife brought a separate action to recover homestead in the land, on the ground of the wife's insufficient acknowledgment of the mortgage. In the last suit the court dismissed their petition, upon the ground that they had had their day in court in the first suit, where the question of homestead was necessarily disposed of by the judgment which sold their entire interest in the land for the payment of the mortgage. *Honaker v. Cecil* was properly decided, and has no application to the case at bar, since the claim of homestead was directly antagonistic to the plaintiff's claim as mortgagee; and, after the plaintiff had obtained a judg-

ment sustaining and enforcing his mortgage, clearly there could be no homestead in the land thus subjected.

Likewise, in *Moran v. Vicroy*, 117 Ky. 195, 77 S. W. 668, relied upon by appellants, a judgment for plaintiff in a suit for trespass to land precluded defendant from relitigating the question of the title to the same land in an injunction suit to restrain further trespasses. The question settled in the suit for trespass was the title to the land, and it necessarily remained settled in future suits. The essence of the rule here relied upon by appellants is that, where a judgment settles a question in issue, that question cannot be again tried. It is peculiarly applicable to defenses and requires a defendant to present all of his defenses before judgment, under penalty of being barred from presenting any new defenses in another action after judgment has once gone against him.

The rule has no application here.

For the error above indicated, however, the judgment is reversed for further proceedings consistent with this opinion.

#### TOWN OF ELSMERE v. TANNER.

(Court of Appeals of Kentucky. May 5, 1914.)

##### 1. MUNICIPAL CORPORATIONS (§ 763\*)—DEFECTIVE SIDEWALKS—DUTY OF TOWN.

All towns and cities are under a duty to exercise ordinary care to keep their streets, sidewalks, and public places in a reasonably safe condition for public travel by persons exercising ordinary care for their own safety.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 796\*)—TORTS—DEFECTIVE SIDEWALKS—ERECTION OF BARRIERS.

Neither the fact that a sidewalk was constructed upon an embankment 2 feet high, with a gentle slope of 3¼ feet to the bottom thereof, nor that the walk was about 4 inches above the level of the top of the embankment, make the place a dangerous one, so as to require the erection of barriers by the town for the protection of persons using the walk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1655; Dec. Dig. § 796.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 768\*)—TORTS—DEFECTIVE SIDEWALKS—DANGEROUS CONSTRUCTION.

The construction of a sidewalk with its edge about four inches above the surface of the ground at the side of the walk does not render the walk unsafe for travel, so as to make the town liable for injuries received by one who stepped off the walk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 762\*)—TORTS—USE OF SIDEWALKS—LIABILITY OF CITY.

A city is not the insurer of the safety of persons who travel its sidewalks, and is not liable in damages for injuries caused by the thoughtlessness or negligence of travelers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.\*]

**5. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—DEFECTIVE SIDEWALKS—ACTIONS—QUESTION FOR JURY.**

While no hard and fast rule for measuring the duty of a town to keep its sidewalks in reasonably safe condition for travel can be laid down, and the question is ordinarily one for the jury, where there can be no reasonable difference of opinion as to the safety of the walk, the court should rule upon the issue, as a matter of law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

**6. APPEAL AND ERROR (§ 999\*)—REVIEW—VERDICT.**

In actions against a city for injuries caused by a defective sidewalk, the Court of Appeals will give great weight to the finding of the jury as to the safety of the walk, and, when there is reasonable ground for a difference of opinion on that issue, will not interfere with their verdict or say that the case should not have been submitted to them, but this rule does not make the finding of the jury on such issue conclusive in all cases.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

Appeal from Circuit Court, Kenton County, Chancery, Common Law, and Equity Division.

Action by Emma F. Tanner against the Town of Elsmere. Judgment for the plaintiff, and defendant appeals. Reversed, with directions for a new trial.

Hall & Adams, of Covington, for appellant. Richard G. Williams and O. M. Rogers, both of Covington, for appellee.

**CARROLL, J.** The appellee, Mrs. Tanner, brought suit against the appellant town of Elsmere to recover damages for personal injuries alleged to have been sustained by the negligence of the town in failing to maintain its sidewalks in reasonably safe condition for public travel. After the issues had been made up, the case went to trial before a jury, and there was a judgment in favor of Mrs. Tanner for \$238. On this appeal by the town the only ground relied on for reversal is that the trial court should have directed a verdict for the town.

[1] Elsmere is a town of the sixth class, and was under a duty, as are all other towns and cities in the state, to exercise ordinary care to keep its streets and sidewalks and public places in reasonably safe condition for public travel by persons exercising ordinary care for their own safety, and so if the town failed to perform the duty imposed, and Mrs. Tanner was exercising ordinary care for her own safety, there is no reason for disturbing the judgment.

The town a few years ago, constructed, or had constructed, a concrete sidewalk five feet wide. The surface of this sidewalk was smooth, and there is no complaint that any part of the sidewalk proper was not in good condition. The sidewalk, at the place of the

accident, was built on an embankment about two feet higher than the natural surface of the ground of the adjacent property owner. The embankment on which the sidewalk was built sloped from the concrete to the surface of the ground of the abutting owner, the distance from the concrete to the base of the slope being about 3½ feet, and the embankment, immediately at the edge of the concrete, lacked about four inches of being flush with the surface of the sidewalk. The town maintained no street light at this place, but the moon was shining, and, the surface of the concrete pavement being almost perfectly white, any person exercising ordinary care for his own safety could easily see the sidewalk, as its white surface plainly distinguished it from the grass and ground on the side.

Mrs. Tanner and two other persons were walking side by side on this sidewalk; Mrs. Tanner being on the inside, or the side next to the lot. While thus walking, she in some way stepped over the edge of the sidewalk with one foot, and, as the surface of the ground, immediately at the edge of the sidewalk, was about four inches below the surface of the sidewalk, she lost her balance and fell or rolled down the embankment. If the ground had been level at this place, and the sidewalk had been built four inches above the surface of the ground, and Mrs. Tanner, in walking along, had stepped with one foot over the edge of the sidewalk, she would probably have lost her balance and fallen exactly as she did lose her balance and fall on the occasion in question. It would appear that the fall she received was due to the fact that, when she stepped with one foot over the edge of the sidewalk at a place where the surface of the sidewalk was four inches above the adjacent ground, she lost her balance, and when she lost her balance in this way she fell. It happened that, as the sidewalk was on an embankment about two feet high, she rolled down the sloping sides to the base, a distance of about 3½ feet; but it was the initial fall that caused the injury, and not the rolling down the bank that followed the fall. Looking at the matter in this way, the question whether the town was negligent or not presents itself in two aspects: One as relates to its failure to make the sidewalk so that its surface would be level with the adjacent ground; and the other as relates to its duty to have barriers on account of the fact that the sidewalk was built on the embankment that we have described.

[2] It is at once apparent that the sidewalk was not built in a dangerous or unsafe place. The surroundings were not calculated to make it any more hazardous than ordinary sidewalks. It cannot be said that a sidewalk built on an elevation two feet high, with side banks gradually sloping from the sidewalk a distance of 3½ feet, is a

dangerous place or such a place as would put upon the town, in the exercise of ordinary care to make it reasonably safe for public travel, the duty of erecting barriers to keep pedestrians from stepping off the sidewalk. Nor do we think the fact that the surface of the sidewalk was about four inches above the level of the sloping bank where it touched this sidewalk manifested a failure on the part of the city to exercise the required degree of care. There are sidewalks to be seen everywhere, especially in towns and small cities, the surface of which is as much as four inches above the ground immediately by the side of the sidewalk. There are great numbers of other sidewalks, built on slight embankments with sloping sides, and, if towns and cities were required to erect barriers on the side of every sidewalk that was built on a slight elevation, almost every town in the state would be disfigured by unsightly barriers erected alongside smooth and wide sidewalks built in safe places for use by persons exercising ordinary care for their own safety.

[3] Likewise, if towns and cities were obliged to have the surface of the sidewalk level with the surface of the adjacent ground, so that persons walking on the sidewalk might step out on the ground without receiving a jar or fall, there would not be, measured by this standard, many sidewalks reasonably safe for public travel. There are few sidewalks alongside of which surface sewers are not constructed, and, as a rule, the face of the sidewalk abutting on the sewer is from four to ten inches higher than the bottom of the sewer, and the fall, from the surface of the sidewalk to the bottom of the sewer, perpendicular; yet it would hardly be contended that, if a person walking on a sidewalk, with a surface sewer beside it, should walk too close to the edge of the sidewalk and make a misstep that would cause him to lose his balance and fall into the sewer, he could recover damages on the ground that the city had not exercised ordinary care to keep its sidewalks in good repair.

[4] A city is not the insurer of the safety of persons who travel its streets or sidewalks, and is not to be held liable in damages for every injury that may befall a traveler who, through thoughtlessness or negligence, meets with some accident. It often happens that people stumble or slip and fall and hurt themselves while walking in safe places, and no amount of care or diligence on the part of a city or town would enable it to prevent accidents of this sort. They happen every day in the year, to young as well as old, and strong as well as weak, and, if cities were required to insure the limbs and life of every person who happened to get hurt on its streets, they would soon be bankrupted by recoveries in damage suits.

If, under the facts of this case, towns could

be held liable, there would scarcely be any limitation upon their liability, and, in almost every instance that can be imagined, a town or city might be subjected to damages where an injury was received by any one using its streets.

When a city has provided a good, safe, smooth sidewalk of ample width for the accommodation of the public, those who use it must walk on it, or, if they carelessly or thoughtlessly step off, must take the consequences of the carelessness, unless the sidewalk is built in an unsafe or dangerous place, as, for example, on an excavation, or ravine, or water course, or on a high, steep embankment, or at a place so dangerous as that barriers should be erected to prevent a false step or movement from causing serious injury. Of course there are situations where a barrier or protection of some sort by the side of a sidewalk might be necessary to fulfill the duty a city owes to travelers on its streets; but that the place here in question was not of this character we think manifest. The conditions were not such as would cause any person of ordinary prudence to anticipate that a traveler, in the exercise of ordinary care, would receive injury. Dillon on Municipal Corporations (5th Ed.) § 1696.

In *Damon v. Boston*, 149 Mass. 147, 21 N. E. 235, the court said: "The danger which requires a railing must be of unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them, unless their condition is such as to expose travelers to unusual hazard." To the same effect is *Shea v. Town of Whitman*, 197 Mass. 374, 83 N. E. 1096, 20 L. R. A. (N. S.) 980. In the note to this case in L. R. A. are cited a number of cases illustrating the duty cities and towns are under in respect to barriers.

In *Beardsley v. City of Hartford*, 50 Conn. 529, 47 Am. Rep. 677, there is found this statement of the duty of a city in respect to barriers: "The true test is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveler, using ordinary care in passing along the street, being thrown or falling into the dangerous place that a railing is requisite to make the way itself safe and convenient."

[5] It is strongly insisted, however, that as the question whether the city exercised ordinary care to keep its sidewalk in this place in a reasonably safe condition was submitted to the jury, and the jury, by their verdict, found that the town did not exercise this degree of care, we should not interfere with their finding on this issue of fact.

It has frequently been observed by this

court that it is difficult, if not wholly impracticable, to attempt to lay down any hard and fast rule by which the liability or non-liability of a city for accidents caused by its alleged failure to keep its streets in reasonable condition for travel may be measured, and, generally speaking, this condition has made it necessary to leave the settlement of the matter to the jury trying the case.

[8] But this often reiterated recognition of the right to have a jury pass on disputed issues of fact in cases like this does not mean that in every case that comes up the issues must be left to the jury, or that, because a properly instructed jury find by their assessment of damages that a municipality was negligent, their finding must be accepted as conclusive, or that a court having the right to review the facts may not reach a different conclusion from that reached by the jury or take the case from the jury. Of course in all cases like this we reasonably and naturally give great weight to the finding of a jury; and when there are reasonable grounds for difference of opinion, under all the circumstances, we will not interfere with their finding upon disputed questions of fact or say that the case should not have been submitted to a jury. *City of Louisville v. Haugh*, 157 Ky. 643, 163 S. W. 1101. But, notwithstanding this reluctance of the courts to invade the field that has been set apart under our system of law as the province of the jury, cases now and then arise in which the courts feel like exercising their discretion and authority to differ with the jury on the facts and to go so far as to say that the court should rule the issue as a matter of law, and this is one of them. Other instances in which this court has held that the case should be ruled as a matter of law are *City of Covington v. Belser*, 137 Ky. 125, 123 S. W. 249; *City of Lexington v. Cooper*, 148 Ky. 17, 145 S. W. 1127, 43 L. R. A. (N. S.) 1158; *City of Corbin v. Benton*, 151 Ky. 483, 152 S. W. 241, 43 L. R. A. (N. S.) 591; *East Tennessee Telephone Co. v. Parsons*, 154 Ky. 801, 159 S. W. 584, 47 L. R. A. (N. S.) 1021.

We do not think that, on the facts stated, there is reasonable ground for difference of opinion concerning the proposition that the city exercised ordinary care to keep the sidewalk in reasonably safe condition for travel. This being the measure of its duty, it is not liable for the accident that happened to Mrs. Tanner, and the motion for a peremptory instruction should have been sustained. If there is another trial, and the evidence as to the condition of the sidewalk is substantially the same as it was on this trial, the court will direct a verdict for the defendant.

The judgment is reversed, with directions for a new trial in conformity with this opinion.

# ELDRIDGE et al. v. EMBRY.

(Court of Appeals of Kentucky. May 5, 1914.)

## INFANTS (§ 37\*)—SALE OF LAND.

Where a will gave a life interest to testator's wife in one-third of realty, of which she then owned an undivided one-fourth interest, and devised the remainder in trust for testator's seven children, four of whom were infants, to pay one-seventh thereof to the sons at a certain age and the income from one-seventh to the daughters, the widow and trustees being in possession, and the land not being divisible, there was such a vested estate and joint ownership as to authorize the sale of the infants' interest under Civ. Code Prac. § 490, authorizing the sale of a vested estate in realty jointly owned by two or more, though plaintiff or defendant be an infant, if the estate be in possession, and the property cannot be divided without materially impairing its value.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 82, 83, 97; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Fayette County.

Suit by G. W. Embry against G. T. Eldridge and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. E. Ross, of Lexington, for appellants. T. T. Forman and Forman & Forman, all of Lexington, for appellee.

NUNN, J. Appellants purchased a tract of land in Fayette county, and have refused to pay the notes executed in consideration for it. This is a suit by appellee vendor to coerce payment, and appellants resist on a plea of deficient title. The land was purchased by appellee at judicial sale, and the power of the court to order a sale, the rights of infants being involved, is the question presented.

The land was owned jointly, and in fee, by Henry F. Embry and his wife, Laura Embry; the wife owning an undivided one-fourth interest. They were residents of Jefferson county, and the husband died in 1909. He left a will disposing of his large estate, real and personal, under some very unusual provisions; but there has never been any dispute between the heirs or the devisees as to the meaning of it, and some parts of it are beyond controversy. By the second clause he gives to his wife one-half of his surplus personalty and a life interest in one-third of his real estate. It will thus be seen that Laura Embry, his wife, owned in fee an undivided one-fourth interest in this land, and by the will she acquired a life interest in one-third of the other three-fourths. By the third clause of the will the testator devises the remainder of his "estate of every kind and wheresoever situated to my trustees hereinafter named upon the following trust," etc. The trust was in favor of his seven children, the trustees being directed to pay one-seventh to each of his five sons as they attained the age of 25 years, and, as to his two daughters, he directed that each shall

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

receive for life the income from one-seventh. By further clauses he directed that his brother Talton Embry qualify as guardian for his infant children, and that two other brothers and two adult sons act as executors and trustees of his will. It is difficult to conceive just how the trustees can carry out the trust without selling his real estate, and there is a strong probability that the testator intended they should be given the power to sell; but such a power is not directly conferred.

In 1910 suit was filed, under section 490 of the Code, for a sale of the land and a division of the proceeds. The executors and trustees, the widow, and all the adult children were parties plaintiff; while the four infant children and Talton Embry, their statutory guardian, were made defendants. Copies of the petition, answers, proof, exhibits, and process are all a part of appellants' pleading in defense of this action on the purchase-money notes. It is not claimed that there was any irregularity in these proceedings, nor is it claimed that any of the parties in interest were not before the court. The appellee insists that by the third clause of the will, above quoted, the legal title to this property went to the executors and trustees, and that they, in conjunction with the widow, had the power to sell and convey the land, and by their joint deed vest in the purchaser a fee-simple title; but we deem it unnecessary to pass upon that question. If the title has ever passed from Henry F. Embry's heirs, it is by reason of the suit above referred to and the decretal sale had thereunder. As a requisite for the sale of infant's realty under section 490 of the Code, there must be a vested estate, joint ownership, and indivisibility. Appellants contend that the title of the Embry widow and children was not a vested estate, nor was their possession such as contemplated in the Code section to authorize a sale. The proof in the suit above referred to showed that the land was not divisible, and the claim that the widow and executors trustees were in possession is not disputed. It is also admitted that in addition to her life estate the widow owned in fee an undivided one-fourth interest. If the widow owned no more than a life interest, under the authority of *Jenkins v. McVaw*, 145 Ky. 205, 140 S. W. 150, this sale would have to be upheld. When it is perfectly clear that all the parties in interest were joint owners, and that they owned vested estates, and that they were in possession, and that the property could not be divided without materially impairing its value, it follows that these conditions meet every requirement of the Code section, supra. It is not necessary that there be unity of ownership either in time, title, or possession, or that each vested interest be equal or alike. *Atherton v. Warren*, 120 Ky. 151, 85 S. W. 1100, 27 Ky. Law Rep. 632. Section 2348 of

the Kentucky Statutes secures to one joint tenant a right of partition, although the other joint tenants are laboring under disability. In discussing this proposition in *Kean v. Tilford*, 81 Ky. 600, this court said: "And this being the case, the one tenant, by making a disposition of his interest by deed or will to his children, or to a stranger, containing a clause prohibiting a sale, cannot take from his cotenants or joint owners the right to have the property sold, if indivisible."

In *Harting's Executor v. Milward's Executor*, etc., 90 S. W. 262, 28 Ky. Law Rep. 776, it is said that infants and those whose shares are contingent hold their interest subject to the right of the other joint owners to have the whole property partitioned at any time. When the nature of the property is such that a partition in kind is impracticable, then the provisions of section 490 for its sale apply. See, also, *Walsh v. Parr's Executor and Trustee*, 110 S. W. 300, 33 Ky. Law Rep. 242; *Atherton v. Warren*, 120 Ky. 151, 85 S. W. 1100, 27 Ky. Law Rep. 632.

When the purchase money was collected from the decretal sale, the statutory guardian went into the circuit court and executed the bond provided by section 493 of the Code, and thereupon receipted for the share of the infants in the land. This bond and the receipt were conditioned upon his investment and accounting as required by the trust clause in the testator's will.

The recent case of *Hatterich v. Bruce*, 151 Ky. 12, 151 S. W. 31, is conclusive on the power of the court to order a sale. The land was jointly owned in fee by four infant children, subject to the dower of their mother. In upholding a sale, and in answer to the same objections as are here made, the court said: "The possession of the property is jointly held by the infants and their mother, though the latter is but the tenant for life in an undivided third in value of the whole."

In the case at bar the widow, not only owned dower in three-fourths, but owned in fee the other fourth of it.

We are of opinion that the proceedings for a sale of the land under section 490 of the Code effectually passed the title of all the parties in interest, and, since that is the only title brought in question by appellants, it follows that they have no just ground in refusing to pay the notes.

The judgment of the lower court is therefore affirmed.

**SIMONS v. AMERICAN BOX BALL CO.†**  
(Court of Appeals of Kentucky. April 30, 1914.)

1. CORPORATIONS (§ 519\*)—ACTION BY SELLER—EVIDENCE—SUFFICIENCY.

In an action for the price of goods sold on a written order which was signed by the defendant personally, a finding by the trial court that the goods were sold to the defendant, and not to a corporation represented by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied June 16, 1914.



him as he claimed, *held* not to be flagrantly against the evidence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088, 2089, 2091, 2093; Dec. Dig. § 519.\*]

**2. ASSUMPSIT, ACTION OF (§ 25\*)—GOODS SOLD AND DELIVERED — ADMISSIBILITY OF EVIDENCE—WRITTEN ORDER.**

Where plaintiff declared in assumpsit for goods sold and delivered, and not upon a written contract, a written order for the goods, signed by the defendant, is admissible, since such order does not amount to a complete contract.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 153-155; Dec. Dig. § 25.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by the American Box Ball Company against Lum Simons. Judgment for the plaintiff, and defendant appeals. Affirmed.

Gifford & Steinfeld, of Louisville, for appellant. Burnett, Batson & Cary, of Louisville, for appellee.

CLAY, C. On May 3, 1912, L. Simons signed and delivered to the American Box Ball Company the following order:

"May 3, 1912.

"American Box Ball Company, Indianapolis, Ind.: Ship me immediately 2 1911 Model Box Ball Alleys complete. Price \$380.00 installed. Terms cash. Length of alleys to be 42 feet. My post office address is Louisville, state Ky. Ship alleys to town of Louisville, state Ky. Ship by Penn. Railroad. [Signed] L. Simons."

The two box ball alleys were shipped and delivered to Simons at 304 Jefferson Street, Louisville, Ky. Payment being refused, plaintiff, American Box Ball Company, brought this action against defendant, Simons, to recover the sum of \$380, alleging that defendant was indebted to it in that sum "for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant at his special instance and request in the year 1912." The allegations of the petition were denied by answer. By agreement of parties, a trial by jury was waived, and the law and facts were submitted to the court. After hearing the evidence, the court separated its findings of law and fact. He found as a fact that the articles sued for were sold to the defendant upon a written order signed by him personally; that they were delivered to him personally upon the faith of this order, which stipulated the price. The court concluded, as a matter of law, that, where one person orders and receives goods, wares, and merchandise at a stipulated price, he is under an obligation to pay the price so stipulated. Pursuant to these findings, judgment was entered in favor of plaintiff for the amount sued for. Defendant appeals.

[1] It was the contention of Col. Simons that the sale was made to the Riverview Park Company; that the agent of plaintiff

so understood when the sale was made. The evidence for plaintiff was to the effect that it would not sell to the park company, but made the sale to Col. Simons individually because of his personal credit. Col. Simons testified that the agent knew at the time of the purchase that he was buying the alleys for the park, and denied the agent's statement that plaintiff would not sell to the park, and that defendant was so informed. In view of the fact that the order was not signed by the Riverview Park Company, or by Col. Simons as its president or agent, but by him personally, and that the alleys were shipped to and delivered to him personally, it cannot be said that the court's finding is flagrantly against the evidence.

[2] But defendant insists that, as plaintiff declared in assumpsit, it was error to permit it to prove the written contract. In response to this contention it is sufficient to say that the paper signed by the defendant was not a complete contract. It was merely a written order or request to send the alleys. It imposed no obligation on defendant to receive the goods until accepted, or to pay for them until delivered. When goods are sold and delivered to another at his special instance and request, either an oral or written request may be shown. The court did not err, therefore, in admitting the evidence complained of. Judgment affirmed.

**TIPPENHAUER v. TIPPENHAUER.**

(Court of Appeals of Kentucky. April 30, 1914.)

**1. APPEAL AND ERROR (§ 1030\*)—HARMLESS ERROR.**

Any error in refusing to transfer a case to the jury in an action to recover realty, and in overruling the exceptions to depositions taken for defendant, is not material, where the court would have been required under the evidence to have directed a verdict for defendant at the close of plaintiff's evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4037; Dec. Dig. § 1030.\*]

**2. ADVERSE POSSESSION (§ 43\*)—TACKING ON ADVERSE POSSESSION.**

Plaintiff, who claimed through her husband, could tack on the adverse possession of her husband before his death to her own adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-224; Dec. Dig. § 43.\*]

**3. GIFTS (§ 47\*)—PRESUMPTION—TRANSFERS BETWEEN RELATIVES.**

Where one permits another for accommodation to enter and occupy land without consideration, and under a verbal consent, no presumption of gift arises from the mere taking of possession.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.\*]

**4. ADVERSE POSSESSION (§ 60\*)—NOTICE OF HOSTILE CLAIM.**

One entering possession of property by consent of the owner cannot claim title by adverse possession, unless the intention to claim it adversely is actually brought home to the

donor by such acts or conduct as would put a reasonable person on notice that a hostile claim was being asserted.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. § 60.\*]

#### 5. ADVERSE POSSESSION (§ 60\*)—NATURE OF HOLDINGS.

One entering upon land under an express unconditional gift or a parol purchase need not, in order to claim the property, openly assert his right thereto adversely or in a notorious way, provided he exercises ordinary acts of ownership, such as payment of taxes, etc.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. § 60.\*]

#### 6. ADVERSE POSSESSION (§ 113\*)—ADMISSIONS.

In an action to recover land, in which plaintiff claimed that her father-in-law gave the property to her husband, and that she and her husband acquired title by subsequent adverse possession, evidence of conversations between plaintiff's mother-in-law and her husband during her father-in-law's lifetime, as well as declarations by a daughter of plaintiff's father-in-law, were irrelevant; the mother-in-law and daughter not then owning the property.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 669, 671-681; Dec. Dig. § 113.\*]

#### 7. GIFTS (§ 49\*)—EVIDENCE.

Evidence in an action involving the right to realty, in which plaintiff claimed through a gift to her husband from her father-in-law, and by adverse possession by herself and husband, held not to show an express or unqualified gift of the property to plaintiff's husband.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

#### 8. ADVERSE POSSESSION (§ 114\*)—SUFFICIENCY OF EVIDENCE.

Evidence, in an action involving property, which plaintiff claims was given to her husband by her father-in-law, and held adversely by herself and husband, held not to show that plaintiff or her husband ever asserted title to the property adversely, so as to acquire it by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.\*]

#### 9. ADVERSE POSSESSION (§ 112\*)—BURDEN OF PROOF.

In an action involving the title to property claimed by plaintiff through a gift by her father-in-law to her husband, and by a subsequent adverse holding by herself and husband, the burden was on plaintiff to prove acquisition of title as alleged.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Campbell County.

Action by Minnie Tippenhauer against Catherine Tippenhauer. From a judgment for defendant, plaintiff appeals. Affirmed.

Kelly & Regenstien, of Newport, for appellant. Bailey & Veith, of Newport, for appellee.

CARROLL, J. On the merits of this case the only question involved is, Did appellant and her husband occupy the house, in which they lived for many years, adversely to the legal title holder, or by his permission? The

lower court held that the occupancy was not adverse but amicable, and in this ruling we concur.

The pleadings in the case presented the issue in this way: The appellant, in 1913, brought a suit in equity against Catherine Tippenhauer, widow of George Tippenhauer, Sr., and who has died since the judgment below was rendered, to quiet her title to the house and lot in controversy. In this suit she averred that in 1881 "George Tippenhauer, Sr., gave said property (described as a house and lot in the city of Newport), to his son, George Tippenhauer, who was then the husband of plaintiff, and that on said day she and her said husband moved on said property and took full and complete possession thereof, and that she has been in the actual, peaceable, exclusive, notorious, continuous, uninterrupted, adverse possession of the whole of said property ever since, holding it and occupying and using it under a claim of right and ownership, and adverse to said George Tippenhauer, for a period of more than 15 years, and more than 30 years next before defendant set up her claim as hereinbefore stated." In an amended petition it was further averred, in substance, that George Tippenhauer gave the property in question to his son, George Tippenhauer, the husband of plaintiff; that she and her husband moved into the property in 1881, and lived there and occupied it in the manner stated in the petition. She further averred that her husband died in 1897, leaving surviving him his widow, and George Tippenhauer his only child, and that from the date of the death of her husband, she and her son, George Tippenhauer, occupied and held the property in the manner stated, until the death of her son in 1911; that her son, by his last will, devised to her all his right, title, and interest in the property, and since his death she has been holding and claiming it as set out in her petition. For answer to these pleadings, Catherine Tippenhauer, the appellee, who was the widow of George Tippenhauer, Sr., denied specifically all the averments of the petition except the occupancy of the house. She further pleaded that her husband, George Tippenhauer, Sr., died in 1903, and that before his death he made his last will, in which he devised to her all of his property, including the house in controversy, and that, by virtue of his will, she was the owner of and entitled to the possession of this house and lot. She further set up that the occupancy of the house by the plaintiff and her husband and her son had always been by the permission of George Tippenhauer, Sr., and herself, and not otherwise. To this answer a reply was filed, which completed the pleadings.

[1] Preliminary to taking up the merits of the case, counsel for the appellee complain that the lower court committed errors preju-

dicial to the rights of their client in prematurely submitting the case, in refusing to transfer the issue of adverse possession to a jury for trial, and in overruling exceptions to certain depositions taken on behalf of appellee, as well as in limiting the time in which depositions should be taken. Whether the court committed error in refusing to transfer the issue to a jury and in overruling exceptions to certain depositions taken on behalf of appellee is not material, because if the issue relating to the nature of the possession of the property had been submitted to a jury, the trial court, upon the introduction of the evidence for the plaintiff as it appears in this record, would necessarily have directed a verdict in favor of the defendant, upon the ground that the evidence for the plaintiff failed to show an adverse holding of the property by the plaintiff and her husband, or either so that these errors could not have been prejudicial. Nor did the court prematurely submit the case. Neither was any prejudicial error committed in failing to give further time for the plaintiff to take depositions, as it appears that all the evidence plaintiff desired to take is in the record, and has been considered by us, as doubtless it was by the lower court. It is true that on May 17, 1913, the plaintiff moved the court for permission to take the remainder of her proof in chief, as well as proof in rebuttal, and that the court overruled the motion to take other evidence in chief. But, notwithstanding this, the plaintiff did take the depositions of several witnesses, whose evidence we have considered in disposing of the case, and it does not appear that she was denied the right to take the depositions of any witnesses. In short, so far as the record shows, all the evidence that plaintiff desired to produce was taken.

[2] It will be observed that the petition sought relief upon the ground that George Tippenhauer, Sr., presented the property to his son, George, the husband of appellant, in 1881, as a gift, and immediately thereafter the grantee in the gift took possession of the property and claimed and occupied it as his own, openly and adversely to the grantor and all others, until his death in 1903, and that after his death his widow and their child claimed and occupied it openly and adversely to the grantor and everybody else until the death of the son in 1911, and that thereafter she claimed and occupied it in the same manner. It was therefore necessary to a successful maintenance of the suit that the plaintiff should introduce evidence showing an express gift of the property to George Tippenhauer, Jr., with an uninterrupted possession, accompanied by the usual acts of ownership exercised by persons who own property, or that George Tippenhauer, Jr., and the plaintiff after his death, claimed the property as their own, openly and adversely to the donor and everybody else for at least

the statutory period of 15 years, and that this claim of right and hostile holding was brought to the notice of the donor. If, however, the plaintiff here established the character of occupancy necessary to constitute adverse possession in her husband, then she had the right to tack onto the adverse possession of her husband her own holding, if it was in fact, adverse, and thereby make the adverse possession continuous from the beginning.

[3, 4] But where a father permits his son, or one person permits another as an accommodation to enter and occupy a house or land without consideration and under a verbal consent, no presumption of a gift arises from the mere act of taking possession of the property under this arrangement, nor will the person who enters into possession of the property be permitted to set up a title to it by adverse possession, unless the intention to claim it adversely is actually brought home to the donor by such acts or conduct on the part of the donee as would put him on notice, or put a man of reasonable prudence on notice, that a hostile claim of title was being asserted, and this character of holding has continued for the requisite statutory period: *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78; *Morton v. Lawson*, 1 B. Mon. 45. In the absence of such acts or conduct as would furnish this notice of a hostile claim, the entry will be deemed amicable, and the possession permissive.

If a person, who enters upon and occupies property for 15 years, or any number of years, merely by the generosity or favor of the real owner, could successfully assert title to it from the beginning, or from any subsequent period, upon the grounds of adverse possession growing out of long-continued, peaceable, and permissive occupancy, uninterrupted by any overt acts of ownership sufficient to put the real owner upon notice that his title was in danger, the beneficiary of the generosity or favor of another could take advantage of his kindness and deprive him of his property without notice that a hostile claim was asserted. A condition like this the law will not tolerate.

[5] An amicable entry, not under an express, unconditional gift or purchase, although it may be accompanied by peaceable possession, will not ripen into a title in the occupier until after the real owner has been given, for the statutory period, warning of the purpose of the occupier and put upon his guard for the requisite time that the intention is to take the property under an adverse claim. If, however, the entry is under an express, unconditional gift or a parol purchase, it is not necessary that the person in possession in order to claim it should openly assert his right to the property adversely, or in a notorious way, or do more than exercise such ordinary acts of ownership in connection with the property as are usually

exercised by owners; as, for example, by the payment of taxes, the making of repairs, and the keeping up of insurance. Many cases have been written illustrating these general principles, and among them we may note the following:

In *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453, 9 Ky. Law Rep. 205, the court, in considering a case where a son, who had entered upon the possession of land under a parol gift from his father, asserted title to it by adverse possession, said: "If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse, and a right of action at once accrues to the vendor or donor. The moment such possession begins, the owner is disseised. It is immaterial whether the entry was by the owner's consent or not. If, after entry, the newcomer claims the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseisin. Whether it has occurred is a question depending upon the circumstances. \* \* \* If one enters upon the land by the owner's mere permission, *expecting* merely that he will give it to him, then such a possession is not a hostile holding; but where there is an unconditional parol gift of it, accompanied by an actual possession of 15 years or over, with claim of ownership, the donor cannot recover it, although the donee may have entered expecting that the donor would in futuro convey or devise the land to him." In that case the donee took possession of the land under an express parol gift, and during the time he was in possession paid the taxes on it, controlled it as his own, and the donor did not exercise any authority over it. To the same effect is *New Domain Oil Co. v. Gaffney Oil Co.*, 134 Ky. 792, 121 S. W. 699.

In *Ward v. Edge*, 100 Ky. 757, 39 S. W. 440, 19 Ky. Law Rep. 59, the court said: "It is a well-settled principle of law that possession of land, as the result of an entry on the premises by permission of the legal owner, will not become adverse until some act is committed by the occupant rendering it so, and notice thereof brought home to the holder of the legal title."

In *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513, the court again marked the well-recognized distinction between that class of cases where the donee enters upon and takes possession of the property under an express parol gift and where he enters upon and takes possession of it merely as a favor or act of kindness or accommodation, unaccompanied by words from which it might be inferred that the donor intended to present the donee with the property as a gift, and said that in the last class of cases the entry is amicable, "and no presumption of adverse claim exists. Adverse possession, in order to bar recovery, should be

brought to the notice of the joint tenant or landlord, and therefore proved to have been open and of such character as to clearly show that the occupant claimed the land as his own. But in this case, as in every one like it, when it is shown an absolute gift of land was made by the father to the son, and that the latter took and held under it, adverse possession follows and continues as a legal consequence, and the donor must be presumed to have had notice of such adverse claim, because it was intended and procured by him to be so." To the same effect are: *Gilbert v. Kelly*, 57 S. W. 228, 22 Ky. Law Rep. 353; *Creech v. Abner*, 106 Ky. 239, 50 S. W. 58, 20 Ky. Law Rep. 1812; *Owsley v. Owsley*, 117 Ky. 47, 77 S. W. 397, 25 Ky. Law Rep. 1186; *Robinson v. Huffman*, 113 S. W. 458.

In *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152, it is said: "Where a possession is in its origin amicable, it will not become adverse so as to set the statute of limitation in motion unless the property is in fact held adversely and in such a manner as to apprise a person of ordinary prudence that the holding is adverse."

In *Murphy v. Newingham*, 151 Ky. 360, 151 S. W. 930, it was again said: "It is well settled that where there is an unconditional parol gift of a well-defined body of land, accompanied by an actual possession for 15 years or over, with claim of ownership, such possession ripens into title, and the donor cannot recover the land. If, however, one enters upon land by the owner's permission, expecting that the owner will give it to him, then such possession is not a hostile holding."

The substance of these cases upon the point under consideration is that where a person takes possession of land under a parol purchase, or under an express unconditional gift, and holds and claims it as his own, his possession will be deemed adverse from the beginning, and if it is continued for the statutory period, it will ripen into a good title, and this upon the theory that it was intended by the vendor or donor at the time of the sale or gift that the possession should be adverse, and therefore he has all the time notice of the adverse holding. But, on the other hand, when a donee enters upon the possession of land merely through the generosity or kindness of the owner, unaccompanied by any express gift of the property, the entry will be deemed amicable and the holding permissive until the occupier asserts title in himself and this hostile claim of title is actually brought to the notice of the real owner by such acts or conduct on the part of the occupier as would put a reasonably prudent person upon notice of his intention to assert claim to the land by adverse possession, and in this character of cases the adverse holding does not begin until the character of notice indicated has been brought home to the real owner.

With this expression of our views upon the

law applicable, let us see now the circumstances under which the husband of appellant took possession of this land and how it has since been held. Waiving the competency of the evidence of appellant, who testified that George Tippenhauer, Sr., her father-in-law, was engaged in the undertaking business, and also operated some brickyards of which her husband was foreman, she said, in relating the manner in which they first took possession of the house, that: "We lived about two years with my mother-in-law, and my husband wanted to go to housekeeping, and went uptown to look for a house, and we rented a place, and my father-in-law said, 'The cottage is vacant.' He said for us to move into the cottage, my husband and I and the baby. He was foreman at the brickyard; and he said he could not send messages; that he could not go way uptown; that he would have to have him close by, and that we should move into the cottage; that the cottage was ours, to live there." Asked, "Why did you and your husband go to housekeeping in the property described in the petition, instead of going uptown as you intended doing?" She answered, "He wanted us to be close; be on hand. I trimmed coffins, and my husband was foreman of the brickyard. He gave us the cottage to live in, and he said the cottage was ours, and he did not want us to go uptown."

Mrs. Kate Rudolph, a sister of the appellant, testified as follows: "Q. State if you ever heard George Tippenhauer, your sister's father-in-law, say anything about the title to the property where your sister now lives. Please tell what he said. A. He told me, 'That house is Minnie's.' Q. When and where was that, and who was present? A. We were at his house; we were lunching, and he said, 'That house is Minnie's.' We were talking about the cottage. Q. State if you ever heard the defendant, Catherine Tippenhauer, say anything about the ownership of this property; tell when it was and where, and who was present and what she said. A. Well, when they remodeled the house, I said to her, 'How strange you are fixing the stairs in the sitting room,' and she said, 'If anything happens Minnie will have to rent it out.' She further said that this conversation took place about two years before the husband of appellant died.

Mrs. Burbeck also said that she heard the old man say, "That home shall be Minnie's, and no one can keep her out of that." "He told me twice."

[8] The appellant also relates some conversations that she heard between her mother-in-law and her husband during the life of her father-in-law, but these conversations throw no light on the transaction, because the mother-in-law was not then the owner of the property, or authorized to make any gift of it. For a like reason, declarations said to have been made by Mrs. Shoen, a daughter

of George Tippenhauer, Sr., are irrelevant.

It might, however, be mentioned in passing that it appears that Mrs. Shoen said to the appellant: "Minnie, I am going to Mrs. Anstead, and I want you to make up your mind what you are going to do. You know Mother is queer, and after her death, I will give you the papers"—and Minnie said, "Yes; you tell Mother this is no inheritance; it is my house, and I do not have to wait until anybody dies." And that she further said: "This is George's home, and after his death it goes to Babe, and after Babe's death you have nothing to show, and therefore death breaks everything." The "Babe" referred to was the son of appellant, who died, as before stated, in 1911. These statements of Mrs. Shoen, while not competent evidence for or against the appellant, are merely noticed for the purpose of illustrating the attitude of the old people, who were apparently willing that their son George should occupy the house as long as he lived, and that his son George should have it as long as he lived, but that the death of both ended this arrangement, or, as expressed by Mrs. Shoen, "death breaks everything."

[7, 8] This evidence, which presents the whole of the case for the appellant, utterly fails to support the averments of the petition, and is entirely insufficient to bring the case within the scope of the authorities we have cited. There is no evidence of an express or unqualified gift of this property by George Tippenhauer to his son, nor is there any evidence that the son or his wife or their child ever asserted title to the property, or exercised towards it acts of ownership that would give notice of an adverse holding. The only fair inference that can be drawn from this testimony is that the father wanted his son to be near him, and therefore permitted him to live in the house, and after the death of his son, his widow and their child were permitted to occupy the house, but when the child died, the old people apparently felt that their obligations were ended, and that the property should return to the real owners.

[9] The burden of proof in this case was on the appellant to show, either that her husband took possession of the property under an express unqualified gift from his father, or that, having entered upon the property as a mere tenant at will of his father, he openly and publicly renounced his tenancy and asserted title in himself, and either brought home notice to George Tippenhauer, Sr., or else by his acts and conduct put him on notice that he was holding and claiming adversely. And there is no evidence to support either of these propositions or to show that the appellant or her husband did more than merely occupy the property.

It is also worthy of notice that, although this property was occupied continuously by the appellant and her husband for 30 years or more, it appears that they never paid any

taxes on it, or had it insured, or improved or repaired it in any manner. It is true that there is some idle talk in the record about money that George Tippenhauer, Jr., made on a prize fight having been expended in improving the house, but we have paid but little attention to this.

So that, looking at the case as presented by the evidence of the plaintiff, without considering at all the evidence introduced for the defendant, we find no difficulty in reaching the same conclusion as the lower court that the entry and holding was purely permissive.

Noticing now for a moment some of the evidence for the defendant, it appears that the property was always listed in the name of and the taxes on it paid by George Tippenhauer, Sr., during his life, and after his death by his widow, Catherine; that in 1886 and again in 1895, George Tippenhauer, Sr., mortgaged this property without asking the advice or consent of his son or daughter-in-law. It is further shown that they kept it insured. In addition to this, extensive improvements were made on the property by George Tippenhauer, Sr., and at different times men were employed and paid by him to plaster and paper and paint and otherwise repair it. In short, so far as it was necessary to do so, George Tippenhauer, Sr., during his life, and his widow, the appellee, after his death, exercised all acts of ownership over the property that owners usually do.

The judgment is affirmed.

DAVID et al. v. LOUISVILLE & I. R. CO.  
(Court of Appeals of Kentucky. May 6, 1914.)

1. EMINENT DOMAIN (§ 222\*)—ASSESSMENT OF COMPENSATION BY JURY—INSTRUCTIONS—MEASURE OF DAMAGES.

In a condemnation proceeding, an instruction to award the landowners what the land and improvements would bring in the hands of a prudent seller at liberty to fix the time and conditions of the sale when offered for sale by one desiring but not obliged to sell, and bought by one under no necessity of buying, was not erroneous, though it omitted to mention the purchaser's desire to buy, as this was a technical, rather than a substantial, omission, since a person does not ordinarily buy property unless he wants it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.\*]

2. EMINENT DOMAIN (§ 222\*)—ASSESSMENT OF COMPENSATION BY JURY—INSTRUCTIONS—MEASURE OF DAMAGES.

While, in a condemnation proceeding, evidence as to the adaptability of the property in the immediate future for uses other than its present use is admissible, it is not proper to charge the jury to consider such adaptability, and the jury should be given the law without any mention of such evidential matters.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.\*]

3. EMINENT DOMAIN (§ 261\*)—PROCEEDINGS TO ASSESS COMPENSATION—REVIEW—TRIAL DE NOVO.

Under Ky. St. §§ 835-839, condemnation proceedings may be instituted in a county court,

and commissioners are thereupon appointed to assess the damages, on the filing of whose report either party may except, and the exceptions are then tried by a jury and judgment rendered on the verdict, unless sufficient cause for setting it aside be shown. Section 839 further provides that either party may appeal to the circuit court, "and the appeal shall be tried de novo upon the confirmation of the report of the commissioners by the county court or the assessment of damages by said court, \* \* \* and the payment to the owners of the amount due \* \* \* the railroad company shall be entitled to take possession of said land and material," but that, when an appeal shall be taken by the company, it shall not be entitled to possession until it shall have paid into court the damages assessed and all costs. *Held*, that the confirmation of the report is not the sole question to be tried in the circuit court, but that the whole question of the assessment of damages may be gone into by that court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 675-680; Dec. Dig. § 261.\*]

4. EMINENT DOMAIN (§ 261\*)—TIME WITH REFERENCE TO WHICH COMPENSATION IS TO BE MADE.

On an appeal to the circuit court, evidence of the value of the property condemned should be confined to its value at the time of the trial which immediately precedes the taking; the company not being entitled to possession until the damages are paid the owner or into court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 675-680; Dec. Dig. § 261.\*]

5. APPEAL AND ERROR (§ 1048\*)—APPEAL—REVIEW—HARMLESS ERROR.

Conceding that, in a condemnation proceeding, the selling prices of surrounding property, similar in character and location, are provable as evidence of the market value of the property in question, it was not prejudicial error to exclude a question as to the cost and selling price of nearby property, where the question did not fix the time of the purchase or sale, and it did not appear what the witness would have testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

6. EMINENT DOMAIN (§ 261\*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Where, on the trial of an eminent domain proceeding on an appeal to the circuit court, the witnesses fixed the market value of the property at prices ranging from \$3,000 to \$9,500, the jury's finding, which fixed its value at \$4,500, the same value put upon it by the commissioners appointed in the county court, was not flagrantly against the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 675-680; Dec. Dig. § 261.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Condemnation proceeding by the Louisville & Interurban Railroad Company against Carrie M. David and others. From the judgment, defendants appeal. Affirmed.

Benjamin S. Washer and Joseph M. Huffaker, both of Louisville, for appellants. Clarence Dallam, of Louisville, for appellee.

CLAY, C. The Louisville & Interurban Railroad Company instituted this proceeding against Carrie M. David and her children to condemn a lot of ground 35 feet wide by 139 feet deep lying on the north side of Linden

street, between Brook and Floyd streets, in the city of Louisville. The commissioners appointed by the court fixed the value of the lot and improvements at \$4,500. Both sides excepted, and a jury in the county court fixed the value of the property at \$6,335. Both sides appealed to the circuit court, where a jury fixed the value of the property taken at \$4,500. On that verdict a judgment was rendered condemning the property for the railroad's uses. Thereupon the railroad tendered to the owners the sum of \$4,500. The tender being refused, the railroad paid that sum in the Jefferson circuit court, and took possession of the property. The owners of the property appeal.

[1] 1. It is first insisted that the court erred in its instruction on the measure of damages. The instruction complained of is as follows: "The court instructs the jury that they will find for the defendants the fair market value of the land and improvements herein sought to be condemned, and, in estimating said market value of said land and improvements, the jury will assess what said land and improvements would bring in the hands of a prudent seller at liberty to fix the time and condition of the sale when offered by one for sale who desires to sell, but who is not obliged to, and when bought by one who is under no necessity of having same."

In discussing the measure of damages in a case like this, the court, in *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 735, 109 S. W. 333, 33 Ky. Law Rep. 98, 36 L. R. A. (N. S.) 456, used the following language: "We think the court should have told the jury substantially that the measure of damages for the taking of the strip of land in question was its fair market value, being that sum which the owner who desired to sell, but was not compelled so to do, would take for it in its present condition, and what a purchaser who desired to buy, but was not compelled to have it, would give for it under the circumstances."

The point is made that the instruction does not comply with the above rule in that it omits one of the most essential elements; i. e., the desire of the purchaser to buy, thus giving to the counsel for the railroad company free rein to make an argument to the jury, based on what the property was worth when purchased by one who did not need it. In the case of *Madisonville, H. & E. R. Co. v. Ross*, 126 Ky. 138, 103 S. W. 330, 31 Ky. Law Rep. 584, 13 L. R. A. (N. S.) 420, the court quoted with approval the following from *Lewis on Eminent Domain*, § 478: "In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it."

It will be observed that that part of the

instruction complained of is in the precise words of the foregoing section from *Lewis on Eminent Domain*. While it is perhaps better to use, concerning the purchaser, the words "who desires to buy," yet the difference between such an instruction and that given is more technical than substantial. One does not ordinarily buy property unless he wants it, and the words in an instruction, "when bought by one," carry with them the idea of the desire to buy. As the instruction is in the language heretofore approved by this court, and is in effect substantially the same as that employed in the instruction directed to be given in *Calor Oil & Gas Co. v. Franzell*, supra, it follows that the court did not err in using the language complained of.

[2] 2. A reversal is asked because of the trial court's refusal to give the following instruction: "The court instructs the jury that they will by their verdict award to the defendants, who now hold title to the property which the Louisville & Interurban Railroad Company now seeks to condemn, such an amount as will fairly and properly compensate them for the market value of their real estate, and the improvements existing thereon. In other words, the jury will determine what the property is worth on the market, and in fixing the amount they should consider the real estate, not merely with reference to the uses to which it is at this time applied, but with reference to the uses to which it may be plainly adapted; that is to say, what is it worth from its being available for valuable uses? Further the jury should consider, in fixing the market value of the property, the uses for which the property is suitable, having regard to the existing business or wants of the community, and such as may be reasonably expected in the immediate future."

It appears from the evidence that the property in question was long a part of the "tenderloin" district of Louisville. At the time of the condemnation proceedings, the improvements consisted of two tenement houses, occupied by colored people. Within recent years quite a number of factories and storage plants have been established in the vicinity. The property in question had thus become available for such special uses as warehouses, cold storage, produce, groceries, factories, etc. It is therefore argued that the offered instruction was peculiarly applicable under the facts of this case. In support of this contention we are cited to the case of *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, and to the opinions in the case of *Chicago, St. Louis & New Orleans R. Co. v. Rottgering*, 83 S. W. 584, 26 Ky. Law Rep. 1167, and *West Virginia, etc., R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. 1055, 15 Ky. Law Rep. 7. Even if it were the rule in this state to instruct the jury that, in estimating the market value of the property condemned, they should take into consideration the uses for which the

property was suitable, having regard to the existing business or wants of the community, or such as might be reasonably expected in the immediate future, it may be doubted if the property in question possesses such peculiar adaptability for a particular purpose as to justify the giving of such an instruction under the facts of this case. However that may be, it is sufficient to say that, although we have recognized the propriety of admitting evidence with reference, not only to the present uses of the property, but as to its adaptability for other uses to which it may be put in the immediate future, as will be seen by an examination of the cases of *Chicago, etc., R. Co. v. Rottgering, supra*, and *West Virginia, etc. R. Co. v. Gibson, supra*, we have never held it proper to instruct the jury on the necessity of considering such evidence in estimating the value of the property condemned. On the contrary, we have repeatedly held that an instruction on the measure of damages similar to the one given in this case, and no other, should be given. In other words, the law should be given to the jury without including the evidential matters referred to in the offered instruction. *West Virginia, etc., R. Co., v. Gibson, supra*; *Calor Oil & Gas Co. v. Franzell, supra*; *Madisonville, etc., R. Co. v. Ross, supra*; *Weiss v. Commissioners of Sewerage of Louisville, 152 Ky. 552, 153 S. W. 967*. In this case evidence of the availability of the condemned property for other uses in the immediate future was heard and considered by the jury. The court, therefore, did not err in refusing the offered instruction.

[3, 4] 3. This proceeding was begun in the county court during the month of September, 1912. The trial in the circuit court took place on May 31, 1913, or about nine months after the report of the commissioners and the verdict in the county court. In the meantime the tenants of the property had vacated the premises, and one of the buildings had been damaged by the fall of the wall of the adjoining property. Evidence of the market value of the property was confined to its value at the time of the trial in the circuit court. This, it is claimed, was error. In this connection our attention is called to the case of *South Park Commissioners v. Dunlevy, 91 Ill. 49*, and to *Burt v. Merchants' Ins. Co., 115 Mass. 14*, where it is held that the land must be estimated according to its value at the time of the filing of the petition. Such is not, however, the rule in this state. Under our statute, the company authorized to condemn begins its proceedings in the county court. Commissioners are appointed to assess the damages. On the filing of their report, either party may except. When exceptions are filed, a jury is impaneled to try the issues of fact made by the exceptions. If sufficient cause be not shown for setting aside the verdict, the court renders judgment. Kentucky Statutes, §§ 835, 835a, 836, 837, 838,

and 839. Section 839 further provides: "Either party may appeal to the circuit court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo*, upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto."

It will be observed that section 839 provides for a trial "*de novo*, upon the confirmation of the report of the commissioner by the county court, or the assessment of damages by said court." In other words, the confirmation of the report of the commissioners is not the sole question to be tried on the appeal to the circuit court, but the whole question of the assessment of damages may be gone into by that court. Until the damages are paid the owner, or paid into court, the company condemning is not entitled to take possession. The value of the property at the time it is taken, which is the same as at the time of the trial, where an appeal is prosecuted to the circuit court, therefore controls, and evidence of the value of the property condemned should be confined to its value at the time of the trial, which immediately precedes its taking. *Arnold v. Covington, etc., Co., 1 Duv. 377*; *L. & N. R. Co. v. Asher, 10 Ky. L. R. 1021*.

[5] Another error relied on is the refusal of the trial court to permit Dr. W. T. Hays, who had formerly owned 82 feet of ground on Green street, directly back of the property in question, to state what he gave for that property, and what he sold it for. It may be conceded that the sale prices of surrounding property, similar in character and location, are admissible as evidence of the market value of the property in question. *Paducah v. Allen, 111 Ky. 371, 63 S. W. 961, 23 Ky. Law Rep. 701, 98 Am. St. Rep. 422*. Here, however, the question propounded the witness fixed neither the time of his purchase nor the sale. Nor does the record contain any avowal as to the cost or sale of the property. Un-



der these circumstances, we cannot say that the refusal of the trial court to permit the witness to answer was prejudicial error.

[6] The witnesses who testified as to the market value of the property in question fixed its value at prices ranging from \$3,000 to \$9,500. A number of witnesses testified for each side. The jury fixed the value of the property at \$4,500, which is the same valuation put upon it by the three commissioners appointed by the Jefferson county court. Under these circumstances, it cannot be said that the finding of the jury is flagrantly against the evidence.

Judgment affirmed.

### O'HARA v. GRAHAM.

(Court of Appeals of Kentucky. May 7, 1914.)

#### 1. SALES (§ 411\*)—ACTIONS FOR BREACH — SUFFICIENCY OF PETITION.

The petition alleged that plaintiff was a retailer of buttermilk and had built up a large trade and contracted with defendant in 1908, by which defendant agreed to sell plaintiff the buttermilk from 37 cows, the contract to begin June 1, 1909, and to continue until terminated by either party, giving 90 days notice, and that defendant, without giving such notice, refused to furnish plaintiff any buttermilk after April 1, 1911, and that after defendant breached his contract, plaintiff was unable to procure buttermilk elsewhere to supply his customers, thereby losing the profit of 7 cents a gallon he would have made on the buttermilk, and also losing many of his customers to his damage, etc. Held, that the petition alleged a good cause of action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.\*]

#### 2. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—SUBMISSION OF ISSUE.

Error in submitting the question of damages for loss to plaintiff's business in an action for breach of contract was not prejudicial to defendant, where the jury did not allow anything for loss to his business.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

#### 3. SALES (§ 417\*)—ACTION—SUFFICIENCY OF EVIDENCE—BREACH.

In an action for breach of contract to furnish plaintiff buttermilk, evidence held to show that defendant agreed to furnish buttermilk to plaintiff until the contract was terminated by 90 days' notice, and that without the required notice refused to deliver any more buttermilk to plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law and Equity Division.

Action by James A. Graham against Michael O'Hara. From a judgment for plaintiff, defendant appeals. Affirmed.

Castleman & Murphy, of Covington, for appellant. O. M. Rogers and R. G. Williams, both of Covington, for appellee.

CARROLL, J. This suit was brought by the appellee, Graham, against the appellant,

O'Hara, to recover damages for the alleged breach of a buttermilk contract. In the petition as amended, Graham averred that he was engaged in the business of retailing buttermilk in the cities of Cincinnati and Covington, and that he had, by the expenditure of much money, labor, and attention, established a large trade in each of these cities; that he made a contract with O'Hara in 1908 by which O'Hara was to sell him the buttermilk from 37 cows, amounting approximately to 500 gallons a week, at the price of \$30 per month; that the contract was to begin on January 1, 1909, and to continue until terminated by either of the parties thereto giving to the other 90 days' notice of his intention to terminate the same. He further averred that O'Hara, in violation of the contract, and without giving the notice required, refused to furnish him any buttermilk after April 1, 1911, and that when O'Hara broke the contract, he was unable to procure buttermilk from other persons to supply his customers, and as a consequence lost the profit of 7 cents a gallon that he would have made on the buttermilk, and in addition thereto lost many of his customers, and he asked damages in the sum of \$10,000. For answer O'Hara denied many of the averments of the petition, but admitted that on April 1, 1911, and thereafter, he refused to deliver any buttermilk to Graham. He further admitted that he had sold Graham buttermilk for the years 1907, 1908, 1909, and 1910 at the rate of \$30 per month, but averred that it was sold under a separate contract for each year, and that each yearly contract expired on January 1st, and that the contract was not renewed in January, 1911, or at any time during 1910, for the year 1911. There was a trial before a jury and a verdict in favor of Graham for \$260, and O'Hara appeals.

A reversal is asked because the petition as amended did not state facts sufficient to support the action, because the court erred in giving and refusing instructions, and because the verdict is not sustained by sufficient evidence and is excessive.

[1] That the petition as amended stated a good cause of action we have no doubt. It set up the contract, the breach of it, and the damages sustained in consequence thereof, resulting not only from loss of profits, but loss of an established business.

[2] Concerning the question that the evidence did not support the verdict, and that the verdict was excessive, we think there was sufficient evidence to take the case to the jury on the subject of the loss of profits that Graham could have made if the contract had not been broken, and to support the assessment. The evidence of Graham is somewhat contradictory, and is not entirely clear as to the time when the contract was made or the terms of it, but yet when the

whole of his evidence is read and considered, there is enough in it to show the terms of the contract as relied on; that he had an established business in the retail buttermilk trade in Cincinnati and Covington; that he sold the buttermilk at an average price of 12½ cents a gallon; that it cost him, including the cost of delivery, about 7½ cents a gallon, leaving a profit of about 5 cents a gallon; that under his contract he should have received from O'Hara about 400 gallons a week; that O'Hara was to give him 90 days' notice before he quit furnishing him buttermilk; and that, although O'Hara promised him in March, 1911, that he would begin furnishing him buttermilk under the contract on April 1st, when April 1st arrived, he refused to let him have any, without giving him previous notice of his intention to break the contract; that when O'Hara refused to let him have the buttermilk to supply his trade, he could not get buttermilk any place else, although he made diligent efforts to do so, and as a result of the failure to get the buttermilk from O'Hara, he lost not only the profit he would have made but the business of several of his best customers. Two other witnesses testified that they heard O'Hara tell Graham in March, 1911, that he could commence getting milk on the 1st of April, and one or two witnesses say that after this they heard O'Hara say that he did not intend to let Graham have any milk, as his son had started in the business, and he was going to let him have all the milk he could spare. O'Hara in his evidence denied that in March, or at any time in 1911, he agreed to let Graham have any milk. He said that his contracts with Graham were made each year and ended on the 1st of January each year, and that in December, 1910, he told Graham that he could not furnish him any milk in 1911. The court instructed the jury in substance, that if they believed from the evidence that O'Hara in 1908 entered into a contract with Graham by which O'Hara agreed to sell and deliver to Graham the buttermilk from 37 cows for the sum of \$30 per month, which agreement might be terminated upon 90 days' notice by either party; and further believed that about the 1st of April, 1911, O'Hara, without notice to Graham, declined to deliver any buttermilk, and by reason thereof Graham suffered loss of profits in his business, they should find a verdict for Graham. They were further told that if they found a verdict for Graham, they should award him such a sum of money as they believed from the evidence would fairly and reasonably represent the difference between the cost of the buttermilk and the price at which it could have been sold for a period of 90 days from April 1, 1911, and further instructed that if they believed O'Hara broke the contract, they might allow Graham, in addition to the loss of profits, such a sum as

would reasonably and fairly compensate him for any damage he suffered by reason of loss of business. The instruction presenting O'Hara's theory of the case was more favorable than the pleadings and evidence justified. Serious objection is urged by counsel for appellant to so much of the instructions as authorized the jury to allow Graham anything on account of loss to his business. We agree with counsel that the evidence did not sufficiently show the damage to authorize an instruction on this subject, but we are further of the opinion that the instruction was not prejudicial, because the jury did not allow Graham anything for loss to his business. Their verdict reads: "We, the jury, find for the plaintiff in the sum of \$260.00, this amount estimated profits for 90 days." As the jury did not allow anything for loss of business, it is apparent that the instruction authorizing them to award damages for loss to his business was, in this case, a harmless error, as it was fully cured by the verdict of the jury.

[3] The weight of the evidence shows very plainly that O'Hara did agree to furnish buttermilk to Graham in 1911, beginning April 1st, and that, without any notice to him that he did not intend to comply with his contract, he refused, on April 1st and thereafter, to deliver any buttermilk to him. It is further shown, without contradiction, that Graham sustained quite a serious loss by this breach of the contract. Upon the merits of the case, the verdict of the jury is fully supported by the evidence and allowed no more than was just compensation to Graham for the loss of profits he would have made if O'Hara had performed his contract.

The judgment is affirmed.

#### JOSSELYN BROS. v. COMMONWEALTH. (Court of Appeals of Kentucky. May 8, 1914.)

##### 1. INTOXICATING LIQUORS (§ 147\*)—OFFENSES —PLACE OF SALE.

Where a resident of a county in which local option was in force sent an order for whisky, accompanied by a money order in payment therefor, to a liquor dealer in another county, who delivered the whisky to an express company in the latter county, consigned to the buyer, the title vested in the buyer when the whisky was delivered to the carrier, and the sale took place in that county, and not in the local option county, in violation of Ky. St. §§ 2557 and 2557a, prohibiting sales in local option counties.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.\*]

##### 2. INTOXICATING LIQUORS (§ 148\*)—OFFENSES —SALE IN LOCAL OPTION TERRITORY.

Nor did such acts constitute a violation of Acts 1912, c. 146, making it unlawful for one, either as agent of the buyer or the seller, to purchase or procure intoxicating liquors in local option territory, since that act applies only to purchases which take place in local option territory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.\*]

Appeal from Circuit Court, Carter County. Josselson Bros. were convicted of a violation of the local option law, and they appeal. Reversed and remanded.

George B. Martin, of Catlettsburg, for appellants. James Garnett, Atty. Gen., and O. S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Defendants, Josselson Bros., were convicted of a violation of the local option law; their punishment being fixed at a fine of \$100 and confinement in the county jail for a period of 20 days. They appeal.

It is insisted that the demurrer to the indictment should have been sustained; but, in view of our conclusion that the facts do not warrant a conviction, we deem it unnecessary to consider that question.

The case was tried on an agreed statement of facts.

[1] From this statement, it appears that the local option law is in force in Carter county, but not in force in Catlettsburg, Boyd county. Defendants, at the time of the transaction complained of, were engaged in the wholesale and retail liquor business in Catlettsburg. The prosecuting witness, J. R. Stidham, who lived in Carter county, on February 16, 1914, wrote the defendants requesting them to ship to him at Grayson, a town in Carter county, four quarts of Old Taylor whisky. Accompanying the letter was a post office money order for \$4.40 to pay for the whisky. The letter was mailed in Grayson, and received by the defendants at Catlettsburg, Boyd county. Thereupon defendants delivered the whisky, consigned to Stidham at Grayson, to the Adams Express Company, a common carrier, at Catlettsburg. It will be observed, therefore, that both the order and the purchase price were received in Catlettsburg, and that, pursuant to said order, the whisky was delivered in Catlettsburg to a common carrier, consigned to the prosecuting witness in Carter county. Under these circumstances, the common carrier was the agent of the purchaser, and the title to the whisky vested in the purchaser on its delivery to the common carrier, and the sale, therefore, took place in Catlettsburg, and not in Carter county. *Josselson v. Commonwealth*, 154 Ky. 795, 159 S. W. 559; *Commonwealth v. Gast, etc.*, 143 Ky. 674, 137 S. W. 515; *Parker v. Commonwealth*, 147 Ky. 715, 145 S. W. 754; *Geo. Weldemann Brew. Co. v. Commonwealth*, 123 Ky. 556, 96 S. W. 834. It follows that the facts are not sufficient to sustain a conviction under sections 2557 and 2557a, Kentucky Statutes.

[2] Nor are the facts sufficient to make out a case under chapter 146, p. 656, Acts of 1912, making it unlawful for any person, firm, or corporation, either as the agent of the buyer or the seller, to purchase or pro-

cure for another intoxicating liquors in local option territory. In construing this act, it has been held that the purchase or procurement must take place in local option territory. It does not apply to the purchase or procurement of intoxicating liquors in territory where they may be lawfully purchased or procured. *Calhoun v. Commonwealth*, 154 Ky. 70, 156 S. W. 1077; *Josselson v. Commonwealth, supra*. In this case the whisky was neither purchased nor procured in local option territory.

It follows that the trial court erred in not directing the jury to acquit the defendants.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

#### HACKER v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 8, 1914.)

##### 1. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

An instruction that the jury believed beyond a reasonable doubt that accused was in danger of death or great bodily harm, and that it was necessary or believed by accused in the exercise of reasonable judgment to be necessary to kill deceased to avert that danger, then he should be acquitted, is erroneous because leaving it to the jury to say whether accused was in danger, instead of accused who was entitled to determine that for himself.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 2. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

An instruction on self-defense, which required the jury to find that accused did not seek or bring on the difficulty, is erroneous without further explanation, for the jury might have understood that accused provoked the difficulty merely by going to the place where deceased was or opening a conversation with him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from Circuit Court, Leslie County.

Jack Hacker was convicted of voluntary manslaughter, and he appeals. Reversed and remanded.

Lewis & Lewis and Oleon K. Calvert, all of Hyden, for appellant. Jas. Garnett, Atty. Gen., and D. O. Myatt, Asst. Atty. Gen., for the Commonwealth.

MILLER, J. The appellant, Jack Hacker, and his brother, Henry Hacker, were jointly indicted for the murder of Charley Maness. The appellant, Jack Hacker, was given a separate trial and found guilty of voluntary manslaughter. He appeals, and asks a reversal upon the ground that the instruction upon self-defense was erroneous.

[1] 1. It would serve no useful purpose to give a detailed account of the testimony; it is sufficient to say the evidence justified an instruction upon self-defense.

The court gave the following instruction upon that subject: "If you shall believe from

the evidence that at the time the defendant, Jack Hacker, shot at, wounded, and killed deceased, Charley Maness, if you shall believe from the evidence beyond a reasonable doubt that he did so do, that the defendant was in danger of death, or the infliction of some great bodily harm at the hands of deceased, Maness, and that it was necessary, or believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to so shoot at, wound, and kill said Maness in order to avert that danger, real or apparent, then you ought to find the defendant not guilty upon the grounds of self-defense, or the apparent necessity therefor; unless you shall further believe from the evidence beyond a reasonable doubt that the defendant sought and brought on the difficulty in which deceased was killed, and made the harm or danger, if any there was, necessary or excusable upon the part of said Maness, in which event you cannot acquit the defendant upon the grounds of self-defense, or the apparent necessity therefor." The complaint is that this instruction took from the defendant his right, under the law, to judge for himself whether he was in danger of losing his life, and erroneously left that question to the jury.

It will be noticed that the instruction, except the last clause thereof and the proper names of the parties, is a copy of the instruction given and condemned in *Sizemore v. Commonwealth*, 158 Ky. 495, 165 S. W. 669. In condemning the instruction in the *Sizemore* Case, we said: "The complaint is that this instruction takes from the defendant the right given him under the law to judge of and act upon the appearances as he saw them at the time of the difficulty, and leaves that defense to the judgment of the jury, who were not present, and who were not called upon to exercise their judgment under the circumstances that *Sizemore* was required to act. Under the conflicting testimony as to who was the aggressor, appellant was unquestionably entitled to an instruction giving the law of self-defense; and, since the jury ought, as far as possible, to judge of the facts surrounding the homicide from the standpoint of the defendant, such an instruction should make it clear that he was justified if the means used by him to protect himself appeared to him, at the time, to be necessary for that purpose."

In speaking of a similar instruction in *Cleveland v. Commonwealth*, 101 S. W. 931, 31 Ky. Law Rep. 115, the court said: "The objection to this instruction is that it left to the jury, and not to the defendants, to say whether or not they believed that the deceased was about to inflict upon them, or either of them, some great bodily harm. In cases of this character the question is not what the jury believes, but what the accused in the exercise of a reasonable judgment believed at the time of the homicide. The jury might not believe from the evidence that

at the time the deceased was killed the accused believed the deceased was about to inflict upon him some great bodily harm, and yet the defendant might have so believed. This identical question has been determined by this court in the cases of *Ellis v. Commonwealth* [98 S. W. 278], 30 Ky. Law Rep. 348, *Dossenbach v. Commonwealth* [99 S. W. 626] 30 Ky. Law Rep. 749, and *Austin v. Commonwealth* [91 S. W. 267], 28 Ky. Law Rep. 1087, in which an instruction in all respects similar to this was condemned, and it was held to be reversible error." See, also, *Adkins v. Commonwealth*, 82 S. W. 242, 26 Ky. Law Rep. 496.

The opinion in the *Sizemore* Case is conclusive of this appeal, and requires a reversal.

[2] 2. It is further contended that the qualification in the instruction above quoted, reading "unless you shall further believe from the evidence beyond a reasonable doubt that the defendant sought and brought on the difficulty," without explaining to the jury how or by what means the difficulty was "brought on" by the defendant, was erroneous.

This precise question has been frequently before this court. In *Allen v. Commonwealth*, 86 Ky. 642, 6 S. W. 645, 9 Ky. Law Rep. 784, the court said: "The jury were told in the broadest language that the accused could not rely upon the plea of self-defense if he 'brought on' the difficulty. This gave them too much latitude. It left out of view any intention upon the part of the accused, and authorized them to find, for instance, that he had 'brought on' the difficulty by merely going to where the deceased was, or opening a conversation with him. Guided by such an instruction, a jury might infer that a defendant had 'brought on' a difficulty by a mere idle word, or one spoken in jest, and without any intention of injuring the other party. \* \* \* It is true some writers, in general terms, say that if an accused 'provokes the difficulty,' he thereby divests himself of the right to say that he acted in self-defense. Bishop says: 'For he who seeks and brings on a quarrel cannot in general avail himself of his own wrong in defense.' 2 Bishop, Criminal Law, § 702. This doctrine, generally speaking, is correct; But it is improper to say to a jury that if the defendant 'brought on' the difficulty he cannot rely upon the plea of self-defense, because the language is too general, and opens altogether too wide a field for inference and supposition upon the part of the juryman."

To the same effect, see *Hamlin v. Commonwealth*, 12 S. W. 146, 11 Ky. Law Rep. 348; *Crane v. Commonwealth*, 13 S. W. 1079, 12 Ky. Law Rep. 161; *Wilcoxon v. Commonwealth*, 23 S. W. 195, 15 Ky. Law Rep. 261; *Greer v. Commonwealth*, 85 S. W. 166, 27 Ky. Law Rep. 333; *McGowan v. Commonwealth*, 117 S. W. 387; *Starr v. Commonwealth*, 97 Ky. 193, 80 S. W. 897, 16 Ky. Law

Rep. 843; Crowe v. Commonwealth, 91 S. W. 663, 29 Ky. Law Rep. 14. In the McGowan Case, supra, after condemning the feature of the instruction now under consideration, the court said: "The error in this instruction is that it fails to define how the defendant 'brought on the difficulty.' The jury should have been instructed that if the defendant brought on the difficulty by striking or attempting to strike the deceased, or by cutting or attempting to cut him, he should not be excused on the ground of self-defense."

Upon another trial, if the evidence warrants an instruction upon self-defense, the instruction should be corrected in the two respects above indicated.

Judgment reversed for a new trial.

### LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 8, 1914.)

#### 1. NUISANCE (§ 3\*)—MAINTENANCE OF RAILROAD YARDS.

The operation of railroad yards is lawful, and the necessary incidents thereto, such as running trains in the yard, the emission of smoke, the ringing of bells, and blowing of whistles, if done in a careful and reasonable manner and without unnecessary noise, is not a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.\*]

#### 2. EVIDENCE (§ 20\*)—JUDICIAL NOTICE—RAILROAD OPERATIONS.

It is a matter of common knowledge that the emission of smoke from engines and the ringing of bells and blowing of whistles are necessary incidents to the operation of railroad trains.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

#### 3. NUISANCE (§ 5\*)—WHAT CONSTITUTES.

The doing of a lawful act in a careful manner is not a nuisance, but the doing of a lawful thing in a negligent manner may be a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 6; Dec. Dig. § 5.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

The Louisville & Nashville Railroad Company was convicted of maintaining a nuisance, and appeals. Reversed, with directions to sustain demurrer to the indictment.

Benjamin D. Warfield, of Louisville, S. D. Rouse, of Covington, and Chas. H. Moorman, of Louisville, for appellant. Jas. Garnett, Atty. Gen., and Richard G. Williams, Commonwealth's Atty., of Covington, for the Commonwealth.

TURNER, J. The grand jury of Kenton county returned the following indictment against appellant: "The grand jury of Kenton county, in the name and by the authority of the commonwealth of Kentucky, accuse Louisville & Nashville Railroad Company, a corporation, of the offense of maintaining and

continuing a common public nuisance committed as follows, to wit: The said Louisville & Nashville Railroad Company, a corporation under the laws of the state of Kentucky between the first day of July, 1912, and the 17th day of February, 1913, in the county and state aforesaid, and before the finding of this indictment and within one year before the finding of this indictment, the said company being then and there a corporation under the laws of the state of Kentucky and as such then and there engaged in the operation of a railroad in the city of Covington by hauling and running cars coupled to and drawn by engines with steam power and in connection therewith did own, operate, manage and control what is known as the railroad yards in the said city, located, being and extending from Twentieth street, just west of Madison avenue, through the southern part of said city, a distance of from one-half to three-quarters of a mile; that in said yards, located in said city, the said company has and maintained many railroad tracks on which freight trains, cars and engines are daily and nightly run into and upon; that in shifting said cars, running and operating its engines in the yards aforesaid, the said company did unlawfully, unreasonably and intentionally cause, suffer and permit, during said time aforesaid and for a long, unnecessary and unreasonable length of time, steam to escape from its engines in said yards, thereby causing sharp, loud and disagreeable noises, steam whistles to sound, making long, loud and piercing blasts, bells on said engines to ring, and large volumes of smoke to come out of and issue from said engines, impregnating the air and atmosphere in the neighborhood thereof, from which noxious disagreeable, unhealthy and unwholesome gases, smoke, vapors, foul odors and sickening smells arise and pass into the houses, homes, and residences of many persons being, residing, passing and repassing in the neighborhood thereof and then and there having the right to be, reside, remain, pass and repass, to the detriment, annoyance and nuisance of all of the good citizens of this commonwealth then and there being, residing, passing and repassing, and having the right so to do." The defendant's demurrer to the indictment was overruled, and it was found guilty and a fine of \$350 assessed against it.

[1] The operation of a railroad train, and of switchyards, in connection therewith, is a lawful occupation, and the carrying on of its business, and the necessary incidents thereto, when done in a careful and reasonable way, and without necessary noises cannot be a nuisance.

[2] It is a matter of common knowledge that the emission of smoke from engines, and ringing of bells, the blowing of whistles, and the grinding of wheels are necessary incidents to the operation of railroad trains. A railroad cannot be operated without burn-

ing coal, and the coal cannot be burned without making smoke; the ringing of bells and the blowing of whistles are not only necessary incidents to the operation of railroad trains, but the giving of signals in that way is actually required by law in many instances; and it is perfectly apparent that the grinding of wheels cannot be avoided in the operation of trains. It will be observed that there is no allegation in the indictment that the things complained of were unnecessarily done, or that it was not necessary for the railroad company in the operation of its trains to blow the whistles, to ring the bells, or to cause the emission of large volumes of smoke. The necessities of commerce demand the operation of railroads, and railroads cannot be operated without these necessary incidents, and there can be no nuisance in the operation of a railroad or of its switchyards, unless the noises created thereby are unnecessary in its operation.

[3] The doing of a lawful thing in a careful and prudent manner cannot be a nuisance; but the doing of a lawful thing in a reckless, careless, or negligent way may be a nuisance. In this case if the ringing of bells, the blowing of whistles, and the emission of smoke was not done to any greater extent than was necessary in the prudent operation of appellant's trains, there was no nuisance, and there being no allegation in the indictment that they were done to any greater extent than was necessary the demurrer should have been sustained. Cyc. vol. 33, p. 644, in discussing nuisances in connection with the operation of railroads, says: "The operation of a railroad constructed by lawful authority cannot, by reason of the noise, smoke, vibrations, or other objectionable features necessarily incident thereto, be deemed a nuisance in the absence of any negligence or abuse in the manner of its operation, although it may be located along a public street, or pass through a populous village or city, and the same rule applies under similar circumstances to the construction, maintenance, and use of terminal yards and structures and appliances necessarily incident to the operation of the road. But a railroad company may be guilty of maintaining a nuisance by reason of the negligent or improper manner of operating or using its cars and locomotives, or of erecting, using, and maintaining structures and appurtenances incidental to the operation of the road such as engine houses, cattle pens, coal bins, and the like, or making an unauthorized or improper use of streets. The Legislature may in the interest of the public welfare require that to be done such as the sounding of bells or whistles which in the absence of statute might be deemed a nuisance, and ordinarily acts authorized by law such as the operation of trains over the road cannot constitute a nuisance unless done in an unauthorized or negligent manner; but if the acts would be

a nuisance on common-law grounds this rule can only apply where the statutory authorization is expressed or clearly implied from the power expressly granted."

For the reason indicated, the judgment is reversed, with directions to sustain the demurrer.

#### UNITED STATES FIDELITY & GUARANTY CO. v. CARTER et al.

(Court of Appeals of Kentucky. May 7, 1914.)

##### 1. TRUSTS (§ 380\*)—TRUSTEES' BONDS—CONSTRUCTION.

Where the bond of a testamentary trustee was conditioned upon the trustee's faithful performance of his duties and his accounting for all moneys belonging to the trust estate, the surety is not liable for attorney's fees expended after the trustee's resignation, to recover amounts defaulted by him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 622; Dec. Dig. § 380.\*]

##### 2. TRUSTS (§ 385\*)—LIABILITY ON BOND—SURETY—CONCLUSIVENESS OF JUDGMENT AGAINST PRINCIPAL—PERSONS CONCLUDED.

Where the judgment finally settling the accounts of a defaulting trustee, who was entitled to a part of the trust estate, and to whose rights the surety on his bond had been subrogated, assessed attorney's fees expended in collecting the amount of the defalcation, and the surety, who was both a party and a privy to the suit, did not appeal, as allowed by Code, § 734, the judgment was conclusive on the surety, thus diminishing its right of subrogation, though the bond did not include attorney's fees.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 624; Dec. Dig. § 385.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Wm. D. Carter and others against the United States Fidelity & Guaranty Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Bruce & Bullitt, Wm. Marshall Bullitt, and Keith L. Bullitt, all of Louisville, for appellant. Ellerbe W. Carter and H. H. Nettelroth, all of Louisville, for appellees.

NUNN, J. In one form or another this is the third time this case has been here, and we therefore venture the hope that this time will be the last time.

In a suit to settle the accounts of a defaulting trustee, an item of \$6,089 was charged against him. The item was for attorneys' fees expended by the succeeding trustee in recovering the loss by prosecuting actions against his sureties, and otherwise. The question here is whether, in a suit on the bond, the surety can attack that settlement, or the items embraced in it. That is, whether as to the surety the settlement suit is *res adjudicata*. The lower court held that it is, and rendered a judgment against the appellant surety for the amount its principal was owing on the settlement.

All the troubles grow out of the theft of a large part of the estate of George L. Douglas by Lattimore D. Carter, who was acting

as trustee. To understand the matter at issue, it is necessary to review some history.

George L. Douglas devised his large estate (realty and personalty) to his daughter, Mrs. Carter, for life, with remainder in fee to her five children (testator's grandchildren). By codicil he attempted to tie up his estate and postpone the vesting of the fee by devising to a trustee for the following uses: (a) Mrs. Carter for life; (b) after her death to her five children for life; and then (c) after their death in fee to their children (testator's great-grandchildren). This will was accepted without question by the devisees, and from time to time various trustees were appointed, and these, after settling their accounts, had, in turn, resigned. These several trustee settlements were made in the suit of John W. Barr v. Stuart R. Carter (No. 47-523), pending in the Jefferson circuit court, and this is commonly referred to in the record of this appeal as the "settlement suit."

Lattimore D. Carter was one of Mrs. Carter's five children, and in 1902, in the settlement suit, he was appointed trustee under the Douglas will, to take the place of the trustee who had resigned, and in that suit he gave an unlimited bond with the appellant guaranty company as surety thereon, covenanting that: "Lattimore D. Carter, as trustee under the will of George L. Douglas, deceased, will faithfully perform all his duties as such, and will comply with the judgment and orders of the court in the action, and will account for, pay, and deliver to the said parties and persons all moneys or property due or belonging to them when required." In 1907 Lattimore Carter absconded, and it soon developed that he had either wasted, or carried away with him, over \$70,000 of the Douglas estate. The only thing he ever sent back was his resignation. The court appointed Peyton N. Clarke as trustee to succeed him. Clarke filed the present suit to recover from appellant, the surety on the bond, the amount of defalcation. Shortly after the suit was filed, the life tenant, Mrs. Carter, died. The guaranty company had already interposed a defense to the action upon the bond, and upon the death of Mrs. Carter tendered an amended and supplemental answer, counterclaim, etc., insisting, to use the language of appellant, that the codicil was void because in violation of the rule against perpetuities; that upon Mrs. Carter's death the entire estate had, under the original will, vested in fee simple in her five children, of whom Lattimore was one; that consequently one-fifth of the funds which Lattimore had appropriated was really his own property; and that the guaranty company should not be made to reimburse Lattimore Carter for property that he took which really belonged to himself; and for the remaining four-fifths of the defalcation, which it would have to pay, it sought recoupment by subjecting Lattimore Carter's one-fifth interest in the real estate, etc.

The chancellor refused to permit the supplemental answer to be filed, and in November, 1908, rendered judgment against the guaranty company for \$72,847.67 as the amount of the whole defalcation as of that date. The guaranty company appealed, but, rather than supersede, it paid Clarke, the trustee, the full amount of the judgment. Clarke took a cross-appeal involving certain items which the lower court had rejected as not being covered by the bond.

In *U. S. F. & G. Co. v. Douglas' Trustee*, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993, this court reversed the judgment on both the original and cross appeals, and decided: (1) That the codicil was absolutely void because in violation of the rules against perpetuities. (2) That on Mrs. Carter's death the entire estate vested in fee simple in her five children, of whom Lattimore Carter was one. (3) That the guaranty company should have been permitted to file its amended and supplemental answer, setting up its contention; and also that certain items involved on the cross-appeal were covered by the bond, and were a part of the defalcation, bringing the amount to \$75,000. On a return of the case the lower court adjudged a restoration to the guaranty company of one-fifth of the gross sum which it had paid into court in lieu of superseding the former judgment; but, in view of the fact that a final settlement of Lattimore D. Carter's account as trustee of the Douglas estate might show that his gross one-fifth of the amount paid into court was in excess of the sum to which Lattimore Carter would be entitled from the whole estate, the following provision was inserted in the judgment: "And it appearing that issues have not yet been joined upon said amended and supplemental answers, counterclaims, and cross-petitions filed herein by said defendant, the United States Fidelity & Guaranty Company, and that it would be premature at this time to attempt herein to determine the amount of the interest or share of said Lattimore D. Carter in said total shortage or in the estate of George L. Douglas, deceased, it is therefore ordered that this cause be retained for such further proceedings as may be necessary or proper to determine the rights of all parties herein arising under said amended and supplemental answers, counterclaims, and cross-petitions; and it is further expressly provided that nothing herein shall prejudice or affect the rights of said plaintiff trustee or of the beneficiaries under said will of George L. Douglas, deceased, to charge against the interest or share of said Lattimore D. Carter in said estate, or against the sum herein ordered repaid unto the United States Fidelity & Guaranty Company, all costs, disbursements, and expenses properly incurred in ascertaining, establishing, recovering, and settling the amount of said trustee's shortage or defalcation, and also all costs and expenses of administration of said trust and the settlement

thereof. This cause is now retained for such further orders, judgments, and proceedings as may be necessary or proper." The guaranty company objected to the entry of this judgment, and particularly to the provisions just quoted from it, upon the idea that the amount of the defalcation had been fixed in a former judgment, and that the Court of Appeals had decided it was only liable for four-fifths of it, and, having paid same, it was in effect exonerated and fully discharged. The guaranty company thereupon sued out a writ of mandamus to compel the lower court to enter a judgment conforming to the opinion of this court in the Douglas Case, supra.

In *U. S. F. & G. Co. v. Miller*, 124 S. W. 341, this court, in an elaborate opinion, denied appellant's application for the mandamus, and concluded as follows: "In our opinion the judgment entered by the chancellor conformed to the opinion of this court and its mandate."

It might be noted here that under the judgment of the lower court, above referred to, the guaranty company was expressly subrogated to all the rights and interest of Lattimore Carter in the estate of George L. Douglas, pursuant to section 466 of the Kentucky Statutes. The guaranty company's supplemental answer showed that Lattimore Carter's interest in the Douglas real estate amounted to \$25,000. How much the guaranty company has been able to realize out of it does not appear. The settlement suit was then referred to the master commissioner, and the parties in interest, including the guaranty company, proceeded to have a final settlement of the defaulting trustee's accounts, and to determine, for the purpose of distribution, the exact amount due and on hand, for the several devisees. The commissioner reported that, on the date of his report, the personal estate with interest, had there been no defalcation, would have amounted to \$85,594, but that same had been reduced to the extent of \$7,150, which the trustee had been compelled to pay out as attorneys' fees in protecting the estate and securing recoupment of Lattimore Carter's shortage. The trustee had also restored to the guaranty company \$16,136, being the amount of L. D. Carter's one-fifth share, plus the interest, and this left on hand for distribution \$62,697. The item of \$7,150 was then charged to L. D. Carter as waste, but it is agreed that this item of waste should be, and was in the report, credited with several sums, so that it appears that the difference in the amount the other four devisees should have received, in the aggregate, from what they did receive, as shown by the report, is \$6,089.75, and this item is the matter of dispute on this appeal.

The Carter children claim that L. D. Carter owes them that sum as trustee, and that it was so adjudged by the court confirming the commissioner's report. The guaranty

company agrees to that proposition, but claims that the judgment is merely one as between Carter, who had defaulted, and these children, but insists that the court neither attempted nor intended to adjudge that the guaranty company should pay the children or trustee such sum. It is conceded that, as between Lattimore Carter and his brothers and sisters, he is not entitled to anything out of the estate until his defalcation has been made good, and until they have received as much from it as he has. The Carters contend that, since the guaranty company is subrogated to the rights of Lattimore Carter, it stands in his place and is not entitled to recoupment until the children have been equalized. In answer to this the guaranty company says that, in withdrawing the \$16,000 from the trustee when the case went back after the first appeal, it was merely withdrawing its own money, and not that of Lattimore D. Carter. In other words, it had paid under an erroneous judgment that much more than it should have paid. It should be remembered, however, that at the time Lattimore Carter defaulted, and when the suit was brought, his mother, the life tenant, was still alive, and the estate, therefore, was not divisible, because it had not come into the possession of the remaindermen; therefore his defalcation was of a trust fund belonging to the whole estate, and not merely of an undivided four-fifths. The life tenant dying in the meantime, the right of his surety to offset the defalcation with his undivided one-fifth interest in the estate is recognized in the first appeal, supra. The surety, although sustaining a heavy loss, has thus been relieved of paying one-fifth of its total obligation, and has also recovered something on Lattimore Carter's interest in his grandfather's estate, which it alleged was worth \$25,000. All these matters are mentioned here to show how intricate and complicated the affairs of the estate have become.

[1, 2] However, in view of the conclusion we have arrived at, it is unnecessary to deal further with them more than to say that for the purposes of this case we may concede that, in the first instance, attorney fees are not covered by the bond, although the charge may be valid against the principal. This statement is supported by ample authority. 11 Cyc. 24-104; 32 Cyc. 120; *National Surety Co. v. Arterburn*, 110 Ky. 832, 62 S. W. 862, 23 Ky. Law Rep. 281. But in this case the guaranty company was not only notified by the master commissioner, but appeared by attorney, and took part in the settlement, which was subsequently reported to the court. When same was reported, it filed objections to the items in question. When these exceptions were overruled, it prayed an appeal to this court, and, although more than two years elapsed, no appeal was ever taken.

The guaranty company was not only a party, but a privy, to the action, and, under section 734 of the Code, it unmistakably had



the right of appeal, and it seems to us that the sole question for determination is whether the judgment of the lower court on that settlement, and the guaranty company's failure to take the appeal, has precluded it from questioning the validity of the charge in a collateral suit. The guaranty company admits that the report and judgment is *res adjudicata*, but insists that it is so merely between Lattimore Carter, the principal, and the other devisees, for it says the report makes no mention of the guaranty company except to recite that its exceptions to the report are overruled, and grants to it the usual exceptions and appeal; but it says that the commissioner's report did not purport in any degree to fix any liability on the guaranty company. Failing to appeal, and two years having elapsed, the Carters then bring a direct action against the guaranty company to recover of it on the bond the amount fixed in the commissioner's report, and adjudged in the settlement suit as being due them from Lattimore Carter on account of the trusteeship.

The guaranty company resisted the payment, claiming that it is merely an indirect attempt to make them pay the trustee's attorney fees in collecting the bond, and that it is no more liable to pay the adverse parties' attorney fees than is any other litigant required to pay attorney fees, except the statutory fees adjudged against unsuccessful parties. The guaranty company admits that the provisions of its bond are sufficiently broad to cover any waste committed by the trustee, but claims that the commissioner cannot make a thing waste by naming it so, and in that way render the surety responsible for it. It argues, and correctly so, that it is not a waste, for waste consists in the misappropriation by the trustee of property itself, and by no construction can waste be considered so as to include attorney fees incurred by another long after the trustee ceased to have any control over the property or estate. But the difficulty with appellant's position is that under whatever name designated, or for whatever purpose the expense was incurred, the commissioner did find that on account of this trusteeship, and on a settlement of it, the trustee was indebted to these devisees in the sum stated. Appellant was a party to the settlement, participated in it, objecting to the finding and to the judgment rendered on it, and prayed an appeal which it never took. It seems to us appellant is now too late in questioning the charge.

The law is well settled in Kentucky that the surety of a fiduciary is bound by the settlement of such fiduciary's accounts in an action instituted for that purpose, and the surety cannot, in a subsequent action on the fiduciary's bond, question the correctness of the judgment on the settlement. *Clark v. Newman's Adm'r*, 49 S. W. 310, 20 Ky. Law Rep. 1239, a surety sought to defend on the ground that the administrator did not in fact receive the amounts with which she was

charged in the settlement, but this court said: "The appellant was a party to the suit in which the accounts of the administratrix were settled. He was not only a party to that suit, but it would appear that he really knew as much about the business as Mrs. Clark did. He was her son-in-law and her attorney. Under the decision in *Hobbs v. Middleton*, 1 J. J. Marsh. 176, he is bound by that judgment."

*McCalla's Adm'r v. Patterson*, 18 B. Mon. 208, was a suit against an administrator and his sureties upon his official bond, for a *devastavit*. The first paragraph of the sureties' answer sought to go behind the decree against the administrator. This court ruled out the defense, saying: "The responsibility of the sureties in the administrator's bond is incidental and collateral to that of the principal, and a judgment in favor of a creditor against the administrator concludes the sureties as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed in a suit on the administrator's bond."

To the same effect is *National Surety Co. v. Arterburn*, 110 Ky. 836, 62 S. W. 862, 23 Ky. Law Rep. 281, where it was sought to recover of an assignee on his bond the amount which it had been previously ascertained on settlement had gone into his hands, and also an additional sum expended by way of attorney fees in making the recovery. The assignee undertook to show that the settlement was erroneous; that in fact no such sum had come into his hands. This court, while denying his right to recover the attorney fees (these were not embraced in the settlement), did hold that an assignee's bond is analogous to that assumed by the surety of the fiduciary, and that a judgment obtained in the settlement suit against the principal is conclusive upon the surety, and the question cannot be reopened in a suit upon the bond.

*Hindman, etc., v. Lewman, etc.*, 63 S. W. 479, 23 Ky. Law Rep. 181, was another suit upon the bond of assignee, and the court used this language: "The action in which the judgment was rendered was in part for the purpose of ascertaining the amount of defalcation of Sullivan, assignee, and for which the appellees were liable. Whether the sureties were parties to the action or not, they are bound by the judgment of the court in fixing the amount of the liability of the assignee. *National Surety Co. v. C. C. Arterburn*, and cases therein cited." This doctrine is in harmony with that prevailing in nearly all other jurisdictions.

21 Cyc. 239, says: "In the absence of fraud or mistake, a final judicial settlement by a guardian is in most states conclusive on the sureties as to the existence and amount of the guardian's liability to the ward, even where the sureties were not made parties to the proceeding or notified thereof. A final settlement is also conclusive in favor of the

sureties as to all matters embraced in the adjudication, in the absence of fraud." Illustrating this rule is the case of *Cross v. White*, 80 Minn. 413, 83 N. W. 393, 81 Am. St. Rep. 267. On final settlement of the guardian's account he was adjudged indebted to his ward in a stated sum, and the court in deciding the case said: "The only question in the case is whether the order and determination of the probate court is final and conclusive against the sureties on the guardian's bond. The question came before this court in *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607, and such determination was there held conclusive. The decision is in line with the trend of authorities generally, and no reason occurs to us why we should depart from it."

We are of opinion that the settlement of the trustees' accounts is conclusive against the surety, and, they having failed to take an appeal, that settlement, and the judgment thereon, is res adjudicata as to the surety.

The judgment is therefore affirmed.

#### LINDENBERGER v. ROWLAND et al.

(Court of Appeals of Kentucky. May 7, 1914.)

#### 1. COVENANTS (§ 96\*) — WARRANTY AGAINST INCUMBRANCES—CONSTRUCTION.

A covenant in a deed "of general warranty against all incumbrances whatsoever except taxes for 1906, which the purchaser assumes to pay," applied only to incumbrances existing at the execution and delivery of the deed, and not to liens for street improvements made many years thereafter.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 111-129; Dec. Dig. § 96.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 16\*)—GROUNDS—IN GENERAL.

Where an instrument fails to embody the actual agreement of the parties because of mistake common to both parties or because of mistake on one side and fraud or inequitable conduct on the other, reformation is the proper remedy.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 68; Dec. Dig. § 16.\*]

#### 3. REFORMATION OF INSTRUMENTS (§ 47\*)—GROUNDS—MISTAKE OF SCRIVENER.

Where an instrument is drawn with intent to execute a definite agreement previously made relating to something within the contemplation of the parties, but which by the mistake of the scrivener, either as to law or fact, does not express such intention, the instrument may be reformed by enforcing specific performance of the agreement according to the real intention of the parties.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 195-198; Dec. Dig. § 47.\*]

#### 4. REFORMATION OF INSTRUMENTS (§ 36\*)—PLEADING—INSTRUMENT AS MADE AND AS INTENDED.

A petition for reformation of an instrument must show in clear and concise language the grounds of reformation, the agreement actually made, and the agreement which the parties intended to make.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

#### 5. REFORMATION OF INSTRUMENTS (§ 36\*)—PLEADING—GROUNDS—MISTAKE.

A petition for the reformation of an instrument on the ground of mutual mistake must clearly allege such mistake or circumstances from which it can be readily inferred.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

#### 6. REFORMATION OF INSTRUMENTS (§ 36\*)—SUFFICIENCY OF PLEADING—MISTAKE.

A petition by the purchaser to reform a covenant of warranty against incumbrances and make it apply to all future improvements, alleging that the vendor represented that there would be no further liens against the land for any subsequent street improvement, and that both the vendor and purchaser believed that such was the fact, and that the deed was executed under the mistaken belief of both parties that it warranted against such liens, without allegation that the vendor actually intended to warrant against future liens, and that such warranty was omitted by mutual mistake of the parties, left the belief that the deed covered such a warranty as the only mistake relied on, and was insufficient.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Bickel Asphalt Paving Company against George Lindenberg, with cross-petition by Lindenberg against Carrie Rowland and another. Judgment for cross-defendants, and cross-petitioner appeals. Affirmed.

William Furlong and Furlong, Woodbury & Furlong, all of Louisville, for appellant. J. C. Dodd and A. P. Dodd, both of Louisville, for appellees.

CLAY, C. On November 28, 1905, Carrie Rowland and Eliza Dumesnil sold and conveyed to Addie Lindenberg a lot of ground fronting on the east side of Galt avenue in Louisville. Mrs. Lindenberg died November 10, 1912, leaving a last will and testament by which she devised all of her property to her husband, George Lindenberg. On November 18, 1912, the Bickel Asphalt Paving Company brought suit in the Jefferson circuit court against George Lindenberg to enforce against the property an improvement lien for the construction of Galt avenue, pursuant to certain ordinances enacted by the general council of the city of Louisville. Thereupon George Lindenberg filed a cross-petition against Carrie Rowland and Eliza Dumesnil, in which he sought to hold them liable for the amount of the apportionment warrant. A demurrer to the cross-petition as amended was sustained, and the cross-petition dismissed. Lindenberg appeals.

After setting out his purchase of the property in 1905, the conveyance thereof to his wife, and that he was the owner under his wife's will, the cross-petition contains the following: "The defendant states that at the time of the purchase of said lot from the

defendants the said defendants, through their agents, servants, and employes, stated and represented to this defendant that the said Galt avenue in front of the lot so conveyed by the defendants and said Galt avenue from Frankfort avenue to Payne street had been made and constructed and accepted by the city of Louisville, and that the price which the defendants charged for said lot and which this defendant and cross-plaintiff paid to said defendants therefor included the cost of the making and construction of said Galt avenue as against said lot, and that said lot would not thereafter have to pay anything toward the construction of said Galt avenue, and this defendant relied on said statements and representations of the defendants, their agents and servants, in purchasing said property and in paying the price therefor, which said defendants asked, and but for said statements and representations on the part of the defendants, their agents and servants, this defendant would not have purchased said lot or paid the price therefor demanded by the defendants. The defendant states that he did not discover until May, 1909, that said Galt avenue had not been originally constructed, or that when it should be constructed that the abutting property would have to pay the cost thereof, and that the defendants, Carrie Rowland and Eliza Dumesnil, at the time of said conveyance, believed that said street had been originally constructed, and that said property would not have to pay any part of the cost thereof when the same was afterwards constructed by the city of Louisville, and they did not discover until 1909 that the improvement of said street, at the time of said conveyance, was not the original construction thereof, and that the defendant and cross-plaintiff and the two cross-defendants were all under the mistaken belief in the sale by said cross-defendants of said property and the purchase thereof by the cross-plaintiff that said street was made and accepted by the City of Louisville."

After alleging the construction by plaintiff of Galt avenue, pursuant to certain ordinances enacted by the general council of the city of Louisville, and the issuance of an apportionment warrant against the property in question for the sum of \$636.85, the cross-petition contains the following: "The cross-plaintiff now calls upon the defendants, Carrie Rowland and Eliza Dumesnil, to answer and defend the claim of the plaintiff herein on said apportionment warrant against said lot of land, and, if it is decided that said lien is a valid one, then that this defendant and cross-plaintiff be given a judgment against said defendants on the warranty in their deed and on their contract made with this defendant at the time of said purchase, and that he have judgment against said defendants for whatever amount, interest, and costs is adjudged against him herein in favor of the plaintiff. The cross-plaintiff

states that in said deed of conveyance the cross-defendants warranted said property conveyed to his said wife to be free of all liens and incumbrances, and that said cross-defendants through their agents and servants represented to this defendant and cross-plaintiff that said property was free of any future lien or incumbrances for the improvement of Galt avenue, and the warranty in said deed was understood and agreed between this defendant and said cross-defendants to expressly include a warranty against any lien against said property for any improvement of Galt avenue between Frankfort avenue and Payne street. But if the court is of opinion that said warranty as at present written in said deed of conveyance does not include the lien for the improvement of Galt avenue, then this defendant and cross-plaintiff asks that the contract of purchase and the deed of conveyance from said defendants, Rowland and Dumesnil, to this cross-plaintiff, be reformed and corrected so as to expressly include a warranty and protection to this defendant against said lien or claim of the plaintiff for the improvement of Galt avenue."

The cross-petition then concludes with a prayer that the deed of conveyance to his wife be reformed and corrected so as to expressly include a warranty against any claim against said property for the improvement of Galt avenue. Thereafter an amended cross-petition was filed, containing the following allegation: "The defendant and cross-plaintiff, George Lindenberg, amends his cross-petition herein against the defendants, Carrie Rowland and Eliza Dumesnil, and now, reiterating and adopting as part of this amendment all of the allegations of his original cross-petition herein, states that at the time he purchased the land described in said cross-petition herein, from said defendants before the execution of the deed referred to therein, said Galt avenue in front of said property had been constructed by grading, curbing, and paving with macadam pavement, and it was expressly represented to this cross-plaintiff by said defendants and their agents that said street had been made and there would be no further charge against the lot of land for any subsequent improvement of Galt avenue, and that this cross-plaintiff and said defendants both believed that such was the fact, and said contract was made under the mistaken belief by both the cross-plaintiff and said defendants that the deed as written warranted said lot against any further lien or claim for the improvement of Galt avenue. That the contract of sale was to the effect that said lot would not thereafter be charged with any cost of improvement of Galt avenue, and that this cross-plaintiff depending on the cross-defendants and their agents to properly write said deed as this cross-plaintiff was not represented by counsel, and had nothing to do with the preparation or writing of the

deed, but that it was prepared and written by the cross-defendants and their agents, and, at the time said deed was delivered to this cross-plaintiff, both this cross-plaintiff and the cross-defendants believed that the warranty contained, covered any claim for the future improvement or construction of said Galt avenue."

[1] The deed from Mrs. Rowland and Mrs. Dumesnil to Addie Lindenberger contains the following warranty: "With covenant of general warranty, against all incumbrances whatsoever, except taxes for 1906, which the purchaser assumes to pay." Manifestly the above warranty applies only to incumbrances existing at the time of the execution and delivery of the deed, and does not include liens for street improvements made many years thereafter: *Long v. Barber Asphalt Co.*, 151 Ky. 7, 151 S. W. 6. The only question to be determined is: Are the allegations of the cross-petition sufficient to justify a reformation of the deed on the ground of mutual mistake?

[2, 3] It is well settled that, when an instrument fails to embody the actual agreement made or transaction determined upon by the parties thereto, reformation is the proper remedy if the case is made out by proper proof; but the instrument sought to be corrected must fail to express the real agreement or transaction because of mistake common to both parties, or because of mistake on one side and fraud or inequitable conduct on the other. 34 Cyc. 907; *Pickett v. Taylor*, 96 S. W. 1111, 29 Ky. Law Rep. 1219. Furthermore, wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, and which, by the mistake of the draftsman or scrivener, either as to law or fact, does not fulfill the intention, but violates it, there is ground to correct the mistake by reforming the instrument and enforcing the specific performance of the original contract according to the real intention of the parties. 34 Cyc. 911; *Thomas v. Conrad*, 114 Ky. 841, 71 S. W. 908, 74 S. W. 1084, 24 Ky. Law Rep. 1630, 25 Ky. Law Rep. 169; *Dever v. Dever*, 44 S. W. 986, 19 Ky. Law Rep. 1988.

[4, 5] In all such cases, however, the agreement itself should be definite. *Auer v. Mathews*, 129 Wis. 143, 108 N. W. 45. The mistake against which reformation is sought must relate to something within the contemplation of the parties in making their contract. It is something agreed upon but not written as agreed upon, and therefore not covered, but intended to be covered, by the written instrument. *Queen Ins. Co. v. John Spry Lumber Co.*, 188 Ill. App. 620; *Hausbrandt v. Hofier*, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 93 Am. Dec. 293; *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660; 34 Cyc. 910. In pleading a cause in reformation the material facts should be set forth in clear and concise lan-

guage. *Pearson v. Dancer*, 144 Ala. 427, 39 South. 474; *Langmede v. Weaver*, 65 Ohio St. 17, 60 N. E. 992. It is necessary to show: (1) The grounds of reformation; (2) the agreement actually made; (3) the agreement which the parties intended to make. *Peacock v. Betha*, 151 Ala. 141, 43 South. 864; *Webb v. Borden*, 145 N. C. 188, 58 S. E. 1083; *Grossbach v. Brown*, 72 Wis. 458, 40 N. W. 494. Where the ground for reformation is mutual mistake, the mutual mistake, or circumstances from which the same can be readily inferred, should be alleged with precision and clearness. *Horne v. J. C. Turner Cypress Lumber Co.*, 55 Fla. 690, 45 South. 1016; *Lewis v. Lewis*, 5 Or. 169.

Stripped of surplusage, the cross-petition alleges the following facts: The cross-defendants, through their agents, represented to the cross-petitioner that Galt avenue had been made and constructed by the city of Louisville. The price paid by the cross-plaintiff included the cost of such construction. The lot would not therefore have to pay anything towards the construction of Galt avenue. Cross-plaintiff relied on these representations, and would not have purchased the property except for them. Cross-plaintiff did not discover until the year 1909 that Galt avenue had not been originally constructed. Cross-defendants believed at the time of conveyance that said street had been originally constructed, and that the property would not have to pay any part of the cost of said street if thereafter constructed by the city of Louisville. Cross-plaintiff and cross-defendants were under the mistaken belief at the time of the sale that the street had been made and accepted by the city of Louisville. Cross-defendants warranted that the property conveyed was free of all liens and incumbrances, and represented, through their agent, to cross-plaintiff that it was free of any future lien or incumbrance for the improvement of Galt avenue. The warranty in the deed was understood expressly to include a warranty against any lien against said property for any improvement of Galt avenue. The cross-petition, as amended, alleges in substance the following: The cross-petitioner purchased the land, cross-defendants represented that there would be no charge against the lot of land for any subsequent improvement of Galt avenue, and cross-plaintiff and cross-defendants both believed that such was the fact. The deed was made under the mistaken belief of both parties that the deed as written warranted said lot against any further lien or claim for the improvement of Galt avenue. The contract of sale was to the effect that said lot would not thereafter be charged with any cost of the improvement of Galt avenue. Cross-plaintiff had nothing to do with the writing of the deed, which was prepared by the cross-defendants and their agents. At the time the deed was delivered by them, cross-plaintiff and cross-defendants

believed that the warranty contained covered any claim for the future improvement or construction of Galt avenue.

[6] Construed in the light of the foregoing principles, it is apparent that the cross-petition is altogether insufficient. Certainly, in an extraordinary case of this kind, where it is sought to reform a covenant of general warranty and make it apply to all future improvements, whenever and by whatever authority they might be made, by the city of Louisville, the rule requiring the pleading to state the grounds of reformation in clear and concise terms should not be departed from. Reduced to its final analysis, the cross-petition merely alleges that the cross-defendants represented that there would be no further charge against the lot of land for any subsequent improvement of Galt avenue, and that the cross-plaintiff and cross-defendants believed that such was the fact, and that the deed was executed under the mistaken belief by both parties that it warranted said lot against any further lien or claim for the improvement of Galt avenue. In other words, there is no allegation that the parties ever intended to incorporate in the deed a warranty against all future improvement taxes. The mere allegation that the parties believed that the warranty in the deed covered any claim for future improvements or construction of Galt avenue is not sufficient to show that they actually intended to incorporate in the deed a warranty against all future improvement taxes. Indeed, the only mistake relied on is the mistaken belief that the deed covered such a warranty. The cross-petition should have alleged in clear and unambiguous language facts showing that the cross-defendants actually intended to warrant the property against all future improvement taxes, and that this warranty was omitted from the deed by mutual mistake of the parties. Such facts not being sufficiently alleged, we conclude that the chancellor properly sustained the demurrer.

Judgment affirmed.

#### REID v. SUN PUB. CO.

(Court of Appeals of Kentucky. May 6, 1914.)

##### 1. APPEAL AND ERROR (§ 1042\*)—HARMLESS ERROR—STRIKING OUT ANSWER.

In an action for libel, pleas that the report had been current in the neighborhood, that it published it in good faith and without malice, and that plaintiff had never requested a retraction or explanation thereof, not covered by the instructions, were properly allowed to remain in the answer, unless they were used to justify the admission of incompetent testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

##### 2. LIBEL AND SLANDER (§§ 104, 111\*)—ADMISSION OF EVIDENCE—GENERAL KNOWLEDGE OF REPORT—STATUTE.

Under Civ. Code Prac. § 124, and Acts 1910, c. 104, providing that, in actions for libel

defendant may plead truth and mitigating circumstances in reduction of damages, it was competent, in an action for libel, to inquire of all witnesses whether the report about plaintiff was generally known in the neighborhood, to rebut malice and to escape the infliction of punitive damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291, 315-324; Dec. Dig. §§ 104, 111.\*]

##### 3. APPEAL AND ERROR (§ 882\*)—PARTY ENTITLED TO ALLEGE ERROR—PARTY INVITING ERROR.

To error in the answers brought out by him on cross-examination, plaintiff could not object.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

##### 4. LIBEL AND SLANDER (§ 101\*)—IMPLIED MALICE—WORDS LIBELOUS PER SE.

Where a publication is libelous per se, the law presumes malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. § 101.\*]

##### 5. LIBEL AND SLANDER (§ 120\*)—PUNITIVE DAMAGES—MALICE.

Where the law presumes malice from the publication of words libelous per se, a recovery of punitive damages is authorized without requiring a showing of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.\*]

##### 6. LIBEL AND SLANDER (§ 7\*)—WORDS ACTIONABLE—CHARGE OF MURDER.

A charge of murder is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-73; Dec. Dig. § 7.\*]

Appeal from Circuit Court, McCracken County.

Action by John R. Reid against the Sun Publishing Company. Judgment for plaintiff, and he appeals. Reversed and remanded.

D. G. Park, of Paducah, for appellant. J. D. Mocquot, of Paducah, for appellee.

MILLER, J. This action by Reid, for damages for libel, is based upon the following news account alleged to have been published of and concerning Reid, in the Paducah Evening Sun of August 5, 1913:

"Drawing Net in on Finley Slayer  
Before Arresting.

"Officers Sure of Murder Seek to Clinch  
Case With Conclusive Evidence.

"No Charge will be Brought until Positive.

"Arrest Rumors are False.

"No arrests in the mysterious murder of Tate Finley have been made, but one is probable in a few days. The officers at present are without all the evidence necessary for a conviction.

"It is positive that Finley was killed because of politics. He was a supporter of James W. Eaker, candidate for sheriff in the recent primary and he had quarreled with friends who were supporters of rival candidates. Mr. Finley had stated to friends that

he realized that he had relatives who would kill him if they met him alone.

"Sheriff George Houser made a careful survey of the scene and he is positive Finley was murdered.

"Detective T. J. Moora was employed by the family to make an investigation. Detective Moore, too, is positive that Finley was murdered, and says that a left-handed man committed the deed.

"It is evident that there was a struggle before the end. The men circled around and around and the leaves were disturbed for some distance. Blood was found in numerous places. The officers are greatly handicapped because of the fact that the clothes were burned. Members of the family did not think they were of value.

"The wound in the right side of Finley's abdomen alone, it is believed, would have caused his death. It is thought that Finley fought his assailant until he fell to the ground, and then his murderer cut his throat. Finley had a small pocketknife which had a sharp point, but the blade was dull. With the knife it would have been almost impossible for Finley to have inflicted the wounds.

"Reports were current to-day that a relative of Finley had been placed under arrest, but this is false, as the officers are awaiting until they are positive that they have a case cinched."

After the court had properly stricken from the petition three clauses thereof which stated irrelevant matter, the defendant answered, admitting the publication in the first paragraph, and that it was published of and concerning appellant, although he was not named therein. It denied, however, any actual malice or ill will against the appellant in making the publication. In the second paragraph of its answer, appellee alleged that the rumors referred to were current in Paducah and in the neighborhood where Finley had lived; that they had been extensively and broadly circulated, to the effect that Finley had been murdered by some one who was related to him; that the defendant merely published the article complained of in good faith and as an item of news, and without any wantonness, ill will, hatred, or malice toward the plaintiff. The third paragraph is a mere traverse of the allegations of damage, while the fourth paragraph affirmatively pleads that the plaintiff never at any time requested the appellee to retract said publication or charge, or to publish a correction, retraction, or explanation thereof.

The trial resulted in a verdict and judgment for Reid in the sum of one cent, and from that judgment he prosecutes this appeal.

1. It is contended that the trial court erred in overruling the demurrers to the several paragraphs of the answer, and also in overruling the appellant's motion to strike out the several paragraphs of the answer, and

similar motions to strike out the material portions of the several paragraphs. The demurrers and motions aimed at each and every paragraph of the answer were so unnecessarily repeated and duplicated as to confuse somewhat the legal questions raised thereby. Giving them, however, the broadest legal effect that could be raised either by the demurrers or the several motions, we will consider the several paragraphs of the answer in connection with the instructions which submitted the case to the jury.

The instructions read as follows:

"Gentlemen of the jury:

"No. 1. It is admitted by the pleading in this case, and is the undisputed evidence, that defendant, in its newspaper, the Paducah Evening Sun, on August 5, 1913, published the following of and concerning the plaintiff, J. Randolph Reid, to wit: [The publication as above given is here set out in full.] The court now instructs you that you will find for the plaintiff such damages as you may believe from the evidence will fairly and reasonably compensate him for injury to his character, if any, and for humiliation and mortification to his feelings, if any of either, or mental anguish and suffering, if any of either; but in all not exceeding the amount claimed in the petition, to wit, \$10,000.

"No. 2. The court further instructs you that if you shall believe from the evidence in this case that said publication was induced by actual malice on the part of the defendant toward plaintiff (that is, with reckless or wanton disregard of plaintiff's rights), then you may or may not, in the exercise of your sound discretion, in addition to compensatory damages as defined to you by instruction No. 1, assess such additional punitive or exemplary damages as you may think right and proper under the facts of this case, but not exceeding in all the amount claimed in the petition, to wit, \$25,000. But, unless you shall believe from the evidence, you cannot find for the plaintiff exemplary or punitive damages.

"No. 3. The court further instructs you that if you find for plaintiff exemplary or punitive damages, as defined to you by instruction No. 2, then you will separate your findings of damages and say in your verdict what amount of compensatory damages you find and what amount of exemplary or punitive damages, if any, you find, and fix each in separate amounts.

"No. A. The court instructs you that the publication set forth in instruction No. 1 accused plaintiff of the crime of murder in connection with the death of Marshall T. Finley; and that it is admitted by the pleadings that such accusation is false and untrue; and that it was published by defendant of and concerning plaintiff without just cause or legal excuse, and you will take these facts as true."

It will be observed that the first instruction peremptorily directs the jury to find for the plaintiff, while the second instruction authorizes punitive damages if the publication was induced by actual malice, on appellee's part. Instruction A is equally peremptory and supplementary to the first instruction by directing the jury to take as true, not only the fact that the charge was made against the plaintiff, but that it was false and published without excuse.

[1-3] As the instructions did not cover either of the special defenses relied upon in the second and fourth paragraphs of the answer, there was no error in permitting them to remain in the answer unless they were used to justify the admission of incompetent testimony. But evidence under these two paragraphs was admissible in mitigation of damages. Civ. Code Prac. § 124; Acts 1910, p. 294.

Appellee's evidence was confined almost entirely, if not exclusively, to proof that the rumors had been extensively and broadly circulated to the effect that appellant had murdered Finley, which appellant's officers and reporters did not believe, and that the publication was made in good faith. The rule upon this subject is laid down in *Nicholson v. Rust*, 52 S. W. 933, 21 Ky. Law Rep. 648, as follows: "Upon the trial of the case quite a number of witnesses were permitted to detail in their testimony conversations had by them with different persons with regard to the alleged report about appellant. This was error. It was competent, under section 124 of the Civil Code, to have inquired of all witnesses whether or not the report spoken of was generally known in the neighborhood, but there the inquiry should have ceased. [Calloway v. Middleton] 2 A. K. Marsh. 378 [12 Am. Dec. 406]; Newell on Slander, pages 893, 894, § 70. It was also competent for appellee to prove the fact that he had stated he did not believe the report, and that he gave the name of his author, and any other mitigating circumstances, for the purpose of rebutting actual malice and to escape the infliction of punitive damages." See, also, *Courier-Journal Co. v. Sallee*, 104 Ky. 340, 47 S. W. 228.

Under the rule thus laid down, the trial court, for the purpose of rebutting malice and the infliction of punitive damages, properly admitted testimony which tended to show that the report of appellant's connection with the murder was generally known in the neighborhood; it did not go any further, except possibly in a very few instances, when details were brought out by appellant's cross-examination. But to these answers appellant could not and did not object.

[4, 5] Appellant further objects, however, that the first and second instructions required him to prove actual malice before he could recover, and that this requirement violated the rule laid down in all the authori-

ties, including *Nicholson v. Rust*, supra. This criticism, in its full import, is not sustained by the record. On the contrary, as above pointed out, the first instruction peremptorily directed the jury to find for the appellant, without, of course, mentioning malice, while the second instruction went further and authorized punitive damages in case appellee acted maliciously.

The general rule is that, where the publication is libelous per se, the law presumes malice and authorizes a recovery of punitive damages. *Tanner v. Stevenson*, 138 Ky. 578, 128 S. W. 878, 30 L. R. A. (N. S.) 200; *Pennsylvania Iron Works Co. v. Henry Vogt Machine Co.*, 139 Ky. 497, 96 S. W. 551, 8 L. R. A. (N. S.) 1023, 139 Am. St. Rep. 504.

It is not necessary that the publication be made maliciously in order to authorize a recovery of punitive damages. "If, as a matter of fact, the words published were false, and tended to the injury of plaintiff, and were published recklessly, even without special ill will, defendant is equally guilty, and punitive damages may be recovered." *Courier-Journal Co. v. Sallee*, 104 Ky. 344, 47 S. W. 228.

It must follow, therefore, that, if the words be libelous per se, it is error for the instructions to require a showing of malice, in order to recover punitive damages, since the malice which the law thus implies is sufficient to authorize such a recovery.

In *Nicholson v. Merritt*, 109 Ky. 369, 59 S. W. 26, the court said: "The words charged, and which in substance are admitted by appellee in his testimony to have been spoken by him, \* \* \* are \* \* \* actionable per se. Ky. St. § 1; *Nicholson v. Dunn*, 52 S. W. 935 [21 Ky. Law Rep. 643]; *Same v. Rust*, 52 S. W. 933, 21 Ky. Law Rep. 645. This being so, we do not think the court should have required the jury to believe the words to have been spoken 'maliciously,' in instruction No. 1."

In *Nicholson v. Merritt*, 67 S. W. 7, 23 Ky. Law Rep. 2282, the court further said: "As to punitive damages, the court instructed the jury that, 'if they believed from the evidence the defendant, in speaking and publishing such words, was actuated by malice in fact, then they may, in addition to compensatory damages, assess punitive damages.' The words 'was actuated by malice in fact' should have been omitted from the instruction. \* \* \* If the words charged are false, and are such as to charge a crime or such moral lapse as do words in the case at bar, they are maliciously uttered, in the eyes of the law, if they are not privileged. The public good, as well as justice to the injured party, demands that compensation, certainly, and punishment by way of exemplary damages, according to the gravity of the wantonness, or lack of it, in the utterance of the falsehood, should be meted to the parties. \* \* \* The instruction on this point approved by

this court in the case of *Nicholson v. Rust*, supra, and applicable to this case, was in substance: 'In assessing such damages, you must consider all the facts admitted to be true by the defendant, as directed by the instructions herein, together with all the facts and circumstances proven in evidence before you, and may, in the exercise of a sound discretion, assess such punitive damages by way of punishment to the defendant as you may believe, from the evidence, the plaintiff ought to recover because of the speaking of the words.'

In *Courier-Journal Co. v. Sallee*, 104 Ky. 341, 47 S. W. 228, especial complaint was made that the instruction authorizing punitive damages was not qualified by the use of the word "malice"; but, in disregarding the complaint, the court said: "There can be no doubt that in all actions for libel the gist of the action is malice, but it must be remembered that the law always presumes that, in the publication of an article which is libelous on its face, it was published with malicious intent, and this presumption remains throughout the entire case, until it is rebutted by proof of the contrary motive, or that the publication was justifiable; and nothing short of the truth of the matter published will excuse its publication. See *Riley v. Lee*, 88 Ky. 614, 11 S. W. 713 [21 Am. St. Rep. 358]. \* \* \* In this state, in all actions for tort, punitive damages are allowed where the injury is the result of a wanton or grossly negligent act; and intent or purpose to injure is not a necessary ingredient. This is especially true where the words published are actionable per se."

[8] The charge of murder made against appellant being, of course, libelous per se, under the rule deduced from the foregoing decisions of this court, the appellant was not required to show malice in order to recover punitive damages; the law implied malice under the admitted facts in this case. In this respect the second instruction was erroneous.

Judgment reversed, and cause remanded for further proceedings.

#### HICKS' COMMITTEE v. SMITH et al.

(Court of Appeals of Kentucky. May 7, 1914.)

#### 1. VENDOR AND PURCHASER (§ 267\*)—VENDOR'S LIEN—VALIDITY OF RELEASE—STATUTE.

Under Ky. St. § 498a, providing that, when mortgage notes are released or satisfied, the record holder may release the lien by release over his own hand, attested by the clerk, and section 499, permitting such lien to be released by one thereunto authorized by power of attorney recorded in the proper office, an attempted release of a vendor's lien by note to the clerk, authorizing him to release the lien when the maker presented the purchase-money notes as evidence of their payment, upon which the

clerk filed a release from the vendor, was ineffectual.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 751-758; Dec. Dig. § 267.\*]

#### 2. VENDOR AND PURCHASER (§ 261\*)—ASSIGNMENT OF PURCHASE-MONEY NOTES—LIEN.

An assignment of a vendor's lien note is an efficient assignment of the lien to that extent, and as between the parties vests the assignee with all the rights and remedies of the vendor under the lien in the deed retained.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. § 261.\*]

#### 3. SUBROGATION (§ 31\*)—VENDOR'S LIEN NOTE—PAYMENT BY SURETY.

A surety on renewal of original purchase-money notes, who is compelled to pay the renewal notes to the assignee, becomes invested only with such rights as the assignee had.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 70-91; Dec. Dig. § 31.\*]

#### 4. ESTOPPEL (§ 74\*)—LIEN—ESTOPPEL TO ASSERT.

A surety on notes given in renewal of purchase-money notes, not showing that they were a lien on land, whose negligence in not possessing himself of the original notes on execution of the renewal notes and in not protecting himself by causing the record to show that the vendor no longer owned the lien enabled the purchaser to obtain them, and with them and an ineffectual release of the vendor's lien to obtain from defendant bank a loan secured by mortgage on the land, and who afterwards paid such renewal notes, thereby relieved the bank of any negligence in taking the mortgage, and estopped himself from claiming a lien superior to its mortgage lien, and was also estopped on the ground that the payee, in whose place he stood after payment of the notes, was itself negligent in permitting the purchaser to obtain possession of the original notes, marked, "Paid," on the principle that, where one of two innocent persons must suffer through the fault of a third, that one shall sustain loss who enabled such third person to occasion it.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 190, 191; Dec. Dig. § 74.\*]

#### 5. ESTOPPEL (§ 74\*)—LIEN—ESTOPPEL TO ASSERT.

In such case, the estoppel against the surety was not limited to the difference between the purchaser's indebtedness to the mortgagee when he obtained the loan from the amount of which the indebtedness was deducted, but extended to the full amount of the loan, where it was made upon the faith of the purchaser's title apparently existing at the time.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 190, 191; Dec. Dig. § 74.\*]

#### 6. ESTOPPEL (§ 74\*)—PURCHASE-MONEY LIEN—ESTOPPEL TO ASSERT.

In such case, and to the extent of the purchase price paid in cash, the surety was estopped from asserting a lien superior to that of a purchaser from his principal after his execution of the mortgage to the bank, who relied on the fact of the principal's possession and exhibition of the original lien notes and the release of the vendor's lien.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 190, 191; Dec. Dig. § 74.\*]

#### 7. CANCELLATION OF INSTRUMENTS (§ 4\*)—FAILURE OF TITLE.

In such case, the purchaser from the first purchaser and mortgagor, joined as a party defendant, on defect in his vendor's title, was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



entitled to a cancellation of purchase-money notes to the principal.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Barren County.

Action by William Hicks, continued by William Hicks, Jr., as his committee, against J. T. Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Allen Sandidge and Porter & Sandidge, all of Glasgow, for appellant. Basil Richardson and Baird & Richardson, all of Glasgow, for appellee Farmers' Nat. Bank. Geo. T. Duff, of Glasgow, for appellee Williams. Smith, McCandless & Larimore, of Munfordville, for appellee Smith.

HANNAH, J. On January 27, 1908, H. J. Kerley and T. A. Kerley sold and conveyed to J. T. Smith a certain parcel of land in Barren county. The consideration expressed in the deed was \$4,000, of which \$500 was paid in cash. The remainder of the said purchase price was evidenced by nine small notes aggregating in amount the sum of \$1,500, and by two notes in the sum of \$1,000 each, due in one and two years thereafter. These two \$1,000 notes are the only ones involved in this action. All the notes were secured by purchase-money lien retained in the deed, and so stated upon their face. The Kerleys assigned the two \$1,000 notes to the First National Bank of Glasgow in payment of notes of theirs held by said bank, and owned by it. The name of William Hicks, a brother-in-law of one of the Kerleys, appears on these two lien notes as surety. Thereafter, these two \$1,000 lien notes were by the First National Bank of Glasgow marked, "Paid," and surrendered into the possession of Smith, their maker; he giving the bank in lien thereof two new notes for \$1,000 each, signed by himself as maker and by said William Hicks as surety, but omitting therefrom the statement that same were secured by a lien on land. In the meantime, Smith had paid or otherwise obtained possession of the other nine original lien notes, and these together with the two \$1,000 original lien notes he presented to the Farmers' National Bank of Glasgow, together with a release executed by the Kerleys of their lien for purchase money, and sought from said bank a loan of \$2,500, proposing to secure same by a mortgage on the land conveyed to him by the Kerleys. The bank caused an examination to be made of the deed records in the office of the clerk of the Barren county court, and finding the Kerleys to be the owners of record, of the purchase-money lien, granted to Smith the loan applied for. The mortgage was executed on February 19, 1910, and Smith obtained the money on February 23, 1910. The bank required Smith, however, to obtain from Kerleys another release of their lien for purchase money, not being

satisfied with the one presented by Smith for the reason that it was executed in pencil. This second release executed by the Kerleys written in ink reads as follows: "Mr. J. A. Murray, Clerk Barren County Court: You are hereby authorized to release the lien which we hold on the property sold to J. Tom Smith, when he presents the several notes given in part payment for the property, as evidence of their having been paid. T. A. & H. J. Kerley and H. J. Kerley. Bowling Green, Ky., March 11, 1910." Upon Smith's presenting this writing to him, accompanied by the original lien notes, the clerk of the Barren county court entered same on the record with the following statement: "Smith presented \$3,500 in notes paid and taken up, and I therefore file this release from Kerleys. J. A. Murray, C. B. C. C. March 17, 1910." Thereafter, Hicks paid the two \$1,000 notes owned by the First National Bank of Glasgow, and afterwards instituted this action against Smith on said notes, making the Farmers' National Bank a defendant, and sought to be adjudged a lien on the land conveyed by the Kerleys to Smith, superior to the lien of the mortgage executed by Smith to said bank. He made V. E. Williams also a party defendant, Williams having, after the mortgage was executed by Smith to the Farmers' National Bank, purchased a half interest in a portion of the land in question, paying \$500 in cash thereon, and executing his notes for the remainder of the purchase price, \$1,100, secured by purchase-money lien; and Hicks sought to have his claim adjudged a lien, superior to the rights of said Williams. Williams answered, and asked a rescission of his purchase, and also that he be adjudged a lien inferior only to the mortgage lien of the Farmers' National Bank, for the \$500 paid by him in cash, and for the cancellation of the purchase-money notes executed by him. Before the case was submitted, the parties agreed upon a sale of the land in question pending an adjudication of priorities, and same brought the sum of \$3,425. The court below held the mortgage of the Farmers' National Bank to be a first and superior lien on the land in question; gave Williams a second lien for the \$500 paid by him in cash on the purchase price of that portion bought by him; and adjudged to Hicks a lien on the land inferior, however, to the liens of the bank and Williams, for the amount of the two notes paid by him, with judgment over against Smith for the amount remaining unpaid thereon after satisfaction of the prior liens. Pending this litigation, Hicks was found to be incompetent to manage his estate, and William Hicks, Jr., was appointed his committee. From the judgment rendered, the committee appeals.

Appellant's contention is that the attempt made by the Kerleys to release the purchase-money lien was ineffectual for the reason that

the statute was not followed; that the lien was not released, but continued in favor of the First National Bank to the extent of \$2,000 upon the assignment by Kerleys to it of said notes; and that this lien continued to Hicks by reason of his payment of the notes sued on to the Bank; and that said lien is prior to that of the mortgage executed by Smith to the Farmers' National Bank and superior to the equities of Williams.

[1] 1. Ky. St. § 498a, provides that the clerk of the county court, in recording an instrument in which a lien is retained for purchase money, shall leave a blank space of at least two lines for each note therein mentioned; and provides further that, when any note or notes mentioned in any deed or mortgage shall be assigned to any other person, the assignor may over his own hand, attested by the clerk, note such assignment in said blank space, and, when any one or more of the notes named in any deed or mortgage is paid or otherwise released or satisfied, the holder of said note or notes, and who appears from the record to be such holder, may release the lien, so far as such note or notes are concerned, by release, over his own hand, attested by the clerk. And no person, except such as shall from such record or assignment of record appear at the time to be the legal holder of any note or notes secured by lien in any deed or mortgage, shall be permitted to release the lien securing any such note or notes; and any release made in contravention of this section shall be void. Section 499 permits such lien to be released by one thereunto authorized by duly executed and acknowledged power of attorney recorded in the proper office.

It will be seen that the attempted release of the purchase-money lien by the Kerleys was insufficient under the statute. Such release was not placed upon the record by the Kerleys in person and attested by the clerk; nor was the release made by any one duly authorized by power of attorney acknowledged and recorded according to law. The attempt of the Kerleys to release on the records the purchase-money lien was therefore ineffectual.

[2] 2. The assignment by the Kerleys to the First National Bank of the two original \$1,000 lien notes was an efficient assignment of the purchase-money lien to that extent; and such assignment as between the parties vested the bank with all the rights and remedies of the Kerleys under the lien in the deed retained.

[3] But, assuming that the notes which Hicks was compelled to pay to the bank, and upon which he sued in this action, were mere renewals of the original lien notes, Hicks, being a party to said notes, became invested only with such rights as the First National Bank had in respect thereto.

[4] 3. It must be conceded that the Farmers' National Bank would not have made the loan of \$2,500 to Smith upon the faith of

the mortgage executed by Smith to it, had it not been for the fact of Smith's possession and exhibition of the original lien notes accompanied by the attempted release of the Kerleys' purchase-money lien; and that this attempted release alone, without Smith's possession and exhibition of the original lien notes, would have been insufficient to have induced the granting of the loan. Smith's possession and exhibition of the two original \$1,000 lien notes was made possible by the negligence of Hicks in failing to possess himself of the original notes at the time they were taken up by the execution of the notes sued on, and at the time he signed said renewal notes as surety. Such possession and exhibition by Smith of the original lien notes, accompanied by the attempted Kerley release of lien, was sufficient to relieve the Farmers' National Bank of any imputation of negligence in taking the mortgage from Smith, notwithstanding the fact of the insufficiency of said release as placed upon the deed records of the Barren county court as a statutory release; and was sufficient to create in behalf of the Farmers' National Bank an estoppel against Hicks to claim a lien superior to the mortgage lien of said bank. The fact that the entry made by the clerk of the Barren county court of the release of said lien made by the Kerleys was ineffectual is immaterial in the light of this estoppel. It is a long-established rule of the law that, if one of two innocent persons must suffer through the fault of a third, that one shall sustain the loss who put it in the power of such third person to occasion the loss.

If Hicks had desired the protection of the purchase-money lien at the time the lien notes were renewed, it was his duty, under the statute, to have caused the record to show that the Kerleys were no longer the owners of the lien to the extent of the notes in question. Had he done this, it would have been impossible for Smith to have obtained the loan from the Farmers' National Bank, or, had he obtained it, that Bank would not now be heard to assert and rely upon an estoppel arising out of the fact of Smith's possession and exhibition of the original lien notes accompanied by the Kerley release of lien. Moreover, standing as he does, in the place of the First National Bank, having been compelled to pay the notes upon which he himself was a party, he is also estopped from asserting a lien superior to that of the mortgage executed by Smith to the Farmers' National Bank, for the reason that the First National Bank, were it the owner of the notes, because of its negligence in permitting Smith to obtain possession of the two original \$1,000 lien notes, marked, "Paid," would be estopped from asserting such superior lien as against the Farmers' National Bank. Having failed to avail himself of a privilege created by statute for his own protection, and that failure having resulted in enabling Smith to obtain from the Farmers' National Bank

the money it loaned him, Hicks is now estopped from asserting a lien superior to that of the mortgage executed by Smith to said bank, and cannot be here heard to complain of the action of the chancellor in adjudging to the Farmers' National Bank a lien superior to that adjudged to him.

[5] 4. It is also contended by appellant that the Farmers' National Bank's estoppel as against Hicks should be extended only to the sum of \$1,316.28, for the reason that Smith was indebted to the Farmers' National Bank in the sum of \$1,183.72 at the time he obtained the loan of \$2,500, and that sum was deducted in passing the proceeds of the \$2,500 loan to Smith's credit on the books of the bank. It appears from the evidence that Smith arranged with the bank for this \$2,500 loan some two or three months before it was finally closed; that the bank had the title of the property examined, and informed Smith that the Kerley lien would have to be released; and that, pending the releasing of the Kerley lien and execution of the mortgage and final closing of the loan, the bank advanced to Smith, for the purpose of buying some machinery, the sum mentioned, taking notes therefor, and, when the loan was finally closed, deducted these amounts and surrendered said notes; and that it would have been closed earlier but for the fact that the bank did not have the full amount thereof to spare therefor. Certainly, under these circumstances, the estoppel should extend to the full amount of the loan, for it was made upon the faith of the facts as they apparently existed at the time thereof.

[6, 7] 5. As to Williams, who purchased a portion of the land in question, after the execution by Smith to the Farmers' National Bank of the mortgage mentioned, Hicks is likewise estopped from asserting a superior lien. Williams testified that he was informed and relied upon the fact of Smith's possession and exhibition of the original lien notes and the Kerley attempted release of lien; and also as to him, to the extent of that part of the purchase price which he paid in cash, Hicks was estopped from claiming a superior lien. As to the purchase-money notes executed by Williams to Smith, he was entitled to cancellation thereof. The chancellor was right in so decreeing.

The judgment is affirmed.

#### WILLIS v. LAM et al.

(Court of Appeals of Kentucky. May 8, 1914.)

#### 1. PLEADING (§ 214\*)—DEMURRE—EFFECT.

In determining the propriety of sustaining a demurrer to the petition, the truth of all allegations therein must be admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

#### 2. TRUSTS (§ 92½\*)—CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS.

Constructive trusts are not within the statute of frauds, Ky. St. § 470, because they are bottomed on an estoppel.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. § 92½.\*]

#### 3. FRAUDS, STATUTE OF (§ 56\*)—CONTRACT TO PURCHASE LAND.

Breach of an oral agreement between the mortgagee of land belonging to a bankrupt corporation and stockholders of the corporation, whereby the mortgagee agreed that, if the stockholders would not oppose foreclosure of his mortgage, he would buy in the property and sell it to them at a price less than the amount of his mortgage, does not give rise to a constructive trust, for the stockholders did not own the property, and the agreement, if enforceable at all, could only have been enforced by the corporation which went out of existence after the liquidation of its affairs in bankruptcy, and hence the agreement is within the statute of frauds, Ky. St. § 470.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

#### 4. FRAUDS, STATUTE OF (§ 56\*)—CONTRACT FOR PURCHASE OF LAND.

After a bankrupt corporation, whose affairs have been liquidated, has gone out of existence, stockholders cannot enforce a parol contract with reference to property formerly owned by it, made by them in their individual capacity with a third person.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

Appeal from Circuit Court, Muhlenberg County.

Action by J. C. Willis against J. W. Lam and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Walker Wilkins, of Central City, for appellant. Hubert Meredith and Taylor & Eaves, all of Greenville, for appellees.

SETTLE, J. This action was instituted against the appellees, J. W. Lam, J. A. Smith, and R. L. Brown, by the appellant, J. C. Willis, claiming to be suing in his own right as a stockholder in a defunct, bankrupt corporation known as the Dovey Coal Company, and in behalf of other stockholders thereof, whose names are not stated in the petition, to compel the execution of an alleged trust arising out of an alleged parol agreement made between the appellant, J. C. Willis, and the appellee Lam, whereby the latter promised and undertook, as averred, to convey to the appellant, Willis, and the other stockholders of the Dovey Coal Company, certain lands and coal mines in Muhlenberg county, which he (Lam) purchased at a sale of the property of the bankrupt corporation and was about to sell, in alleged violation of the trust, to J. A. Smith and R. L. Brown, who, by reason thereof, were made defendants to the action, and against whom, together with Lam, an injunction was asked to prevent the consummation of the sale in question. Appellees filed separate general demurrers to the petition, all of which were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sustained by the circuit court, to which the appellant excepted. Thereafter the latter filed an amended petition making more specific certain allegations of the original petition, and averring, in substance, that the alleged trust created by the parol agreement between the appellant, Willis, and the appellee Lam, was for the benefit of the creditors of the bankrupt corporation, to whom it was owing unpaid claims, as well as for the benefit of the stockholders thereof. Following the filing of this amendment, appellees insisted upon their demurrers to the petition as amended, and the same were again sustained, to which appellant also excepted. Thereupon the court, following appellant's refusal to plead further, dismissed the petition; and from the judgment manifesting these several rulings this appeal is prosecuted.

We gather from the record the following history of the transactions resulting in this controversy: In the year 1905 the appellee Lam, for the sum of \$50,000, sold and by deed conveyed to the Dovey Coal Company, incorporated, the several tracts of land and coal properties described in the petition. The consideration of \$50,000 was paid in certain mortgage bonds, with interest coupons attached, which the corporation issued and delivered to Lam, and these bonds were secured by a mortgage or deed of trust on the property conveyed. In 1910 the Dovey Coal Company, desiring to make certain improvements on the property it had purchased from Lam, borrowed of the latter \$40,000, for which mortgage bonds of that amount, with interest coupons attached, were issued by it and accepted by Lam. These bonds were also secured by a mortgage or deed of trust giving a second lien on the entire property mentioned. In December of the following year the Dovey Coal Company defaulted in the payment of the interest on the outstanding bonds, held by the appellee Lam, and had then incurred an indebtedness, in addition to the bonds and unpaid interest, amounting to more than \$10,000. Being unable to meet the demands of its creditors, the company filed a voluntary petition in bankruptcy in the United States District Court for the Western District of Kentucky and was duly adjudged a bankrupt by that court, following which the trustee elected by its creditors proceeded to wind up and settle its business and affairs. Pending the bankruptcy proceedings, the appellee Lam, together with William Eads, who had acquired title to a part of the second issue of bonds, filed a petition in the United States District Court, praying the enforcement of the mortgage liens given to secure the payment of the bonds and asking a sale of the property covered by the liens to satisfy first, the issue of bonds aggregating \$50,000, and, second, those aggregating \$40,000, with accrued interest. The prayer of the petition was granted by the entering of a decree directing the sale of

the mortgaged lands and mining properties for the purposes mentioned and appointing the trustee in bankruptcy to make the sale. Prior to the sale, however, Eads sold and assigned to Lam the bonds held by him. Pursuant to the judgment, the trustee made the sale of the property described therein, and the appellee Lam, being the highest and best bidder, became the purchaser of the whole of it at the price of \$75,000. At that time the face value of the bonds held by Lam was \$90,000, to say nothing of the interest due thereon. In addition, there were claims against the property, secured by liens that were superior to those securing the bonds held by him, which, with certain costs, all amounting to something more than \$10,000, he was compelled to pay in order to secure a clear title to the property. By an order of the federal court, and with its approval, the trustee, following the consummation of the sale, made Lam a deed conveying the property purchased by him. This action was brought by the appellant, Willis, about a year after the purchase by the appellee Lam of the lands and other property of the Dovey Coal Company.

This appeal presents for decision the single question: Do the facts alleged in the petition as amended state a cause of action? The facts alleged are, in substance, that, prior to the purchase of the lands and other property of the bankrupt corporation, the appellee J. W. Lam entered into a parol contract with the appellant, Willis, acting for himself and other stockholders of the Dovey Coal Company, whereby he agreed that he would buy the property at the trustee's sale, take a deed to himself, and hold the property until such time as the appellant and other stockholders might be able to redeem it, and then convey it to them by a proper deed at the price of \$77,000, and the amount of costs expended by him in the bankruptcy proceedings in proving his claims against the estate of the bankrupt and obtaining a sale of the mortgaged property to pay them; the costs to be paid in cash or secured and the \$77,000 in a bond or bonds maturing five years after date, with interest, secured by a first mortgage lien upon the lands and other property to be reconveyed appellant and the other stockholders by the appellee, Lam. This agreement, it was further alleged, created by operation of law an enforceable trust for the benefit of the former stockholders of the bankrupt corporation and its creditors as well; but that the appellee Lam had wrongfully refused to execute the trust, though appellant, Willis, and other stockholders, were ready and had offered to comply with their part of the alleged agreement as to the payment of the costs incurred by Lam in the bankruptcy proceedings and the securing of the \$77,000 by the execution of the necessary bond or bonds and mortgage, according to the terms of their agreement.

The only inducement or consideration al-

leged in the petition for the undertaking of the appellee Lam to convey the property to the appellant, Willis, and other stockholders of the Dovey Coal Company after his purchase of it, was the agreement of the latter that they would not resist his application to the district court for its sale in satisfaction of the bonds held by him, or make any effort to delay the sale, as they had intended doing. It does not appear from anything alleged in the petition that the appellant, Willis, or other stockholders of the Dovey Coal Company, had or could have made any defense to the petition filed in the district court by the appellee Lam to obtain a sale of the mortgaged property in satisfaction of the bonds held by him, or that they had or could have shown any legal cause for delaying the sale of the mortgaged property by that court; in view of which it is difficult to see why Lam should have been influenced by a mere threat from Willis and associate stockholders, if any was made, to resist his application for a sale of the mortgaged property, to enter into an agreement, that would compel him to suffer approximately a loss of \$20,000, by conveying to them property, which, including the loss on his bonds, cost him not less than \$100,000, at \$77,000 and the costs he incurred in the bankruptcy proceedings.

It is stated in the petition that the capital stock of the Dovey Coal Company was \$100,000, and that \$25,000 thereof was owned by the appellant, Willis, and a like amount by Hywell Davis, of Louisville; but the names of the other stockholders are not disclosed by the petition or the amount of stock owned by any of them. The petition is also silent as to whether Willis had authority from the absent stockholders to make the agreement with Lam for them. It is admitted by the petition that the appellee Lam was not to convey to Willis and associate stockholders the lands and other property in question until he received from them in cash or its equivalent the amount of the costs he expended in the bankruptcy proceedings and the bond or bonds for the \$77,000 purchase price, payable in five years and secured by a mortgage on the property. It is merely alleged therein that the appellant, Willis, and other stockholders, offered to comply with the alleged agreement, but not alleged that such offer was made by a tender of the money to pay the costs incurred by him in the bankruptcy proceedings or that there was a tender of the bond or bonds for the \$77,000 required by the agreement; nor does the petition give any information, by way of averment or otherwise, as to the manner in which these bonds were to be executed, whether they were to be signed by each stockholder or to be executed by a new corporation to be formed by them. In other words the petition is silent as to these and other material facts necessary to show that the benefi-

ciaries of the alleged trust have placed themselves in a position to enforce its terms.

[1-4] But the petition as amended is open to a yet greater objection than any mentioned. Admitting, as we must for the purposes of the demurrer, the truth of all that is therein alleged, the facts averred fail to establish the trust asserted and therefore fail to state a cause of action. The contract here sought to be enforced, being in parol, is clearly within the statute of frauds (section 470, Ky. Stats.), unless it created a constructive trust enforceable at the suit of the appellant Willis and other stockholders as beneficiaries thereof. The principle upon which a constructive trust may be created and enforced is thus stated in Pomeroy's Equity Jurisprudence, § 1044: "If a person obtains the legal title to property by such arts or acts or circumstances or circumvention, imposition, or fraud, or if he obtains it by virtue of the confidential relation or influence under such circumstances that he ought not, according to the rules of equity and good conscience, as administered in chancery, to hold and enjoy the beneficial interest of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances and relations; and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and to promote the safety and interests of society."

Constructive trusts are held not within the statute of frauds, because they are bottomed on the doctrine of estoppel and the operation of an estoppel is never affected by the statute of frauds. There are numerous cases in which constructive trusts with respect to real estate have been held by this court to arise from parol contracts, and that such contracts are not within the statute of frauds; but in each of these cases the alleged beneficiary of the trust either furnished the purchase money with which to buy the land or had owned the land or had a bona fide claim thereto. *Crutcher v. Muir*, 90 Ky. 142, 13 S. W. 435, 11 Ky. Law Rep. 989, 29 Am. St. Rep. 366; *Griffin v. Schlenk*, 139 Ky. 523, 102 S. W. 837, 31 Ky. Law Rep. 422; *Sherley v. Sherley*, 97 Ky. 512, 31 S. W. 275, 17 Ky. Law Rep. 450; *Payne v. McClure Lodge*, 115 S. W. 764; *Wiedemann v. Crawford*, 142 Ky. 303, 134 S. W. 495; *Parker v. Catron*, 120 Ky. 145, 85 S. W. 740, 27 Ky. Law Rep. 740, 117 Am. St. Rep. 575; *Warden v. O'Brien*, 142 Ky. 633, 136 S. W. 635. It is manifest, however, that the instant case does not belong to this class of cases, as the persons seeking to enforce the alleged trust did not own the lands or other property sought to be recovered by virtue thereof, have an actual interest therein, or a bona

side claim thereto. The appellant, Willis, and others for whom he claims to have acted in making the contract with the appellee Lam, by which the alleged trust was created, were mere stockholders of the Dovey Coal Company. The corporation alone held the title to the property down to the time it was vested in the trustee in bankruptcy, from whom it was purchased by the appellee Lam, and the contract relied on as creating the trust sought to be enforced could have been made only by the corporation, its officers, or other person having authority to act for it. The business and affairs of the corporation having been liquidated and disposed of by the proceedings in bankruptcy and the corporation as such having gone out of existence, we know of no rule of law or practice that will permit its stockholders, or some of them, at this late day, to enforce a parol contract affecting property formerly owned by it, made by them in their individual capacity with a third party. The rule is that such a contract, to be valid, must be made by the corporation as such and enforced at its suit. A different question would be presented if the contract had been made by the corporation, and the stockholders were attempting to enforce it upon a showing that its directors had corruptly, or for other wrongful reason, refused to do so, to their injury. 10 Cyc. 669, 670. But no such case is here presented, and no right of action in the stockholders is shown. As the appellee Lam purchased the lands and other property in controversy in his own name and paid for it with his own money, a mere verbal agreement, if any, on his part to make the purchase for appellants, who owned no interest in the property and had no authority to make such a contract, cannot be enforced because within the statute of frauds. The case is controlled by the principles announced in the following cases: *Letcher v. Letcher's Heirs*, 4 J. J. Marsh. 590; *Graves v. Dugan*, 6 Dana, 331; *Com. v. M. B. S. R. R. Co.*, 94 Ky. 16, 21 S. W. 342; *Estes v. Estes*, 142 Ky. 262, 134 S. W. 494; *Day v. Amburgey*, 147 Ky. 123, 143 S. W. 1033, in each of which the character of relief here sought was refused.

Judgment affirmed.

#### SAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 8, 1914.)

##### 1. CRIMINAL LAW (§§ 134, 1150\*)—CHANGE OF VENUE—DECISION—REVIEW.

Where a petition for a change of venue on the ground of local prejudice and the supporting affidavits of disinterested residents, expressing the opinion that accused could not obtain an impartial trial in the county, were denied by the commonwealth's attorney and by affidavits of citizens, a denial of the petition was not an abuse of discretion and would not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252, 3044; Dec. Dig. §§ 134, 1150.\*]

##### 2. HOMICIDE (§ 255\*)—VOLUNTARY MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Evidence held not to support a conviction of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.\*]

##### 3. CRIMINAL LAW (§§ 561, 741\*)—EVIDENCE OF GUILT—SUFFICIENCY.

The guilt of accused must be established by evidence to the exclusion of a reasonable doubt, and where the evidence creates only a suspicion of guilt the case must not be submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1267, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. §§ 561, 741.\*]

##### 4. CRIMINAL LAW (§ 741\*)—EVIDENCE—PEREMPTORY INSTRUCTIONS—AUTHORITY OF COURT.

Where the commonwealth's evidence does not incriminate accused or is wholly insufficient to show his guilt, the trial court must direct an acquittal; but where there is any evidence of guilt the case must be submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.\*]

##### 5. CRIMINAL LAW (§ 1159\*)—VERDICT—CONCLUSIVENESS.

A conviction will not be reversed on the ground that the evidence is not sufficient to support it, but a reversal is proper when there is no evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from Circuit Court, Magoffin County.

Denny Saylor was convicted of voluntary manslaughter, and he appeals. Reversed and remanded for new trial.

See, also, 156 Ky. 249, 160 S. W. 1032.

D. G. Sublett and D. D. Sublett, both of Salyersville, and W. W. Ferguson, of Wheelersburg, for appellant. James Garnett, Atty. Gen., and D. O. Myatt, of Frankfort, for the Commonwealth.

SETTLE, J. The appellant, Denny Saylor, was indicted in the Magoffin circuit court for killing Mack Bailey. The indictment contained two counts; the first charging him with willful murder, and the second charging him with conspiring with one Bud Collins to kill Bailey. He was tried at the May term, 1913, but the jury then disagreed and did not return a verdict. The commonwealth, complaining of the refusal of the lower court to give an instruction on that trial upon the law of voluntary manslaughter, prosecuted an appeal from the ruling in question to obtain this court's decision and certification of the law thereon. It was held on that appeal that the circuit court erred in refusing to give the instruction on voluntary manslaughter, and in the opinion directed that such instruction be given upon another trial of the case. *Com. v. Saylor*, 156 Ky. 249, 160 S. W. 1032. Following that decision and its certification to the circuit court as the law of the case, appellant was again tried un-

der the indictment, the trial resulted in a verdict finding him guilty of voluntary manslaughter, upon which judgment was entered, fixing his punishment at confinement in the penitentiary not less than 2 nor more than 21 years, as provided by the Indeterminate Sentence Law (Laws 1910, c. 4). Having been refused a new trial, he has appealed.

[1] The first ground urged for a reversal is that the trial court erred in refusing appellant a change of venue. The application for such change was made by petition in which it was in substance stated that, immediately following the killing of Bailey, there was such excitement in Magoffin county over the homicide, that the state militia were called into service to assist the sheriff of the county to make arrests and prevent mob violence; that Bailey was related to the county judge, county attorney, sheriff, and circuit court clerk of Magoffin county, and that these officers, with other relatives of the decedent, after the killing interested themselves in creating public sentiment against appellant, with a view of obtaining his conviction, because of which and the prejudice existing against him in the county he could not obtain a fair and impartial trial therein. The petition was supported by the affidavits of two disinterested residents of the county, not related to nor of counsel for appellant, who expressed the opinion that by reason of the facts set forth in the petition appellant would be unable to obtain an impartial trial in Magoffin county. The allegations of the petition and statements contained in the affidavits in support thereof were specifically denied by a pleading entitled "Answer and Response," filed by the commonwealth's attorney; and controverted by the affidavits of certain citizens of the county, filed at the same time.

We have repeatedly held that the decision of the trial court, either in granting or refusing a change of venue in a criminal case, will not be disturbed unless it was based upon some ground not authorized by the statute or amounted to an abuse of discretion; and this is particularly so when the evidence for and against the change was so conflicting as to make it difficult to determine on which side it preponderates. *Mount v. Com.*, 120 Ky. 398, 86 S. W. 707, 27 Ky. Law Rep. 788; *Fletcher v. Com.*, 123 Ky. 571, 96 S. W. 855, 29 Ky. Law Rep. 955; *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540; *Martin v. Com.*, 100 S. W. 872, 30 Ky. Law Rep. 1196. The rule announced must be applied in this case, for it is not apparent from the evidence appearing in the record that the refusal of the change of venue complained of by appellant was an abuse of discretion on the part of the trial court.

[2] Appellant's second ground for a reversal is that the trial court erred in refusing to peremptorily instruct the jury to find him not guilty; it being his contention that there was no evidence conducing to prove his guilt.

In order to properly pass on this contention, careful consideration of the evidence appearing in the record will be required. As the opinion in *Com. v. Saylor*, supra, contains an elaborate statement of all the evidence introduced by the commonwealth and appellant on the first trial of the case, and a comparison thereof with the evidence furnished by the record on this appeal shows it to have been substantially the same on both trials, it is deemed unnecessary to here reproduce it in detail. It is conceded by counsel for the commonwealth that Bud Collins, a cousin of appellant, shot and killed Bailey, but insisted that appellant conspired with Collins to commit the crime and aided him in its commission. The evidence furnishes a motive on the part of Collins for the killing, as it shows that he and Bailey were waiting upon the same girl, and that at a gathering at the home of Collins' uncle and appellant's father, which took place two or three nights before the homicide, a difficulty occurred between Collins and Bailey because of the girl's apparent preference for Bailey. Appellant, however, according to the evidence, took no part in that difficulty, but, on the contrary, was then, prior thereto, and down to the time of the killing, on friendly terms with Bailey. The following evidence is relied on by the commonwealth as tending to show the alleged conspiracy between appellant and Collins, and that the former aided and abetted the latter in the killing, namely: That they were together at the country church on the evening of the homicide and just before its occurrence; that they left the church together on Collins' mule, appellant riding in the saddle and Collins behind him; that as they proceeded on the way they overtook Bailey, the young lady to whom he and Collins were paying their addresses, and others, walking in the direction of their homes; that upon reaching them the mule was stopped, Collins dismounted, and with pistol in hand advanced upon Bailey and shot and killed him, appellant in the meantime remaining seated upon the mule; that immediately following the shooting appellant in substance said to Collins, "You have done what you came to do, now get away"; that Collins then made his escape by running away, and a few minutes later appellant leisurely rode off in the direction of his home. It also appears from the evidence of the commonwealth that Collins was very much intoxicated at the time of the killing and that he was armed with a pistol, which he fired off once or twice after leaving the church and before overtaking Bailey and those who were with him, and that as he and appellant overtook Bailey the latter remarked, with reference to the shooting done by Collins, that he (Collins) was "bluffing."

Appellant, testifying in his own behalf, denied that he conspired with Collins to kill Bailey, or that he knew of the purpose of the

latter to shoot Bailey until the shooting occurred; and stated that he rode with Collins upon his mule for the purpose of getting him to his home and of preventing a difficulty between Collins and Bailey; that, when Collins got off the mule immediately before the shooting occurred, he caught him by the arm and tried to prevent him from dismounting; and that he did not after the shooting or at any time say to Collins, "You have done what you came to do, now get away."

Of the many persons present at the time of the killing, only one of them, Lonnie Litteral, professed to have heard the above remark from the appellant. The others testified that if such a statement was made by appellant they did not hear it, and it is apparent from the testimony of Litteral that he was not positive in his recollection as to what was said by appellant, for his statement was; "I think I heard defendant say to Collins, 'You have done what you came to, now get away.'" Two of the bystanders corroborate appellant's statements as to his catching Collins by the arm and attempting to prevent him from dismounting just before he killed Bailey.

[3] After a careful consideration of all the evidence and every fact legitimately deducible therefrom, we are convinced that as a whole it merely creates a suspicion of appellant's guilt. The law in a criminal case requires that the guilt of the accused shall be established by the evidence to the exclusion of a reasonable doubt, and, where the evidence as a whole creates only a suspicion that the defendant might be guilty, there is nothing to submit to the jury. The circumstances show, it is true, that appellant put himself in bad company; but they manifest nothing in his conduct that can fairly be regarded inconsistent with his innocence; whatever suspicion of guilt they may have raised was dispelled by the evidence in his behalf and as a whole. If correct in the above conclusion as to the meaning and effect of the evidence, it follows that the circuit court erred in refusing the peremptory instruction directing an acquittal, asked by appellant at the conclusion of all the evidence.

[4] The trial court has the same right and authority to give a peremptory instruction in a criminal case that it has in a civil action or proceeding. This rule of practice has long been recognized in this jurisdiction. In *Blankenship v. Com.*, 147 Ky. 768, 145 S. W. 752, we quoted with approval the following statement of the rule found in *Com. v. Murphy*, 109 S. W. 353, 83 Ky. Law Rep. 141: "The trial judge has the same right and authority to give a peremptory instruction in a criminal proceeding that he has in a civil ac-

tion. And if the evidence introduced in behalf of the commonwealth fails to incriminate the defendant, or is wholly insufficient to show that he is guilty of the offense charged, it is not only the right but the duty of the trial judge to instruct the jury to return a verdict of not guilty. \* \* \* This rule of practice is not found directly in either the Code or statutes, but it is firmly established as a part of the criminal jurisprudence of the state, and is uniformly applied by this court in considering appeals in criminal cases when a reversal is asked because the verdict is flagrantly against the evidence, or is not supported by sufficient evidence, and should control the lower courts in the disposition of criminal cases." *Vowells v. Com.*, 83 Ky. 193; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387, 9 Ky. Law Rep. 481; *Lucas v. Com.*, 147 Ky. 744, 145 S. W. 751; *Sprouse v. Com.*, 122 S. W. 134.

[5] The foregoing rule cannot be applied where there is any evidence of the guilt of the accused, for it is an equally recognized doctrine that, where there is any evidence of the guilt of the accused, whether it is sufficient to warrant a conviction is a question exclusively for the jury and cannot be determined on appeal. In other words, a judgment of conviction in a criminal prosecution will not be reversed upon the ground that the evidence is not sufficient to support the verdict, but the reversal will be proper when there is no evidence to support it. *Levering v. Com.*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 140; *Watson v. Com.*, 132 Ky. 46, 116 S. W. 287; *Webb v. Com.*, 99 S. W. 909, 30 Ky. Law Rep. 841; *Payne v. Com.*, 110 S. W. 311, 33 Ky. Law Rep. 229.

The questions decided on this appeal were not presented by the appeal in *Com. v. Saylor*, supra. The only question there decided was whether the circuit court erred on the first trial in failing to give an instruction as to voluntary manslaughter; and it was held that the instruction should have been given. In passing on that question consideration of the evidence was necessary, hence it fully appears in the opinion; but the court did not consider it, or express any opinion, as to its effect upon the questions here involved. Therefore in arriving at the conclusions expressed in this opinion we were in no way hampered or controlled by the opinion on the former appeal.

If there should be another trial of this case and the evidence relied on for a conviction does not materially differ from that of the last trial, the jury should be peremptorily instructed to find appellant not guilty. For the reasons indicated, the judgment is reversed and cause remanded for a new trial consistent with the opinion.



**KNISELY v. LEATHE. (No. 16,411.)**

(Supreme Court of Missouri, Division No. 1. Jan. 3, 1914. Rehearing Denied March 3, 1914. Motion to Transfer to Court in Banc Denied April 2, 1914.)

**1. APPEAL AND ERROR (§ 544\*)—PLEADING—MOTIONS—DEMURRER—REVIEW—RECORD.**

Where a motion to strike out parts of a petition pleading the institution, pendency, and dismissal of a prior suit to avoid the bar of limitations, and a demurrer to the remainder of the petition, based on the two and five year statute of limitations, were filed on the same day and considered together, and the decision on both was included in a single entry, the action of the court in sustaining the demurrer and the motion to strike were reviewable on the record proper; and neither the motion nor the action of the court in sustaining it need be preserved by exception, followed by motion for new trial, in which the same matter was again made the subject of complaint and exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2428, 2428, 2478, 2479; Dec. Dig. § 544.\*]

**2. LIMITATION OF ACTIONS (§ 180\*)—PLEADING—DEMURRER.**

One seeking by demurrer to take advantage of the statute of limitations must plead the statute on which he relies.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 870-875, 681; Dec. Dig. § 180.\*]

**3. LIMITATION OF ACTIONS (§ 24\*)—STATUTES—CONSTRUCTION—ACTION FOUNDED ON WRITING.**

Rev. St. 1899, § 4272, limiting the time within which to sue on any writing for the payment of money or property, includes every action for money or property founded on a writing, and the contingency on which the payment or delivery is to be made is immaterial, and, where an action is brought by an administrator against an executor on the theory that it was the duty of testator, under a contract in writing with intestate, pleaded in the petition, to carry out the contract and pay the sum sued for, the action is founded on an instrument in writing, within the statute, and it is immaterial whether a suit is in debt for the amount due on the contract or in covenant for unliquidated damages for breach thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

**4. LIMITATION OF ACTIONS (§ 119\*)—ALLOWANCE OF CLAIMS—EXHIBITION OF DEMANDS—LIMITATIONS.**

Under Rev. St. 1909, §§ 190-195, providing for the classification of demands against decedents' estates, and declaring that all demands not exhibited in two years shall be barred, but suits pending against decedent at the time of his death shall be considered as demands legally exhibited from the time of revivor, and all actions begun against an executor or administrator shall be considered demands legally exhibited against the estate from the time of the service of the original process, etc., service of process in a suit against an executor within two years after the granting of letters testamentary stops the running of limitations, provided the cause of action was not barred by the general statute of limitations at that time, and the cause of action could then be kept alive or new actions brought during the period of limitation prescribed by the general statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 529-535; Dec. Dig. § 119.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 437\*)—DISMISSAL OF ACTION—SECOND ACTION.**

Though a suit against an executrix, brought within the period of limitations prescribed by the general and special statutes, was dismissed, the suit was an exhibition of the claim, which removed the bar of the special statute, leaving the claim subject thereafter only to the general statute of limitations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1729-1761, 1764; Dec. Dig. § 437.\*]

**6. LIMITATION OF ACTIONS (§ 24\*)—DAMAGES FOR BREACH OF CONTRACT—PETITION.**

Where the petition, in an action by an administratrix against an executrix, alleged that testator contracted in writing to convey real estate to a third person for a specified consideration, and agreed, in the event of a sale, to pay the intestate a specified sum for services rendered, out of the price, and that the testator failed to perform his contract of sale, and that, by reason thereof, his estate was indebted to the administratrix to the amount of the agreed compensation, the cause of action was based on a contract for the money demanded within the ten-year statute of limitations. Rev. St. 1899, § 4272.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

**7. BROKERS (§ 52\*)—COMPENSATION—WHEN EARNED.**

Where a broker employed to procure a purchaser procures a purchaser who enters into a written contract with the owner to purchase, the owner becomes at once liable to the broker, in the absence of any special provision to the contrary.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.\*]

**8. BROKERS (§ 52\*)—COMPENSATION—WHEN EARNED.**

Where a broker procured a purchaser, who entered into a contract in writing with the owner, which stipulated that the owner agreed to sell to the purchaser described property for a specified price, and to deliver a warranty deed and abstracts of title showing and conveying good title, and that the purchaser should be the sole judge as to whether the owner had a good title, and that the purchaser should have a reasonable time before making the first payment of the price to have the lands surveyed, the broker had earned his commissions, in the absence of some express agreement in his contract of employment to the contrary.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.\*]

**9. BROKERS (§ 63\*)—COMPENSATION—WHEN EARNED.**

Where a contract employing a broker to procure a purchaser of real estate recited that, in the event of a sale of the property, the broker, for services rendered, should receive a specified sum, paid out of the price, the payment to be made in installments, as payments of the price were made, the broker, procuring a purchaser who contracted with the owner to purchase, was entitled to compensation, though the owner refused to carry out the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by Elizabeth C. Knisely, administratrix of Charles Knisely, deceased, against Grace A. Leathe, executrix of Samuel H.

Leathe, deceased. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This suit was instituted March 10, 1909, by filing in the clerk's office of the circuit court the original petition, which stated that a copy of the written contract sued on was filed with it as an exhibit. Summons issued next day, returnable to the April term, and was returned not found April 5th. Alias summons issued on the same date, returnable to the June term, and was returned served on the defendant executrix April 27, 1909. The defendant appeared and answered during the April term, and the cause proceeded so that at the April term, 1910, and on June 4th, the plaintiff, with leave of court, filed her thiru amended petition, which, omitting venue and signature, is in words and figures following:

"Elizabeth C. Knisely, Administratrix of the Estate of Charles H. Knisely, Deceased, Plaintiff, v. Grace A. Leahé, Executrix of the Estate of Samuel H. Leahé, Deceased, Defendant.

"Plaintiff, for third amended petition, filed by leave of court, states that Charles H. Knisely died in the city of St. Louis, state of Missouri, on the 17th day of July, 1904, intestate; that thereafter, on the 30th day of August, 1904, she was duly appointed by the probate court of the city of St. Louis, Mo., administratrix of the estate of said Charles H. Knisely, deceased, gave bond for the faithful discharge of her duties, qualified and is now acting as such by virtue of said appointment.

"Plaintiff further states that said Samuel H. Leahé died in the city of St. Louis, state of Missouri, on the 3d day of March, 1907, testate; that the last will and testament of the said Samuel H. Leahé was duly admitted to probate by the probate court of the city of St. Louis, Mo., on the 19th day of March, 1907; that by the terms of said will the defendant, Grace A. Leahé (who is the widow of said Samuel H. Leahé), was named as executrix without bond, and letters testamentary dated March 20, 1907, were issued to her by said court, and she then qualified and entered upon the discharge of her duties as such executrix, and, within 30 days after said letters were granted to her, she published notice thereof for three weeks, as required by the provisions of section 86 of the Revised Statutes of Missouri 1899.

"Plaintiff, for her cause of action against defendant, states that on the 25th day of October, 1900, said Samuel H. Leahé and one Charles C. Wolcott made and entered into a contract in writing of that date (a copy of which is herewith filed and marked 'Exhibit A'), wherein and whereby the said Samuel H. Leahé, in consideration of the sum of \$1 to him paid by said Wolcott, agreed to and did sell to the said Wolcott, for the sum of \$850,000, certain lands situate in the coun-

ties of St. Francis and Madison, in the state of Missouri, containing 37,514 acres, and being known as the Mine La Motte and other lands of the said Samuel H. Leahé, particularly described therein, together with all machinery, operating plant, and personal property then and thereon belonging to the said Samuel H. Leahé; that in and by said contract said sum of \$850,000 was made payable as follows: \$300,000 in cash, as soon as the report of the engineer of said Wolcott upon said lands was completed, and abstracts of title to said property examined by the attorneys of said Wolcott and deed delivered and possession of said property given to said Wolcott, one-third of the remainder on or before one year from the date of delivery of title and possession of said property to him, and one-third in two years, and one-third in three years thereafter; that in and by said contract the said Samuel H. Leahé agreed to execute and deliver a warranty deed to the said Wolcott of said property, with abstracts of title showing and conveying a good title to all of said real estate; and it was further especially agreed that said grantee, Wolcott, or his attorneys, should be the sole judges as to whether such abstracts and facts in relation thereto showed a good and indefeasible title to said lands in said grantor, Samuel H. Leahé, said deferred payments to be secured by a trust deed on said property, and notes to bear interest at the rate of 6 per cent. per annum from their date, and that said Wolcott should have a reasonable time before making said first payment to have said lands surveyed, maps made thereof, and also to have his engineer to make a full and complete examination and report upon the property; such examination to begin not later than December 1, 1900.

"Plaintiff further says that the said Charles C. Wolcott caused his engineer to begin such examination of said property prior to said December 1, 1900, and that said Wolcott was at all times ready, able, and willing to comply with and perform all of the other provisions of said contract to be complied with and performed by him, and he would have complied with and performed said other provisions of said contract to be kept and performed by him but that said Samuel H. Leahé failed and refused to comply with his part of said contract in this, to wit:

"First. That he failed to execute and deliver to the said Wolcott a warranty deed, as he had agreed.

"Second. The said Leahé failed and refused to deliver to said Wolcott, or his attorneys, abstracts of title showing good and indefeasible title to the said real estate described or any abstracts of title thereof whatever, which said abstracts of title said Wolcott requested and demanded of said Leahé January 4, 1901.

"Third. The said Leahé repeatedly offered to sell and sold said premises prior to July 12, 1902, and subsequently sold and conveyed

by deed the said property to a grantee other than said Wolcott, or any person or persons to whom he sold the same, to wit, the Mine La Motte Lead & Smelting Company, a corporation.

"Plaintiff further states that on the said 25th day of October, 1900, the said Samuel H. Leathe, by his contract in writing (herewith filed and marked 'Exhibit B'), promised that, in the event of the sale of said property described in said contract with said Wolcott of even date therewith, to or through said Wolcott or his assigns, for services rendered, the receipt and value of which services were thereby acknowledged, to pay to said Charles H. Knisely, plaintiff's intestate, or his order, the sum of \$107,500 out of the purchase price of said \$850,000; the payment of said \$107,500 to be made by said Leathe to said Knisely in four payments, the first one of \$37,941.19, and three additional payments of \$23,186.27 each, at such time and place as the said Leathe should receive the principal payment on said real estate, as per the contract of sale entered into by him with the said Charles C. Wolcott of even date therewith, deferred payments of said amount to bear interest at the rate of 6 per cent. per annum, the same as the original sum in said contract of sale entered into between said Leathe and Wolcott.

"Plaintiff further states that on the 1st day of August, 1907, she filed in the clerk's office of this court a petition, wherein she was plaintiff, and defendant herein was defendant, setting forth the same cause of action therein as is set forth in the petition in this cause and sued out process therein, on which petition a summons was issued directed to the sheriff of the city of St. Louis, who served the same upon the said defendant in said city of St. Louis on September 7, 1907, to which petition the defendant, on October 7, 1907, filed an answer in this court; that said cause No. 46,873 was pending in this court until February 15, 1909, when same was called for trial by the court during the absence of plaintiff, and, on motion of defendant's counsel, was dismissed by the court for failure of plaintiff to prosecute the same; that thereafter plaintiff filed a motion in said court to set aside dismissal, which motion said court overruled March 8, 1909. Wherefore plaintiff says that the demand set forth in the petition herein was legally exhibited against the estate of said Samuel H. Leathe, deceased, within one year after granting the first letters of administration on his estate.

"Plaintiff further states that the original petition herein was filed in said clerk's office on March 10, 1909, and process sued out therein on which a summons was then issued and delivered to said sheriff; that the cause of action herein accrued to plaintiff and against the defendant, who was a resident of this state, prior to the 1st day of January,

1909, and that defendant, prior to the filing of said original petition, departed from and absented herself from this state continuously until the 27th day of April, 1909, and thereby prevented the service of said, or any other, summons in this cause on her by said sheriff until the latter date.

"Plaintiff says that, by reason of the premises aforesaid, the estate of said Samuel H. Leathe is justly indebted to plaintiff, as administratrix of the estate of Charles H. Knisely, in the sum of \$107,500, with interest thereon at the rate of 6 per cent. per annum, as aforesaid.

"Wherefore plaintiff prays judgment against the said defendant for the sum of \$107,500, together with interest and costs."

At the June term, and on June 8, 1910, the defendant filed her motion to strike out all that part of the third amended petition having reference to the suit filed by plaintiff August 1, 1907, on the ground that said part was irrelevant, that no right of action could be founded thereon, and that it was redundant, and not proper matter to be pleaded.

Afterward on the same date the defendant filed a demurrer to all the third amended petition not included in the said motion to strike out, which demurrer, omitting venue and signatures, is as follows:

"Elizabeth C. Knisely, Administratrix of the Estate of Charles H. Knisely, Deceased, Plaintiff, v. Grace A. Leathe, Executrix of the Estate of Samuel H. Leathe, Deceased, Defendant.

"And now comes the defendant and demurs to the plaintiff's third amended petition, other than the parts thereof on page 4, beginning with line 16, and on page 5, ending with line 5, which parts defendant has filed a motion to strike out. And for ground of this demurrer the defendant assigns that said parts of said petition not moved to be stricken out do not state facts sufficient to constitute a cause of action.

"I. That said parts of plaintiff's third amended petition herein not moved to be stricken out show that defendant was granted letters testamentary, and qualified as executrix of the estate of said Samuel H. Leathe, deceased, March 20, 1907, and duly published notice thereof, but said part of plaintiff's third amended petition does not show that the summons in this case was served on defendant within two years from March 20, 1907, as required by section 185 of the Revised Statutes of Missouri for 1899, but the return of the sheriff upon the alias writ issued herein shows that such service was made April 27, 1909, after the expiration of said two years; and said parts of said third amended petition not so moved to be stricken out also fail to show that plaintiff caused notice of her said pretended demand to be served on defendant and filed, as required by section 198 or 212 of said statutes,

within said two years, or that plaintiff, within said two years, filed notice of said pretended demand alleged in and by said third amended petition in the office of the probate court of said city, as required by said section 212; wherefore plaintiff's said pretended demand was barred after March 20, 1907, by the special limitation of two years fixed by section 185 of said statutes, when said summons was served herein on defendant April 27, 1909.

"II. Said petition fails to show that the deceased Samuel H. Leathe received from Charles C. Wolcott any money out of which the deceased Charles H. Knisely was to have been paid part, according to the terms of his contract with said Leathe, so that plaintiff's pretended cause of action herein for damages for breach of contract accrued prior to July 12, 1902, more than five years before this suit was begun."

At the April term, 1910, the court made the following order in said cause:

"Elizabeth C. Knisely, Administratrix, etc.,  
v. Grace A. Leathe, Executrix, etc.  
No. 58,063A.

"Now, at this day, the court, having duly considered defendant's motion to strike out part of plaintiff's third amended petition, heretofore filed and submitted herein, doth order that said motion be, and the same is hereby, sustained. And the court, having duly considered defendant's demurrer to all remaining parts of plaintiff's third amended petition (not stricken out on said motion), heretofore filed and submitted herein, doth order that said demurrer be, and the same is hereby, sustained."

During the same term the plaintiff filed its bill of exceptions to the action of the court in striking out part of the third amended petition. On the last-mentioned date, the plaintiff declining to plead further, the court rendered judgment for the defendant, from which this appeal is taken.

E. P. Johnson, Edward C. Crow, and Morton Jourdan, all of St. Louis, for appellant. A. & J. F. Lee, Charles M. Polk, Luther Ely Smith, George W. Lubke, and George W. Lubke, Jr., all of St. Louis, for respondent. Wildley, Wildley, McIntyre & Nardin, of St. Louis, for Title Guaranty Trust Co.

BROWN, C. (after stating the facts as above). [1] 1. The respondent's counsel say in their brief that neither the force nor effect of any provision of the written contract pleaded as the foundation of the action is involved in this record. We agree with them, except in so far as such provision may have a bearing upon the questions raised by the motion to strike out and demurrer directed against the third amended petition, and upon which it was held so fatally defective that judgment was given to the defendant. While

it is agreed that the demurrer and the action of the court thereon are before this court as belonging to the record proper, respondent says that neither the motion nor the action of the court in sustaining it is here for review, because the exception taken to that action was not followed up by a motion for a new trial in which the same matter was again made the subject of complaint and exception. If this be true, we take the petition, with all that portion covered by the motion eliminated, and have no power to review the action of the trial court in so emasculating it. Is this the condition of the record? The motion to strike out covers that part of the petition which pleads the institution, pendency, and dismissal of a previous suit to avoid the bar of the statute of limitations, which might otherwise arise on account of delay in bringing this action. The demurrer to the remainder is founded upon two specifications. The first amounts to a plea of the special limitation of two years prescribed for the exhibition of demands against deceased persons by section 185, Revised Statutes of 1899, and the other is a like plea of the limitation of five years contained in section 4,273 of the same revision. These papers were filed on the same day, were considered together, and the decision of the court upon both was included in a single entry. Both together they amounted to a demurrer to the petition, on the ground that it showed affirmatively upon its face that the demand sued on was barred by these statutes of limitations, of which the defendant chose to avail herself by demurring specially on that ground. Or, if we choose to put it the other way, they together constituted a motion to strike out the entire petition, for reasons of which the defendant could avail herself or not, as she chose, but which, if well founded, would destroy it as the statement of a cause of action. *Shohoney v. Railroad*, 223 Mo. 649, 122 S. W. 1025; *s. c.*, 231 Mo. 131, 148, 132 S. W. 1059, Ann. Cas. 1912A, 1143, and cases cited; *Burrows v. McManus*, 249 Mo. 555, 155 S. W. 403. It is the hybrid offspring with which we are concerned, and not the arrangement of its parentage. The destruction of the petition upon which the entire record rests is the matter complained of, and we cannot examine the record proper without taking cognizance of that fact, by whatever process it may have been accomplished. The propriety of the action of the court in sustaining both the demurrer and the motion to strike out a part of the petition is therefore before us.

[2] 2. What provision of the general statute of limitations was applicable to and running against this demand at the time of Mr. Leathe's death? The defendant elected, by her demurrer, to plead the limitation of five years. "Whenever the defense is of the nature of a special privilege, of which the party can only avail himself by pleading it, then

his pleading, whether by demurrer or answer, must specify the ground of his defense" (State v. Spencer, 79 Mo. 314), and, if he seeks by his demurrer to take advantage of the statute of limitations, he must plead the very provision on which he depends (Murphy v. De France, 105 Mo. 53, 62, 15 S. W. 949, 16 S. W. 861; State v. Spencer, supra). In this case he pleaded not only the special statute limiting the time for the exhibition of demands against the estates of deceased persons, but also the five-year general limitation.

[3] Section 4272, Revised Statutes 1899, provides that "an action upon any writing, whether sealed or unsealed, for the payment of money or property" may be commenced within ten years. This clause is more expressive in its breadth than in its length. It is attenuated by no qualifying word, such as "direct" or "unconditional," but includes every action for money or property founded upon a "writing." The contingency upon which it is to be paid or delivered does not enter into the construction of this short and expressive clause. This action is brought upon the theory that it was the duty of the defendant's testator, under the provisions of the contract with plaintiff's intestate pleaded in the petition, to carry out the terms of the contract of sale to Wolcott, made the same day, and to pay the sum sued for out of the proceeds; that, having refused to do so, the amount became due and payable; and, although the plaintiff's intestate could not, of course, enforce the specific performance of the contract with Wolcott, he stood in the same favorable position he would have occupied had it been honestly performed by the testator.

In *Curtis v. Sexton*, 201 Mo. 217, 230, 100 S. W. 17, 20, the plaintiff had purchased from the defendant's partnership an interest in a tract of land, which the partners promised in writing that they would at a given date repurchase, if the plaintiff should so desire and request, at an amount equal to all sums paid by him on the original purchase, with 10 per cent. interest. The plaintiff expressed his desire, and tendered a deed to defendant, and requested the payment of the amount agreed on, which was refused, and the plaintiff brought suit to recover it. In holding that the limitation of ten years, and not five, applied, the court said: "In the case at bar there is an express agreement to pay the amounts the plaintiff paid on account of his purchase, and interest thereon; the only necessity for going beyond the paper writing to make out the case is to show the performance of the contract on the part of the plaintiff and the breach on the part of the defendant. The action is founded on the written contract, and falls within the ten-year section of the statute of limitations."

We see no difference in principle between the case we are considering and the one just cited. In the latter the amount sued for was

the agreed purchase price of the land, but the refusal of the defendant to take the deed when tendered did not prejudice the plaintiff's right to recover it, as if his tender had been accepted. It makes no difference, however, whether the suit be in debt for the amount due upon a contract, or in covenant to recover unliquidated damages for its breach. Both are alike on the contract; and, if the contract is "for the payment of money or property," it fills the requirement of the provision of the statute of limitations we have quoted. The following cases are more or less in point on the same question: *Reyburn v. Casey*, 29 Mo. 129; *Moorman v. Sharp*, 35 Mo. 283; *Henoch v. Chaney*, 61 Mo. 129, 133; *Miner v. Howard*, 93 Mo. App. 569, 67 S. W. 692. We have no doubt that the ten-year limitation would apply in a suit of this character brought on a similar contract in the lifetime of the party.

[4] 3. There remains, stripped of these preliminary matters, the important question presented by this appeal: Is the demand sued on barred by the special limitation of two years, in force when the suit was begun? The special provisions relating directly to that period of limitation in case of demands against the estates of deceased persons are, as they appear in the Revised Statutes of 1909, as follows: Section 190, relating to the classification of demands, provides that the fifth class shall consist of "all demands, without regard to quality, which shall be *legally exhibited* against the estate within one year after the granting of the first letters on the estate"; and, in the sixth class, "all demands *thus exhibited* after the end of one year and within two years after letters granted." And section 191 provides that "all demands not *thus exhibited* in two years shall be forever barred," etc. By section 192 suits pending against the deceased at the time of his death are to be considered as demands *legally exhibited* from the time of their revivor, and by section 193 "all actions commenced against such executor or administrator, after death of the deceased, shall be considered demands *legally exhibited* against such estate from the time of serving the original process on such executor or administrator." Section 194 provides that demands may be exhibited by serving upon the executor or administrator a notice in writing, stating the amount and nature of the claim, with a copy of the instrument of writing or account upon which it is founded, and that such claim shall be considered legally exhibited from the time of service of such notice or its waiver in writing; and section 195 requires that, to avail himself of that method of exhibition, the claimant must present his demand to the court in the manner provided by law for allowance within two years after the granting of letters. Originally both the last clause of section 190 and also section 191 contained, following the words

"thus exhibited," the words "and presented to the court for allowance" (R. S. 1889, §§ 185 and 184), but these were stricken out by amendment in 1899 (Laws 1899, p. 38).

We have given the foregoing summary of the several statutory provisions affecting the limitation of actions for the establishment and collection of demands against the estates of deceased persons for the purpose of showing that the Legislature has made a plain and deliberate distinction between the exhibition of such demands and their presentation for allowance; that it has emphasized this distinction by striking out by amendment those provisions of sections 183 and 184 of the Revised Statutes of 1889 which required that they must be "presented to the court for allowance" to stop the running of the special statute, and also by providing that in certain instances the demand may be exhibited at one time and presented for allowance at another and later time; but in every case the course of the statute is arrested by the "legal exhibition" of the demand. There is no avenue of escape from the direct declaration of the Legislature that on September 7, 1907, the date of the service of the original process in the first suit brought by the plaintiff against the defendant, executrix, on this demand, the running of the special statute against it stopped, and it was then the duty of the defendant to classify it immediately in the fifth class, and report it to the court in his first annual settlement. R. S. 1909, § 156. Up to that time two statutes of limitation were running simultaneously against the claim—the general and the special. At the expiration of the term provided by either, the action would be barred as to both. *McKinzie v. Hill*, 51 Mo. 303, 11 Am. Rep. 450. Comparison of the language of these two statutes may also throw some light upon the legislative purpose. The general statute is directed only against the particular remedy which it is intended to exclude. It employs the time-honored formula that a civil action can only be commenced within the time limited; that is to say, the time is limited with reference to the beginning of the particular action in which the plea is made. The special statute before us provides that the demand shall be barred against all remedy, unless it be exhibited within the time limited, thus necessarily implying the correlative proposition that all remedies will be preserved by its exhibition within the time. The defendant, on the other hand, seems to contend that, while the exhibition of the demand impeded the running of the special statute for a time, the dismissal of the suit swept away the impediment, and the placid waters of repose resumed their flow, undisturbed, into legal oblivion. She refers to no statute, nor does she cite any authority in support of this contention. The limitation depends entirely upon the statute for its existence, and we have

no authority to write into it what the Legislature has left out.

We have already mentioned the fact that the special limitation goes hand in hand with that imposed by the general statute. When a demand is barred by the latter, it cannot be a living one through the former. *McKinzie v. Hill*, supra. Had this cause of action accrued nine years before the issue to defendant of letters testamentary, it would not wait to be barred by the special statute in two years, but would come within the bar of the general statute at the end of the first year. Were suit brought during that first year, it would be a perfect statutory exhibition of the demand, and therefore stop the running of the special and general statutes of limitation. The special limitation would then be out of the case, the only condition required to prevent it from running having been fully performed, and it would only remain to take such steps that the action already pending could be kept alive, or new actions brought during the period of limitation prescribed by the general statute.

[5] Should a nonsuit or dismissal be suffered, the suit might be renewed as provided in section 1900 of the General Statutes of 1909, under the very letter of which it would fall. We see no difference in principle between such a case and this one. The bringing of the suit and service of the original process September 7, 1907, exhibited the demand and stopped the running of the special statute. *Tevie v. Tevie*, 23 Mo. 256; *Farrar v. Comfort*, 33 Mo. 44, 56; *Ryans v. Boogher*, 169 Mo. 673, 684, 69 S. W. 1048. This suit was dismissed during the absence of plaintiff on February 5, 1909; a motion was filed to set aside the judgment of dismissal, and overruled March 8th; and on March 10, 1909, the petition in this case was filed and process sued out thereon, at which time it still lacked ten days of being two years since the issue of letters testamentary to the defendant.

The General Code (R. S. 1909, § 1756) provides that: "Suits may be instituted in courts of record, except when the statute law of this state otherwise provides, \* \* \* by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action, and the remedy sought, \* \* \* and suing out thereon a writ of summons." So far as the provisions of our general statute of limitations is concerned, this has always been considered such a commencement of an action as arrests its running. *State ex rel. v. Wilson*, 216 Mo. 215, 292, 115 S. W. 549, and cases cited. In this case, however, it is claimed that it is otherwise provided by the statute fixing a limitation to the presentation of demands against the estates of decedents. We have already seen that the provision relating to service of summons on the executor or administrator only applies to the exhibition of

the demand, and that there can be but one exhibition of the same demand. It follows that the present suit was instituted in time to avoid the bar of the special limitation.

While the demurrer states that the petition does not state a cause of action, it expressly places its conclusion on the ground that the cause of action appeared, upon the face of the petition, to be barred by the statute of limitations. Respondent makes no other objection here. Under these circumstances, we have confined our examination to the question presented to and decided by the circuit court, and again presented by this appeal, leaving all other questions to be decided as they may hereafter arise.

For the reasons we have stated, the judgment will be reversed, and the cause remanded.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court.

LAMM, J., concurs. GRAVES, J., concurs in separate opinion, in which WOODSON, P. J., and BOND, J., concur.

GRAVES, J. I concur in all that is said by our learned Commissioner in this case, except where he says that the respondent raises no other questions here besides those disposed of by the opinion, and wherein he says that all other questions should be left to future determination. I think there is another question of vital importance which should be now determined to the end that this case may be properly tried when tried anew below. Counsel differ as to the character of the instrument involved in this suit, and even as to the character of the action. Counsel for plaintiff contends that the petition is one upon a contract to pay money, and that the amount to be recovered is measured by the provisions in the written instrument, which respondent in her brief, through her able counsel, thus denominates the cause of action: "The purpose of both suits was to establish a pretended demand for damages against the Leathe estate for \$107,500, on account of services which the deceased Knisely claims to have rendered Leathe in an endeavor by Leathe to sell, for \$850,000, to one Charles C. Wolcott 37,514 acres of land in St. Francois and Madison counties, Mo., known as the Mine La Motte property, together with the machinery, operating plant, and other property thereon belonging to said Leathe."

Thus it appears that the theory of the one party is that the action is one upon a written contract for the recovery of a specified sum, stated in the contract, whilst the theory of the other is that the petition states only an action for damages. In the one instance

the contract would be the very basis of the action, whilst in the other it would be purely evidentiary. Again in the brief this diverse contention of the parties is further emphasized by respondent's counsel, in this pointed language: "(b) The demand of the appellant was not founded upon a writing, sealed or unsealed, for the payment of money or property, within the meaning of the general statute of limitation of ten years (R. S. 1909, § 1888), but was a demand for damages to which the written contract was an incident, and was therefore governed by the five-year limitation (R. S. 1909, § 1889), and the demurrer to appellant's third amended petition was therefore also rightfully sustained on that ground. The demand was barred by the five-year limitation before the first suit was brought August 1, 1907. Leathe's written contract with Knisely promised the latter for his services the \$107,500 in installments "out of the purchase price" of the property "at such time and place as the said Leathe should receive the principal payment on said real estate" from Wolcott. But Leathe never received any purchase money from Wolcott; and, if Leathe wrongfully refused to perform his contract with Wolcott, the latter's action at law could only have been one for unliquidated damages for such breach, to which the five-year limitation would have applied. Knisely's demand under these conditions was not greater than Wolcott's. They were analogous."

We should not leave this case in this kind of a turmoil upon a retrial thereof nisi. Not only is this diverse contention squarely suggested and argued in the briefs here, but it was likewise argued in the very demurrer which was sustained by the lower court. In that demurrer it is said: "Said petition fails to show that the deceased Samuel H. Leathe received \* \* \* any money out of which the deceased Charles H. Knisely was to have been paid part, according to the terms of his contract with said Leathe, so that plaintiff's pretended cause of action herein for damages for breach of contract accrued prior to July 12, 1902, more than five years before this suit was begun."

Whilst it is true that this second point of the demurrer says something as to the five-year statute of limitations, yet it is further true that it urges that the petition fails to state a cause of action, because it fails to state that Leathe ever received any money from Wolcott. It is clear that counsel for respondent were urging that plaintiff could not recover because there had been no money paid by Wolcott to Leathe. So that, from all standpoints, the character of this written instrument between Leathe and Knisely is a vital question here, in view of the fact that this case must go back for trial below. Not only so, but the very character of the suit is challenged, and, the court below having sustained the demurrer as a whole, we must take the

view here that the trial court stood with respondent upon these contentions as to the character of the suit and the character of the contract. He could not have sustained the second ground of demurrer as he did without saying that the written contract was not one "for the payment of money or property," or without saying that the suit was not upon the written contract, but was one for damages of which the written contract might be purely evidentiary. So that throughout this record these questions bristle as big as life, and they should be determined at this trial, to the end that another appeal to determine them may be averted. We are of opinion that the demurrer was improperly sustained upon any theory of the case, and shall proceed to discuss the character of this petition and the contract upon which we think the cause of action is based.

[§] II. This action is one upon the contract for the money mentioned therein, and not an action for damages for the breach of the contract. It is clear that the petition proceeds upon that theory. Eliminating from the petition matters relative to the statutes of limitations and the status of the parties plaintiff and defendant, it reads:

"Plaintiff, for her cause of action against defendant, states that on the 25th day of October, 1900, said Samuel H. Leathe and one Charles C. Wolcott made and entered into a contract in writing of that date (a copy of which is herewith filed and marked 'Exhibit A,' wherein and whereby the said Samuel H. Leathe, in consideration of the sum of \$1 to him paid by said Wolcott, agreed to and did sell to said Wolcott, for the sum of \$850,000, certain lands situate in the counties of St. Francois and Madison, in the state of Missouri, containing 37,514 acres, and being known as the Mine La Motte and other lands of the said Samuel H. Leathe, particularly described therein, together with all machinery, operating plant, and personal property then and thereon belonging to the said Samuel H. Leathe; that in and by said contract said sum of \$850,000 was made payable as follows: \$300,000 in cash, as soon as the report of the engineer of said Wolcott upon said lands was completed, and abstracts of title to said property examined by the attorneys of said Wolcott, and deed delivered and possession of said property given to said Wolcott, one-third of the remainder on or before one year from the date of the delivery of title and possession of said property to him, and one-third in two years, and one-third in three years thereafter; that in and by said contract the said Samuel H. Leathe agreed to execute and deliver a warranty deed to the said Wolcott of said property, with abstracts of title showing and conveying a good title to all of said real estate; and it was further especially agreed that said grantee, Wolcott, or his attorneys, should be the sole judges as to whether such abstracts and facts in relation thereto showed a good and indefeas-

ible title to said lands in said grantor, Samuel H. Leathe, said deferred payments to be secured by a trust deed on said property, and notes to bear interest at the rate of 6 per cent. per annum from their date, and that said Wolcott should have a reasonable time before making said first payment to have said lands surveyed, maps made thereof, and also to have his engineers to make a full and complete examination and report upon the property; such examination to begin not later than December 1, 1900.

"Plaintiff further states that the said Charles C. Wolcott caused his engineer to begin such examination of said property prior to said December 1, 1900, and that said Wolcott was at all times ready, able, and willing to comply with and perform all of the other provisions of said contract to be complied with and performed by him, and he would have complied with and performed said other provisions of said contract to be kept and performed by him but that said Samuel H. Leathe failed and refused to comply with his part of said contract in this, to wit:

"First. That he failed to execute and deliver to the said Wolcott a warranty deed, as he had agreed.

"Second. The said Leathe failed and refused to deliver to said Wolcott, or his attorneys, abstracts of title showing good and indefeasible title to the said real estate described or any abstracts of title thereof whatever, which said abstracts of title said Wolcott requested and demanded of said Leathe January 4, 1901.

"Third. The said Leathe repeatedly offered to sell and sold said premises prior to July 12, 1902, and subsequently sold and conveyed by deed the said property to a grantee other than said Wolcott, or any person or persons to whom he sold the same, to wit, the Mine La Motte Lead & Smelting Company, a corporation.

"Plaintiff further states that on the said 25th day of October, 1900, the said Samuel H. Leathe, by his contract in writing (herewith filed and marked 'Exhibit B'), promised that, in the event of the sale of said property described in said contract with said Wolcott of even date therewith, to or through said Wolcott or his assigns, for services rendered, the receipt and value of which services were thereby acknowledged, to pay to said Charles H. Knisely, plaintiff's intestate, or his order, the sum of \$107,500 out of the purchase price of said \$850,000; the payment of said \$107,500 to be made by said Leathe to said Knisely in four payments, the first one of \$37,941.19, and three additional payments of \$23,186.27 each, at such time and place as the said Leathe should receive the principal payment on said real estate, as per the contract of sale entered into by him with the said Charles C. Wolcott of even date therewith, deferred payments of said amount to bear interest at the rate of 6 per cent. per annum, the same as the original sum in said contract



of sale entered into between said Leathe and Wolcott. \* \* \*

"Plaintiff says that by reason of the premises aforesaid, the estate of said Samuel H. Leathe is justly indebted to plaintiff, as administratrix of the estate of Charles H. Knisely, in the sum of \$107,500, with interest thereon at the rate of 6 per cent. per annum, as aforesaid.

"Wherefore plaintiff prays judgment against the said defendant for the sum of \$107,500, together with interest and costs."

A study of the foregoing petition shows that the plaintiff is suing upon the contract of Leathe with Knisely for the money therein agreed to be paid, and not otherwise. The pleading of the Leathe-Wolcott contract was for the purpose of showing that Leathe had actually sold the property to Wolcott, and had actually accepted the purchaser found by Knisely, and for that reason the commission mentioned in the Leathe-Knisely agreement had been, in fact and in law, earned. The pleading of the other extrinsic facts was but to show that the money was due at the date of the demand or suit.

[7] The petition proceeds upon the theory, and rightly so, that, if Wolcott purchased the property, and a completion of that purchase by exchange of deeds and trust deeds was prevented by the act of Leathe, then the money mentioned in the Leathe-Knisely contract at once became due, and this, too, without reference to the payment of any money by Wolcott; in other words, that Leathe could not willfully refuse to enforce the Wolcott contract, and thereby defeat the promise to pay made in the Knisely contract. It follows that counsel for respondent are in error when they insist that the action is one sounding in damages for a breach of contract. It also follows that the circuit court was in error if it followed this bent of counsel's mind. It is further true that the court was in error in sustaining the record ground of the demurrer, that the petition stated no cause of action without the allegation that the money had been paid by Wolcott. That one having an enforceable contract of sale with another person, induced and procured by an agent, cannot defeat the agent's commission by refusing to enforce the contract is well-settled law. His refusal to carry out the contract or, in the event he himself has signed the contract of sale with the purchaser, his refusal to afterwards enforce such contract renders him liable for commission in the sum agreed upon.

Thus in *Roche v. Smith*, 176 Mass. loc. cit. 597, 58 N. E. 153, 51 L. R. A. 510, 79 Am. St. Rep. 345, is it said: "Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability to do so does not deprive the broker of his commission, provided the principal made a valid and binding agreement for the sale of the land with

the customer produced by the broker. *Ward v. Cobb*, 148 Mass. 518 [20 N. E. 174, 12 Am. St. Rep. 587]; *Burnham v. Upton*, 174 Mass. 408, 409 [54 N. E. 873]. The grounds on which this is settled is that, by entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case the decision would have to be the other way, were it not that, by entering into the contract with him, the principal accepts the customer produced by the broker; what the broker is employed to do is to produce a customer who will buy and pay for his principal's land. *Fitzpatrick v. Gilson*, 176 Mass. 477 [57 N. E. 1000]. If it turns out that the customer produced by the broker is not able to pay, and does not pay, for the land, the broker has not performed his duty, and has not earned his commission; and it is only because the principal accepts the customer by entering into a valid contract with him that it is held in cases like *Ward v. Cobb* that the broker has earned his commission. *Coleman v. Meade*, 13 Bush (Ky.) 358; *Donohue v. Flanagan* (City Ct. N. Y.) 9 N. Y. Supp. 273; *Francis v. Baker*, 45 Minn. 83 [47 N. W. 452]; *Wray v. Carpenter*, 16 Colo. 271 [27 Pac. 248, 25 Am. St. Rep. 265]; *Lockwood v. Halsey*, 41 Kan. 166 [21 Pac. 98]; *Springer v. Orr*, 82 Ill. App. 558. The law is settled in other jurisdictions in accordance with *Ward v. Cobb*, 148 Mass. 518 [20 N. E. 174, 12 Am. St. Rep. 587]. See *Francis v. Baker*, 45 Minn. 83 [4 N. W. 452]; *Wray v. Carpenter*, 16 Colo. 271 [27 Pac. 248, 25 Am. St. Rep. 265]; *Love v. Miller*, 53 Ind. 294 [21 Am. Rep. 192]. And generally that a broker makes out a case for a commission earned by proving a contract made. See *Cook v. Fiske*, 12 Gray (Mass.) 491; *Rice v. Mayo*, 107 Mass. 550; *Keys v. Johnson*, 68 Pa. 42; *Veazie v. Parker*, 72 Me. 443; *Conkling v. Krakauer*, 70 Tex. 735, 739 [11 S. W. 117]."

In the later case of *Johnson v. Holland*, 211 Mass. loc. cit. 364, 97 N. E. 755, the same court says: "The defendant's testator having accepted the proposed purchaser by entering into the written contract of sale with him, it was not necessary for the plaintiffs to prove at the trial that the purchaser was able, ready, and willing. When the valid written contract was executed the commission of the plaintiffs was earned. *Roche v. Smith*, 176 Mass. 595, 597 [58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345], and cases cited. The plaintiffs were not obliged to go further."

In this state, *Smith, P. J.*, in *Wright & Orison v. Brown*, 68 Mo. App. loc. cit. 583, among other things, said: "And when the purchaser is accepted and the contract executed, the principal cannot be heard to say, when the agent calls on him for compensation, that: 'You did not produce a purchaser who was financially able to perform the contract and respond in damages, in the case

of nonperformance by him, and therefore I owe you nothing for your services.' The same doctrine is approved by Johnson, J., in the more recent case *Glade v. Mining Co.*, 129 Mo. App. loc. cit. 455, 107 S. W. 1002.

For a long line of authorities from all parts of the United States, along the same line, see brief of appellant. The doctrine bears the impress of reason. The agent brings to the seller a purchaser. The seller does not have to accept any kind of a purchaser, but he may do so. The seller can size up the purchaser and either accept or reject him. If he accepts him, he at once becomes liable to the real estate agent who produced the customer, although the purchaser may not afterwards meet the expectations of the seller. The fact, if it be a fact, as alleged in the petition, that Leathe accepted Wolcott as a purchaser by entering into a contract of sale with him, if he did enter into such contract, would render Leathe liable to Knisely for the agreed commission, unless there was some express agreement to the contrary. As said, the rule is based upon the idea that the seller does not have to accept an unworthy or unreliable purchaser, but that he may accept him if he choose so to do, and, if he does accept the purchaser, the deal between him and his real estate agent becomes a sealed lock. The commission has been earned, and must be paid.

[8] III. The paper writing between Leathe and Wolcott was a sale of the property to Wolcott by Leathe. Such contract, omitting the description of the land, reads:

"In consideration of one dollar, receipt whereof is hereby acknowledged, I have this day agreed to sell to Charles C. Wolcott, party of the second part, all of the following described land, situated in the counties of St. Francois and Madison, in the state of Missouri, containing thirty-seven thousand five hundred and fourteen (37,514) acres, described as follows: \* \* \* Together with all machinery, operating plant and personal property now thereon, belonging to said vendor, for the sum of eight hundred and fifty thousand (\$850,000.00) dollars, this amount payable as follows: three hundred thousand dollars in cash as soon as engineer's report is completed upon the property and abstracts of title are examined by the attorneys of the party of the second part, deed delivered and possession given; one-third of remainder on or before one year from date of delivery of title and possession, one-third in two years, and one-third in three years. Said party of the first part agrees to execute and deliver a warranty deed, with abstracts of title, showing and conveying good title to all the real estate above described.

"It is especially agreed that said grantee or his attorneys shall be the sole judge as to whether such abstracts and facts in relation thereto show a good and indefeasible title to said lands in grantor herein mentioned. Deferred payments to be secured by a trust

deed on the property, and notes to bear interest at the rate of six per cent. (6 per cent.) per annum from their date, payable on or before. It is further agreed that the party of the second part shall have a reasonable time before making first payment to have lands surveyed and maps made of same, also to have their engineer make a full and complete examination and report upon the property, such examination to begin not later than December 1st, 1900.

"A failure by the party of the second part to comply with the above contract or to make such payments as they come due, shall make this contract null and void.

"Witness our hands this 25th day of October, 1900.

"[10-cent United States revenue stamp affixed and canceled.]

"[Signed] S. H. Leathe.

"[Signed] Charles C. Wolcott."

When Leathe signed this contract with Wolcott, if he did sign it, his liability to Knisely, the procuring agent, became fixed, unless such liability was defeated by some express agreement to the contrary. And this brings us to the Knisely contract as pleaded and sued upon in this case.

[9] IV. The Knisely contract can well be gathered from the pleadings heretofore set out, but, that there may be no misunderstanding, we quote it thus:

"In the event of the sale of the Mine La Motte estate and additional lands belonging to me (described in contract with Charles C. Wolcott of even date herewith) amounting in total to 87,514 acres, to or through Charles C. Wolcott of New York or his assigns, for services rendered, the receipt and value of which are hereby acknowledged, I hereby promise and agree to pay to Charles H. Knisely, of St. Louis, Missouri, trustee, or his order, the sum of one hundred and seven thousand five hundred (\$107,500) dollars out of the purchase price of \$850,000; the payment of said \$107,500, to be made by me to said Charles H. Knisely, trustee, or his order, in four payments, the first one of \$37,941.19, and each of the three additional payments of \$23,186.27 each, at such time and place as I receive the principal payment for said real estate as per contract of sale entered into by me with Charles C. Wolcott of even date herewith; deferred payments of the amount above written to bear six per cent. interest per annum, the same as the original principal sum.

"Done at St. Louis, Mo., this twenty-fifth day of October A. D., 1900.

"S. H. Leathe."

This contract, at least when coupled with the allegations that Wolcott or his assigns stood ready and willing to perform, and Leathe refused and failed to perform the Leathe-Wolcott contract, rendered Leathe liable at once for the full amount agreed to be paid in the Knisely contract as and of the date of such refusal, and this too in a suit

upon the contract. *Curtis v. Sexton*, 201 Mo. loc. cit. 230, 100 S. W. 20. In that case Valliant, P. J., said: "In the case at bar there is an express agreement to pay the amounts the plaintiff paid on account of his purchase and interest thereon; the only necessity for going beyond the paper writing to make out the case is to show the performance of the contract on the part of the plaintiff and the breach on the part of the defendant. The action is founded on the written contract, and falls within the ten-year section of the statute of limitations."

So in this case. The action is upon the contract, and, at the very most, it is only required to go outside of the contract to show that Wolcott was ready and willing to perform, and Leathe refused to perform, the Wolcott-Leathe contract. In fact, under all the case law, except that of Maryland, the fact that Leathe accepted Wolcott as a purchaser, and he himself contracted with him as such, eliminates the proof that Wolcott was able, ready, and willing to perform, as is indicated by the case quoted from and cited supra, unless, of course, some fraud was practiced upon Leathe in reference to the contract.

The circuit court seems to have so misunderstood the case, and the diverse views of counsel in the briefs are such, that the case should not be sent back without some expression from this court upon the questions.

With these added views, I concur.

WOODSON, P. J., and BOND, J., concur in these views.

**CITY OF ST. LOUIS v. BARTHEL et al.**  
(Supreme Court of Missouri, Division No. 1.  
April 2, 1914.)

**1. PLEADING (§ 36\*)—CONCLUSIVENESS—TITLE OF DEFENDANT.**

In a suit to condemn a strip of land for a street, an allegation in the petition that the defendants were the owners of or claimed some interest in the several parts of the premises therein described did not estop the city to question the title of a defendant to a part of the strip, as the object of such a suit is not only to condemn the land, but to determine who the owners are, which could not be done without making all who claimed title or an interest parties to the suit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 38.\*]

**2. DEDICATION (§ 19\*)—ACTS CONSTITUTING—DESIGNATION IN MAPS OR PLATS.**

Where, in a suit to partition land, the commissioners, as shown by their report and the accompanying plats, laid out and reserved a strip 30 feet wide for a street, and described the property allotted to each heir as fronting on a street, and not as including any part of the strip so reserved, and the report was confirmed by a judgment from which no appeal was taken, and with the attached plat on which the city engineer certified that the streets and alleys represented thereon conformed with the official city plat on file in his office was recorded in the city recorder's office, and the various lots in the

tract were sold to various parties, who purchased and improved them on the understanding and belief that the street was a public street, there was a dedication of the strip as a public street whenever accepted by the city by user or formal acceptance, though the commissioners used the words, "reserved for street purposes" instead of expressly stating that the strip was set aside and dedicated for such purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Condemnation suit by the City of St. Louis against Louisa Barthel and others. From a judgment in favor of the city, defendants J. E. Brawner and others appeal. Affirmed.

This suit was duly instituted in the circuit court of the city of St. Louis to condemn certain lands particularly described in the petition for street purposes. A trial was had, which resulted in a judgment for the city, and the defendants J. E. Brawner, W. P. McCrory, and Anna M. Hilton appealed the cause to this court.

The common source of title, as I gather from the record, was Henry Elbreder, who owned the land and died intestate in the year 1860. The street in question was Compton avenue, and the strip of ground sought to be condemned was some seven blocks in length, and among other tracts was one 30 feet wide and some 600 feet in length, claimed by the appealing defendants as belonging to them. The city claims this particular strip of ground under a partition decree, dedicating it for street purposes in the year 1874; while appellants claim through mesne conveyances from Elbreder.

The real contention of the parties to this appeal is fairly well stated by counsel for appellants in the following language: "On November 14, 1908, respondent filed in the court below a petition for the condemnation, as a public highway of respondent, of the west half of Compton avenue, as shown on the Elbreder partition plat, and marked 'Reserved' thereon, and marked, 'Anna M. Hilton,' as owner, pursuant to ordinance on the plat attached to the report of the commissioners in the cause, which piece of land is 30x600 feet. The proceedings were regular, and there is no conflict in the testimony or evidence nor any objection to any of the documentary evidence that challenges the sufficiency of any of it for the purpose for which it was intended, leaving only the proper construction of the pleadings, report of the commissioners, and the evidence to be passed on by this court, to determine whether there had been a dedication, or an acceptance by respondent of the same if made, of said land, as a public highway, either by dedication shown by said commissioners' plat, or by calls for Compton avenue as a bounding street in conveyances made by the heirs."

As indicated by the foregoing statement of counsel, there is no dispute as to the facts;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, since they are fully set out by counsel for respondent I will adopt their statement as the statement of the case, which is as follows:

"Commissioners (in this suit) were duly appointed after proper service upon all parties who owned or claimed any interest in the property, and their report, together with plats attached thereto, which were furnished by the street commissioner of the city of St. Louis under authority of ordinance, were filed in the circuit court on the 18th day of October, 1909. The plat attached to the report of the commissioners in this condemnation suit shows the following situation: That Compton avenue from Gravois avenue southwardly to Osage street was a public highway in the city of St. Louis of irregular width. At some places it was 30 feet wide; at others 60 feet wide. The purpose of this ordinance, as shown by the plat, was to make a street with uniformly straight east and west lines, from Gravois avenue to Osage street, 60 feet wide. It shows that the center line of the proposed street was a straight line extending from Gravois avenue to Osage street, and that to make it 60 feet wide through this entire length in some cases required the condemnation of 30 feet westwardly from this center line, and in some cases 30 feet eastwardly from the said line; at other places it is already 60 feet wide. Compton avenue is a north and south street. The section of Compton avenue included within ordinance 23567 from Gravois avenue to Osage street is crossed by the following east and west streets southwardly from Gravois avenue in the following order: Utah street, Cherokee street, Potomac street, Miami street, Winnebago street, Chippewa street, Keokuk street, and Osage street. As the exceptions filed on the part of the defendant Hilton relate only to property which she claims, we shall describe the blocks bounded on the north by Winnebago, and on the south by Chippewa street, a little more minutely. The plat appearing in the appellants' abstract shows city block 1,619, and one-half of city block 1,622. The strip of land shown on this plat which Anna M. Hilton claims to own in fee extends from the south line of Winnebago street to the north line of Chippewa street, a distance of 600 feet, and has a width of 30 feet. This strip of land 30 feet wide is the western half of Compton avenue as established by ordinance 23567. The eastern half of this street is shown on this plat with the following notation (which is very indistinct): 'Heirs of William B. Betts, deceased, viz.: Elizabeth L., William, Carrie, Leonard Betts, and Julia Parsons, wife of Charles T.' This strip of land has the same dimensions as the strip in which appellant Hilton claims an interest. It is the eastern half of the street and extends from Winnebago southwardly to Chippewa street. The plat shows city block 1,619 as Elbreder's estate subdivision; the plat shows city block 1,622 as Betts' subdivision.

Virginia avenue bounds city block 1,619 on the west, and Michigan avenue bounds city block 1,622 on the east. Both blocks are subdivided in the same manner. Each block has a frontage of 270 feet on the south line of Winnebago street, and 270 feet on the north line of Chippewa street. Block 1,622 has a frontage of 600 feet on the west line of Michigan avenue, and block 1,619 has a frontage of 600 feet on Virginia avenue. There are 12 lots in each block fronting on Compton avenue between the alley south of Winnebago street and the alley north of Chippewa street. The lots in city block 1,619 extend from the west line of the property in which the appellant Hilton claims an interest westwardly for a distance of 125 feet to an alley. The lots in city block 1,622 front upon the east line of the strip of land, in which the heirs of William Betts claim an interest, and extend eastwardly for a distance of 125 feet to an alley. These 24 lots, 12 in city block 1,619, and 12 in city block 1,622, have no outlet, except over the two strips of land in which Hilton and Betts claim an interest. In city block 1,619 the 12 lots fronting on this strip of land claimed by Hilton are owned by 11 separate and distinct proprietors, and if the contention of the appellant be true that the land shown on the plat in the name of Anna M. Hilton is not a street, and that the alley in the rear shown in the name of the heirs of Elbreder is not an alley, the present owners of this property have no possible method of getting to their property except over the property of others.

"In the year 1849 the east half of the southwest quarter of block 69 of the commons of the city of St. Louis was acquired by Henry Elbreder in a partition by a partition deed. This eastern half of the southwest quarter of block 69 comprises what is shown by the plat in the appellants' abstract, at page 10, as city block 1,619 (which will be presently set out and marked 'Exhibit A'). Henry Elbreder died in 1860 and at the time of his death he was still the owner of this property, now known as city block 1,619. On May 11, 1874, a partition suit was instituted in the circuit court of the city of St. Louis for the partition of this property among the heirs of Henry Elbreder. Commissioners were duly appointed and returned into court their report in the proper form, partitioning all of this property on the 30th day of November, 1874. The plat showing the method of partition was attached to said report (which will be set out and marked 'Exhibit B').

"The commissioners' report in partition recites that they 'proceeded to view and examine the premises, and they thereupon laid them off in blocks and lots, in compliance with the manner of subdividing lots and blocks within the limits of the city of St. Louis, and with a view to the future opening and widening of streets and alleys, and reserved sufficient ground for the purpose of

later being appropriated to such streets and alleys, all of which will more fully appear hereto attached,' etc. The report recites the different lots assigned to the different heirs, which is in accordance with the designations made upon appellants' Exhibit B. This plat designates Virginia avenue, which bounds the property on the west, as 60 feet wide. It marks the eastern 30 feet of this 60-foot strip street, however, as 'reserved.' This 30-foot strip was a portion of the property owned by Henry Elbreder. It shows Compton avenue as 60 feet wide, with the notation on the western 30 feet 'reserved.' This western 30 feet was part of the property owned by Henry Elbreder included in the partition suit. The plat shows Winnebago street 60 feet wide, with the notation on the south 30 feet 'reserved.' It shows an east and west alley parallel with Chippewa street and northwardly therefrom 125 feet. This alley is shown as 20 feet wide, and extends entirely through this block from Virginia avenue to Compton avenue. It shows an east and west alley 20 feet wide, extending from Compton avenue to Virginia avenue, said alley being parallel with Winnebago street and distant southwardly therefrom 125 feet. It shows a north and south alley extending from the east and west alley on the north to the east and west alley on south through this city block. This north and south alley is shown on the plat as 20 feet wide. The plat also shows that Compton avenue extends southwardly from Chippewa street, and northwardly from Winnebago street in each case, with the center line coincident with the center line of Compton avenue, marked on the plat as 60 feet wide, extending in front of the Elbreder's property, as shown by Exhibit B. This commissioners' report was confirmed by final judgment in the partition suit entered on the 4th day of January, 1875. The proceeding in partition, including the report of the commissioners and the plat attached thereto, was filed for record in the recorder's office on the 24th day of September, 1875. Before filing the same the plat was taken to the city engineer of the city of St. Louis, and he certified that the location of the streets and alleys represented thereon was in conformity with the official city plan on file in his office. So that on the 24th day of September, 1875, after having obtained the approval of the city engineer as to the location of streets and alleys designated on the plat, the decree and the report and plat of the commissioners in the partition case were placed on record in the recorder's office of the city of St. Louis.

"The indorsement of the city engineer is as follows: 'City Engineer's Office, St. Louis, September 23, 1875. I hereby certify that the location of streets and alleys as represented on the above map is in conformity with the official city plan on file in this office. Walter Katte, City Engineer.'

"The commissioners in their report, parti-

tioning the real estate among the heirs, used this language: 'And thereupon they made partition of said lands in manner following, that is to say: To Catherine Elbreder, the plaintiff, they set off, allotted, and assigned the following: Lots numbered 1, 2, and 3, having a front on Chippewa street of 85 feet in the aggregate, by a depth northwardly along Compton avenue of 125 feet to an alley 20 feet wide \* \* \* bounded north by an alley, east by Compton avenue, etc. To Henry Elbreder \* \* \* lots numbered 33, 34, 35, and 36, having a front of 105 feet on Compton avenue by a depth westwardly of 125 feet to an alley 20 feet wide, and bounded north by an alley running east and west, east by Compton avenue, \* \* \* west by an alley running north and south. To Theresa, wife of Ernst Reisse \* \* \* lots numbered 41, 42, 43, and 44, having a front of 105 feet on Compton avenue by a depth westwardly of 125 feet to an alley 20 feet wide, and bounded \* \* \* east by Compton avenue, south by an alley running east and west, west by an alley running north and south. To George Elbreder \* \* \* lots numbered 37, 38, 39, and 40, having a front of 100 feet in the aggregate on Compton avenue by a depth westwardly of 125 feet to an alley 20 feet wide, and bounded north by lot number 36, east by Compton avenue, south by lot 14, and west by an alley. To Dorothea Nieman \* \* \* lot 32 having a front of 28 feet on Winnebago street by a depth southwardly and along Compton avenue of 125 feet to an alley 20 feet wide, and bounded north by Winnebago street, east by Compton avenue, south by an alley. \* \* \*

"The commissioners in partition throughout the entire length of their report describe the property allotted to each heir as fronting upon a street and extending to an alley. The plat of the commissioners in partition attached to their report shows the same situation. The plat does not show that these lots extend to the center of Compton avenue, 60 feet wide; no allotment is made to any of the heirs extending beyond the boundaries of the streets which are shown on the plat as 60 feet wide.

"The deeds introduced in evidence by respondent show that all of the heirs who became the owners in the fee of the several lots awarded to them in the partition suit transferred said lots to third parties.

"On the 11th day of June, 1877, Anton Elbreder, the administrator of the estate of Henry G. Elbreder, deceased, under an order of sale by the probate court, sold and conveyed to Louis Kohlbly lots 33, 34, 35, and 36, in city block 1,619, describing the property as having 'a front of 105 feet on Compton avenue, by a depth westwardly of 125 feet to an alley \* \* \* bounded north by an alley running east and west; east by Compton avenue. \* \* \*' The deed also recites: 'All of the aforesaid lots are situated in Elbreder's subdivision.' As to the

power of the administrator to sell said real estate the deed recites: 'That, whereas, the probate court of the county of St. Louis, state of Missouri, at its March term, 1877, made an order of sale directing the administrator of said estate of Henry B. Elbreder, deceased, to sell certain real estate in said order of sale mentioned, that said administrator had caused the real estate directed to be sold to be appraised by three disinterested householders of St. Louis county, as the law directs, and also caused a notice of the time, terms and place of said sale to be published for four weeks prior thereto in the St. Louis Times, a newspaper printed in the English language and published in said county of St. Louis, Missouri.' This deed was recorded in the recorder's office on the 14th day of June, 1877, in Book 574, p. 303.

"On the 12th day of January, 1878, Henry Reisse and wife, by their trustee, John E. Wurtz bach, trustee under deed of trust, executed by Ernst Reisse and Theresa, his wife, dated November 10, 1874, sold and conveyed to Maria Lohrmann 'the undivided six twenty-fifths interest in, to and out of the east half of the southwest quarter of block 69 of the commons of the city of St. Louis, in the state of Missouri.' This deed, executed by the trustee, recites that it is executed in pursuance of a trust imposed by a certain deed of trust, dated November 10, 1874.

"Maria Lohrmann, the grantee in the deed last above mentioned, conveyed to Jacob Engasser, by deed dated September 13, 1883, lots 41, 42, 43, and 44, in city block 1,619, and in said deed describes said lots as 'having an aggregate front of 105 feet upon the west side of proposed Compton avenue by a depth westwardly of 125 feet, and being bounded west and south by an alley, north by Sutmoeller, and east by proposed Compton avenue.'

"On the 21st day of February, 1883, George Elbreder and wife sold and conveyed to John D. Sutmoeller lots No. 37 and 38, in city block 1,619, and described said lots as 'having an aggregate front of 50 feet on the west line of Compton avenue, by a depth westwardly of 120 feet to an alley, and being bounded east by Compton avenue, west by an alley, south by Elbreder and north by Kohlby.'

"By a deed of trust dated April 6, 1883, George Elbreder and wife sold and conveyed to John D. Sutmoeller lots 39 and 40, in city block 1,619, and described said lots as 'having a front of 50 feet on the west line of Compton avenue, by a depth of 125 feet to an alley.'

"On the 17th day of October, 1885, Dorothy Sanders, formerly Dorothea Niemann, then the wife of William L. Sanders, and William L., her husband, sold and conveyed to Margaretta Niemann, lot No. 32, in city block 1,619, which had been allotted to Dorothea Niemann by the commissioners in partition,

and in said deed described said lot as having 'a front of 28 feet on the south line of Winnebago street by a depth southwardly and along Compton avenue of 125 feet to an alley 20 feet wide, and bounded north by Winnebago street, east by Compton avenue, south by the alley aforesaid,' etc.

"On the 17th day of September, 1887, George Elbreder, executor of the estate of Catharine Elbreder, deceased, by order of probate court of the city of St. Louis entered at the June term, 1887, sold and conveyed to William Sanders all the right, title, and interest of Catharine Elbreder, deceased, in and to lots 1, 2, and 3, in city block 1,619, and in said deed described the lots as having an aggregate front of 85 feet on the north line of Chippewa street and 125 feet on Compton avenue.

"It will be seen from the extracts that, in all these deeds executed by the owners who acquired title in the partition suit, the lots conveyed were designated as fronting upon streets and extending to alleys. All of these lots in city block, 1,619 have, since the date of said deeds, been transferred by mesne conveyances to the parties now owning them, as shown by the plat attached to the commissioners' report in this condemnation suit.

"The appellants have introduced in evidence certain condemnation proceedings bearing upon the question of res adjudicata. The first proceeding is the case of the City of St. Louis v. J. Oliver. The Oliver suit was a suit in condemnation for the opening of Winnebago street from Nebraska avenue to Louisiana avenue. This section of Winnebago street, to be opened under this proceeding, extended several blocks east and west. Final judgment in this cause was entered on February 9, 1895. The appellants' record in this case does not show what the issues were in the Oliver Case; neither are the pleadings set out, nor any of the evidence or the judgment of the court. The appellants' record, so far as the Oliver Case is concerned, shows only a suit in condemnation; that a commissioners' report was filed in the cause, and allowance was made of \$480 in favor of one J. Oliver for the taking of a parcel of land 30 by 330 feet along the north side of the Elbreder subdivision, for use of Winnebago street as a public highway, and that this report was confirmed by the judgment of the circuit court, which established said Winnebago street as a public highway on the condition of the payment or the tender of damages assessed by the commissioners. The record does not show that an appropriation ordinance was ever passed, or that the city ever took advantage of this judgment by paying the damages. It does show, however, that the parcel which the appellants are claiming was taken for Winnebago street, and upon the taking of which they base the question of res adjudicata, was a separate and distinct parcel of land from

the parcel involved in this appeal, which is 30 by 600 feet.

"The next proceeding is the case of the City of St. Louis v. Rankin. This was a proceeding to open Compton avenue. Final judgment in the Rankin Case was entered on the 28th day of July, 1897. Appellants' abstract shows that after the judgment in the Rankin Case no appropriation ordinance was ever passed to take advantage of the same, and that therefore the judgment of the court confirming the commissioners' report was never made a finality by the appropriation by the city of the money necessary to pay the damages.

"The next proceeding is the case of the City of St. Louis v. Elizabeth Bocka, for the opening of Virginia avenue. The appellants' record in this case shows that, after the commissioners' report was filed on the 20th day of April, 1897, the cause was dismissed on the 5th day of April, 1898, that final judgment was not entered in the Bocka Case, and that the proceeding was abandoned and dismissed at the motion of the plaintiff.

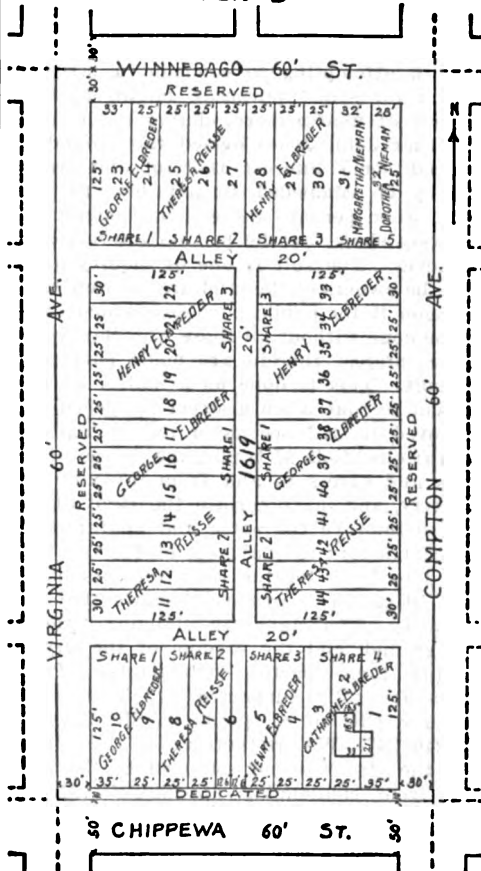
"The next case is the case of the City v. Bocka, filed on the 5th day of June, 1904, for the opening of Virginia avenue. The record of this proceeding shows that the commissioners' report was filed on the 2d day of October, 1905; that the commissioners found in this case that the damage for the strip of land taken for Virginia avenue, on the west side of the Elbreder subdivision, was \$1, but the proceeding was dismissed on motion of defendants in this cause. This was done undoubtedly on account of the fact that the charter provides that no suit shall be brought for 10 years for the condemnation of the same property after a commissioners' report has been filed in the case, and the record shows that this second Bocka suit was filed six years after the first suit had been disposed of.

"The next proceeding is the case of the City v. Bocka for the opening of Virginia avenue. The petition in this case was filed on November 16, 1908. The commissioners assessed the damages to the property, in which Anna M. Hilton claimed an interest at the time at the sum of \$2,728. The record shows that final judgment was entered in this cause confirming the report of the commissioners, but that this judgment was entered after the hearing of the appellants' exceptions in this cause, and it is, therefore, not a part of this record. We might state, however, since this has been incorporated in the record, that in that case an assessment against the city of \$1 was made by the commissioners. All the rest of the damages were assessed against private property. The city filed exceptions to the commissioners' report on the ground that the allowance of \$2,728 to Hilton was improper, as the land was already a public highway, and had a trial on these exceptions. At the trial of these exceptions

the appellants in this cause took the position that the city had no right to except on account of the fact that only \$1 had been assessed against the city, and tendered the \$1 so assessed to the city, and the circuit court took the view that the city had no right to except and dismissed its exceptions. This case not only shows that the city of St. Louis did not acquiesce in the finding of the commissioners, but that it excepted and attempted to have the commissioners' report set aside, but, owing to the legal proposition raised by these appellants, the court found that the city was not injured by the report because only \$1 had been assessed against the public generally, and that the city had no right to except."

The following is a plat of the property in question:

EXHIBIT B



E. P. Johnson, of St. Louis, for appellants.  
William E. Baird and Elmer E. Percy, both  
of St. Louis, for respondent.

WOODSON, P. J. (after stating the facts as above). I. There are but two questions of law presented by this appeal, namely: First, is the city estopped by the pleading from questioning the title of appellants to the property in question; and, second, did the

partition decree mentioned in the evidence amount to a dedication of said strip of ground to the city for street purposes? We will dispose of these questions in the order stated.

[1] Attending the first: The petition in this case, in substance, stated that the defendants named in the caption of the petition were the owners, respectively, of the several parts of the premises therein described, or that they claimed some interest therein. Counsel for appellants, with more plausibility than soundness of logic, contends that the city by the above charge solemnly admitted by record that the appealing defendants were the owners of the strip of ground in controversy, and that it should not now be heard to contradict the allegations of the petition. The very purpose of condemnation proceedings is to ascertain and acquire title to the land sought for street purposes, and to foreclose all outstanding claims and interests that are, or may be, asserted thereto by others. If that was not true, then the city, in attempting to condemn a strip of ground for street purposes, might, through mistake or inadvertence, charge in the petition that John Jones owned the ground or claimed some interest therein, and would thereby be compelled to pay him for the same, when perhaps the evidence might conclusively show that he had no interest in it whatever. The suit is one of inquiry as to who the owners of the land are, as well as to condemn it for public purposes, which could not be done without all those who claimed title or interest therein are made parties to the suit. This is done as a matter of precaution so that when a street is opened and improved it will become a public highway for various kinds of traffic, the means of ingress and egress to and from the adjacent property, and make certain the right of the city to improve the same and guarantee to the contractors the payment of the tax bills issued to them for the improvements made. This litigation conclusively shows that the appealing defendants are claiming title to this ground, and the wisdom of the city in making them parties defendants. These views are fully supported by the case of *Moses v. City of St. Louis*, 84 Mo. 242, loc. cit. 246, 247. We are therefore of the opinion that the city was not estopped by the petition from challenging appellants' title to land.

[2] II. The second proposition must also be decided against the appellants, for the reason that the report of the commissioners made in the partition suit mentioned, accompanied by the plats filed, show conclusively that the west 30 feet of Compton avenue, the land in controversy, was laid out and reserved, or dedicated as a public street of the city, whenever it saw proper to accept the same, either by user or formal acceptance. The parties to that suit received, or at least they thought they received, full and fair compen-

sation for the strip of land in question, by the partition of the estate, by the circuit court of that county; otherwise I naturally presume that the interested parties would have appealed the case to this court, but, not having done so, they and their privies in blood and contract are firmly bound thereby. Moreover, the city and the various parties who have for all of these years considered and acted upon the belief that Compton avenue was a public thoroughfare, and the latter, having purchased property and improved the same upon the understanding and belief that it was a public street, should not be prejudiced by the failure of the interested parties to use technical words in the dedication of the street. The words used clearly indicate that the strip of ground in question was intended as a street, and since all parties so considered it to be such, it would be extremely unjust at this late date to declare to the contrary. I am firmly impressed with the idea that the appellants are trying to make the city pay them for this strip of land, which they never owned, upon the flimsy pretense that the commissioners who partitioned the land used the words "reserved for street purposes," instead of stating that the same was set aside and dedicated therefor. There is no justice or equity in such a contention.

Viewing the case as we do, we are of the opinion that the judgment of the circuit court should be affirmed; and it is so ordered. All concur.

ROURKE et al v. HOLMES ST. RY. CO. et al.  
(No. 343.)

(Supreme Court of Missouri. April 2, 1914.  
Rehearing Denied April 13, 1914.)

#### 1. COURTS (§ 231\*)—APPELLATE JURISDICTION—STATUTE.

Const. Amend. 1884, § 3, giving the Legislature power to increase or diminish the pecuniary limits of the jurisdiction of the Courts of Appeals, did not authorize the Legislature to amend Rev. St. 1909, § 3937, which set such limits by adding, by Laws 1911, p. 190, a proviso that the Supreme Court should retain jurisdiction in any case pending in which it had made any decision or ruling.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

#### 2. COURTS (§ 231\*)—APPELLATE JURISDICTION—SUPREME COURT—CONSTITUTIONAL PROVISION.

The effect of Const. Amend. 1884, creating the Kansas City Court of Appeals and authorizing the creation of another, section 4 of which amendment provided that the powers, jurisdiction, etc., of the St. Louis Court of Appeals, which had been created by Const. art. 6, § 12, should apply to the new Courts of Appeals, and section 5 of which granted to the Supreme Court exclusive appellate jurisdiction of all causes other than those within the jurisdiction of the Courts of Appeals, and provided for direct appeals to that court, was to give the Supreme Court exclusive and direct power to review all cases from which appeals might



have been taken to it from the St. Louis Court of Appeals, by Const. art. 6, § 12.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**3. COURTS (§ 231\*)—APPELLATE JURISDICTION—POWER OF LEGISLATURE.**

Since the appellate jurisdiction of the Supreme and appellate courts is constitutional, the Legislature can alter that jurisdiction only as permitted by the Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**4. COURTS (§ 231\*)—APPELLATE JURISDICTION—SUPREME COURT—CONSTITUTIONALITY OF STATUTE.**

The fact that Rev. St. 1909, § 3937, required the transfer to the Court of Appeals of cases pending in the Supreme Court, but not submitted, and which were below the new pecuniary limit thereby fixed, and that the courts had obeyed such provision, does not show that the Legislature had power to classify cases for jurisdictional purposes, since such provision was expressly made by Const. Amend. 1894, § 7, and was of continuing force.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**5. COURTS (§ 231\*)—RULES OF DECISION—PRIOR OBEDIENCE TO UNCONSTITUTIONAL ACT.**

The fact that the Supreme Court had followed an unconstitutional law prescribing its jurisdiction does not establish the validity of such law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**6. COURTS (§ 231\*)—VALIDITY—CLASSIFICATION.**

The provision of Rev. St. 1909, § 3937, requiring the transfer to the Courts of Appeals of "cases which have not been submitted" which were below the new jurisdictional amount fixed for the Supreme Court, is not a classification of cases for jurisdictional purposes, but merely fixes the time when the law dividing the jurisdiction should take effect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**7. COURTS (§ 231\*)—RULES OF DECISION—ACTION OF INFERIOR COURT.**

The transfer by the Court of Appeals to the Supreme Court, under the authority of Rev. St. 1909, § 3937, as amended by Laws of 1911, p. 190, of a case in which the Supreme Court had rendered a decision on a previous appeal, has no persuasive value on the Supreme Court as to the constitutionality of that amendment, since that question was one which the Court of Appeals could not consider.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**8. COURTS (§ 89\*)—RULES OF DECISION—CONSTITUTIONALITY OF LAW—OBJECTION NOT CONSIDERED IN PREVIOUS DECISION.**

Where a prior decision as to the validity of an act of the Legislature did not rule on, or refer to, the ground of attack made in a subsequent case, the former decision is without authority in the decision of the later case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

Lamm, O. J., and Brown and Faris, J.J., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by Mamie F. Rourke and another against the Holmes Street Railway Company and another. Judgment for the plaintiffs, and defendants appealed to the Court of Appeals, which transferred the case to the Supreme Court. Cause retransferred to the Court of Appeals.

Plaintiffs sued for injuries to their property, caused by the building of an electric street railway, asking \$35,000 as damages. The judgment was rendered for defendant, from which plaintiffs appealed to this court (Rourke v. Railway, 221 Mo. 46, 119 S. W. 1094, 133 Am. St. Rep. 468), where the judgment was reversed, and the cause remanded.

Upon a retrial, plaintiffs had judgment for \$5,000 on October, 1910, in the circuit court of Jackson county, from which judgment defendant appealed to the Kansas City Court of Appeals. The case was lodged there until that court transferred it to this court, under the amendment of section 3937 of the Revised Statutes of 1909, by the act of the Legislature of March 30, 1911. Laws of 1911, p. 190.

John H. Lucas and E. R. Morrison, both of Kansas City, for appellants. Yates & Mastin, of Kansas City (Perry S. Rader, of Jefferson City, of counsel), for respondents.

BOND, J. (after stating the facts as above). [1] The question necessarily arising upon the transfer of this case to this court by the Kansas City Court of Appeals is whether the attempted amendment by the Legislature of 1911 of section 3937 of the Revised Statutes of 1909 is constitutional. In order that the exact relation to each other of the previous act and the proposed amendment may appear, we insert that act and the proposed amendment in full, with the latter italicized: "Sec. 3937. The various Courts of Appeals of Missouri shall have jurisdiction of appeals and writs of error in all cases where the amount in dispute exclusive of costs, shall not exceed the sum of seventy-five hundred dollars. All cases now pending in the Supreme Court, which have not been submitted, and which by the provisions of this section come within the jurisdiction of said Courts of Appeals, shall be certified and transferred to the proper Courts of Appeals, to be heard and determined by them, *provided, that the Supreme Court shall retain and have full exclusive appellate jurisdiction in any case pending in which the Supreme Court has made any decision or ruling.*"

It is conceded that this case involves no subject nor any class of cases reviewable by this court, unless appellate jurisdiction was vested in it by the terms of the italicized proviso attempted to be added to the above section of the statute by the Legislature of 1911. At the time of the judgment from which the present appeal was taken, the pecuniary limit of the jurisdiction of this court included all

cases wherein the amount in dispute, exclusive of costs, exceeded the sum of \$7,500, which was then the maximum of the jurisdiction of the Courts of Appeals. R. S. § 3937. This appeal having been taken to the Kansas City Court of Appeals from judgment rendered within its territorial district, that court was vested with exclusive appellate jurisdiction of the case under the constitutional grant (*Wilson v. Drainage Dist.*, 237 Mo. loc. cit. 45, 139 S. W. 136; *King's Lake Drainage & Levee Dist. v. Jamison*, 176 Mo. 557, 75 S. W. 679), unless that power has been taken away by the act of the Legislature passed after the lodgement of the appeal (*Laws 1911*, p. 190).

In order to determine the power of the Legislature to alter the respective jurisdiction of the Supreme Court and the Courts of Appeals, it is necessary to make a brief reference to the provisions of the Constitution creating the Courts of Appeals and providing for the distribution of the appellate jurisdiction between them and the Supreme Court. The Constitution of 1875 established the first Court of Appeals (St. Louis), and gave it territorial jurisdiction over that city and four adjoining counties, with a right to review by appeals and writs of error taken from all judgments rendered within that district, and provided that such review should be final in all cases except the following, as to each of which an appeal or writ of error would lie from the decision of the St. Louis Court of Appeals to this court. The cases thus excepted were, to wit: (1) All cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; (2) in all cases involving the construction of the Constitution of the United States and this state; (3) in all cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in the question; (4) in cases involving the construction of the revenue laws of this state, or the title to any office under this state; (5) in cases involving the title to real estate; (6) in cases where a county or other political subdivision of the state or any state officer is a party; (7) and in all cases of felony. Const. of 1875, art. 6, § 12.

While this plan sifted out all cases of which the St. Louis Court of Appeals had the power of final review, it left the remainder subject to be prolonged by the appeals to that court and afterwards to a final review in this court. To avoid this delay and to provide other Courts of Appeals with aggregate territorial jurisdiction coextensive with the state, and to relieve the crowded docket of this court, a constitutional amendment was submitted to the people and adopted in November, 1884. The objects had in view by that amendment where carried out by the establishing of the Kansas City Court of Appeals, which was granted exclusive jurisdic-

tion identical as to subjects and amounts with that given to the St. Louis Court of Appeals, and a division between them of the entire territory of the state. The amendment also provided for the establishing of another Court of Appeals by the General Assembly, and vested it with authority to make an allotment of territorial jurisdiction for such court by the changing of the limits of the territorial jurisdiction of the Courts of Appeals then established, and also gave the General Assembly power, to wit, "to increase or diminish the pecuniary limit of the jurisdiction of the Courts of Appeals; to provide for the transfer of cases from one Court of Appeals to another Court of Appeals; to provide for the transfer of cases from a Court of Appeals to the Supreme Court, and to provide for the hearing and determination of such cases by the courts to which they may be transferred." Amendment of 1884, § 3.

[2] The amendment further provided, with reference to the subject-matter of appellate jurisdiction in the Courts of Appeals, that the provisions of the Constitution concerning "the powers, the jurisdiction and proceedings of the St. Louis Court of Appeals, should apply to the Kansas City Court of Appeals and to such additional Courts of Appeals when created." Amendment of 1884, § 4. The amendment of 1884 then in express terms granted exclusive appellate jurisdiction of all other causes than those within the jurisdiction of the Courts of Appeals to the Supreme Court, and provided for direct appeals and writs of error to that court. Amendment of 1884, § 5. The effect of this constitutional provision was to give the Supreme Court exclusive and direct power of review of all classes of cases mentioned above, arising in any part of the state from which an appeal might have been taken to it from the decision of the St. Louis Court of Appeals, under section 12, art. 6, of the Constitution of 1875. *Steffen v. City of St. Louis*, 135 Mo. 44, 36 S. W. 31; *State ex rel. v. Smith*, 131 Mo. 176, 33 S. W. 11; *State ex rel. v. Norton*, 201 Mo. 1, 98 S. W. 554.

[3] The only power given by the amendment of 1884 to future Legislatures to change or alter the express allotment by the Constitution of the appellate jurisdiction between this court and the Courts of Appeals is contained in the following terms: "*To increase or diminish the pecuniary limit of the jurisdiction of the Courts of Appeals.*" There is not another line or word or syllable in the amendment of 1884 which gives any other authority to any Legislature to alter, change, or reclassify any of the subjects of appellate jurisdiction specified and granted to this court and to the three Courts of Appeals. In the performance of this single function, the Legislature is a constitutional agent with limited and defined authority. Within the exercise of the power given to it,

its action has all the force of a constitutional grant, but anything done by it outside of that authority is void, and without any binding force on any one. What the Constitution designed was to give the Legislature power to change the boundary of jurisdiction between this court and Courts of Appeals, so far as it was divided by the amount in dispute in any case, by sliding the scale up or down; for it was reasonably anticipated by the framers of the Constitution that the growth and development of the state would make it proper to enlarge the pecuniary boundary of the Courts of Appeals or to adjust the scale so that a proper proportion of jurisdiction, dependent on amount should be vested in each of the two appellate systems. The framers of the Constitution recognized that the act permitted to be done by the Legislature would necessarily affect the right of review on the part of the Supreme Court, as well as the Courts of Appeals, of all cases where the appellate jurisdiction was hinged solely on the question of amount in dispute, and they were willing to intrust to the Legislature the fixing of the specific sum which should divide the jurisdiction as to all cases dependent on it. But the provision of the Constitution went no further. It no more gave the Legislature power to subdivide or classify the body of litigation thus divided and to transfer such subdivisions from one court to another than it gave to it the right to transfer to this court the particular causes of actions on bills and notes, on open accounts, for equitable relief, to establish trusts in personal property, or for torts; all of which would embrace under their respective heads homogeneous elements, and would afford a more natural classification than the artificial one attempted to be formed out of the heterogeneous list of cases, wherein this court might have made some prior ruling or decision either by original writs or on appeals. The only constitutional way in which the Legislature can deal with any of these distinct and separable causes of action is by doing the particular thing delegated to it, the doing of which would necessarily, at one and the same time, affect *all* said classes. If any other view could be maintained, then it must logically follow that subsequent Legislatures at different times might insert various provisos in an existing statute fixing the pecuniary limit of jurisdiction to the effect that such statute should not apply to certain of the several classes above mentioned, if the excepted class involved a dispute, for example, exceeding \$100 in one case, \$5 in a second, \$1,000 in a third, \$250 in a fourth, or \$1 in actions of tort. But it is not conceivable that the framers of the Constitution designed to put it in the power of succeeding Legislatures to accomplish such absurd results by varying, at their caprice, the pecuniary boundary be-

tween the jurisdiction of the Courts of Appeals and this court as to the class to which it should be applied. This will be evident if the matter is viewed from another standpoint. Suppose, instead of inserting the proviso of 1911 in the valid act which theretofore bounded the jurisdiction of the Courts of Appeals (R. S. 1909, § 3937), the Legislature at that time had enacted an independent law embodying the *very* classification expressed by the proviso. Could there be two opinions as to the unconstitutionality of such an act? Would not its very terms disclose a classification of causes *irrespective of amount* which were bodily transferred from the jurisdiction of the Courts of Appeals to the jurisdiction of this court? Is it possible to point to any power given to the Legislature by any provision of the Constitution to enact such a law altering the previous apportionment of jurisdiction by that instrument? If not, then the act would be wholly void. But, if the Legislature would have no power to *alter* the constitutional grant of the jurisdiction by such independent act, necessarily it would have no power to do the same thing under the guise of a proviso embracing the same classification of cases. What it could not do directly it could not do indirectly. The Constitution having acted in the matter of separating the jurisdiction of the systems of courts, the Legislature could not thereafter change such relations, except in the precise mode and for the precise purpose pointed out by the Constitution. The proposition is so grounded on elementary constitutional principles as to have the force of an axiom. *State v. Iron Mt. Ry.*, 162 S. W. 149, and cases cited; *Redmond v. Railway*, 225 Mo. loc. cit. 731, 126 S. W. 159; *Com. Tub. Hos. Dist. v. Peter*, 161 S. W. 1155. The Constitution gave the Legislature no power whatever to redistribute the jurisdiction which it had conferred upon the two sets of courts by reclassifying or inventing new classifications which would subtract from the jurisdiction of one and add to the jurisdiction of the other. All it permitted the Legislature to do was to vary the money measure of the jurisdiction as to meet changed conditions. In exercising that function, it was competent for the Legislature as it did on two occasions, to raise the pecuniary limit, and it might hereafter lower that pecuniary limit, but, having done the one or the other, its constitutional authority was *functus officio*. By giving the Legislature this special and particular authority, the Constitution withheld from it any further power to act in the matter, and where, as in the case at bar, it attempted to act by making a new classification of subjects, regardless of the amount in controversy—it necessarily ignored the very purpose for which it was given power to act at all and acted for another purpose (classification), which transcended the only au-

thority which the Constitution gave it to interfere at all with its own previous action in the matter.

II. But we are not left to the conclusion as to the limitation of the power given to the Legislature under the terms in question, dictated by an analysis of their import, by process of reason, and by fundamental principle of constitutional construction. For this court in banc has directly adjudged that the Legislature can enact no law touching the jurisdiction of the Courts of Appeals until it can point to a specific amendment in the Constitution; for the reason that the Constitution has conferred that jurisdiction, and its grant cannot be modified or altered except it has given power so to do.

The question involved in these two cases was the power of the Legislature, after it had allotted to the three Courts of Appeals their respective territorial jurisdiction, to pass an act whereby a case which had arisen in the territory of one of the Courts of Appeals could be transferred for decision to another Court of Appeals. The Legislature assumed the power to enact such a law under the language of section 3 of the amendment of 1884. That section gave it power to transfer causes from one Court of Appeals to another, "and to provide for the hearing and determination of such cases by the courts to which they may be transferred." Acting under that authority the Legislature sent to the Springfield Court of Appeals the case of *Houts v. Jackson*, 143 Mo. App. 584, 128 S. W. 281, which had been tried at St. Louis, and appealed after judgment for \$5,038 to this court, and by this court transferred to the St. Louis Court of Appeals, for that, pending its submission here, the Legislature had increased the pecuniary limit of the Courts of Appeals to \$7,500, by section 3937 of the revision of 1909 (the very act to which the proviso under review was added in 1911). *Wilson v. Drainage Co.*, 237 Mo. loc. cit. 41, 139 S. W. 136; s. c., 176 Mo. 557, 75 S. W. 679. The St. Louis Court of Appeals transferred the case to the Springfield Court of Appeals, in pursuance of an act of the Legislature of 1909 (Laws 1909, p. 396) purporting to authorize such transfer. A writ of prohibition was sued out against the St. Louis Court of Appeals on the ground that the act authorizing it to transfer the cause exceeded the limit of power given to the Legislature by the above-quoted words in section 3 of the amendment of 1884. Said this court in banc, in making that writ permanent: "When the Constitution speaks on a subject to the extent it disposes of the matter, it ends all legislation."

The court then recited the history of the creation of the three Courts of Appeals and the exclusive appellate jurisdiction granted to them by the constitutional amendment of 1884, and referred to the two acts of the Legislature (Laws of 1901, p. 107; Laws of

1909, p. 393) which increased the pecuniary limit of the jurisdiction of said courts, and pointed out the constitutional authority of these two acts expressed in section 3 of the amendment of 1884. The opinion then took up the act in judgment, and stated the argument in its support based on so much of the language of section 3 of the amendment of 1884 as referred to the transfer of causes from one Court of Appeals to another, and to the provision for their determination, which is quoted above. To the point that those quoted words implied a power in the Legislature to confer jurisdiction by transferring a cause from the territory of one Court of Appeals to another, this court said: "But that is not the language of the Constitution, nor its meaning. The Constitution itself had already declared the jurisdiction of those courts, both as to the *amount in dispute* and as to territory, and it had expressly authorized the General Assembly to alter the limit as to the amount and to alter the limits of the districts, and that was the extent to which it authorized the General Assembly to go in changing the jurisdiction." (*Italics mine.*) *State v. Nixon*, 232 Mo. loc. cit. 104, 133 S. W. 336; *State v. Nixon*, 232 Mo. 496, 134 S. W. 538.

These two decisions in banc settled the principle that the power given to the Legislature by the terms of section 3 of the amendment of 1884 excluded the doing of any act by it which shall affect the jurisdiction conferred by the Constitution in any other way than the exact mode expressed by the words of that section. This principle of limitation was applied by this court in the above cases to an act of the Legislature which sent a case to one Court of Appeals which had arisen in the territory which the Legislature had allotted to another. But that principle necessarily applies with the same constitutional force to an act of the Legislature which attempts to alter the jurisdiction of a class of cases vested in the Courts of Appeals by an act of the Legislature fixing the pecuniary limit of jurisdiction with which it was held to apply when the Legislature undertook to transfer the causes in contravention of its local division of jurisdiction. And this conclusion is *expressly ruled in the above quoted language* of this court in banc.

No valid reason can be given why the Legislature is restricted by the Constitution in one case, and not in another. The Courts of Appeals got their appellate jurisdiction of subjects or classes of cases within certain pecuniary limits, just as they got the territorial jurisdiction by the act of the Legislature in pursuance of a specific constitutional authority. Amendment 1884, § 3. And, if the Legislature, after having acted so as to define the jurisdiction of the Courts of Appeals *locally*, is without power thereafter to alter such jurisdiction, then the Legislature, after having defined the jurisdiction of

the Courts of Appeals *pecuniarily*, is also without jurisdiction thereafter to pick out a class within that pecuniary limit, and transfer that class, regardless of the amount involved, to the Supreme Court. The prohibition in each case is that of the Constitution against any alteration of its action, except for the very object and in the exact mode which the Constitution permits its own grant to be affected. To my mind, this conclusion rests upon irrefragable reason and the accordant decisions of the court in banc, and upon elementary constitutional principles.

The peculiar class of cases which would fall within the purview of the proviso affords a powerful inference that it was one of those many instances where our statute books have been littered with legislation enacted at personal request or to embrace some pending suit. But, whatever inspired the proviso in question, it was a clear violation of the power to act given to the Legislature by section 3 of the amendment of 1884. Wherefore I see no escape from the conclusion that the sole power to review the appeal taken in this cause is constitutionally lodged in the Kansas City Court of Appeals, to which, after deciding the unconstitutionality of the amendatory proviso, the case should be sent for disposition on its merits.

[4] III. Neither is it possible to uphold the proviso under review as legitimate classification by the Legislature of subjects, the jurisdiction of which it might change from the Courts of Appeals to this court by calling attention to the terms of the section 3937 of the revision of 1909, which required this court to transfer to the Courts of Appeals all cases pending here *which had not been submitted* at the time the act went into effect, and urging that this court, by complying with those terms and similar ones in the previous act, has conceded the right of the Legislature to change the jurisdiction between this court and the Courts of Appeals by its own classification of subjects. To this notion it only need be answered that it loses sight of the fact that that classification was made in pursuance of a direct and express *constitutional* authority. In other words, the Legislature put in its general act defining the pecuniary limit of jurisdiction no classification of its own, but only the very requirements which the Constitution itself had imposed on this court, and therefore this court, in recognizing its duty to send to the Courts of Appeals all cases pending here which had not been submitted at the time of the passage of the act under which they would fall into their jurisdiction, was only obeying the mandate of the Constitution, and was not recognizing any power of classification in the Legislature. This is apparent when it is observed that the terms of the act referring to *cases not submitted* (R. S. § 8937) were simply a rescript of the following constitutional provisions (section

7): "Cases Now Pending in Supreme Court Transferred to Kansas City Court of Appeals—All cases which may be pending in the Supreme Court at the time of the adoption of this amendment, *which have not been submitted*, and which by its terms would come within the territorial appellate jurisdiction of the Kansas City Court of Appeals, shall be certified and transferred to such court to be heard and determined by it." Section 7, amendment of 1884; Const. 1875, art. 6, § 19. (*Italics mine.*)

Clearly this constitutional provision is of continuing force, and governs the disposition of cases not submitted when subsequent changes were constitutionally made in the relative jurisdiction of the Supreme Court and the Courts of Appeals. Under the guidance of, and to effectuate, this constitutional regulation, the Legislature inserted in its general act altering the pecuniary limit of the jurisdiction of this court and the Courts of Appeals the provision requiring the transfer of cases according to the standard fixed by the act. Hence its observance by the court was only for the reason that the Constitution, not the Legislature, made it obligatory. And it has been decided by this court that the power of the Legislature to pass any act providing for transfers of cases between the Courts of Appeals and to the Supreme Court is sustainable solely on the ground of a specific authority so to do, given by the Constitution. In *re Garesche*, 85 Mo. 469; affirmed *Schuster v. Weiss*, 114 Mo. loc. cit. 172, 21 S. W. 438, 19 L. R. A. 182.

[5] If it could be held, therefore (which we do not concede), that the Constitution designed to regulate the transfer of cases only to *one* court (the Kansas City Court of Appeals), and did not design that the same rule should govern transfers of cases similarly situated to the other Courts of Appeals, then, under the explicit rulings of the two decisions last cited, the Legislature had no constitutional power to enact the provision in question, as far as the St. Louis and Springfield Courts of Appeals are concerned, for *they are not mentioned in the act*. And, even if this court had followed the act as to said courts, that would not have supplied the lack of constitutional power in the Legislature, and necessarily would not have shown that the Legislature was making a valid classification of subjects of appellate jurisdiction between this court and the Courts of Appeals under any constitutional authority given to it.

It is clear that no conclusion can be drawn from the presence in the act of the language authorizing the transfer of cases "*not submitted*" at the time of the fixing of the pecuniary boundary of the jurisdiction of the respective courts that the Legislature had any constitutional power to put in the same act (by the amendment of 1911), a clause divesting the Courts of Appeals of their juris-

diction of any case wherein this court had made a previous ruling or decision. What the Constitution intended and expressly provided was that the three Courts of Appeals should have the same jurisdiction as to subjects of review, exert the same judicial powers, entertain the same proceedings, and be governed by the same rules; and this purpose is expressly set forth in the words of the amendment of 1884. Amendment 1884, § 4.

[6] But, besides all this, there is not even an attempt at classification by the use of the words "not submitted." All that was intended by them was to *fix the time* when the law dividing the jurisdictions should take effect, the purpose being to fix a time *before* the decision of the cases to be affected; and hence the time adopted was a period when a decision had not been made.

The whole effort to build an argument of power to classify, from the use of these terms, is based on two erroneous assumptions: First, the assumption of a power which did not exist; second, the assumption of a classification which *was not made*. From these incorrect premises no correct conclusion can be deduced of constitutional power in the Legislature to amend the act of 1909 as attempted by the proviso inserted in 1911.

[7] IV. It is hardly necessary to refer to the suggestion as to the "persuasiveness" of the ruling of the Kansas City Court of Appeals in sending this case here after the enactment of the proviso by the Legislature of 1911. The Kansas City Court of Appeals had no power to decide any case "involving the construction of the Constitution of this state." The amendatory act of 1911 presented on its face that question. The Kansas City Court of Appeals, therefore, with perfect propriety, transferred the case to this court, to the end that the constitutionality of the act should be first considered by the only court permitted to solve that question under our judicial system. The Kansas City Court of Appeals withheld any expression of its own views as to the validity of the act, but *read* its terms of attempted classification of cases irrespective of the limit of its own jurisdiction, and promptly transmitted the record to this court as the only authority which could decide the question presented by the terms of the act. The mere action of sending to this court a case falling within the letter of the new act could not, in the nature of the things, afford any greater persuasive authority for a holding by us that the act was constitutional than we could have from a mere *reading* of the act itself.

[8] V. It is finally suggested that the question of the constitutionality of the proviso was "settled" by the ruling of Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512. A brief reference to that opinion will demonstrate that it made *no ruling whatever* on the ground of attack directed at the act of 1911 which is now called to the attention of this court.

The point that the Legislature transcended the constitutional limit of its power to act only on the subjects or classes of the appellate jurisdiction of the Courts of Appeals so as "to *increase* or diminish the amount" upon which their jurisdiction was predicated, by altering it with respect to the entire subject-matter of that jurisdiction, was not raised, nor called to the attention of the court, nor passed upon in that case, nor even referred to in the remotest way by anything that was said in that opinion. This is proven by the following extract from that opinion: "The constitutional objections urged are those relating to the passage of local laws, and laws touching upon 'class legislation.' No specifications are furnished us by counsel showing wherein a provision of this court violates the law forbidding class legislation, nor do we know of any such reason. The law applies to all pending cases, both those which are here, and those which shall hereafter be appealed to this court, wherein this court shall, prior to the passage of the act, have made some decision and ruling. We rule this point against defendant." Curtis v. Sexton, 252 Mo. 253, 159 S. W. 518.

That case not only did not settle the point now under review, but it is *not even persuasive* authority, since it gives no expression whatever on the question which now has arisen for judgment, but which was neither in judgment nor touched upon there. There is no exception to the doctrine established in this state and elsewhere that, where a prior decision does not rule upon or refer to a ground of attack made upon an act of the Legislature in a subsequent case, the former decision is without any authority whatever in the decision of the later case. Koerner v. St. Louis Car Co., 209 Mo. loc. cit. 156, 107 S. W. 481, 17 L. R. A. (N. S.) 292; State ex rel. v. St. Louis, 241 Mo. loc. cit. 239, 145 S. W. 801. But a careful analysis of the ruling in Curtis v. Sexton will disclose that what, in effect was held there, to wit, that the act of 1911 constructed a *class of cases*, furnishes a conclusive reason why the act must fall under the present constitutional attack. This is so because the Legislature had no constitutional power to *classify*; its only authority being to change the pecuniary limit of jurisdiction. And it is wholly illogical to say that the Legislature was acting in accordance with a power to change the amount in dispute when it left *that matter* entirely out of view, and made the *class of cases* sought to be created depend for their existence solely upon the factitious circumstance that a prior ruling or decision had been made in them at some earlier stage by this court. In other words, the Legislature could not have acted in conformity with the Constitution while *ignoring the only object* for which it authorized the law-makers to act. Hence it follows that its at-

tempt to withdraw jurisdiction from the Court of Appeals of a class of cases was devoid of any constitutional authority, and its act in so doing is patently void.

VI. It is a matter of the greatest importance to the people of this state that the Courts of Appeals shall be allowed to exercise the jurisdiction expressly conferred on them by the Constitution as amended. This court has not an atom of power to withdraw any jurisdiction of cases granted exclusively to the Courts of Appeals by the Constitution. This court is itself a creature of the Constitution, and cannot, without usurpation, annul the very authority to which it owes its being. It is the pinnacle of the judicial system devised by the Constitution to administer the law and to enforce its supremacy.

It has been shown that the lawmaking body attempted, by the proviso to a previous valid act, to create an unrelated and artificial class of cases which should be transferred, without reference to any constitutional authority so to do, from the subject-matter of appellate jurisdiction of the Courts of Appeals. This appears on the face of the act and by any possible construction which can be given to it. It is a self-evident proposition that the Legislature was powerless to do this, and that this court is equally powerless to validate its attempt so to do. The commands and limitations of the Constitution may be altered or amended by the people, in the exercise of the powers reserved in that instrument, but, until that is done, they are beyond the control of the courts or the Legislature; for neither of them are framers of Constitutions.

This court is content to move in the orbit prescribed for it by the instrument to which it owes its creation. If it leaves that course, the whole system of government is at once deranged by the infraction of the laws upon which it is founded and by which it is regulated and controlled. That no other tribunal can coerce or restrain its action is the moral reason which makes self-restraint an imperative duty. Though possessed of unchecked power, this court will steadily pursue the paramount behests of right action, and thus refute detraction and silence "envious tongues," uttering the misjudgments of the judiciary, which distort the popular fancy of the hour.

We accordingly hold that the proviso attempted to be inserted by the Legislature in 1911 (Laws of 1911, p. 190) is void, because it is beyond the scope of the power conferred upon the Legislature by the Constitution as amended in 1884. This result does not affect the validity of the act of 1909 (R. S. 1909, § 3937) which established the present criterion of jurisdiction of the Courts of Appeals in respect to the amount in dispute; for that or any similar future enactment is within the just authority given the Legislature under the present Constitution.

It is evident that the determination of the

present appeal in the case at bar is vested in the Kansas City Court of Appeals, and the cause is hereby transferred to that court.

WOODSON, GRAVES, and WALKER, JJ., concur. LAMM, C. J., dissents in opinion filed, in which BROWN and FARIS, JJ., join.

LAMM, C. J. (dissenting). This cause, having been heretofore in this court, on a new appeal was sent to the Kansas City Court of Appeals, and by that court was transferred to this court, because of a statute enacted in 1911, *infra*.

A preliminary question, viz., one of jurisdiction, was raised by the court *sua sponte*, and the case is made to break on that. To that result I cannot agree, because:

The Constitution (section 3 of the amendment of 1884) reads: "The General Assembly shall have power by law to create one additional Court of Appeals, with a new district therefor; to change the limits of the appellate districts, and the names of the Courts of Appeals, designating the districts by numbers or otherwise; to change the time of holding the terms of said courts; to increase or diminish the pecuniary limit of the jurisdiction of the Courts of Appeals; to provide for the transfer of cases from one Court of Appeals to another Court of Appeals; to provide for the transfer of cases from a Court of Appeals to the Supreme Court, and to provide for the hearing and determination of such cases by the courts to which they may be transferred."

Under that grant of power the General Assembly, having in 1901 and 1909 enacted statutes, finally in 1911 (Laws 1911, p. 190) amended section 3937, R. S. 1909, so as to read as follows: "The various Courts of Appeals of Missouri shall have jurisdiction of appeals and writs of error in all cases where the amount in dispute exclusive of costs, shall not exceed the sum of seventy-five hundred dollars. All cases now pending in the Supreme Court, which have not been submitted, and which by the provisions of this section come within the jurisdiction of said Courts of Appeals, shall be certified and transferred to the proper Courts of Appeals, to be heard and determined by them, *provided, that the Supreme Court shall retain and have full exclusive appellate jurisdiction in any case pending in which the Supreme Court has made any decision or ruling.*" The change made by the amendment of 1911 was the addition of the italicized proviso. If that proviso is constitutional, we have jurisdiction—otherwise, otherwise.

I am of opinion the proviso stands as a valid exercise of legislative power, because:

(a) We are strictly admonished by canonized rules that courts approach the adjudication of the unconstitutionality of an act of the lawmaking power with caution and gravity. So they must resolve all doubts in favor

of such act. So, before such act is declared invalid, it must be shown to be so clearly bad that its vice is put beyond any reasonable doubt. Then, too, every reasonable intentment must be allowed in favor of the act, so that, if possible, it may stand, not perish. Every allowable act, art, or part of judicial power resting in reason must be called into play to uphold the act. To that end, if a certain construction brings the act under the ban of unconstitutionality, and any other construction within reason is permissible, taking it from under such ban, we are bound to be astute in accepting that construction; for the most pregnant and solemn reasons underlie the foregoing doctrines. It is in the light of those doctrines, and not otherwise, the question must be ruled. Board of Com'rs Tuberculosis Hosp. Dist. v. Peter, Intervener, 161 S. W. 1155, not yet officially reported. It is said the life story of a chicken is told in the phrase "from egg to ax." It will be seen from the foregoing view that such crisp and dramatic summary is mal apropos in dealing with laws, and yet—but let the playful conceit in mind go unsaid in order to pick up the thread of sober judicial exposition.

(b) By the 1884 amendment to the Constitution the "pecuniary limit" of appellate jurisdiction was dropped as a constitutional provision, and the Legislature was granted power to prescribe such limit. Up to that time the Constitution itself prescribed the pecuniary limit. Const. § 12, art. 6. With the "pecuniary limit" thus put by that amendment within Legislative regulation and released from constitutional regulation, the Legislature took up the subject-matter and passed the proviso. When read with the act of which it is a part, the proviso deals with the pecuniary limit of jurisdiction as its motive and end. If anything else is drawn within the line of the enactment (which I do not admit), it is only incidentally, and in contribution to the principal motive and end, and cannot furnish a constitutional test. In effect, the statute means that Courts of Appeal shall have jurisdiction, with reference to pecuniary amount, in all cases where the amount in dispute does not exceed \$7,500, except in cases pending in the Supreme Court or in the circuit court in which the Supreme Court has made a decision or ruling, and, as to them, Courts of Appeal shall not have jurisdiction, but the Supreme Court shall have jurisdiction *in any amount*. Clearly the Legislature by that act did not undertake to overleap constitutional barriers, and foist jurisdiction upon this court of any subject-matter, except the one relating to pecuniary limit. Mark, it behooves us to see and admit, I think, that the act does not undertake to alter, affect, or in aught deal with the express and enumerated constitutional subjects of jurisdiction lying outside of pecuniary limit. It leaves untouched cases under our constitutional jurisdiction, to wit, those involving title to land, revenue, consti-

tutional or federal questions, title to office under this state, or cases where a county is a party. Const. § 12, art. 6. That is to say, cases of that ilk come here automatically, whether we have once ruled thereon, or whether we have not theretofore ruled thereon. It establishes a pecuniary limit, with an exception to the effect that in a case in which we have ruled or made a decision the \$7,500 pecuniary limit, ordained by the principal statute, is not the minimum pecuniary limit of our jurisdiction; but that, as to such case, there is another pecuniary limit, to wit, any amount whatever. The statute is susceptible of that construction and, if necessary, we are bound to give it that construction rather than another; to sustain it as valid rather than expand its meaning so as to impinge upon the other heads of our jurisdiction. It is a most singular fact that, while the Constitution gives this court appellate jurisdiction in general language (section 2, art. 4), and superintending control and power to issue certain original writs (section 3, art. 6), yet it nowhere parcels out appellate jurisdiction between this court and the Courts of Appeal, except by a *side stroke and by indirection*. In delimitating our jurisdiction on appeal in material features and to make the Constitution a working instrument, we have been forced to do so by inference, by judicial construction of a pronounced character, in dealing with section 12, art. 6 (q. v.), a section directed primarily to appeals from the St. Louis Court of Appeals to this court, a scheme now abandoned. I mention this to show how much our jurisdiction owes to the exercise of judicial construction and we ought not to hesitate to use it in perfecting our jurisdiction.

(c) Again, all legislative power lies in the General Assembly of Missouri, except in so far as it be directly or by inexorable implication forbidden by the state or federal Constitution. So much, I take it, is a truism in constitutional law. State ex rel. v. Shepard, 192 Mo. loc. cit. 506 et seq., 91 S. W. 477. The federal Constitution *grants* power to Congress to legislate; the state Constitution *leaves* to the State Legislature all legislative power it does not take away. Giving full force to that principle, a vital and main question springs spontaneously, to wit: Where is the constitutional provision *prohibiting* the General Assembly from fixing two or more pecuniary limits? Who can put his finger on it in the Constitution? Nay, why should it be there? Is not the lawmaker authorized by the Constitution to *write the pecuniary limits*—to prescribe them by metes and bounds? With the constitutional hand in that regard lifted, and the legislative hand laid on, was it not intended that the lawmaker should have leave to act reasonably and deal with it with the usual full-fledged legislative power, to wit, a *power to classify*? When that question is answered, "Yes," as it should be, I respectfully submit, all trouble



and doubt disappear. In dealing with the subject-matter of pecuniary limits, the lawmaker might not make an unnatural or unreasonable classification, and thus bring himself within the interdiction of the Constitution against special or class legislation. Nor might he cut away from us our jurisdiction of a subject-matter plainly set down in the Constitution. All that is beyond his power. But in this instance he has done neither the one or the other. As already pointed out, the constitutional limits of our jurisdiction on other matters are left untouched by the proviso, and it has primary reference to the subject-matter of pecuniary limit only, with, what I conceive to be, a constitutional—I, e., a reasonable and natural—classification. Is not *classification* a favorite legislative scheme which we constantly sustain as constitutional, if grounded in reason? Clearly so, and that theory sustains the act of 1911, to my mind.

(d) We may, with profit, consider the terms of section 3937 before it was amended by the 1911 proviso. It will be found to deal itself with a classification. Are *all* cases under the act of 1909, where less than \$7,500 are in dispute, to be transferred to the Courts of Appeals? No; those "which have been submitted," are exempted. Admit that the classification is small or rudimentary; yet it is there plainly put in the law of 1909. Is *that* exemption also unconstitutional, as outside of legislative power? If so, we have violated the Constitution many times; for we retained jurisdiction of all cases of that class existing at the time the original act went into effect in 1909.

Going back a little further, in 1901 (Laws 1901, p. 107) a statute was enacted with the same classification or exemption in pecuniary limit as that of 1909, to wit, the "under submission" exemption, and we accepted and acted on it as valid. Is this long-continued and practical construction worthless as a constitutional guide? I do not so understand the rule.

But the majority opinion, inadvertently I think, seeks to parry the force of the invoked, the practical, and long-existing construction, whereby that rudimentary classification exempted pecuniary amount was allowed as valid. This by pointing to a provision of the Constitution said to permit it. Let us look to that. The provision is (section 7, art. 6): "Cases Now Pending in Supreme Court Transferred to Kansas City Court of Appeals.—All cases which may be pending in the Supreme Court at the time of the adoption of this amendment, which have not been submitted, and which by its terms would come within the territorial appellate jurisdiction of the Kansas City Court of Appeals, shall be certified and transferred to such court to be heard and determined by it."

It will be observed that such provision relates solely to the Kansas City Court of Appeals, and establishes a *modus transferendi*

for sending cases from this court to that. There is no such constitutional provision relating to any other Court of Appeals and holding in this court cases that are "under submission." Despite that limited and exclusive grant of power, the Legislature passed a general law, to wit, section 3937, *supra*, including *all* Courts of Appeals. It is on that *statutory* warrant, and not otherwise, that we have been acting from time to time in sending only those cases "not under submission" to the St. Louis Court of Appeals and the Springfield Court of Appeals, and in retaining those under submission. So that it is just to say, as we have said, that we have allowed the idea of classification to obtain on the subject-matter of pecuniary limit of jurisdiction. If we were right in so doing, then why is this dissent not justified?

(e) Moreover, the identical question has been ruled, and is not open as *res integra*. In *Curtis v. Sexton*, handed down in banc, 252 Mo. 221, 159 S. W. 512, the question of our jurisdiction was raised by counsel. It hinged upon the validity of the proviso in question. In that case we assumed jurisdiction. Handed over to us by the Kansas City Court of Appeals on the strength of the proviso, we sustained the constitutionality of the law by deciding the case and ruling the point agreeably to the ruling proposed in this dissenting opinion. It is clear that, if we have no jurisdiction of the present case, then we had no jurisdiction in the *Curtis-Sexton* case, and all the weighty and far-reaching matter there adjudicated tumbles down like a house of cards, as declared and decided in a case in which we had no jurisdiction to say anything at all. *Stare decisis*. So, the Kansas City Court of Appeals construed the proviso in the act of 1911 to give us jurisdiction in the instant case and in the *Curtis-Sexton* Case. Is not the holding of that learned court, though not put on constitutional grounds (as it could not be), at least persuasive? The act is too young to permit of many precedents in construction, but such as exist are worth while, and run in favor of the validity of the law.

(f) It has been argued that, conceding the doctrine of classification as applicable, yet the classification attempted is unnatural and unreasonable. But is it? The division of cases into (1) those that are pending in or have been to this court and are now below, and in which we have made a decision or a ruling, and (2) into those in which such condition does not arise, is, to my mind, natural, logical, and entirely wise. It prevents mischievous confusion and the perpetuation of error "broadening down from precedent to precedent." It is in no just constitutional sense class or special legislation, as denounced in cases expounding the Constitution. Take a case to illustrate: We reverse and remand a case for a new trial. Such new trial is had. In the meantime the Legislature has changed the pecuniary limit of jurisdiction,

or the new judgment falls below the old one, and thus affects jurisdiction, absent the proviso. In such case, under the former law, the new appeal went to one of the Courts of Appeal. See what happens? Automatically, by mandate of the Constitution, the Court of Appeals is bound *nolens volens* by our former decision, right or wrong, and the door of judicial investigation is forever closed on that question (despite the mischief) until such time, withal, as another case reaches us carrying the point. Such is no fanciful hypothesis. It has arisen over and over. It is precisely what would have happened in *Bagnell Timber Co. v. Missouri, Kansas & Texas Railroad Company*, 242 Mo. 11, 145 S. W. 469. The several Courts of Appeal were following our first erroneous opinion in that case on a vital principle of law of everyday application. 180 Mo. 420, 79 S. W. 1130. They were obliged to do so by the Constitution, and would have continued to do so had it not happened, fortunately, that the case reached this court on its second appeal, when we corrected our own error in the same case.

More could be said in favor of the justness, the wisdom, the constitutionality of the proviso if need called or time allowed. The statute, as it stands, prescribes a general rule of jurisdiction on amount, disposing of all cases, and the classification made by the proviso seems to me to be just and constitutional.

It has been suggested that the use of the word "or" precludes the construction we have put upon the Constitution and statute. The argument, as advanced, runs thus: By using the disjunctive conjunction "or" in the Constitution, power is left to the Legislature to increase "or" diminish the pecuniary limit, *but not to do both at one stroke*. But I conceive that to be too narrow and precarious a point upon which to rule the unconstitutionality of the law in question. Is it likely that a Constitution maker, intent on large themes, would intend to make a grave constitutional provision turn on "or," "and," "a," "the," *et hoc genus omne*? That would be, by judicial construction, to turn a mere linguistic pin prick into the stroke of a hammer (*St. Louis v. Handlan*, 242 Mo. loc. cit. 94, 145 S. W. 421), or make a mountain out of a molehill.

It is familiar doctrine that, where an absurd result will be prevented, or where another construction is useful to further a legislative intent or to give a constitutional provision full and rounded vigor in order to cover its true and whole intentment, the word "or" may be read "and," and vice versa; that is frequently done. *State v. Bulling*, 100 Mo. 93, 12 S. W. 356; 29 Cyc. p. 1505 et seq., where many authorities are assembled on the proposition.

Deeming it an unhappy circumstance that the point has to be ruled without the aid of brief or argument by counsel, for the point is not made by them, but is sprung *ex mero*

*motu* by the court, I have given my views on this matter, one of pronounced importance.

Those views compel me to dissent, and that I do.

BROWN and FARIS, JJ., join me herein.

**EMBREE et al. v. KANSAS CITY-LIBERTY BOULEVARD ROAD DIST. et al.**  
(No. 17,450.)

(Supreme Court of Missouri. April 2, 1914.  
Rehearing Denied April 13, 1914.)

**1. EMINENT DOMAIN (§ 2\*)—CONSTITUTIONAL PROVISIONS—SPECIAL TAXES FOR LOCAL IMPROVEMENTS.**

Special taxes for benefits, levied under Rev. St. 1909, §§ 10611-10625, authorizing special road districts and special taxes to pay for road improvements, are not taxes but are merely compensation for the enhanced value of the land due to the improvements in roads, and no property is taken without compensation, within the prohibition of Const. art. 2, § 21.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

**2. CONSTITUTIONAL LAW (§ 200\*)—HIGHWAYS (§ 122\*)—DUE PROCESS OF LAW—SPECIAL TAXES.**

Special taxes, levied under Rev. St. 1909, §§ 10611-10625, providing for special road districts and special taxes for benefits for road improvements, do not deprive an owner of his property without due process of law merely because they are levied without notice, where they can only be collected by suit, in which the owner may set up all defenses.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\* *Highways*, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**3. CONSTITUTIONAL LAW (§ 290\*)—HIGHWAYS (§ 122\*)—DUE PROCESS OF LAW—SPECIAL TAXES.**

Rev. St. 1909, § 10615, dividing special road districts into three beneficial zones, and assessing the lands in each zone at a different percentage, without notice to the property owners, is not invalid as depriving the owners of their property without due process of law, in violation of Const. art. 2, § 30, since the division of the road districts into zones and the fixing of the percentage of benefits in each are legislative acts which cannot be questioned on the ground of want of notice.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\* *Highways*, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**4. CONSTITUTIONAL LAW (§ 63\*)—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW—SPECIAL TAXES.**

The Legislature may delegate the authority to create benefit districts and determine the percentage of the benefits to be assessed for the construction of a local improvement to officers of public corporations, and, so long as they act within their legislative authority, their acts cannot be questioned because of want of notice to property owners before creating the districts and fixing the percentage of the benefits, in the absence of a statutory provision to the contrary.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 108-114; Dec. Dig. § 63.\*]

**5. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW—SPECIAL TAXES.**

Rev. St. 1909, § 10615, providing for the division of special road districts into three beneficial zones and the assessment of the lands in each at a different percentage, without notice to the owners, does not deprive the owners of their property without due process of law, though the valuation of the lands is made by the board of commissioners in each of the zones, on which the percentage of benefits is based, where each owner within the district is afforded a hearing on the question of benefits in suits for the collection of the taxes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\*]

**6. CONSTITUTIONAL LAW (§ 208\*)—CLASS LEGISLATION.**

A statute which embraces all persons and things that naturally belong to the same class and are similarly situated, and on whom it must operate uniformly and equally, is not invalid as class legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

**7. CONSTITUTIONAL LAW (§ 208\*)—CLASS LEGISLATION—ESTABLISHMENT OF SPECIAL ROAD DISTRICTS.**

Rev. St. 1909, §§ 10611-10625, authorizing the establishment of special road districts and the levying of special taxes for benefits for road improvements, and authorizing taxation of real estate according to reasonable value, exclusive of buildings thereon, is not invalid as class legislation, though orchards, vineyards, and other such betterments added to the soil as improvements are taxed, since there is a clear distinction between such improvements and buildings.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

**8. HIGHWAYS (§ 95\*) — SPECIAL ROAD DISTRICTS—"INDEBTEDNESS"—LIMITATIONS.**

The assessments authorized by Rev. St. 1909, §§ 10611-10625, providing for the establishment of road districts and special taxes for benefits for road improvements, are not an indebtedness, within Const. art. 10, § 12, limiting the indebtedness which public corporations may incur.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3528-3536.]

**9. HIGHWAYS (§ 95\*) — SPECIAL ROAD DISTRICTS—"INDEBTEDNESS"—LIMITATIONS.**

The bonded indebtedness of a special road district created under Rev. St. 1909, §§ 10611-10625, authorizing the creation of special road districts and the issuance of bonds for the cost of improvements on the landowners' voting in favor of bonds, is not an indebtedness, within Const. art. 10, § 12, limiting municipal indebtedness, because the bonds are simply evidences of an indebtedness payable by special taxes for benefits and are not obligations of the district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.\*]

**10. HIGHWAYS (§ 90\*) — SPECIAL ROAD DISTRICTS—PUBLIC CORPORATIONS.**

A road district created under Rev. St. 1909, §§ 10611-10625, providing for the organization of special road districts governed by a board of commissioners, in the first instance appointed by the county court, and thereafter elected by the landowners of the district, is a public corporation, and the commissioners appointed or elected are public officers, charged

with the care and maintenance of public highways in the district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90.\*]

Brown, J., dissenting.

In Banc. Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by W. S. Embree and others against the Kansas City-Liberty Boulevard Road District and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

The plaintiffs instituted this suit in the circuit court of Clay county against the defendants, to enjoin them from issuing \$77,000 of bonds, the proceeds of which were to be used in the construction of public highways in the Kansas City-Liberty Boulevard road district, of Clay county, Mo. A trial was had which resulted in a judgment in favor of the defendants and a dismissal of the bill. After taking the proper preliminary steps therefor, the plaintiffs appealed the cause to this court.

The facts of the case are practically undisputed, and are as follows:

The Kansas City-Liberty Boulevard road district of Clay county is a special road district, organized and incorporated under article 7 of chapter 102, R. S. 1909, and the amendments thereto. There is no pretense but what the district was duly incorporated under the provisions of said article, but the contention is that the article is unconstitutional, null, and void under both the state and federal Constitutions. In order to intelligently understand the legal propositions here presented, it is necessary to briefly notice the provisions of said article 7.

The first section thereof, being 10611, R. S. 1909, provides that the county courts of the various counties of the state may divide them into road districts, and authorizes said courts to incorporate with the usual powers of corporations for public purposes, and each to be known as "\_\_\_\_\_ road district of \_\_\_\_\_ county." Each district to embrace not less than 2,000 acres of contiguous lands, and may be commensurate with a township, but must be located wholly within the county in which it is organized.

Section 10612 provides: That when a petition signed by the owners of a majority of the acres of land within any district proposed to be organized, stating the name of the proposed district, giving the boundaries thereof, and the number of acres embraced, and stating the names of the owners of the land, and the number of acres owned by each, and praying for an origination of such public road district in accordance with the provisions of said article and filed in the office of the clerk of the county court 30 days before the first day of the next term thereof, the clerk shall give notice that the petition will be heard at the next term of the court, etc., which shall state the names

of at least three of the petitioners and the boundaries of the proposed district, and notify all owners of the land in said district who may desire to oppose the formation thereof to appear on the first day of said term and file their written remonstrance thereto, etc., which shall specifically state their objections to said organization. That the court shall hear said remonstrance, and may make such changes in the boundaries of such district as the public good may require. That if, after such changes have been made, it appears to the court that the petition so filed still contains the names of the owners of a majority of the acres contained in the district, the court shall make a preliminary order establishing the district, and set out the boundaries thereof. If no remonstrance shall have been filed, the court shall determine whether the petition for the organization has been signed by the owners of a majority of the acres embraced within the proposed district, and, if so, shall establish the district with the boundaries given in the petition, or with the boundaries as may be set forth in the amended petition signed by the owners of a majority of the acres affected thereby; and said amended petition may be filed at any time before the preliminary order establishing the district is made, but the boundaries of the district shall not be changed so as to embrace any lands not described in the notice given by the clerk, unless the owner shall in writing consent thereto, etc.

Section 10613 provides that, after the district has been formed, the county court shall appoint three commissioners, possessing certain qualifications, to hold their office until the first Tuesday after the first Monday in January thereafter; "and on said last date the landowners in the district shall elect three commissioners, one to hold office for one year, one for two years, and one for three years, and, on the first Tuesday after the first Monday in January of each year thereafter, they shall elect one commissioner for a period of three years," etc. Then follows provisions for filling vacancies on the commission, etc.

Section 10614 provides for the qualification of the commissioners, organization of the board, the election of officers, and the times and places for holding meetings, etc. The county treasurer is made treasurer of the road district, etc. The president of the board of commissioners shall preside at all meetings, sign warrants, and have general supervision over the work of the commission, etc., and the secretary shall keep a record of all the proceedings of the board, draw warrants, etc.

Section 10615 provides: That the board of commissioners shall fix a fair and impartial value on each tract of land within the district, independent of the buildings thereon, and make a tabulated statement of such valuations, according to numbers, and the names

of the owners, if known, etc., and note what tracts lie within one mile of the road proposed to be improved, those that are a greater distance than one and under two miles, and those over two miles, and, when more than one road is proposed to be improved, a separate statement as to each shall be made. The statements of valuations shall be signed by the commissioners and acknowledged, etc. Thereupon the board shall request the county surveyor to draw estimates of the costs of the road to be improved, etc., who, under the direction of the board, shall make estimates of the various costs of the improvements, etc., and make a report to the board accompanied by maps and profiles, specifying the road or roads to be improved, and the various kinds of work and materials to be used, etc., and the proportionate cost to be charged to each separate tract of land for each separate road, and for the whole, according to the valuations previously made, if all are to be paid for at once, and the amount if to be paid in 5 or 20 years equal installments, and the amount of each installment. That each tract of land within one mile of the road to be improved shall be charged in proportion to the valuation fixed thereon as previously directed, and each tract located at a greater distance than one mile and less than two miles from such road shall be assessed at 75 per cent. of the value thereof, as previously fixed, and all the tracts more than two miles therefrom shall be charged with 50 per cent. of said valuation; and, in determining the share of any tax bill or bonds to be taxed against each and all tracts of land in the road district, the rule of apportionment above stated shall govern the county clerk in extending the taxes on the tax books kept by him for that purpose.

Section 10616 provides that upon filing said tabulated statement of the valuations, and said report, maps, and profiles, the board of commissioners shall call a general meeting of all the landowners in the district, etc., and give 20 days' notice thereof. At such meeting the board shall submit the report containing the estimates, together with the maps and profiles, made by the engineer, to the landowners for examination, and shall take a vote of those present on the following propositions: First. Shall the roads mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out, and the cost thereof to be charged against the lands in the district? Second. What materials shall be used in constructing said road or roads? Third. Shall the cost be paid (1) at once, or (2) distributed through 5 years, or (3) distributed through 20 years? Then follows a provision as to the number of votes each landowner has, and the number necessary to carry each proposition submitted.

Section 10617 provides: That if the landowners vote, as previously stated, in favor of

the improvements and to charge the cost thereof against the lands, as previously stated, then the commission shall make out and sign and acknowledge, etc., a report of the action of the landowners at said meeting, and file the same with the clerk of the county court, and said clerk shall enter the same upon the records of said court, and from the filing of said report said public road district, by the name mentioned in the preliminary order of the court, shall be a political subdivision of the state, for governmental purposes, with all the powers mentioned in said article 7. That, if the owners of a majority of the acres of the land in the district do not vote for the construction of the improvements mentioned, then the board of commissioners shall report that fact to the county court, and the court shall make an order rescinding its former preliminary order establishing the district, and order that all the costs thereof be paid out of the general road funds of the county.

Section 10618 provides: That, after any such road district has been established, the board of commissioners shall employ a competent engineer to draw plans and specifications for the construction of the roads and the materials to be used, etc., according to the vote of the landowners, as in section 10616 directed. That after said specifications have been approved by the board of commissioners they shall be filed with said commission, and thereupon said commission shall in the name of said district enter into a written contract with the lowest and best bidder, to construct the roads, etc.

Section 10619 provides: That if, at the general meeting of the landowners, previously mentioned, they should vote for the payment of the entire cost, by one assessment, the contract should provide for the payment of said work or improvements by special tax bills issued against the lands in the district, in the proportions previously mentioned, and that upon the completion of the work, and the acceptance of the same, etc., the board of commissioners shall make out and certify to the county clerk a statement of the contract price of the entire improvements, a description of each tract of land embraced in the district, lying within one mile of the road, and of each that is situated more than one and less than two miles therefrom, and of each tract which is located at a greater distance than two miles, accompanied with a statement of the number of acres in each tract, and the name of each record owner thereof, and the valuation fixed thereon by the commission, which shall be acknowledged, etc. That thereupon the clerk of the county court shall apportion to each tract its share of the cost of said improvements and make out separate, special tax bills against each tract for the amount apportioned it as provided for by section 10615, which shall be payable to the contractor within 60 days

from issue, etc. That said bills shall be signed by the president of the board and attested by the county clerk, delivered to the contractor and accepted by him in full payment for his work, etc. That said tax bills shall be a lien upon the respective tracts of land against which they are issued, and if not paid when due, the owner may sue thereon in the circuit court at any time within two years thereafter, etc. That, before issuing said tax bills, the county clerk shall enter in a book to be denominated "Special Tax Record of ——— Road District," a description of the tax bills by number, amount, payee, date of issue and maturity, and the numbers of the land and the names of the owners, if known, etc. Said record book shall be kept in the office of the county clerk, and a duplicate thereof shall be made by him and deposited with the county treasurer, and he shall give to the owner of each tract, if known, or, if not known, to the occupant, a notice of the amount due on said bill and when due. Then follows a minute provision as to how the tax bills shall be paid, and the release and cancellation of the same.

Section 10620 provides: That when the landowners, at the general meeting authorized by section 10616, shall by vote direct that the cost of said improvements shall be made payable in annual installments extending over 5 or 20 years, as the case might be, the board of commissioners shall issue the bonds of the district for the length of time by said meeting directed, and in an amount not to exceed the estimates submitted to said meeting, plus 10 per cent. thereof, and enter into a contract for the construction of said road, as directed by sections 10618 and 10619 of this article, except the contract for the improvements shall provide that the cost thereof shall be paid for in money instead of special tax bills. Provided, however, the board of commissioners may use said bonds or any part thereof at par in the payment of said work. That said bonds shall run in the name of the road district, bearing 6 per cent. interest, payable at the expiration of the time indicated by the landowners at said general meeting, etc. Said bonds shall be signed by the president of the road district and attested by the county clerk, who shall, before their delivery, register them in a suitable book procured for that purpose. That, whenever the board of commissioners shall sell any of said bonds for the payment of any work to be performed under this article, the proceeds thereof shall be paid to the county treasurer, who shall enter the same to the credit of said district, etc., and shall pay the same out on the warrants drawn by the board of commissioners. That the board of commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, and a description by numbers of each tract of land in the district lying within one mile of the road, and of each

that lies a greater distance than one mile and less than two miles, and of each tract that lies a greater distance than two miles therefrom, with a statement of the number of acres contained in each tract, and the valuation placed thereon by them, and acknowledge the same as is provided for acknowledging deeds to real estate, and file the same with the clerk of the county court. Thereupon said clerk shall apportion to each and all of said tracts, according to the rule prescribed by said section 10615, its share of said bond issue, etc., and enter the same in a book to be denominated "Bond Tax Record of ——— Road District," and shall append thereto his certificate as county clerk, and from said date such apportionment shall be a charge against the tracts of land indicated, until paid. The county clerk shall in each succeeding year make out a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, etc., and deposit said duplicate record with the collector of revenues of the county, etc., and said collector shall annually make out separate tax bills against each tract for the amount shown by the duplicate record, and collect the same as other taxes are collected, and receipt for them in the same manner. Each tax bill shall contain the name of the owner of each tract, and if not paid on presentation shall bear interest, etc., and, if not paid within six months, suit may be brought thereon by the collector to the use of the owner thereof, etc. That a judgment in any such suit shall be a lien on the lands described in the tax bills, and sued on, etc. The collector shall deposit all moneys by him collected on said tax bills with the county treasurer, etc. Then follows a provision fixing the liability of the collector for the collection of said tax bills, the fees he shall receive for his services, the receipts he is to give in satisfaction of the same when paid, and the release of the tax against the lands, etc.

Section 10621 provides as to how titles to certain lands must be considered, which is not important in this case.

Section 10623 authorizes the board of commissioners to employ county surveyor and bridge commissioner to perform certain work.

Section 10624 provides: That the county clerk shall set aside to the credit of the road district the portion of the revenues for working the public roads that may be raised by direct taxation against the property lying therein, according to any existing laws or subsequent enactment, and said revenue shall be spent by said board of commissioners for keeping any road within the district in repair. Also a proper apportionment of any license taxes and poll taxes and city revenue raised and set aside to any special road district organized under this article be made by the county court and turned over to said

board of commissioners. That any road overseer who shall be such under any law at the time of the organization of such road district shall turn over to the board of commissioners any tools, graders, scrapers, or implements of any kind in his possession which may by a proper apportionment belong to such district. Then follows a provision authorizing the board of commissioners to make contracts for the improvement of the roads of the district from time to time, and paying for the same out of the funds coming into its hands.

And section 10625 provides that all poll taxes of the district shall be paid in cash and placed to the credit of the district.

Simrall & Simrall, of Kansas City, and Craven & Moore, of Excelsior Springs, for appellants. Claude Hardwicke, of Colorado Springs, Colo., for respondents. John T. Barker, Atty. Gen., W. T. Rutherford, Asst. Atty. Gen., and Neville & Gorman and Barbour & McDavid, all of Springfield, amici curiae.

WOODSON, J. (after stating the facts as above). I. Counsel for appellants first insist that the judgment of the circuit court was erroneous because the taxes levied against their property, under and by virtue of chapter 102, art. 7, R. S. 1909, are illegal, for the reason that said article authorized said levy without notice to them, and therefore authorizes the taking of their property in violation of sections 21 and 30 of article 2 of the Constitution of this state, and section 1 of the fourteenth amendment of the Constitution of the United States. These constitutional provisions in substance provide: (1) That private property shall not be taken for public use without just compensation; and (2) that no person shall be deprived of his property without due process of law. There is absolutely no merit in either of these contentions.

[1] Regarding the first: This court, from its earliest history down to this time, has uniformly held that special taxes or benefits, such as were levied against appellants' property, under said article 7, are not public taxes, within the meaning of the Constitution authorizing the levy and collection of taxes for public or governmental purposes, but are special taxes assessed against the property for the payment of the improvements made upon the highways in the vicinity of the property, which, in legal contemplation, adds to the value of the property as much or more than the amount of the taxes imposed. It would serve no good purpose to cite authorities in support of this ruling, save the case of *Ranney v. City of Cape Girardeau*, 164 S. W. 582, not yet officially reported, wherein many of the cases so holding are cited by Judge Lamm.

[2] Attending the second: This contention is also untenable for the reason that this

court and the Supreme Court of the United States have repeatedly held that where these special benefits are levied, and no provision is made for the property owners to be heard during the proceedings imposing the special benefits, and where they are only collectible by suit, as in the case at bar, then all legal defenses the property owners may have, from the inception of the proceedings down to the rendition of the judgment of the court on the tax bills, may be pleaded and contested in the same manner that any legal or equitable defense may be made in any other action at law or in equity.

The only procedure prescribed by said article 7, for the collection of these benefits, is section 10620, previously mentioned which only authorizes their collection by suit in the circuit court.

In treating this question, Page & Jones on Taxation by Assessment, § 119, uses this language: "The general rule is that at some time before the assessment becomes an absolute finality there must be a notice to the property owner and an opportunity for a hearing as to those questions of fact which concern the amount of the assessment to be imposed upon such property, except such as the legislative power has authority to determine without special inquiry, and has in fact so determined. \* \* \* If such notice is not given, and under the law the assessment becomes a finality, subject to be enforced summarily, without giving any opportunity for a hearing as to the questions of fact which concern the amount of the assessment other than those which the legislative power has authority to determine without special inquiry, and which the legislative power has in fact so determined, such assessment then constitutes a taking without due process of law, and is in violation of the constitutional provision under consideration."

In section 132 the same authority says: "If the assessment is to be enforced summarily without notice or judicial proceedings, it is evident that no opportunity is thereby given to the property owner to contest the assessment on its merits. \* \* \* If notice has not been given at a prior stage of the proceedings, so that the property owner has an opportunity to contest the assessment on its merits, the proceeding is in violation of the constitutional provision which forbids the taking of property without due process of law." Also *Pash v. City of St. Joseph*, 165 S. W. 710, not yet officially reported.

In section 773 the same authority says: "If the assessment can be enforced only by an action at law or a suit in equity, and in such proceeding the property owner is given a full opportunity to be heard upon the question of benefits, the property owner is not entitled, as of constitutional right, in the absence of statutory provision therefor, to any notice, except that of the institution of such proceedings to enforce the assessment."

In *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, it is held that: "A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment of the Constitution, which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection." The same ruling has been announced by this court in the following cases: *City of St. Louis v. Richeson*, 76 Mo. 470; *Kansas City v. Huling*, 87 Mo. 203; *Saxton National Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279; *Springfield v. Weaver*, 137 Mo. 650-672, 37 S. W. 509, 39 S. W. 276.

The case of *City of St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910, is not in conflict with the principles of law announced in the foregoing cases. In that case the question was: Had the provisions of an ordinance of the city authorizing the improvements to be made, and the assessment of benefits therefor, been complied with? Said ordinance provided that notice should be given of the establishment of the benefit district, the time and place of making the assessments, and giving the property owners the right to be then heard upon those propositions. This ordinance was wholly ignored, and this court held, and properly so, that the assessments were void because those provisions of the ordinance had not been complied with. While it is true in that case the charter and ordinances of the city provided, as do those of most of the cities of the state, that, if any property owner shall consider himself aggrieved by the award of the commission chosen to assess the damages and benefits, he may file in the circuit court exceptions to the report of the commissioners, which shall be heard by said court, etc.

In that class of cases the lawmaking power has deemed it proper to give the property owners two hearings, one before the commissioners and another in the circuit court. But there is no such provision as there stated provided for in the statutes under consideration in this case.

I am therefore clearly of the opinion that there is no merit in either of those contentions of counsel for appellants.

II. If I correctly understand counsel for appellants, they lodge an additional objection against the validity of section 10615 of article 7 of chapter 102 of R. S. 1909, which is closely related to or germane to the questions presented and disposed of in paragraph 1 of this opinion. In substance it is contended that said section divides the road district into three benefit zones of one mile each, and further provides that the lands in the first shall be assessed according to their values, say, 100 per cent., the second at 75 per cent., and the third at 50 per cent. of the values of

which are to be fixed by the board of commissioners, without notice to the property owners. This contention can be more logically considered by dividing it into two elements and considering each separately.

[3] First. It is contended that because said section 10615 of the statutes arbitrarily divides the road district into three beneficial zones, and assesses the lands in each at a different percentage, without giving the property owners in each notice thereof and an opportunity to be heard thereon, is violative of said section 30 or article 2 of the Missouri Constitution, and therefore deprives them of their property without due process of law. In answer to that contention it is sufficient to state that said division of the road district into zones and the fixing of the percentage of benefits to the lands in each are legislative acts which cannot be questioned upon the ground of want of notice to the property owners.

[4] The reason for this rule is that the authority to create benefit districts and the percentage of the benefits to be assessed rest solely with the Legislature, which, however, may delegate that authority to certain officers and institutions of the state, such as the common councils of the various cities of the state and the county courts of the various counties thereof, and, so long as they act within their legislative authority, their acts cannot be questioned because of want of notice, in the absence of some charter, ordinance, or statutory provision to the contrary. Such acts are known as legislative enactments or legislative assessments, as the case may be. This has been so often decided by this court and the Supreme Court of the United States that it is no longer open for discussion. The case of *Naylor v. Harrisonville*, 207 Mo. 341, loc. cit. 353, 105 S. W. 1074, reviews some of the cases deciding this question by both this court and the Supreme Court of the United States. There is therefore no merit in this contention.

[5] The second objection before mentioned, namely, that, while it may be conceded that the division of the districts into zones and the percentage of benefits to the lands in each zone may be legislative acts, yet the valuation of the lands by the board of commissioners in each and all of the zones, upon which the percentage of benefits is to be based, was not made or fixed by the Legislature, but by said board, and is therefore subject to question by the property owners in each and all of them, and, if not afforded that right, then the proceedings would result in taking their property without due process of law.

It must be conceded that, if appellants' major premise is true, then the sequence must necessarily follow. But is the major premise true? I think not, for the reason, as before stated, namely, that each and all property owners within the district, who considered himself or themselves aggrieved by the valuation of his or their lands by the board

of commissioners, are offered an opportunity for a full hearing upon that question in the circuit court when suit is brought upon the tax bill, which cannot be collected in any other manner. This proposition was fully considered and decided in clause 2 of paragraph 1 of this opinion, and there is nothing additional, that I know of, that could with profit be added to what is there stated.

I am therefore of the opinion that there is no merit in this contention.

III. It is next insisted by counsel for appellants that said section 10615 of article 7 is unconstitutional, null, and void because, as stated, it is class legislation, in that it authorizes the taxation of the real estate of the district according to its reasonable value, exclusive of the buildings thereon. In other words, it is contended that the taxation of the lands, and not the buildings thereon, is an unreasonable and unjust classification, and therefore the statute authorizing that to be done is class legislation, within the meaning of the state and federal Constitutions.

[6] There is no constitutional provision prohibiting legislation which embraces all persons and things that naturally belong to the same class and are similarly situated, and upon whom it must operate uniformly and equally. *State ex rel. v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, and cases cited.

The case of *Corrigan v. Kansas City*, 211 Mo. 608, 111 S. W. 115, in the majority opinion written, goes to the extent of holding that property of the same class, if belonging to different classes of owners, may be exempt from the payment of these special benefits.

[7] I did not then, nor do I now, subscribe to that doctrine, for the reasons stated in the dissenting opinion at page 633; but independent of that error, as I see it, that case properly recognizes the authority of the Legislature to make reasonable and natural classifications of property for the purpose of assessment, to pay for local improvements. In fact, that rule of taxation is recognized and enforced by practically all, if not all, of our cities, towns, and villages in paying for street and other improvements and the cost of constructing sewers, etc., as is shown by the scores of cases which have reached this court. Moreover, it would be difficult to conceive of a more natural classification of real estate than that of soil, buildings, trees, etc. This classification runs all through the laws of states and nations; and, without it, legislation regarding questions of rents, landlord and tenant, fire insurance, arson, mechanic's liens, railroads, telegraph and telephone lines, and all classes of local improvements, such as streets, alleys, sewers, and public parks in cities, and drainage and levee districts in the country, would have to rest upon totally different foundations than it now does; and to abolish that classification at this late date would disturb the whole fabric of our jurisprudence and would inject therein endless confusion and complications. Even



though we should consider orchards, vineyards, and other such betterments added to the soil by the hand of man as improvements, yet there is a clear distinction between that class of improvements and those known as houses, buildings, etc. The former becomes, not a fixture to the land, but a part of the soil itself, as it were. They owe their life to, and draw their substance, growth, and development therefrom, aided by the air, rain, and sunshine, without which they would die, perish, and return to dust, but not so as to the latter; they owe no debt to the earth, except for the footstool upon which they stand.

I am therefore clearly of the opinion that there is no merit in this insistence.

[8] IV. Counsel for appellants also insist that said article 7 is unconstitutional, null, and void because it authorizes the road district to create a bonded indebtedness in excess of the constitutional limitation. The constitutional provision referred to is section 12 of article X, and, in so far as it is material to this question, reads as follows: "No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness."

The assessments authorized by said article 7 of the statute are for the payment of local improvements, denominated special benefits to the land against which the assessments are made; and for that reason this court has uniformly held that such assessments do not constitute an indebtedness, within the meaning of the constitutional provision just quoted. *Ranney v. Cape Girardeau*, supra. In fact, I do not understand counsel to contend that they do; but, be that true or not, the uniform ruling of this court has been that no such assessment constitutes an indebtedness, within the meaning of that provision, but are special assessments made to pay for the special benefits accruing to the property by reason of the local and special improvements; the one offsetting the other.

I also understand from the briefs and arguments of counsel for appellants that they practically concede that if, under said sections 10619 and 10620, the property owners of the district have voted in favor of paying the entire cost of the improvements by one assessment, then a special tax bill would

have been issued against each tract of land in the district, which would have constituted a special lien thereon, and would not have constituted an indebtedness of any kind against the road district as such, in any sense; but, be that as it may, there is no language contained in the said article which remotely indicates that such assessments would be an indebtedness against the district. But, upon the contrary, the whole import and meaning of the article is to the contrary.

But the real contention of counsel for appellants is that since the landowners did not vote in favor of paying the entire cost of the improvements by one assessment, but by installments, as provided for by said section 10619, then it became the duty of the district to issue its bonds for the amount of the estimated cost of the improvements, plus 10 per cent., and that they be sold in the manner prescribed for, and that the proceeds thereof be used in the construction of the roads ordered, etc. From that premises it is insisted and argued with much force and earnestness that, since the bonds are the bonds of the district, the indebtedness which they represent must also be that of the district, and consequently they must pay by it. If that contention is true, then clearly the district would, by said section 12 of the Constitution, be prohibited from issuing the bonds in question, for the reason that their face value would far exceed the constitutional limitation contained therein. If that is the meaning to be placed upon the statute, then I do not understand counsel for respondent to differ from counsel for the opposition as to what would be the legal effect of the Constitution upon the statute and upon the bonds proposed to be issued under that authority.

Under that assumption counsel for both parties would be compelled to admit that the statute would be unconstitutional and the bonds would be void. But the record in the case fails to disclose that counsel for respondents are so generously inclined as to admit that counsel for appellants have correctly interpreted said statute; consequently they persist in their contention that the statute is constitutional and that the bonds, if issued, would be valid.

[9] The basis of this contention is the same as that upon which it is practically conceded, as previously stated, that, if the vote of the landowners had been in favor of paying the entire cost of the improvements by one assessment, then the tax bills would have been a special lien against the respective tracts of land, and not an indebtedness of the road district, as such.

If I correctly read and understand the meaning of sections 10619 and 10620, there is no difference in principle between the character of the indebtedness created for the payment of the special benefits conferred by the improvements or by what hand the same is to be paid, whether it is payable by one assess-

ment and evidenced by a single tax bill issued against each tract of land and delivered to the contractor, or whether the indebtedness is to be paid for by annual installments evidenced by several tax bills issued against each tract, and collected by the county collector, and the proceeds thereof turned over to the county treasurer for the purpose of paying the bonds as they mature, instead of the tax bill, had they been based upon one assessment, and had been delivered to the contractor in the first instance, as previously stated.

The indebtedness voted by the landowners, whether payable by a single assessment or several, constitutes liens upon the respective tracts of land in the district, in proportion to their respective values, and must be paid severally by each landowner, whether paid in bulk or in annual installments. If in bulk, the payments would have been made payable to the contractor, because in such case the tax bill would have been made payable to and delivered to him; but, if in installments, then they would have been payable to the county collector, and by him turned over to the county treasurer, and by him paid to the bondholders, whoever they might be. This is not controverted by counsel for appellants, but they insist that there is no provision contained in said article 7 of the statutes which authorizes the issuance of such bonds, containing a clause showing that they are only payable out of the special benefits collected, and therefore they must be considered and treated as the bonds of the district, and not simply evidences of an indebtedness, only payable, as previously stated, out of the proceeds of special tax bills issued for benefits imposed against the several tracts of land in the district, and collected in the manner therein provided for. This contention is unsound for two reasons: First, because the statute does not undertake to prescribe the form of the bonds to be issued, and the presumption is that the officers charged with their execution will issue bonds in harmony with the provisions of the statutes authorizing their issuance and the purpose for which they are executed and the means of their payment. If those mandates of the statutes are complied with, the bonds upon their face, as well as the statutes authorizing their execution, which must be read into the face of the bonds, will conclusively show that they are not the bonds of the road district, but simply evidences of an indebtedness payable out of the proceeds of the special tax bills issued against the lands embraced in the district, for the benefits mentioned. And the second reason mentioned for saying that said bonds are not the obligations of the road district is this: That, in considering the nature and character of the bonds in question, it is the duty of the court, and all parties dealing with them, to read and consider in connection therewith the entire article of the statute bearing thereon

and authorizing their execution; and by so doing it will clearly appear that no authority is given to any officer of the county or road district to levy or collect any tax with which to pay said bonds, except the special assessments authorized for the improvements mentioned, which are for the benefit of the respective landowners, and not for the benefit of the district itself. Moreover, the district, as such, has no means out of which it could pay said bonds, nor any authority to make assessments therefor, except in the manner previously stated, which conclusively shows that the indebtedness is against the lands and not against the road district.

The principle underlying these observations was presented to this court in the case of *State ex rel. v. Gordon*, 223 Mo. 1, 122 S. W. 1008. There one of the questions presented was regarding the form of the bonds to be issued. The bonds were issued under the statutes authorizing the issuance and sale of bonds for the purpose of building schoolhouses and furnishing them. One of the points made was that the bonds issued should have shown upon their face (which they did not do) that they were issued for the purpose of building schoolhouses and for furnishing the same. This court in a very carefully considered opinion, written by Judge Lamm, held that the bonds issued were valid, notwithstanding the omission from the face thereof of the purposes for which they were issued. Judge Graves dissented from the entire opinion for several reasons, one of which was that the recital mentioned did not appear on the face of the bond, impliedly holding that the recital should have been made. Counsel for either party, nor did any member of the court, contend or hold that such a recital in the bonds would have been improper, but, with the exception of Judge Graves, were of the opinion that the bonds were not invalid because of such omission, believing that the statutes should be read into the face of the bonds, which would be as effectual as if the recital had been actually written in the face of the bonds.

I am therefore of the opinion that this contention is without merit, and it is ruled against appellants.

[16] V. It is also insisted by counsel for appellants that said article 7 is unconstitutional for the reason stated "that it turns over the care and maintenance of the public highways to a body of landowners, and also confides to them the expenditure of public moneys." This is clearly a misconception of the statute. Section 10617 in clear and unambiguous language declares that after the meeting of the landowners, and their votes are cast in favor of the propositions contained in the previous section, the district "shall be a political subdivision of the state for governmental purposes with all the powers mentioned in this article, and such others as may from time to time be given it

by law." The board of commissioners are in the first instance appointed by the county court and thereafter elected by the landowners of the district. Under these statutes all such road districts are public corporations, organized under the unquestioned authority of the Legislature. *Harris v. Bond Co.*, 244 Mo. 664, 149 S. W. 603. And, as was held in that case, the commissioners appointed or elected in the manner provided for by section 10613 are public officers for the purposes mentioned in said article 7. Moreover, all of our drainage districts are organized and administered by a board of commissioners in pursuance to statutes practically similar to these under consideration. This being true, there remains no foundation whatever for this resistance to rest upon; and it is accordingly ruled against the appellants.

Entertaining these views of the case, I am perfectly satisfied that the statutes in question are valid, and that no error was committed by the circuit court in the trial of the cause.

The judgment is affirmed.

GRAVES, BOND, and WALKER, JJ., concur. LAMM, C. J., dubitante. BROWN, J., dissents. FARIS, J., not sitting.

**STAPP v. KANSAS CITY-LIBERTY BOULEVARD ROAD DIST. et al.**  
(No. 17,451.)

(Supreme Court of Missouri. April 2, 1914.)

In Banc. Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by Joseph Stepp against the Kansas City-Liberty Boulevard Road District of Clay County and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. E. Lawson, of Liberty, for appellant. Claude Hardwicke, of Colorado Springs, Colo., for respondents.

WOODSON, J. This is a companion case of *W. S. Embree et al. Appellants, v. Kansas City-Liberty Boulevard Road District of Clay County*, 166 S. W. 282, just decided.

Each involves the same facts and propositions of law, and the rulings in that case are controlling in this; and, for the reasons there stated, the judgment of the circuit court is affirmed.

GRAVES, BOND, and WALKER, JJ., concur. LAMM, C. J., dubitante. BROWN, J., dissents. FARIS, J., not sitting.

**KLEIN v. KINGSHIGHWAY ROAD DIST. OF NEW MADRID COUNTY et al.**  
(No. 17,471.)

(Supreme Court of Missouri. April 2, 1914.)

In Banc. Appeal from Circuit Court, New Madrid County; C. B. Faris, Judge.

Action by James M. Klein against the Kingshighway Road District of New Madrid County and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Gresham & Moore, of Sikeston, for appellant. Henry C. Riley, of New Madrid, for respondents.

WOODSON, J. This case is practically the same as that of *W. S. Embree et al. Appellants, v. Kansas City-Liberty Boulevard Road District of Clay County et al. Respondents*, 166 S. W. 282, just decided. The parties here are different and the road district in this case is located in New Madrid county, but it was organized under the same article of the statutes which that one was. The facts of that case and the law governing them are substantially the same as they are in this; consequently the ruling there must control here.

The judgment of the circuit court is affirmed.

GRAVES, BOND, and WALKER, JJ., concur. LAMM, C. J., dubitante. BROWN, J., dissents. FARIS, J., not sitting.

**CHICAGO GREAT WESTERN R. CO. v. KEMPER et al.**  
(No. 16,855.)

(Supreme Court of Missouri, Division No. 1. March 3, 1914. Rehearing Denied April 2, 1914.)

**1. VENUE (§ 75\*)—CHANGE OF—JURISDICTION.**

Where a change of venue from one circuit court to another is awarded, the second court is not without jurisdiction because the order reciting that the venue of the cause was changed used the word "court" instead of "cause"; that being a mere clerical mistake.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 130-132, 137; Dec. Dig. § 75.\*]

**2. APPEAL AND ERROR (§ 186\*)—WAIVER OF OBJECTIONS.**

Where an order granting change of venue recited that the venue of the "court" instead of the "cause" should be changed, defendant cannot on appeal complain that the second court was without jurisdiction because of that clerical mistake, where that ground of objection was not raised below.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 186; \* *Venue*, Cent. Dig. § 149.]

**3. EMINENT DOMAIN (§ 172\*)—PROCEEDINGS—JURISDICTION.**

The filing of the petition and service of the notice provided for by Rev. St. 1909, § 2361, in condemnation cases gives the court jurisdiction of the subject-matter and of the person.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 470-472; Dec. Dig. § 172.\*]

**4. EMINENT DOMAIN (§ 185\*)—APPEARANCE—EFFECT.**

A voluntary appearance by the defendant in a condemnation suit gives the court jurisdiction without service of notice.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 499; Dec. Dig. § 185.\*]

**5. JURY (§ 19\*)—JURY TRIAL.**

In a proceeding for the condemnation of land, the defendant is entitled to a jury trial only on the question of damages.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 104-133; Dec. Dig. § 19.\*]

**6. EMINENT DOMAIN (§ 164\*)—CONDEMNATION—ESTOPPEL.**

Rev. St. 1909, §§ 2361, 2362, 2364, relating to condemnation, contemplate two hearings, the first upon the filing of the petition for condemnation when the court determines whether condemnation should be had and appoints commissioners to assess the damages, and the second upon assessment of damages. *Held*, that a defendant by accepting the damages awarded by

the commissioners and deposited by the plaintiff with the clerk estopped himself from objecting to irregularities in the judgment of condemnation, although he could thereafter complain of the inadequacy of the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 442-444; Dec. Dig. § 164.\*]

#### 7. TRIAL (§ 296\*)—INSTRUCTIONS.

Where the other instructions in the series expressly authorized the jury in a condemnation suit to take into consideration the damages to the remainder of defendant's land, an instruction that the only matter for determination was the just compensation for taking of the land is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

#### 8. APPEAL AND ERROR (§ 882\*)—INSTRUCTIONS—RIGHT TO COMPLAIN.

In condemnation for land for railroad terminal, defendant cannot complain of an instruction that in assessing damages the increased danger from fires, increased noise and smoke, etc., could not be considered, where defendant's own instruction charged that damages common to other landowners of the neighborhood whose property was not taken could not be considered, this instruction precluded the consideration of the very elements mentioned in the first instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 9. EMINENT DOMAIN (§ 141\*)—CONDEMNATION—DAMAGES.

In assessing damages for land taken for a railroad terminal, defendant is not entitled to damages for injuries to his remaining property which he suffers in common with adjoining landowners whose property was not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.\*]

#### 10. EMINENT DOMAIN (§ 203\*)—CONDEMNATION—ELEMENTS.

In condemnation where part of one farm was taken, testimony concerning the use of another parcel three-quarters of a mile distant is inadmissible on the question of damages, without proof that the two tracts were especially adapted to one use and had a peculiar value because of that adaptability.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.\*]

Appeal from Circuit Court, Andrew County; Alonzo D. Burnes, Judge.

Condemnation by the Chicago Great Western Railroad Company against Bernard P. Kemper and others and John Holtman. From a judgment for plaintiff, the last-named defendant appeals. Reversed and remanded, with directions.

J. C. Growney, of St. Joseph, for appellant. Shinabargar, Blagg & Ellison, of Maryville, for respondent.

GRAVES, J. This is a condemnation proceeding originating in the circuit court of Nodaway county; the purpose of the condemnation being thus stated in the petition: "Plaintiff further states that as such railroad corporation it is now, and it and its predecessors for a long time have been, operating said line of railroad, which line is a continuous line between Kansas City in the

state of Missouri, and the city of Chicago, in the state of Illinois, and the city of St. Paul in the state of Minnesota; that for the public use and convenience in the operation of its said line of railroad it has become and is necessary for it to construct certain division terminal facilities occupying about \* \* \* acres and extending in a general northerly and southerly direction over said sections 11, 14 and 23, consisting of a roundhouse, switch tracks, storage tracks, connecting tracks, machine shops, etc., together with the necessary grading therefor, which are to constitute a part of said system and line of railroad. Plaintiff further states that it has acquired by purchase or donation all the land required for said improvement except a certain tract owned by the defendant Bernard P. Kemper, who now occupies the same, and a certain tract owned by John Holtman, who now occupies the same." Upon the presentation of the petition to Hon. William C. Ellison, judge of the Fourth judicial circuit of Missouri, he in vacation ordered the same filed by the clerk of the Nodaway county circuit court, and that summons be issued to all the defendants to appear at his office in the city of Maryville on August 20, 1910, when and where he would hear said petition, and defendants could make such objections as they thought proper. Defendants appeared on August 20th and applied for a change of venue from Judge Ellison. This application was sustained and the cause sent to the circuit court of Andrew county. On September 3, 1910, the defendant (and sole appellant here) John Holtman and other defendants filed, in vacation of that court, their objections to the petition and their protests against the appointment of commissioners. These were lengthy and will be noted later, if occasion requires. The matter seems to have been continued from time to time until finally, on October 29, 1910, Judge Burnes of the Andrew county circuit court concluded his hearing of the petition of the plaintiff and the objections of the defendants thereto, and found that it was necessary for plaintiff to have about 70 acres of land for the purposes stated in its petition, which included the land of John Holtman or in which he was interested. Commissioners were appointed to assess the damages. On November 11, 1910, these commissioners filed their report (in vacation of the Andrew county circuit court) in which damages to John Holtman, Joseph Holtman, and Nathaniel Sisson were allowed in the sum of \$1,500. November 18th, and during the November term of said court, John Holtman and Bernard P. Kemper filed exceptions to the report of the commissioners. The record presented to this court then thus details the trial judgment: "Upon the issues thus presented, the cause was called for trial at the regular February, 1911, term of said circuit court, of the 28th of February, 1911, the same being the second day of said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexe

term, the parties appeared in persons and by their respective attorneys, and, as a result of a trial before a jury, a verdict for defendants was returned on March 1, 1911, in open court, assessing the damages sustained by Bernard P. Kemper at \$1,238.40, and by John Holtman at \$1,399.50. And thereupon on said date the court rendered judgment on said verdict in words and figures as follows, viz.: 'It is therefore ordered, considered, and adjudged by the court that the defendant Bernard P. Kemper have and recover of and from the plaintiff the said sum of \$1,238.50, so found by the jury as aforesaid, and that the defendant John Holtman have and recover of and from the plaintiff the said sum of \$1,399.50 so found by the jury as aforesaid.' Motion for new trial was filed in due time, and this passed over to the May term of the court. At this time the defendant Kemper withdrew his motion for new trial, and the motion was overruled as to the defendant John Holtman. From this judgment, Holtman, alone, has appealed.

By an additional abstract prepared by the plaintiff, it appears that plaintiff paid into court on November 17th the money assessed by the commissioners, for the several defendants. And further that at a later term (date not shown) the defendant John Holtman received such money and receipted of record therefor. This outlines the case. Additional matters will be noted in the course of the opinion in connection with the points made.

[1, 2] I. Appellant, although he applied for and got a change of venue from Judge Ellison's court, now complains of the jurisdiction of the Andrew county circuit court. All this arises over the wording of the order, and, as appellant claims, the wrong use of the word "court" for "cause." Appellant sets out the order thus: "And the venue of said court is accordingly hereby ordered changed to the said circuit court of Andrew county." Respondent files an additional abstract of the record and makes said order read "cause" instead of "court." This contention of the appellant should not be entertained for two reasons at least: (1) It is apparent that if the order really shows the word "court" it was a mere clerical mistake; and (2) because appellant relied upon no such question in the court below. In the Andrew county circuit court he did challenge the validity of the change of venue, but did it in this language: "That the court has no jurisdiction of the subject-matter of this suit, because the order of the circuit court of Nodaway county, Mo., awarding a change of venue herein is null and void, neither has this court jurisdiction of the person of the defendants named in plaintiff's petition, for the reason that the circuit court of Nodaway county had not acquired jurisdiction of the person of all said defendants at the time of making the alleged order, awarding a change of venue as shown by the transcript and original papers here-

in." The reason then assigned and the reason now assigned are totally different. It should be further added that no suggestion of this want of jurisdiction is found in the motion for new trial filed nisi. Other reasons might be suggested, but these are sufficient to rule this point against the appellant.

[3-6] II. Respondent contends, and we think rightfully, that the appellant having taken down the money paid into court for his benefit is now estopped from questioning any matter except the hearing had upon the question of the amount of damages. This view of the law eliminates a "slough" of questions presented in the appellants' brief. Our statutes relative to condemnation contemplate two hearings in the course of the proceeding. First upon the filing of the petition for condemnation the court or the judge thereof in vacation must make one order requiring all interested parties to be notified of the time and place where he will hear said petition. R. S. 1909, § 2361. The filing of the petition and service of notice gives the court jurisdiction of the subject-matter and the person. *Quayle v. Railway Co.*, 63 Mo. 465; *Railway Co. v. Swan*, 120 Mo. 30, 25 S. W. 534. Appearance of the defendant will confer jurisdiction even without service of notice. *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 26 S. W. 350; *Railway Co. v. Donovan*, 149 Mo. 93, 50 S. W. 286.

At the hearing the sufficiency of the petition and the necessity for the condemnation is determined by the court, or the judge thereof in vacation. If the petition is sufficient, and the court determines that condemnation should be had, then the court or the judge thereof in vacation appoints the three statutory commissioners to assess the damages, and make report thereof to the court. R. S. 1909, § 2362. These proceedings constitute the first branch of the case. Upon the filing of the report of the commissioners, the clerk of the court must give notice of the filing of such report to all parties whose interest is affected thereby. If any person is dissatisfied therewith, he or they may file exceptions thereto, and the court may, "upon good cause shown," order a new appraisal, which at the request of either party may be had before a jury. R. S. 1909, § 2364. This hearing before a jury constitutes the second branch of the case. This right to a trial by a jury only exists as to the amount of damages or compensation. *Railway Co. v. Railway Co.*, 118 Mo. loc. cit. 617, 24 S. W. 478. And the statute says (section 2364, *supra*), "and any subsequent proceedings shall only affect the amount of compensation to be allowed."

So that, if the court has jurisdiction, we think the defendant in a condemnation proceeding can estop himself, as to all questions of mere irregularities in the first branch of the proceeding, by taking down and receipting for the damages which the plaintiff has

paid into court for his benefit. Such act upon his part is a concession by him that the plaintiff is entitled to take the property under the proceedings, upon the payment of full and adequate compensation thereof. If he expects to question this right to condemn at all, or the regularity of that part of the proceeding, he should not take down the allowance of the commissioners, which for the time stands for just compensation. In other words, he should not place himself in the attitude of claiming all his original interest in the land, whilst having adequate compensation thereof in his pocket. A litigant should not be permitted to accept the fruits of a proceeding, and at the same time question the regularity thereof, for his own further self-aggrandizement. By taking down the money he estops himself from questioning the regularity of the proceeding up to that point, although under the statute and our holdings he is permitted to further litigate the question of whether or not the allowance made by the commissioners is full and just compensation. The supplemental or additional abstract of the record in this case shows that this appellant took down and receipted for the full allowance made to him by the commissioners. Such being the case, all irregularities, if any, in the first stage of the proceeding, is to him a sealed book on this appeal. In *Corwin v. Railway Co.*, 51 Kan. loc. cit. 459, 33 Pac. 103, Horton, C. J., said: "Subsequently, Mrs. Sanders accepted the condemnation money. Clearly, she was thereafter estopped from raising any objections to any mere irregularity in the condemnation proceedings." In the case of *Weeks-Thorne Paper Co. v. City of Syracuse et al.*, 139 App. Div. 858, 124 N. Y. Supp. loc. cit. 321, it is said: "The chief contention of the appellant is that the petition did not state facts sufficient to confer jurisdiction, and the specific defect urged is the omission of the petition to set forth accurately the property sought to be condemned. The Supreme Court certainly had jurisdiction to entertain a proceeding of this kind, and the petition was adequate to confer authority over the subject-matter, as well as of the person of the defendants. The question is of no importance now, for the court assumed jurisdiction, disposed of the rights of the parties to the action, and the Hartlot Paper Company cannot recognize the validity of the judgment by accepting the money awarded it, and, while retaining it through its successor in interest, challenge the adequacy of the petition. *Tonnele v. Wetmore*, 195 N. Y. 436, 88 N. E. 1068; *Sherman v. McKeon*, 38 N. Y. 266, 274, et. seq.; *City of Buffalo v. Balcom et al.*, 134 N. Y. 532, 536, 32 N. E. 7. As was said in *Sherman v. McKeon*, supra, 38 N. Y., at page 275: 'The receipt of the money operates as an estoppel, and the damages paid have the same effect as a conveyance, and vest the title in the corporation.'"

To like effect is *Holland v. Spell et al.*, 144 Ind. 561, 42 N. E. loc. cit. 1015, wherein the Supreme Court of Indiana says: "It is a general rule that, where benefits are awarded to the owner of land in proceedings to condemn, an acceptance of the sum awarded will preclude the owner from prosecuting an appeal. *Elliott*, App. Proc. § 150; *People v. Mills*, 109 N. Y. 69, 15 N. E. 886; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrall*, 19 Conn. 142; *Elliott, Roads & S.* 277. Judge Elliott says, in his Appellate Procedure (section 151): 'It will be observed that in the cases in which it has been held that an estoppel exists the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property.' These principles have been applied by this court in proceedings similar to those involved in the present case. *Test v. Larsh*, 76 Ind. 452; *Railroad Co. v. Johnson*, 84 Ind. 420; *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006. In *Byer v. Town of New Castle*, 124 Ind. 86, 24 N. E. 578, the doctrine that one may estop himself to deny the validity of condemnation proceedings was recognized. That he may estop himself, by the receipt of the money awarded in condemnation proceedings, to deny the validity of the proceedings, was held in a full and satisfactory opinion and citation of authority in *Test v. Larsh*, supra. We can conceive no good reason why he should, in good conscience, be permitted to receive all the benefits of the proceeding, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits."

These cases are right in principle. The act of taking down the money, under our law, does not preclude the defendant from saying that the amount is not adequate compensation, and he can litigate that question after taking down the money (*Railway Co. v. Donovan*, 149 Mo. loc. cit. 103, 50 S. W. 286), but he cannot act under the judgment, and yet deny the sufficiency of that judgment to vest his property in the plaintiff. We exclude from this announcement his right to question the want of jurisdiction in the court. That question can perhaps be raised even in this court. But there is a difference between that question and mere irregularities in the proceeding. The first judgment of the court in a condemnation proceeding goes to the very propriety of the condemnation itself. The second judgment goes to the damages to be paid. The parties interested can waive irregularities in such first judgment, and if they do so waive them by taking and receipting for the money paid into court for their benefit they are estopped from further questioning the regularity of that judgment of the court; the court being possessed of full jurisdiction at the time. As said, this view

of the law eliminates a discussion of many questions urged in the brief as to the alleged irregularity of the first judgment.

[7] III. Our ruling supra leaves us to begin with point XI of defendants' brief, rather than with point I. It is urged under proposition XI of the brief that there was error in giving plaintiff's instruction No. 1. This instruction is: "The court further instructs you that the plaintiff has the right under the law to take and appropriate the strips of ground containing 9.33 acres, and 7.59 acres, described in the pleadings and evidence, upon paying to said defendants just compensation therefor, and that the only matter for the jury to determine in this cause is the just compensation to be paid by the plaintiff to said defendants." The tract of 9.33 acres was the one belonging to Holtman, this appellant. This instruction No. 1 is practically a rescript of instruction No. 2 given for plaintiff in *So. Ill. & Mo. Bridge Co. v. Stone*, 194 Mo. loc. cit. 182, 92 S. W. 475. Whilst we do not seem to have discussed this particular instruction, the series of instructions in that case seems to have met with the approval of the court.

The objection which appellant urges is that said instruction "excludes from the jury a consideration of the depreciation in value of the remaining portion of appellant's farm." This instruction here criticised is the first of a series of instructions. It is only general in nature, but it is followed by instructions 2 and 5, in this language: "This just compensation, or, in other words, the damage to which defendants are entitled, is the difference in the fair market value of defendants' respective whole farms before and after the appropriation by plaintiff of the respective parcels of land, mentioned in evidence to be taken out of each, occasioned by the taking of and the uses to which said parcels condemned are to be put." "In determining the compensation or damages to which the defendants are respectively entitled, as more fully explained in preceding instructions, the jury should ascertain: First, the market value of the land actually taken; second, the diminution in value of the remainder of said farms respectively, if any, as a result of the taking of the part of each that is condemned, and of the use to which such parts are to be put by the railroad company. The total amount found on account of these items will be the damage to which the defendants are entitled. If the jury shall further find from the evidence that by reason of the taking and appropriation by the plaintiff of the parcels of land hereinbefore described out of said whole farms, and the use to which said parcels are to be put by the plaintiff, the remainder of said farms will receive special and peculiar benefits, not common to other lands in the vicinity, then the jury should estimate the amount or value of such special benefits, if any, and deduct the same from the total damages, as found

above, and the remaining sum, if any, will be the amount of damage or compensation, which defendant should be allowed." These instructions, when read together, cover the law of the case, and in addition it might be added that they do not differ in principle from the instructions asked and obtained by defendant.

[8, 9] IV. Next it is urged that there was error in giving for the plaintiff its instruction No. 3, in this language: "The court instructs the jury that, in estimating the damages occasioned to the defendants by the condemnation of the two parcels of land described in the first instruction, they have no right to take into consideration any damage that might result from fires in the future, if any; nor should they consider the increased damage to life and limb, if any, from trains passing over the public wagon road; nor any damage from smoke or noise from passing trains or from ringing of bells or sounding of whistles; although the jury may consider the increased risk of fire, if any, from said terminals so far as the same may affect the market value of said lands, if any." Appellant cites us to some decisions from other courts upon the question, but does not cite one from this court. In so far as this instruction relates to fires, it announces well the doctrine of this court. *Railroad v. Mendonsa*, 193 Mo. 518, 91 S. W. 65; *Railroad v. Pfau*, 212 Mo. 398, 111 S. W. 10; *Railroad v. Shoemaker*, 160 Mo. 425, 61 S. W. 205.

The point urged is that the instruction forbids the consideration of smoke and noise from passing trains and the ringing of bells and sounding of whistles as affecting the future enjoyment of the farm. This point we think fully answered by a portion of defendant's own instruction. We refer to instruction No. 4 for the defendant, which reads: "The jury are instructed that in determining the decrease, if any, in the market value of the respective farms of said defendants, in consequence of the construction and maintenance by the plaintiff company of its proposed division terminal facilities, they will consider the manner in which each of said farms is to be divided by the construction of said division terminal facilities, the disfigurement, if any, to each of the farms as a whole, and generally all such matters, owing to the peculiar location of the division terminal facilities through each of the respective farms of said defendants, as may in the judgment of the jury and from the evidence in the case affect the convenient use, and further enjoyment of each of said farms, considered as a whole, in so far as the same affects the market value thereof; *but in the application of this rule the jury will not take into consideration such inconveniences to defendants, or either of them, as are the consequences of the lawful and proper use, by the plaintiff company of said division terminal facilities, in so far as the same are common to the other land owners in the*

neighborhood, portions of whose land are not taken." We have italicized the portion having application. By defendant's own instruction, matters and things, occurring in the lawful use of the property, and which were common to other landowners in the neighborhood, whose property had not been taken, could not be considered. This would preclude the jury from considering the very elements mentioned in plaintiff's instruction, of which defendant now complains. To say the least, the defendant is in no position now to complain. We think, however, both his instruction and that for the plaintiff properly declare the law.

[10] V. It is next urged that the court erred in excluding some testimony about the use of another 40 acres of land some three-fourths mile from the farm out of which the land condemned was taken. We have examined this evidence and think it was properly excluded. There was no offer to prove that the two tracts were especially adapted to one use and that they had a peculiar value because of such adaptability in excess of what the two would have been worth on the market as separate tracts. Without some such offer, the matters excluded were properly excluded.

VI. We find nothing in the record here which would justify a reversal of this judgment upon the defendant's appeal. Upon the jury trial he was allowed only \$1,399.50, and the judgment was that he recover such sum from the plaintiff. But it appears that he has taken down \$1,500, which is \$100.50 more than the just compensation adjudged to him by the jury. The judgment should be reversed, and the cause remanded, to the end that the trial court may adjust its judgment to the facts and rights of the parties. Railroad v. Russell, 150 Mo. 453, 51 S. W. 1030. Appellant, however, should not be allowed the costs of this appeal, because the cause is only sent back to dispose of the verdict by a proper judgment below. No retrial of the merits is awarded.

Judgment reversed and remanded, with the directions above given. All concur.

### KANSAS CITY SOUTHERN RY. CO. v. SECOND STREET IMPROVE- MENT CO. (No. 15,620.)

(Supreme Court of Missouri, Division No. 1.  
April 2, 1914.)

#### 1. EMINENT DOMAIN (§ 164\*)—RIGHT TO CON- DEMN—OBJECTIONS—ESTOPPEL.

Defendant in a condemnation proceeding, having accepted and retained the amount awarded by the commissioners, could not thereafter insist, in further proceedings before a jury, that plaintiff had no right to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 442-444; Dec. Dig. § 164.\*]

#### 2. EMINENT DOMAIN (§ 183\*) — RAILROAD GROUNDS—IMPROVEMENTS.

Where, during the term of a lease of certain land to a railroad company for railroad purposes, the lessee constructed certain railroad improvements thereon, consisting of tracks, roundhouses, turntables, etc., such improvements did not constitute real estate, though not removed during the term of the lease; and hence the lessor was not entitled to have them considered in determining the value of the property in subsequent proceedings by the railroad company to condemn the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 858-861½; Dec. Dig. § 183.\*]

#### 3. EMINENT DOMAIN (§ 183\*)—CONDEMNATION PROCEEDINGS—VALUE.

Where, during the term of a lease of certain property for railroad purposes, the president of the road constructed a house on the leased land, largely with his own funds, for the convenience, pleasure, recreation, and edification of the railroad employés, to be used in connection with the road, it did not become a part of the realty on the termination of the lease, and its value should not be considered in determining the value of the land in subsequent condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 858-861½; Dec. Dig. § 183.\*]

#### 4. APPEAL AND ERROR (§ 882\*)—RIGHT TO ALLEGE ERROR—ESTOPPEL.

Where, in condemnation proceedings, defendant asked and the court gave an instruction that the value of the property taken should be determined as of the date when the commissioners made and returned their assessment of damages, which was in accordance also with an instruction offered and given for plaintiff, defendant could not allege that the court erred in refusing an instruction that the value should be determined as of the date of the filing of the condemnation suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 5. EMINENT DOMAIN (§ 124\*)—CONDEMNATION PROCEEDINGS—VALUE OF LAND—TIME.

Since land is not taken for public use until it has been condemned and paid for by the condemning party, the value is to be determined as of the date the commissioners make their report of damages and the condemning party pays the award into court for the benefit of the landowner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. § 124.\*]

#### 6. TRIAL (§ 296\*)—CONDEMNATION PROCEED- INGS—DAMAGES—INSTRUCTIONS.

Where, in proceedings to condemn land adjoining and surrounding an elevator for railroad purposes, on which the railroad company had previously maintained its tracks and railroad improvements under a lease, the court directed that the jury, in arriving at defendant's damages, should first ascertain and allow the fair market value of the land taken, and in addition the additional damages, if any, to the land and improvements of defendant which were not taken by the railroad company, and which formed a part of the land taken, a further instruction that the railroad company was obliged, after condemnation, to furnish to defendant's elevator all reasonably necessary switching service and facilities without discrimination and at reasonable rates, and that the jury should therefore not allow defendant any damages in the belief that by reason of the condemnation proceedings whereby defendant's land was taken on both ends of the elevator the same was or in the



future would be deprived of such switching service and facilities, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**7. WITNESSES (§ 255\*)—EXPERTS—RECOLLECTION—REFRESHMENT—CONDEMNATION COMMISSIONERS' REPORT.**

Where a condemnation commissioner was offered as an expert to testify as to the value of land sought to be taken, etc., it was his duty to testify with reference to facts within his own knowledge, or give his expert opinion on a hypothetical state of facts; and hence it was error to indirectly use the commissioners' report to refresh the witness' recollection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Condemnation proceedings by the Kansas City Southern Railway Company against the Second Street Improvement Company. From a judgment for plaintiff, assessing defendant's damages, it appeals. Reversed and remanded.

C. A. Braley and Edward C. Wright, both of Kansas City, for appellant. S. W. Moore, Cyrus Crane, O. W. Pratt, and J. M. Souby, all of Kansas City, for respondent.

**GRAVES, J.** This is a condemnation proceeding, but one with some rather unusual features. A number of parties, headed by Arthur E. Stillwell and E. L. Martin, were interested in the construction of a railroad from Kansas City, Mo., to the Gulf of Mexico. To this end there seems to have been several companies organized, which were largely officered by the same parties, and which seem to have had a community of interest in the one project, i. e., the railroad from Kansas City to the Gulf. The railroad proper, which did not touch Kansas City, but started from Grandview, near Kansas City, was built by the Kansas City, Pittsburg & Gulf Railroad, a corporation chartered for that purpose. Getting from Grandview into Kansas City was left to other terminal companies, which were finally merged into the Kansas City Suburban Belt Railroad. This latter was the result of a consolidation between the Consolidated Terminal Railway Company and other interests. At the same time and officered practically by the same parties, was the Second Street Improvement Company, the defendant in this action. The chief duty of this land company (for such was and is the character of the Second Street Improvement Company) seems to have been to buy up the land along the proposed route of the railroad companies, and land which said companies would have to have for construction purposes, and lease the same to the railroad companies. Accordingly, in 1892, the defendant in this case bought 28 acres of land in the east bottoms at Kansas City, Mo., but outside of the city limits. On the 2d day of May it leased these lands to

the Consolidated Terminal Railway Company, and this lease passed to the Kansas City Suburban Belt Railroad, upon the consolidation mentioned above. This lease ran for 10 years, and gave to the lessee an option to purchase at stipulated prices at the end of the term, or during the term at annual periods. More of the details of this lease may be required in the course of the opinion. During the term of this lease, and pursuant to the rights conferred upon the lessee by it, the Suburban Belt Railroad erected on the land a roundhouse, turntable, machine shops, and numbers of miles of railroad tracks. In 1898 the defendant, with the consent of the lessee, Suburban Belt Railroad, sold  $7\frac{1}{2}$  acres of the leased lands to the Kansas City, Pittsburg & Gulf Railroad, a matter which may become material. Adversity overtook the two railroad corporations, and by foreclosure proceedings in the federal court the property of both were sold out, and the plaintiff in this case became the purchaser. These proceedings occurred from 1899 on, but prior to the termination of the lease. Plaintiff operated under the lease until it expired May 1, 1902. August 12, 1902, defendant notified plaintiff to vacate, and, the parties failing to agree upon a price for the purchase of the property, this suit was brought October 6, 1902. Commissioners were appointed October 22, 1902, and filed their report July 8, 1903, assessing defendant's damages at \$26,000, which sum was paid into court for the defendant, and, as appears from the final judgment itself, was taken down by the defendant. Exceptions having been filed to this report, and a trial by a common-law jury demanded, the question of damages was again tried before a jury, which jury allowed to defendants damages in the sum of \$30,000. Upon this verdict the following judgment (omitting description of the land) was entered: "Wherefore it is considered, ordered, and adjudged by the court that the defendant, Second Street Improvement Company, as owner of the following described tract of land in Kansas City, Jackson county, Mo., to wit \* \* \* has been and is damaged by the taking of the property above described in the sum of \$30,000, of which said sum there has heretofore been paid by the Kansas City Southern Railway Company to said owner, the defendant, the Second Street Improvement Company, the sum of \$26,000. Wherefore it is further ordered and adjudged by the court that the said the Kansas City Southern Railway shall, within 10 days from this, pay to the defendant, the Second Street Improvement Company herein, as owner of the said land, the sum of \$4,000 with interest from July 8, 1903, and the costs of this proceeding, and in default of such payment that said defendant have hereof execution, providing the said the Kansas City Southern Railway Company shall not elect to abandon this proceeding,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as by the statute in such cases made and provided. And it is further considered, ordered, and adjudged by the court that, upon the payment of said sum of \$4,000, with interest as above provided, to said defendant, the Second Street Improvement Company, or into the hands of the clerk of this court for defendant, the Second Street Improvement Company, the real estate above described be and stand condemned for the purpose and uses mentioned in its petition for condemnation." The italics are ours. This judgment the plaintiff abided, but defendant, being discontent therewith, has appealed, and urges here questions, not only as to the matter of damages, but also as to the right of the plaintiff to condemn at all. This fairly outlines the case.

[1] I. Defendant presses a number of questions upon the right of the plaintiff to condemn the land involved in this action. Under the record in this case, these questions cannot be urged by the defendant. The circuit court had full jurisdiction of the subject-matter and the parties. It adjudged plaintiff's right to condemn, and the defendant accepted the award made by the commissioners. Such fact is recited in the judgment before us. In this situation the defendant (with plaintiff's cash in its coffers) cannot gainsay the right of plaintiff to condemn. It is estopped from questioning that portion of the condemnation proceeding. The usual rule is that one who accepts the benefits of a judgment is estopped from denying the validity thereof. The law will not permit a person to blow both hot and cold. It will not permit the landowner to deny the plaintiff's right to condemn, whilst such landowner has in his pockets what, up to that point of the proceeding, is the constitutional just compensation for his property. This question we have recently been over in *Chicago Great Western Railroad Co. v. Kemper et al.*, 166 S. W. 291, not yet officially reported. Vide, also, *Railroad v. Bridge Co.*, 215 Mo. 286, 114 S. W. 1084. In fact it is only by virtue of our statutes that the owner can further litigate the question of damages after he has accepted the award made him for his land. See R. S. 1909, § 2364. Under the facts and the law he is estopped from now urging that plaintiff had no right to condemn, and also estopped from urging that the judgment of the circuit court, determining that plaintiff did have the right to condemn the property specified in its petition, is erroneous. That portion of the judgment is therefore affirmed. This leaves us only such questions as are urged against the judgment upon the matter of damages, and those questions we take next.

[2] II. The preceding paragraph eliminates points 1, 2, and 3 of defendant's brief, but we are not left without trouble, because the diligence of its counsel has furnished us with 10 more points, numbered separately

from 4 to 14, inclusive. Some of these are worthy of note, whilst others are without force. The first point urged, and this is stated in several ways under separate propositions, is that the defendant was entitled to have the jury consider the value of the improvements made on this ground; i. e., the tracks, roundhouse, turntable, etc., taken into consideration in determining the "just compensation" to which the defendant was entitled for the appropriation of the property to a public use. These improvements, made solely for railroad purposes under the consent given in the lease, are urged to be worth some \$46,000, and defendant says that the trial court, by excluding that item or element of damages from the jury by its instruction, has grievously wronged the defendant, although all of such improvements were put there by and with the consent of the defendant. In fact the property was leased for the very purpose of putting those improvements thereon. Defendant has builded up a theory of the law more specious than sound, to the effect that, inasmuch as plaintiff was its tenant, and as such tenant allowed its lease to expire without removing the improvements from the leased premises, such improvements thereupon became a part of the realty and belonged to defendant. In other words, they seek to apply the ordinary rule in cases of landlord and tenant to the situation here, leaving out of consideration that the general public has some interest in improvements made for public service. Ordinarily an ejectment will lie for the recovery of realty owned by one party and wrongfully held by another, yet this is not always true. *Second Street Improvement Co. v. Kansas City Southern Railway Co.*, 164 S. W. 515, not yet officially reported. In this case we held that where the railroad company went into possession with the knowledge or consent of the owner, then such owner would be driven to ask for his just compensation in an action for the appropriation of his property, rather than have a suit in ejectment to recover such property in kind. The rule announced in the case *supra* is one well sustained by the case law, and it should be added that such rule is founded upon the idea that the broad rights of an individual should be curtailed to some extent if the exercise of the broad right would interfere with the public service. So the courts say that whilst a landowner usually has the broad right to sue in ejectment and recover in kind lands wrongfully in the possession of another, yet if he has stood by and permitted improvements to be made thereon by a public service corporation, such as a railroad, which improvements are to be used in connection with the public service, such broad right will be refused, and the landowner required, in the interest of the public service, to sue for and take the value of his land rather than the land itself. This, however, is somewhat by

the wayside. The real question is, Have these improvements become the property of the defendant by being a part of the realty under the facts of this case? We think not.

This question is practically settled by the very recent utterance of the court in *banc* in *Hatton et al. v. Ry. Co.*, 162 S. W. 227, not yet officially reported. In that case *Faris, J.*, discusses all the case law upon the question of whether or not these improvements shall be considered realty or personalty. In that case we indorse the rule announced in 33 Cyc. p. 227, which is in this language: "Where the company's occupation of the land is not illegal, its rails and other structures thereon do not become a part of the realty, and it should have a reasonable time in which to remove them, upon abandonment; and the fact that the landowner has been allowed to take possession of the land embraced in the right of way and hold it for a term of years less than is required to extinguish the company's easement does not imply relinquishment by the company of its right to enter and remove its structures." To state the rule in different language, if the possession of the railroad is with the express or implied consent of the landowner, then upon leaving the property, if the railroad does leave it, the right to remove its improvements is unimpaired. In other words, the trend of the case is that such property is and remains personal property, and does not attach to and become a part of the realty. In the instant case the property was bought by defendant for the very purpose for which it was afterward used. By express language the railroad was authorized to use the property for railroad purposes, a matter in which the general public have a practical concern. The lease itself made no provision as to the disposition of improvements at or after its termination. The lease, however, gave the railroad an option to buy, but no more. The railroad did not have to buy under the lease. If it thought the price named too high at the end of the lease, it could decline to buy and have a reasonable time in which to remove its property. Or, on the other hand, it could decline the option, and proceed as it did to get title by condemnation. The time between the expiration of the lease and the institution of the suit was short, and at least partially occupied in an attempt to agree with defendant upon the terms of a settlement and a conveyance of the property. Under these circumstances the improvements never became a part of the realty, so that defendant would become entitled to compensation thereof in this action. We think the discussion in the *Hatton Case*, *supra*, settles this question, but there are others settling the question on a different line of reasoning, but a line sound nevertheless.

In 15 Cyc. pp. 763, 764, it is said: "Where a corporation invested with the power of em-

inent domain enters upon land without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort-feasor becomes a part of the land does not apply, and the owner is not entitled to the value of the improvements thus wrongfully erected. So where a company enters and erects improvements pending condemnation proceedings which are subsequently abandoned, or where it has no positive knowledge as to the ownership of the land, and enters upon it with the intention of subsequently instituting condemnation proceedings, or of subsequently purchasing the land, the owner is not entitled, in proceedings for condemnation afterward commenced, to an award for the value of the improvements so constructed. *With stronger reason the landowner is not entitled to the value of such improvements, if the company enters on his land with his permission; and if the company enters with the consent of a person in possession claiming under color of title, one who afterward shows himself to be the paramount owner is not entitled to recover the value of the improvements placed on the land by the company.*" The italicized portion of the text (the italics are made by us) announces the rule applicable to the facts of this case. To the doctrine that where the improvements are made without the consent of the landowner, yet such owner is precluded from recovering\* for the improvements, there is some discord in the cases, but where the improvements for railroad purposes are made upon the land, either with the express or implied consent of the landowner, the overwhelming case law is that in subsequent proceedings the landowner cannot claim the benefits of the improvements to enhance his damages for the taking of private property for a public use. Vide cases cited under the text in Cyc., *supra*.

In 10 Am. & Eng. Ency. of Law, p. 1159, it is said: "Where the government or a corporation to which has been delegated the power of eminent domain enters upon land before its condemnation, but with the consent or license of the owner, and proceeds to construct its work or to make improvements upon the land, such works or improvements do not become a part of the land, and their value is not to be considered in determining the compensation to be awarded for the land." "Where the company enters upon the land and makes the improvement without the consent of the owner, and without having caused the land to be condemned, there is a difference of opinion as to whether, in subsequent condemnation proceedings, the owner is entitled to compensation for the improvements made by the company. But the greater weight of authority seems to be against the owner's recovery for such improvements."

Under these texts we again have collected the cases which amply sustain the rules announced. In 4 *Sutherland on Damages* (3d Ed.) § 1076, it is said: "The numerous exceptions to the common-law rule that everything attached to the realty by one who had no right to the latter became part of it have been extended in recent times upon grounds of public policy so far as railroad companies are concerned. An entry by them in advance of the acquirement of the right to make it is not unlawful in the same sense as such an entry by an individual or a corporation which is not invested with the power of eminent domain. Hence, if such a company enters upon land with the consent of the life tenant, or the person who appears to own it, and erect a depot or other structure thereon without injuring the inheritance, the remainderman or legal owner cannot, in a subsequently instituted proceeding for the condemnation of the property, recover the value of such improvements. This is the rule where the entry is made without license."

Here we have the idea of public policy noted by us in the beginning of this opinion. The courts have different ways of putting the rule, and the reasons therefor. Thus in *McClarren v. Jefferson School Tp.*, 169 Ind. loc. cit. 143, 82 N. E. 74, 13 L. R. A. (N. S.) 417, 13 Ann. Cas. 978, the court said: "The great weight of authority, however, is that when a person, corporation, or body, invested with the power of eminent domain, enters upon land with or without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort-feasor becomes a part of the land does not apply, and the owner is not entitled to the value of such improvements." This court collects and cites cases, both federal and state, from every section of the Union.

In *Ry. Co. v. Dunlap*, 47 Mich. 465, 11 N. W. loc. cit. 273, the Michigan court says: "We are of opinion that no error was committed in excluding from the compensation allowed to Dunlap the value of the railroad track laid upon the land. We think the case cannot be distinguished from *Morgan's Appeal*, 39 Mich. 675. The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railway track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil, except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose, there would be no sense in compelling them to buy their own property."

To like effect in *Jones v. Railway*, 70 Ala. loc. cit. 232, whereat *Brickell, C. J.*, said: "The duty rested upon the appellee, before the taking and appropriation of the lands, to have caused, in the appointed mode, an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful—no title to them was acquired, and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the appropriate proceedings for the acquisition of the lands, and, of consequence, availing itself of all the structures it may have placed thereon. *Justice v. N. V. R. R. Co.*, 87 Pa. 28; *Secombe v. R. R. Co.*, 23 Wall. 108 [23 L. Ed. 67]. Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser, by which he may acquire the use and enjoyment of, or title to the lands. There is, also, another distinguishing fact; the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses, which are the consideration for the grant to the appellee of corporate franchises, and of the right, in the exercise of these franchises, to take and appropriate private property. *Justice v. N. V. R. R. Co.*, supra; *N. C. R. R. Co. v. Canton* [30 Md. 347], supra; *Morgan v. C. & N. R. R. Co.*, 39 Mich. 575; *Lyon v. G. B. & M. R. Co.*, 42 Wis. 538. These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty, and which, following the title to the soil, as one of its incidents, pass to the proprietor." In the *Jones Case* the railroad had entered the land without legal right, further than the statutory right to condemn. It had no authority from the owner to enter and make the improvements, but did enter and make them. The landowner claimed that he was entitled to the value of the improvements just as contended here, but the lower court found against him, and he met with no better fate in the Supreme Court. The courts all proceed upon the theory that, there being the right to condemn, vested in a railroad corporation, it cannot become a trespasser in the same sense as an individual or corporation having no right to condemn, because the corporation having the right to condemn can perfect its title and possession by a subsequent condemnation, whilst the

party having no right to condemn can never perfect his right to hold the land.

In *Newgass v. Railroad*, 54 Ark. 146, 15 S. W. 2d 189, it is said: "It is insisted that the court erred in refusing to include in its estimate of the value of the land taken the value of a railroad previously constructed upon it by the appellee or its vendors. It is argued that the railroad was built on it by a trespasser; that it became a part of the land, and, as such, passed to the landowner; that when the petition was filed the railroad was as much the property of the appellant as the soil itself, and could not be taken from him without just compensation. There is an old maxim that 'whatever is affixed to the soil belongs to the soil,' and it is a general rule of the common law that a trespasser who builds on another's land dedicates his structure to the owner. The reason of the rule, which has been often stated, is that the entry was a trespass to the injury of the owner, and that the trespasser could not add further injury by tearing down and removing the building, for in that the law contemplates that an injury to the soil will result as a necessity. The trespasser has no legal right to acquire the soil, and, when he places on it a building which cannot be removed without some injury to it, it will be presumed that he intended to dedicate the building to the use of the land, and not that he contemplated a second trespass. He could not remove the building, for its severance would damage the soil; he could not exact pay for it, for he could not impose upon the owner of the soil an obligation to pay for improvements which he had not authorized and may not have desired. Those reasons fail when applied to the case at bar. The corporation had the right to enter upon the land for purpose of survey, and to appropriate it on making just compensation. It is therefore not necessary to presume that when it built its railroad it intended either to dedicate it to the use of the land or to commit another trespass to the damage of the land; but it is more reasonable to presume that it intended to retain the railroad for use as such, and lawfully to acquire the land upon which it rested. The railroad was not built to improve the ground, or to enhance its ordinary utility, but to be used as part of an easement for public purposes, entirely independent of the ordinary uses of the ground. To the rule relied upon, exceptions have always been recognized, increasing with the importance and value of personal property, and with the demands and exigencies of society; and, as its reasons fail in this case, we do not think it should control. All that the Constitution guarantees or the law demands is that the just compensation shall be made to the owner in return for property appropriated by the public. A rule that would exact of a corporation the payment of a sum to cover the value of a railroad as such, constructed

at its own expense, would go beyond the demands of justice, and could find no sort of countenance in conscience or in law outside of the strict letter and fanciful presumptions of the rule stated. The same question has been often adjudicated by the courts of the highest dignity and learning in sister states, and the decided weight of adjudged cases is against the appellant. Aside from adjudication, reason and justice condemn the contention."

Nor are we wholly without authority in this state. *Dietrich v. Murdock*, 42 Mo. 279; *Hosher v. Railway*, 60 Mo. 329.

There can be no question that, where the railroad with the knowledge and consent of the landowner places improvements upon the land, such owner cannot claim for such improvements in a condemnation suit, subsequently brought to acquire such lands. The case at bar is not different in principle.

[3] III. The foregoing disposes of all the improvements except a building called "Stillwell's Rest." This it is claimed was erected largely by funds furnished by A. E. Stillwell, the president of the railroads concerned. It was a house maintained along with the other improvements for the convenience, pleasure, recreation, and edification of the employes of the railroad. Its name indicates in a way its use. Whilst the funds were largely donated by Stillwell, yet when the building was put up, it was used in connection with the railroad properties, and should be so considered in this case. It was built to be so used, and the fact that the president of the railroad donated largely to this wise provision for the employes of the railroad does not change the character of the property. In the assessment of damages it should be classed as one of the railroad improvements, because it was so maintained and used. This contention of the defendant is therefore overruled.

[4] IV. It is next urged that the court erred in fixing July 8, 1903, as the date at which the value of the property taken should be determined. July 8, 1903, was the date when the commissioners made and returned into the court their assessment of damages. Defendants by one instruction asked (instruction No. 3½ given by the court) fixed July 8, 1903, as the date at which the value should be determined, and in this it accorded with plaintiffs' instruction. But by another instruction No. 4 (which was refused) it asked that October 6, 1902, be taken as the date upon which to determine the value. This date is the date of the filing of the suit in condemnation. Defendant having asked and obtained an instruction fixing July 8, 1903, as the proper date for determining the value of the property is in no position now to question the instruction for plaintiff fixing the same date. This proposition has been so universally ruled, and always in the one way, citation of cases

would be superfluous. If the court erred the defendant was a party to such error.

[5] But we need not stop here. Land is not taken for public use until it has been condemned and paid for by the party desiring it and authorized by law to take it. As a general rule, the appropriation and taking is fixed as of the date the commissioners make their report of the damages, and the condemning party pays such sum into court for the benefit of the landowner. Up to this point the party can abandon the condemnation, but when the payment is made, there is and has been a taking of the property in a constitutional sense. Such seems to be the well-settled rule in this state. *Railroad v. Town Site Co.*, 103 Mo. 451, 15 S. W. 437; *Simpson et al. v. Kansas City*, 111 Mo. 237, 20 S. W. 38; *Ry. Co. v. Ry. Co.*, 138 Mo. 591, 89 S. W. 471; *State ex rel. v. Fort*, 180 Mo. loc. cit. 110, 79 S. W. 167.

There is nothing in this case to take it but of this general rule. Under the evidence the relation of landlord and tenant existed until the taking in the constitutional sense occurred in this condemnation proceeding. Defendant recognized this relation of landlord and tenant by bringing suit for the rents. Under the facts of this case, the instruction given for the plaintiff was right, and that refused the defendant was wrong. The point is ruled against the defendant.

[6] V. Complaint is urged as to plaintiff's instruction No. 1, which reads: "The court instructs the jury that under the law of the state of Missouri and of the United States the plaintiff railroad company was obliged, after the condemnation of the land, to furnish to defendant's elevator all reasonably necessary switching services and facilities, such as supplying cars, storing cars, moving cars to and from said elevator, and switching and transporting the same to and from the elevator without discrimination or favor, and at reasonable rates, neither higher nor lower than it performed the same service for other elevators similarly situated along the line of plaintiff's railway, and the jury must not allow defendant any damages in the belief that, by reason of these condemnation proceedings, whereby defendant's land was taken on both ends of the elevator, said elevator was or in the future would be, deprived of such switching services and facilities." To get at the right of this proposition we must consider this instruction along with other instructions given. At the request of defendant the court gave defendant's instruction No. 2 which reads: "The court instructs the jury that the defendant, the Second Street Improvement Company, in this case is entitled to damages against the plaintiff for a sum equal to the difference of what the fair market value of the whole property was at the time of the appropriation with such improvements thereon as was owned thereon by the Second Street Improvement Company and the fair market value of the

property left and not taken by the plaintiff, and of which that taken forms a part, and in arriving at said damages you may first ascertain and allow as damages the fair market value of the land taken, *and in addition thereto you should allow the defendant the additional damages, if any, to the land and improvements of the defendant, which were not taken by the railroad, and which formed a part of the land taken*; and, in determining what is the market value, your inquiry should be directed to what is the property worth in the market in view not merely with reference to the use it was put at the time of condemnation, but with reference to the uses for which it was plainly adapted, having regard to the existing business or wants of the community at the time of the condemnation, or such as may have been reasonably expected in the immediate future." We should further go to some of the evidence bearing upon the question to the end that the theory nisi may be fully gathered. The railroad was not condemning the land upon which the elevator stood, but was condemning the land right up to the elevator. Under the lease the railroad company was to put switch tracks to elevators, and this it had done. The railroad in this proceeding was condemning the land upon which these switch tracks were built, to the end that it might own all of its tracks and other improvements, but not the elevators along its line.

Now with these things in view, let us turn to the evidence introduced. The defendant introduced a Mr. Minter and he testified: "Q. I will ask you whether or not the Second Street Improvement Company being deprived of the right to construct and maintain its own switch tracks upon this land colored red, and taken in this proceeding, to and from its elevators, as distinguished from the switching facilities which the railroad is required by law to furnish, would affect the value of that Sun Elevator on that date, July 8, 1903. A. Well, I would say anything from 65 to 75 per cent. of the valuation of the elevator." On cross-examination he further said: "Q. Now, Colonel, if in this situation precisely the same switching facilities are furnished and the same room for the storage of cars, and everything of that kind, that existed before the condemnation, where does the damage lie? A. The damage lies in the possession of the ground to the elevator. Q. The possession of what ground? A. Why, the ground that they own; when you take away the ground from the elevator, I say you practically destroy the greater value of the elevator. Q. Well, why? A. Simply because the ground—when you go to sell the elevator you sell it without the ground. Q. Well, all you want the ground for, as I understand, is for switching purposes? A. Yes, but when you come to sell it you want to own the ground as well as the switching service, too."

There was other evidence along the same line. Now, under this evidence and defendant's instruction No. 2, *supra*, it is clear that the jury was directed to allow the defendant any damages which might result to the elevator property itself by reason of the taking from the owner of the elevator this adjoining land upon which the tracks were located. We have italicized that portion of defendant's instruction No. 2, which applies to the facts shown as above. That italicized portion reads: "*And in addition thereto you should allow the defendant the additional damages, if any, to the land and improvements of the defendant which were not taken by the railroad, and which formed a part of the land taken.*" Under this evidence and this instruction the defendant was allowed to recover (and from the verdict we think did recover) for such damages as was occasioned to the elevator property by the taking of the land adjoining it. Both the evidence and the instruction authorized such a recovery. Instruction No. 1 for the plaintiff does not undertake to preclude the defendant from the recovery of these damages to its remaining property by reason of the taking of the adjoining property. All such instruction does is to tell the jury that under the law the railroad company was required to do certain things, and these things should not be considered in determining the depreciation of defendant's remaining property by reason of the taking of the adjoining land. We think the instruction a proper one. It does not preclude the defendant from recovering damages to the property remaining by reason of the taking of the land adjoining the elevator. Nor does it preclude the defendant from recovering damages to its remaining property, the elevator, by reason of having its individual switch grounds taken, because such damages were recoverable under defendant's instruction No. 2, *supra*. Not only so, but defendant put in its evidence on this theory, as appears from the portions which we have quoted, *supra*. Under instruction No. 2, *supra*, and the evidence, *supra*, the defendant could recover for all damages done to its remaining property, by reason of taking the land adjoining, including such damages as might result to the remaining property (the elevator and ground upon which it stood) by reason of having its private switch ground taken away. The instruction for plaintiff, vigorously assailed by defendant, only directs the jury not to find for defendant any damages to its remaining property on the theory that it would not be furnished reasonable switching facilities after the condemnation. If the defendant failed to furnish reasonable switching facilities, the defendant has its action for such failure. There was no error in giving plaintiff's instruction No. 1.

[7] VI. It is next insisted that there was error in the admission of the testimony of the witness Truitt. This witness was one of

the commissioners. He seemed to have had no independent recollection of the value fixed by the commissioners. Counsel for the plaintiff was trying to refresh the witness' recollection by having him refer to the report. Counsel for defendant were continuously objecting to having the witness thus refresh his recollection, but at no time did counsel for defendant say the report itself was not competent evidence for some purposes, although said counsel did say that it was not competent for refreshing the witness' recollection or to show the value of the land. The court had several times said that the report was not competent, and that an indirect effort to get the facts of the report before the jury was improper. This matter covers several pages, but the exact situation had best be set out. The counsel for the plaintiff was contending that the report of the commissioners was competent, and counsel for defendant was not combating that view, except to the extent that it was not competent to be used for the purpose of refreshing the witness' recollection, or as evidence of value. The situation is best shown by the record, thus:

"Q. The commissioners' report, Mr. Truitt, was filed July 8, 1903, and the land which is sought to be condemned in this case, Mr. Truitt, is all of this land shown in pink or red coloring on this plat which is in evidence as Exhibit I. I wish you to state to the jury what, in your opinion, was the fair reasonable market value of that land on the date of the filing of this report July 8, 1903. A. I don't remember what the value was placed upon it; the report there, I suppose, shows. Q. The amount named in the report? A. That would be my answer. I have no recollection of what the amount was. Q. I will refresh your recollection by letting you look at this report which you made at that time.

"Mr. Wright: If your honor please, I object to that. The report of Mr. Truitt, refreshing his recollection from the report, is not a proper way of getting at the value. If he is an expert on this, he knows what the value was at that time.

"The Court: Yes, the commissioners' report is not competent.

"Mr. Crane: I don't want to introduce the report, but he says that he—

"The Court: That is just an indirect way of getting in what he did before, showing him what he did and then asking him to do it over.

"Q. Well, Mr. Truitt, there were something like 20 $\frac{1}{4}$  acres taken in this proceeding, and what I want to get at is what, in your judgment, on that date was the fair reasonable market value of that per acre. A. It is the amount set forth in that report, is what we felt that the land was worth at that time.

"Mr. Wright: I object to that, if your

honor please, and move to have it stricken out as being not responsive to the question, not a proper answer to the question. (The court sustained the motion to strike out.)

"Q. You went out and looked at the property at that time? A. Yes, sir. Q. In company with the other commissioners? A. The other commissioners; yes, sir. Q. And did you investigate as to the value? A. Heard the evidence as to value from both sides; yes, sir. Q. And you say you looked at the property? A. Yes, sir. Q. And adjoining property around there? A. Took into consideration everything around there, and there were values proven on property on practically all sides of it.

"Mr. Wright: I object to that, if your honor please, as assuming the legal conclusion that the values were proven as to surrounding property, invading the province of the jury in this case, and ask to have that answer stricken out. (The court sustained the objection and motion to strike out.)

"Q. I don't care for that. I am simply asking if a thorough— A. A thorough examination was made of the property. Q. A thorough examination was made of the property. Do you remember, Mr. Truitt, what allowance was made per acre? A. I do not. Q. You don't remember? A. I dismissed it from my mind after that, and never thought of it since until I was asked to come down and testify two or three days ago, and I have not seen the report or given it a thought since that; I didn't think I would have to come down, didn't want to come; I was too busy to get away. Q. Well, now, then, if it be a fact and if it be shown in evidence that you at that time—

"Mr. Wright: I object, if your honor please; if he intends to give any figures at this time, he is indirectly getting the report before the jury of the commissioners by assuming a state of facts.

"Mr. Crane: *You don't pretend that I don't have a right to offer this report in evidence?*

"Mr. Wright: *You don't have a right to offer it for the purpose of refreshing his recollection now, or showing the value of the land.*

"Mr. Crane: *I understand that, but you don't contend that I don't have a right to offer this report in evidence?*

"Mr. Wright: *I expect all the facts in this case are competent evidence.*

"Q. (by Mr. Crane). You say you don't recollect that amount at the present time? A. No, I don't recollect it, I don't. Q. I will ask you, Mr. Truitt, if it shall appear in evidence here that the amount allowed by the commissioners was \$26,000, whether or not that, in your judgment, was the fair reasonable market value of the land at that time?

"Mr. Wright: I object to that, if your honor please, as being incompetent, irrelevant, and immaterial and not a proper method of

refreshing the recollection of the witness, and as indirectly assuming facts, invading the province of the jury.

"Mr. Crane: I think the witness has shown that he was at that time familiar with the market value; he made an endeavor to ascertain what it was, and that since that the matter has passed from his mind, and he don't now recollect it as an independent proposition.

"Mr. Wright: I don't think he has.

"Mr. Crane: Don't have to; he recollects that whatever the allowance was at that time that that was the then market value of the land.

"Mr. Wright: I object to it.

"The Court: It is admitted that the commissioners' report is competent evidence in the case; that objection will be overruled. (To which ruling of the court, defendant then and there at the time duly excepted.)

"Q. (by Mr. Crane). What is your answer? A. My answer is whatever the amount set forth in that report is; that was what we felt was a fair valuation for the land at the time of this proceeding, and if that be \$26,000, that is the amount."

"Re-direct examination by Mr. Crane: Q. I will let you look at this report, Mr. Truitt (handing commissioners' report to witness who examines it). Now Mr. Truitt, have you finished with your examination? A. Not quite—well, I want to look the first over again, I was trying to see the amount of ground taken here.

"Mr. Braley: It is on the blueprint, I guess.

"Witness: I suppose it is on the blueprint or set forth here at the last, I suppose.

"Mr. Crane: No, I believe it is 20—how many acres?

"Mr. Braley: Twenty and three-quarters acres.

"Mr. Crane: This center strip is not taken, you know, it runs from here down to here, down to here (indicating on the map).

"A. Yes, 20¼ acres.

"Q. (by Mr. Crane). Having seen your report and examined it, can you now state what the fair market value of that land, that 20 acres, in July, 1903, was?

"Q. (by Mr. Braley). Wait a moment. Independent of your report which you made at that time, do you now know what the market value was of that 20¼ acres taken in this condemnation proceeding on July 8, 1903? A. My knowledge is based upon the report that I handed in at that time.

"Q. And independent of that you don't now know what the market value is? A. I should say it was worth from \$1,000 to \$1,500 an acre, just guessing now, because I gave myself such wide latitude. I think I hit about where it was, but to get at what the actual value was at that time, I couldn't say except that we have given our sworn statement in that report there that that was what we felt



it was actually worth at that time; no, I could not give the exact value of that land.

"Mr. Braley: Well, I object to his answer in which he states he is giving a guess it would be worth \$1,000 to \$1,500 an acre.

"A. I know it was not worth over \$1,500 at that time, and I am not positive it was not less than \$1,000, so that is the reason I placed my figure so.

"Mr. Braley: He says it is a guess as to what it was, independent of the report.

"Mr. Crane: Well, he put the guess in the sense—from \$1,000 to \$1,500 I understood is not a guess, but he says he has given me a wide berth.

"A. A wide latitude so I would be sure I would not miss the value of the land.

"Q. (by Mr. Crane). You say independent of the commissioners' report your statement now, the testimony is independent of that, it would be from \$1,000 to \$1,500? A. That would be my recollection of the value at that time. Q. And you actually thought it was at that time without paying any attention to it since? A. That would be my recollection of the value at that time. Q. And you actually thought it was at that time without paying any attention to it since? A. It was \$1,253 per acre. Q. Twelve hundred and fifty-three dollars per acre? A. From the report; yes, sir.

"Mr. Braley: We ask that that answer as to \$1,253 an acre be stricken out as simply a computation of what his report is, and he says he don't know whether that was the actual value except by referring to his report.

"The court sustained the objection and motion to strike out.

"Mr. Crane: Now, I offer to show by the witness that in 1903, July 8th, that he ascertained the market value of this ground; that he stated it in the report; that he then dismissed the matter from his recollection, and has had nothing to do with it since that time, and he don't recollect, independently of the report, exactly what he found it to be at that time, but that he does recollect that it stated in the report, and that he will now testify, that what was there stated in the report was at that time the actual value, actual market value of the land.

"The Court: Well, it is admitted that the report is competent evidence. Now, the report itself shows what the commissioners found.

"Mr. Crane: Yes, your honor.

"The Court: That is the best evidence of that; the commissioners will not be permitted to dispute it, so it is not necessary for him to testify to it.

"Mr. Crane: I don't want him to dispute it, and, on the other hand, I don't want his testimony thrown entirely from the record, but I do want to show that he can from the report refresh his recollection on a matter

which he has since dismissed from his mind, and testified then exactly what the market value was as he ascertained it to be at that time.

"The Court: But suppose that he is testifying from the report.

"Mr. Crane: Well, he is refreshing his recollection from the report.

"The Court: And the report is the best evidence of what he ascertained at that time?

"Mr. Crane: Then you overrule my offer?

"The Court: Yes, sir; it is not necessary for him to fortify his own report.

"Q. (by Mr. Crane). Whatever you found in that report, reported to the court, was, in your judgment, the market value at that time? A. Yes, sir; it is, was sworn to.

"Mr. Braley: I object to that, and move that the answer be stricken out as incompetent, irrelevant, and immaterial and invading the province of the jury.

"Witness: Your honor, after I look that report over, can't I state what the market value was of that land at that time?

"The Court: If you know of your own knowledge after refreshing your recollection.

"Witness: I do know of my own knowledge after looking it over.

"Q. (by the Court). If you know of your own knowledge what was the fair market value of that property in July, 1903, you can testify. A. I do, from the evidence before the commissioners, what it was worth.

"Q. (by the Court). No, but of your own knowledge, do you know of your own knowledge?

"Q. (by Mr. Crane). It does not mean what source you got it from, but if you know of your own knowledge, from whatever source you got it. A. I know of my own knowledge what I felt at that time it was worth.

"Q. What was that? A. Twelve hundred and fifty-three dollars an acre.

"The Court: Proceed.

"Mr. Wright: We object to that, and ask that the answer be stricken out as not being competent or relevant at this time as to what the witness at that time felt it was worth; he does not now testify that it was the market value, or that he had any personal knowledge other than what is contained in the report, and we move that the answer be stricken out as to what he felt at that time. (The court overruled the objection and motion to strike out, to which ruling of the court defendant then and there at the time duly excepted.)

"Q. (by Mr. Crane). You signed the report and swore to it? A. I signed the report and swore to it; yes, sir.

"Mr. Braley: Was that stricken out?

"The Court: No.

"Mr. Braley: He said what he felt it was worth at that time, his answer; we would like to have a ruling on the question.

"The Court: I understood the witness to

say that he knew what its value was at that time after having refreshed his memory. (Answer read by the witness).

"Mr. Wright: I move to strike it out. It was simply a statement of the witness' feelings at that time, based solely on the report, and incompetent, irrelevant, and immaterial.

"Q. (by the Court). You mean that as a conclusion from what you heard from other witnesses? A. A conclusion from what I heard at that time, backed up by the report that we made.

"The Court: Well, the motion will be sustained.

"Q. (by Mr. Crane). You mean, as I gather it, Mr. Truitt, that you went out there and examined the land? A. Heard the evidence. Q. Heard the evidence? A. And at that time it was worth \$1,253 an acre. Q. And made investigations? A. Made investigations. Q. As to other sales in the neighborhood? A. Other sales and all the evidence that was before us. Q. And from that you arrived at it? A. I say at that time it was worth \$1,253 an acre. Q. And you know that of your own knowledge? A. Know that of my own knowledge after refreshing my memory. Q. And I suppose, too, in arriving at that you took into consideration the—

"Mr. Braley: Wait a moment. I object to the form of the question.

"Q. (by Mr. Crane). I don't want to put it in leading form. Did you or not also in arriving at that value take into consideration such knowledge as you had gained in the real estate business here in the city? A. I did.

"Mr. Crane: That is all."

The trial court was right in saying that the report of the commissioners was improper, and of course counsel for the plaintiff was in error in contending that it was competent. This division had the question up in *Railroad v. Roberts*, 187 Mo. loc. cit. 321, 86 S. W. 94, and by a full consent, we then said: "When the exceptions are sustained, the report of the commissioners is set aside and becomes functus officio except for the purpose hereinafter indicated. The jury have no more right to know what the report or assessment of damages of the commissioners was than any jury in any case has to know what the verdict of a previous jury was in the same case. The jury in such cases has only one duty to perform, and that is to assess the damages the defendant will sustain by the appropriation of his land to public use. All other questions arising in any manner in the case are matters for the court to settle in its judgment. The rule laid down in the *Clark Case* and reiterated here is in accord with the law in other jurisdictions. 2 *Lewis on Eminent Domain* (2d Ed.) § 449, states the law as follows: 'On appeal from the commissioners and trial de novo, the report appealed from is not evidence as to the amount of damages.' The authority cites cases supporting the text from *Indiana*, *Iowa*, *Wisconsin*, *Kansas*, *Rhode Is-*

*land*, and *Massachusetts*. The case of *Railroad v. McElroy*, 161 Mo. 584 [61 S. W. 871], does not correctly state the law and it is therefore overruled."

In *Railroad v. Pfau*, 212 Mo. 398, 111 S. W. 10, our brothers in Division 2 quoted and approved the above language from the *Roberts Case*, and we have no doubt about the correctness of that rule. It is clear from the evidence quoted above that the plaintiff evidently got before the trial jury the contents of the commissioners' report of the amount of damages. It is true that the report itself was not offered in evidence, but its poisonous effect was instilled into the jury by this evidence of Truitt. No person can read this evidence without knowing that thereby the jury was given to understand that the commissioners had found this property to be of \$28,000 in value. It was but an indirect method of putting the report of the commissioners in evidence, which was not allowable under the rulings above mentioned. Counsel for the plaintiff, in this court, do not controvert the doctrine of the *Roberts* and *Pfau Cases*, supra, but they say that the counsel for defendant are in no position to urge the question here. In their brief here counsel for plaintiff puts the matter thus:

"The report of the commissioners was not offered in evidence, although, under the attitude of defendant's counsel the plaintiff would have been justified in offering it in toto. A litigant is never permitted to play fast and loose with the court. It must take a stand one way or the other. Defendant's counsel were asked squarely to say whether or not they objected to the introduction of the report in evidence, and they squarely stated that it was competent evidence, and the court so understood them, as did counsel for plaintiff. When Mr. Truitt was on the stand, this occurred (Abst. Rec. p. 297):

"Mr. Crane: I understand that, but you don't contend that I don't have a right to offer this report [commissioners'] in evidence.

"Mr. Wright: I expect all the facts in this case are competent evidence."

"Instead of saying he did object to this being offered in evidence, or used in evidence, counsel for defendant made the foregoing answer. Both the court and counsel for plaintiff understood this to mean that it was conceded by defendant's attorney that the report could be used. Witness this language of the court on the following page (298):

"The Court: It is admitted that the commissioners' report is competent evidence in this case; that objection will be overruled.' And defendant's attorneys made no objection or protest to this statement, showing the understanding of the court.

"Again, on page 303, this occurred:

"The Court: Well, it is admitted that the report is competent evidence. Now, the report itself shows what the commissioners found.

"Mr. Crane: Yes, your honor."

"And again defendant's counsel were mute and made no objection to the statement and understanding of the court as to the admissibility of the report.

"It is too fundamental to need citation of authority that counsel cannot, at the trial, take an attitude of this kind and then attempt to put the trial court in error here after such plain concessions. It may be that the counsel had purposes of their own in thus conceding the admissibility of the report at the time of the trial. Whatever those reasons may have been, it is too late now to contend that any error was committed in this regard."

We are not inclined to the view that the action of counsel for the defendant amounts to an admission that the report of the commissioners was competent. Nor do we think the trial court was justified in so construing it, although there is some ground for such a construction. It is clear that counsel for defendant was objecting to the use which was being made of this report, i. e., to refresh the recollection of an *expert* witness. It is clear that the report was so used. It is further clear that in doing so the substance of that report was before the jury. The report was not properly used to refresh the expert witness. An expert testifies to things within his own knowledge, or gives his expert opinion upon a hypothecated state of facts. There is no reason for refreshing the recollection of such a witness. Upon the whole the examination of this witness was improper, and constituted prejudicial error. We cannot say that this character of evidence did not influence the jury, when it is considered that the evidence for the defendant tends to show damages far in excess of that allowed by the jury. For this error the judgment as to damages should be reversed, and the cause remanded for the trial of that issue only.

There are other matters argued, but they are not such as we deem it necessary to discuss them.

Let the judgment be reversed, and the cause remanded for the reason aforesaid, and with the directions aforesaid as to the issue to be retried. All concur.

# ST. LOUIS ELECTRIC TERMINAL RY. CO. v. MacADARAS et al. (No. 17,154.)

(Supreme Court of Missouri. April 2, 1914.  
Rehearing Denied April 13, 1914.)

## 1. EMINENT DOMAIN (§ 10\*)—CONDEMNATION OF LAND—RIGHT TO CONDEMN—ELECTRIC RAILWAY.

An electric railway incorporated under the steam railroad act (Rev. St. 1899, §§ 1034-1174) is entitled to condemn land for railroad purposes, and, if it is an interurban railroad, it has the same right conferred by Laws 1907, p. 174.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.\*]

## 2. EMINENT DOMAIN (§ 145\*)—CONDEMNATION PROCEEDINGS—VALUE OF PROPERTY.

Where condemnation of land for railroad freight and passenger depot purposes was part of a general scheme previously inaugurated for the construction and operation of the railroad in accordance with a lay-out and plat adopted prior to the construction of railroad buildings on adjoining property, the owners of the property sought to be condemned were not entitled to have any increase in value of their property by reason of the improvement of the adjoining property considered in determining the value of their property for railroad purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.\*]

## 3. EMINENT DOMAIN (§ 204\*)—EVIDENCE—PRIOR CONTRACT.

Where, in proceedings to condemn land for railroad purposes, defendants claimed they were entitled to the increase in value of their property by reason of plaintiffs' improvement of adjoining property, evidence of a contract made by defendants' agent, without authority, for the sale of defendants' property to plaintiffs for a specified sum, prior to the construction of such improvement, was admissible, not to show the value of the land sought to be taken, but to show that the condemnation of defendants' property was part of a general plan inaugurated prior to the improvement, and to rebut defendants' right to damages by reason of the appreciation of their property from such improvement.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 543; Dec. Dig. § 204.\*]

## 4. EVIDENCE (§ 142\*)—VALUE OF PROPERTY—SALE OF SIMILAR PROPERTY.

In condemnation proceedings, it was error for the court to admit evidence of the value of dissimilar property as a standard by which to fix the value of the property in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.\*]

In Banc. Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Condemnation proceedings by the St. Louis Electrical Terminal Railway Company against James D. MacAdaras and another. From a judgment sustaining the right to condemn and assess damages, both parties appeal. Affirmed on defendants' appeal, and reversed and remanded on plaintiff's appeal.

Edward C. Crow, of St. Louis, for plaintiff. John S. Leahy and Block & Sullivan, all of St. Louis, for defendants.

GRAVES, J. Barring a few sentences of argumentative matter, counsel for the defendants have made a very concise statement of the case, and we adopt it, with these sentences cut out. In fact, we could take the statement of counsel upon either side of the controversy and have a fair general outline of the case, but that made for the defendants is a little more compact and concise, and we take that. It reads:

"This is a proceeding, instituted December 1, 1910, by the plaintiff, in the circuit court of the city of St. Louis, to condemn, for the use of the plaintiff for depot purposes, certain property situated in city block 841 of the city of St. Louis.

"The petition was in the usual form, and need not be particularly noticed at this point. The defendants are husband and wife, and the title to the premises is in the wife. The city block in which the premises are situated lies just a block north and east of Twelfth and Washington avenue, in the city of St. Louis, and is bounded on the east by Twelfth street, on the west by High street (which is really Twelfth street at that point), on the north by Linden street, and on the south by Lucas avenue, which is the next street north of Washington avenue. The three pieces of property sought to be condemned comprise a lot at the northeast corner of the block fronting 71 feet and some inches on Twelfth street by a depth westwardly on Linden street of 107 feet some inches; another lot at the southwest corner of the block fronting 71 feet and some inches on High street by a depth on Lucas avenue to the east of 60 feet and some inches; and a third lying in the eastern center of the block, fronting 18 feet on Twelfth street by a depth of 78 feet toward the west.

"The defendants answered setting up two affirmative defenses: First, that the railroad, for the use of which the plaintiff sought to condemn the property, was an interurban electric railroad, within the meaning of section 3228, R. S. 1909, and that therefore the plaintiff was without authority of law to condemn said property to the uses mentioned in the petition; and, second, that the plaintiff had abandoned a material portion of the route of its railroad, as described in its charter, and was therefore without authority of law to condemn any property to its use for any purpose. The affirmative averments of this answer were put in issue by a reply filed by the plaintiff.

"Upon the issues thus made a trial was had to the court March 27, 1911, resulting in a judgment finding the issues submitted by the answer in favor of the plaintiff, awarding the plaintiff the right to condemn the property, and appointing commissioners to assess the damages.

"Within four days after that judgment was entered the defendants filed their motion for a new trial and in arrest of judgment. These motions the court overruled, and the defendants excepted, and, having obtained time within which to file a bill of exceptions, filed the same within the time allowed, with all formalities duly complied with.

"In due time, and under date of June 8, 1911, the commissioners appointed by the court reported that they value the property sought to be condemned at \$164,300. Thereupon both parties excepted to this report; the exceptions of the defendants being filed June 10, 1911. In these exceptions the defendants renewed their objections to the proceeding and to the right to condemn the property, on the same grounds as were set forth in their answer, *supra*; and also com-

plained that the damages allowed by the commissioners were inadequate. The plaintiff likewise filed exceptions to this report, complaining of the manner in which the commissioners had arrived at their conclusion as to the value of the property, and of the valuation placed thereon. Each side asked a jury trial as to the value of the property; and, in response to that request, such was had, beginning December 11, 1911.

"At the opening of this trial the defendants objected to the introduction of any testimony, and to the trial of the exceptions with respect to the value of the property, on the ground that the plaintiff was shown to have no right to condemn the property, for the reasons set forth in the answer above referred to. The court overruled the objection, and defendants excepted, and, at the conclusion of the trial, filed a motion for a new trial and in arrest of judgment, assigning the same reasons as those set forth in the answer above referred to, and, on the overruling of these motions, duly excepted, and took another bill of exceptions embodying the rulings on that subject.

"At the trial to the jury on the question of value, each of the parties called numerous expert witnesses, and their testimony with respect to the proper value of the premises on the 8th day of June, 1911, when the commissioners filed their report, took a wide range. The minimum valuation assigned by any witness was \$96,000; the maximum nearly \$300,000. The jury, by their verdict, assessed the value of the premises at an aggregate of \$175,850, and the court entered judgment accordingly. After all due formalities, both parties appealed. The defendants here contended: That, under the evidence in the record, the affirmative defenses in the answer ought to have prevailed, to wit, that the railroad which the plaintiff owned and operated, and to the use of which it sought to condemn this property, was, and is, an interurban electric railroad, within the meaning of section 3228 of the Revised Statutes of 1909, and hence the plaintiff was without authority of law to condemn property to its use for depot purposes, as it sought to do in this proceeding; and, secondly, that the plaintiff had abandoned a material portion of the route for its road designated in its charter, and was therefore without authority to exercise the power of eminent domain for any purpose. The plaintiff, appealing, complains of rulings of the trial judge on the admission and exclusion of testimony, and on instructions, during the progress of the hearing before the jury on the question of value.

"The parties have left the field of their controversy long enough to unite in printing the entire record applicable to both appeals, and have brought it here in that form, certified by the clerk, with a separate publication comprising copies of the blueprints, maps, etc., which were introduced in evidence

and are called for by the various bills of exception contained in the record."

To this it is added by counsel for the plaintiff that, upon the return of the award, the money was promptly paid into court for the defendants, and again, upon the return of the verdict by the jury, the additional sum awarded by the jury was likewise paid into court, and thereupon the plaintiff took possession of the property for the uses stated in the petition. Matters of detail will be left to the opinion.

[1] I. As said in the case of *Chicago Great Western Railroad Company v. Kemper et al.*, 166 S. W. 291, just handed down, condemnation proceedings have two stages or hearings; i. e., one upon the sufficiency of the petition and the right to condemn, and one upon the compensation to be paid for the property taken or damaged. Defendants in this case direct their attack here more particularly to the result of the first judgment in the case; i. e., the judgment by which it was determined that the plaintiff had the right to condemn defendant's property. Plaintiff by its appeal attacks the latter judgment as to the compensation allowed by the jury. The contention of the defendants is one of easy solution. The right of this plaintiff to condemn property for right of way and other railroad purposes has been before us twice. *Julius E. Greffet and Rosalie Greffet*, property owners in the city of St. Louis, along the identical line here involved, sought to prohibit Judge Williams, and the three commissioners which he had appointed, from further proceeding in the condemnation proceeding brought by this same plaintiff. This plaintiff was made a party respondent in that suit. In that case we held that the plaintiff had the right to condemn property for railroad purposes, and with the reasoning of that case we are satisfied. *State ex rel. v. Williams*, 227 Mo. loc. cit. 47, 127 S. W. 52. Not only so, but in this identical proceeding the two Macadaras, the defendants here, likewise filed their application in this court for a writ of prohibition against Judge Shields, who tried the instant proceeding. In that petition they urged the same matter that they urge now. Therein they said: "And the petitioners say that said railway company is not entitled to condemn their said property to its such use because: (1) The said railway company has abandoned the route for its road designated in its articles of incorporation, and is therefore without the power of eminent domain; and (2) the said railroad, to the use of which said property is sought to be condemned, is an interurban electric railroad, within the meaning of section 3228 of the Revised Statutes of 1909, and lands may not be condemned to its use for depot purposes; and that the said respondent, Hon. George H. Shields, as judge of the circuit court for the Eighth judicial circuit, presiding in division No. 4 of the circuit court

of the city of St. Louis, is, for the same reasons, without jurisdiction or authority of law to condemn said lands of the said petitioners to such use of said railway company." Vide files of record in the office of the clerk of this court. This application we denied on April 11, 1911, and thereafter Judge Shields proceeded with the case to the judgment now attacked on this appeal. If the plaintiff is a railroad company under the steam railroad act, there can be no question of its right to condemn property for right of way and depot purposes. If it is an interurban railway company, as defendants contend, then, by the act of 1907 (*Laws of 1907*, p. 174), it was given the same rights and power as steam railroads in the matter of condemning property for railroad purposes. *State ex rel. v. Williams*, supra.

So that the right of this plaintiff to condemn property for the purposes stated in its petition in this case has been practically twice passed upon by this court, and we shall not open up the question now. The refusing of the writ of prohibition in the matter mentioned supra, however, did not preclude the defendants from urging the question of abandonment pleaded in their answer. That was a matter of fact to be threshed out by the trial judge. Under the evidence, Judge Shields, in an exhaustive and elaborate opinion (found in the files of the case *State ex rel. Macadaras et al. v. Shields*, No. 11,947) held that the evidence totally failed to show abandonment. We have examined this evidence, and are satisfied with the ruling nisi thereon. Under the evidence and the law, that judgment finding that the plaintiff was entitled to condemn and take the property in dispute should be affirmed.

[2] II. Plaintiff's appeal is directed to the trial of the issue as to damages. In this relation it complains of instructions given and refused, as well as the admission and rejection of evidence. It first challenges instruction No. 11 given by the court, which instruction thus reads: "If the jury find and believe from the evidence that the plaintiff had located its road in St. Louis and constructed a freight depot or station in proximity to the property of the defendants before it sought to condemn the property in controversy, and that this location and construction had enhanced the value of the defendants' property, you should take that enhancement into consideration in fixing the fair market value of the defendants' property at the time the same was taken, to wit, June 8, 1911."

To gather the force of plaintiff's objection to this instruction a few pertinent facts should be stated. Plaintiff was building its line from a bridge across the Mississippi river out into the city. It was a single contemplated scheme and plan for a railroad and necessary freight and passenger depots. The land in dispute was sought for its tracks and

passenger depot. Prior to the date plaintiff paid the commissioners' award of damages into court, the plaintiff had located and built its freight depot in the vicinity of the property in dispute upon property it had acquired for that purpose. Plaintiff contends that, as the building of the railroad and necessary freight and passenger depot for use thereon was all one plan and one work, the defendants were not entitled to have the jury consider the enhanced value, if any, which was given to the property by reason of the doing a part of the work contemplated by the plan—i. e., the building of the freight depot—but that the value should be ascertained without the consideration of that matter. The plaintiff took all of the three lots, so that the question of damages is somewhat simplified. Counsel for defendants thus state the situation: "But in this case the question of the amount to be recovered was entirely uncomplicated by any consideration of consequential damages, or special benefits to property not taken, such as is usually met with in cases of this character; because, forsooth, the whole of each property was sought to be appropriated."

It being true, as this record shows, that the building of the railroad and the building of a freight depot and a passenger depot were parts and parcels of one single continuous and simultaneous public improvement, we are impressed with the view that this instruction is not supported by the weight of authority, and certainly not by the reason of the thing. If, when property is taken in toto, as here, it be the rule that the owner can have considered, as an element of his damages, the enhanced value of the property occasioned by a partial construction of the railroad, and its incidents (such as depots, switches, etc.), then the converse of the proposition should likewise be true; i. e., that, if a partial construction of the contemplated road and its incidents, above named, had depreciated the property sought to be taken, then the railroad should have the benefit of such depreciation, when it actually came to the taking of the property. No court would stand for this latter rule, and yet it is the very converse of the one sought to be enforced here. The proper rule, when the whole property is being taken, is not to allow the jury to consider either enhancements or depreciation brought about by the construction of the improvement for which the property is being taken. In other words, the value should be determined independent of the proposed improvement. If the anticipated and proposed improvement had been completed, and the value of the property had been enhanced thereby, and afterward it was sought to condemn the property for additional improvements, as the building of passenger depot, not a part of the original improvement, then we would have a very different question. But in this case we have the building of railroad tracks, switches, depot

(freight and passenger) as part and parcel of one continuous and simultaneous improvement, and to say that, when (under the one general plan and scope of the improvement) the builder got the road built to a block where they had located a freight depot, and then built that depot, would allow the owner in the next block to enhance the value of his property (by this partial construction of the proposed work) before the condemner had had time to get to his block (although on and along the profile map of the road) would be to allow enhanced values upon a very shadowy ground. And as suggested above, if such partial construction of the contemplated whole did, in fact, enhance the value, and the landowner, at the time of the actual taking, is entitled to such enhancement, then the other and opposite rule must be true; i. e., that, if such partial construction of the whole contemplated improvement decreased the value of the land before the company actually took it, then the decrease should be considered in assessing the damages. I do not agree to either of these two doctrines, and hence say there was error in giving instruction No. 11, supra. There are cases which squint at the rule announced in the instruction, but reason is not with them. These cases will be found collated in a note to the text of Lewis' *Eminent Domain*, vol. 2 (3d Ed.) § 745. That section reads: "Whatever the time fixed upon with reference to which the compensation shall be estimated, the owner is entitled to the actual value of the land at that time, even though it may have been enhanced by reason of the projected improvement for which it is taken. It is said this is not really making the condemning party pay for an enhancement caused by its own work, as such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built. In so far as the enhancement is due to such circumstances, no doubt it is properly considered and allowed. But it may be doubted whether the rule should go any further. If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, and the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work. It has been held improper to consider what the property would have been worth if it could have had the benefit of the proposed improvement without being taken."

The views of the author as to what should be the rule accords with my views, and for such there is ample authority. Thus in *May v. Boston*, 158 Mass. loc. cit. 29, 32 N. E. 904, it is said: "If the expected improvement involves the taking of land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for

the taking precludes the possibility of ever using it under improved conditions. In that respect it stands differently from other land in the vicinity which is not taken. Whenever there is a project for laying out or widening a way, or taking land for any other public use which is expected to increase the value of real estate in the neighborhood, if the market price of land in the vicinity rises in anticipation of the change, the statute very justly says that the land taken shall not be paid for at the increased price. If it is known from the beginning exactly what land will be taken, it must also be known that that particular land can never be made more valuable by the improvements, since it can never be used by its owner under the improved conditions. If the plan is general, and it is not known exactly what land will be needed by the public, but only that some land will, whenever the plan takes definite form, and the location is fixed, it is known that the land to be taken has not received, and never can receive, any benefit from the improvements. There is no injustice in saying that such land shall not entitle its owner to be paid out of the public treasury at a rate determined, not by its value for use, but by a prospective and speculative value of land in the vicinity, derived from an expectation of the benefit to come from the public use for which this is to be taken."

In an earlier Massachusetts case, *Dorgan v. City of Boston*, 12 Allen, loc. cit. 231, Bigelow, C. J., said: "We are unable to perceive that this rule of damages will work any injustice to the landowner. It provides for compensation to him for the value of the property as possessed and enjoyed by him at the time when the statute was enacted which appropriated it to the public use. Nor can we see any good reasons for including in the valuation an element not incident or appertaining to the property itself in the hands of the owner, but which it acquires only by the act which takes it from him and appropriates it to the public. Strictly speaking, the land taken is intrinsically worth to the owner only so much as its valuation would be as part of the entire tract or lot, irrespective of its proposed severance for the public use. It is difficult to understand how land is increased in value to the owner by a public improvement which can be effected only by depriving him of its use. Certainly there is no principle of equity on which a party can rest a claim for damages for the loss of a benefit or profit which, from the very nature of the case, he never could have received or enjoyed."

These cases, it is true, are discussing a statute which fixed the rule of damages, but the validity of the statute was challenged, on the ground that it was a wrongful taking of the landowners' property, and therefore the very reason of the rule had to be discussed. And, further, in *Benton v. Brook-*

line, 151 Mass. loc. cit. 258, 23 N. E. 846, the court says: "The benefit and the increased value arise from the expected construction of the way. The location does not construct it, but only renders its contemplated construction more probable. Its location and construction may be so assured before the location that the formal location may make no appreciable difference in the market value of land affected. It would be as reasonable to hold that there could be no assessment for betterments because the increase in market value from the expected construction of the way accrued in anticipation of the record location as it would be to hold that such increase could be allowed in damages for land taken. *Cobb v. Boston*, 112 Mass. 181."

In *Ry. & Nav. Co. v. Xavier Realty*, 115 La. loc. cit. 342, 39 South. 6, it is said: "We think the district court was right in taking as the date for estimating the value of property expropriated for railroad purposes that of the institution of the expropriation suit, *withdrawing, however, from the value so ascertained so much of the same as was the result of the construction*. Many elements enter in enhancing the value of the property in the interval between the date of the determination of the railroad company to build its road and the date of the expropriation proceedings which may be taken for that purpose which are entirely independent of the building of the road. The property owners, not the railroad company, are entitled to the benefit of such factors in increasing values." (The italics are ours.)

In *Shoemaker v. United States*, 147 U. S. loc. cit. 305, 13 Sup. Ct. 393 (37 L. Ed. 170), that court said: "While the board should be allowed a wide field in which to extend their investigation, yet it has never been held that they can go outside of the immediate duty before them, viz., to appraise the tracts of land proposed to be taken, *by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had*. *Kerr v. South Park Commissioners*, 117 U. S. 379, 380 [6 Sup. Ct. 801, 29 L. Ed. 924]." (Again the italics are ours.)

So, too, in *City of El Paso v. Coffin*, 40 Tex. Civ. App. 60, 88 S. W. loc. cit. 505, the Texas court thus states the rule: "It is held generally, in cases presenting the appropriate facts, that, where a person's entire property is included in one general proceeding of condemnation for a particular purpose, it is not permissible to consider that purpose, or the results thereof, in estimating the owner's compensation. The reasons for this rule are apparent. To permit it would be to take into consideration the condemnation proceeding itself as a factor, which is not allowed. Further, it is evident in such a case that the taking, and the effect on the value from such taking would be concurrent,

and such increase would not exist when the taking occurs. The person's property is taken, and is absorbed in the purpose for which it is taken, and to allow him a compensation based on the value which the property would have had if not taken would be giving it a status it could not possibly have had in the very nature of the act. The reasoning of the Supreme Judicial Court of Massachusetts is appropriate here (though not its decision, as that was controlled by a statute): 'Its real value for use is not increased until the change in its surroundings comes. If the expected improvement involves the taking of the land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for the taking precludes the probability of ever using it under improved conditions.' *May v. City of Boston* [158 Mass. 21] 32 N. E. 902."

Other cases will be found cited in the briefs and by the author under section 745 of *Lewis' Eminent Domain*, supra. These, however, suffice to illustrate the correct rule. In the case at bar the condemnation proceedings were begun December 1, 1910. February 24, 1910, plaintiff tried to buy these very lots from defendant for depot purposes. It thought it had bought them. It had a contract signed by the purported agent of defendants for them. The plaintiff even acquired the very property upon which the freight depot was located after it thought it had acquired this property from the defendants. The freight depot was begun in November, 1910, and first used in February, 1911. These facts are outlined as showing that the entire proceeding was one continuous and simultaneous act of public improvement, with the taking of defendants' property as a part of the improvement scheme.

Under the facts of the case, this instruction was error, for which the judgment must be reversed.

[3] III. From the foregoing it follows that the refusal of plaintiff's instructions covering the contrary view of defendants' instruction No. 11 should have been given, and their refusal constitutes error. It is urged that the court erred in excluding from the case a certain written contract of date February 24, 1910. By this contract the defendants, through their purported agent, John S. Leaby, sold this property to plaintiffs for the sum of \$150,000. The defendants later disavowed Leaby's authority, and declined to make the conveyance. This contract was not competent upon the question of the value (because Leaby's authority to make it is not conclusively shown) but it was competent as tending to show that the whole improvement was one simultaneous act, and that it included the taking of this property, as might have been gathered from the profile of the road. It only becomes material by reason of the defendants claiming that

the act of building the road and constructing the freight depot were independent acts, and the taking of defendants' property for a passenger depot was an afterthought. This attempted purchase of the property, evidenced by that contract, rebuts this theory of the defendants, and, whilst there is other evidence rebutting such theory, yet, if defendants persist in their theory, this contract fully explodes it, because it was made and executed and \$2,500 paid thereon long before the freight depot, which causes the trouble in this case, was even located. For this purpose the contract was competent.

[4] There are other matters suggested in the briefs, but only one other need be noted. The court admitted some evidence of the value of property on Washington avenue as a standard by which to fix the value of this property. The two classes of property are entirely too dissimilar under the record to make this evidence of value, and it would therefore likely prove confusing and injurious. Upon retrial this should be excluded.

From what has been said, the judgment as to damages should be reversed, and the cause remanded, with directions to the trial court to retry the question of damages alone in the light of this opinion.

It is so ordered. All concur.

#### STAHLMAN v. UNITED RYS. CO. OF ST. LOUIS. (No. 13,581.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

##### 1. NEW TRIAL (§ 150\*)—NEWLY DISCOVERED EVIDENCE—COMPETENCY AND SUFFICIENCY OF AFFIDAVITS.

Depositions of witnesses, filed as affidavits on behalf of defendant and by the persons by whom it is proposed to prove newly discovered evidence, are competent as affidavits; and while an applicant for a new trial must personally make an affidavit in support of it, such affidavit is properly made by the attorney of a corporation, who swears that he has the entire charge of the case for it.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

##### 2. APPEAL AND ERROR (§ 981\*)—DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL.

The action of the trial court upon a motion for new trial on the ground of newly discovered evidence, is not to be disturbed, unless it is clear that its discretion has been abused. Where a new trial is granted, justice may yet be done between the parties, and an appellate court will look to the matter with less scrutiny than if it had been refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3876; Dec. Dig. § 981.\*]

##### 3. NEW TRIAL (§ 150\*)—NEWLY DISCOVERED EVIDENCE—AFFIDAVITS—REQUISITES AND SUFFICIENCY IN GENERAL.

A party desiring a new trial on the ground of newly discovered evidence must show that the evidence has come to his knowledge since the trial, that he was not wanting in due diligence, that it is so material that it would probably produce a different result if a new trial were granted, that it is not cumulative only,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that its object is not merely to impeach the character or credit of a witness, and produce the affidavit of the witness himself or account for its absence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 806-810; Dec. Dig. § 150.\*]

**4. NEW TRIAL (§ 103\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—MATERIALITY.**

In an action for personal injuries, where the issues were whether plaintiff was injured by a fall from defendant's car and whether she had suffered therefrom up to the trial, and where she was subjected to a long cross-examination as to the accident and her subsequent suffering, and was examined by a physician appointed by the court, who was called by defendant and testified, and where there was testimony of other physicians and surgeons as to her past and present physical and mental condition, newly discovered evidence to the effect that in an application for a policy of life insurance, subsequent to the alleged date of her injury and prior to the trial, she had signed statements that she had never sustained any accidental injury and that she then had no disease or disability, was not sufficient to warrant a new trial, since it was not so material that it would probably produce a different result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.\*]

**5. NEW TRIAL (§ 104\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

Such newly discovered evidence, in view of defendant's contention at the trial that plaintiff's condition was simulated and her suffering was imaginary, was cumulative evidence, in the sense that it was of the same import as that given upon the trial, and hence was not sufficient to warrant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

**6. NEW TRIAL (§ 105\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.**

Such newly discovered evidence tended to impeach the credibility of plaintiff by showing that outside of court she had made statements contradictory to those made in court, although she was not asked as to contrary statements made out of court, but was examined at length on the fact of the accident and her subsequent condition, and hence was insufficient to warrant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. § 105.\*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by Marie Stahlman against the United Railways Company of St. Louis. Judgment for plaintiff, motion for new trial sustained, and plaintiff appeals. Reversed and remanded, with directions to reinstate the verdict and enter up judgment thereon as of the date of its rendition.

William A. Kane and Charles P. Comer, both of St. Louis, for appellant. Boyle & Priest, S. P. Chesney, and Paul U. Farley, all of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, Mary Stahlman, brought her action against the United Railways Company to recover damages for injuries alleged to have been sustained by her while alighting from a street car operated by defendant in the city of St. Louis on

April 27, 1911, it being alleged that her ankle and ribs had been broken and her nervous system shattered; that her injuries are permanent.

The answer is a general denial.

At a trial before the court and jury, plaintiff recovered a verdict for \$4,500. Defendant filed a motion for a new trial, alleging eighteen grounds, one of them that evidence had been discovered since the trial of the cause and rendition of the verdict, the evidence, it is claimed, being "material to the issue in this cause and which, with due diligence, the defendant could not have discovered in time to have offered same in the trial of said cause, and which said evidence, if offered at the subsequent trial herein will, in all probability, produce a different result from that obtained at the trial of the cause. That said evidence is not offered for the purpose of impeaching any witness who testified at the trial, nor is such evidence cumulative, nor, in fact was any evidence of the character of said newly discovered evidence offered at the trial of this cause." It is averred that this evidence which defendant has so discovered is a written statement made by plaintiff approximately between August 28 and September 4, 1911, in an application for a policy of life insurance in the Prudential Life Insurance Company, which application was made subsequent to the date plaintiff, in her petition, alleges she met with the accident and was injured, and subsequent to the filing of her petition, and prior to the trial of this cause; that in this application plaintiff stated that she had never sustained any injury through an accident and that at the time of making such application plaintiff did not have any disease or disability. It is further set out that this written statement or application can be produced at another trial of the cause. Defendant was granted ten days, and afterwards a further extension of ten days, in which to file affidavits in support of this motion. During these twenty days defendant, on notice to the attorney for plaintiff, took depositions of several agents of the Prudential Life Insurance Company, who produced two applications, one dated August 18, 1911, the other December 14, 1911, purporting to be signed by plaintiff, her signatures to at least one of them being identified by one or more of these witnesses, in which applications it is set out that the applicant had never suffered from various diseases or from accident of any kind, the answer to the question as to whether she had any of the mentioned diseases or any accident being "No," and to the question as to whether she had ever had any of the named diseases being "None," all these answers, as we understand, written by some one other than plaintiff; at least it does not appear that plaintiff had written them, but the application concludes with the usual state-

ment that the applicant had read them over and knew what they were, and with the warranty clause usually found in policies of this kind, as to the truth of the answers. While the testimony of these witnesses was taken in the form of depositions, they were filed as affidavits in support of the motion for new trial, along with the affidavit of one of the attorneys for defendant, that affidavit practically following the averments of the motion, all of them duly signed and sworn to. They were filed within due time and on consideration of them by the court the motion for a new trial was sustained solely upon the eighteenth ground set out in the motion, namely, "newly discovered evidence." From this action of the trial court plaintiff has duly perfected her appeal to this court.

The sole question before us turns on the correctness of the action of the learned trial court in sustaining the motion for a new trial on this ground of newly discovered evidence, no claim being made that there are any other grounds, apart from this, for that action.

[1] We accept and treat these depositions so filed, as affidavits made on behalf of defendant and by the persons by whom it is proposed to prove the alleged newly discovered evidence. As depositions, they would not fall within the rules of practice. They are competent as affidavits. While it is the rule that the applicant for a new trial must personally make an affidavit in support of it, the applicant here being a corporation, the affidavit is properly made by its attorney, who swears that he had the entire charge of this case for the defendant.

On a careful reading of all the testimony in the case, and considering these depositions as affidavits in support of the motion, we are compelled to hold that the motion for new trial should not have been sustained on the ground assigned.

[2] We are aware of the rule that the action of the trial court in sustaining or overruling a motion for new trial, on account of newly discovered evidence, is not to be disturbed unless it is clear that the discretion lodged in the trial court has been abused. It has been said that "where a new trial is granted, justice may yet be done between the parties and an appellate court will look to the matter with less scrutiny than if it had been refused." *Bloch Queensware Co. v. Smith, Saxton & Co.*, 107 Mo. App. 13, loc. cit. 14, 80 S. W. 592. This has been repeated in *Allen v. St. Louis & S. F. R. R. Co.*, 167 Mo. App. 498, loc. cit. 506, 151 S. W. 762. With this rule in mind we have read all the testimony in the case and the affidavits in support of the motion.

[3] It was long ago announced by our Supreme Court that the party desiring a new trial on the ground of newly discovered evidence, "must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want

of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not cumulative only; fifth, that the affidavit of the witness himself should be produced, or its absence accounted for; and sixth, that the object of the testimony is not merely to impeach the character or credit of a witness." *State v. McLaughlin*, 27 Mo. 111, loc. cit. 112. That rule has been announced and adhered to in many cases from that time down, its last announcement to which our attention has been called being *State v. McKenzie*, 177 Mo. 699, loc. cit. 716, 76 S. W. 1015. While the cases above cited and many intermediate ones in which this rule is announced are criminal cases, our statute (R. S. 1909, sec. 5285), provides that motions for new trial in criminal cases "shall be heard and determined in the same manner as motions for new trials in civil cases."

[4] The issues tried in this case were as to whether the plaintiff in point of fact had fallen off the car at all; whether she had received any injuries in consequence of a fall from a car operated by defendant on its road; whether since the time of the alleged accident she had suffered and up to the time of the trial was suffering from the effects of that accident. The testimony in the case was entirely on these lines. Plaintiff was in court; the jury saw her; she was subjected to a long cross-examination as to the accident and her subsequent suffering; she had been examined by a physician appointed by the court who was called by defendant and who testified; testimony of other physicians and surgeons was introduced by the respective parties to the controversy as to her past and present physical and mental condition. So that the question as to whether plaintiff had sustained the accident she alleged and whether any injurious results had followed which were of a permanent character, bodily and mental, the latter as affecting her nervous system, was threshed out very thoroughly.

Under this state of the case, we are of the opinion that this newly discovered evidence is not sufficient to warrant the granting of a new trial for several reasons.

First, we cannot say that it is so material that it would probably produce a different result if a new trial was granted, admitting that plaintiff in these applications for insurance may then have stated that she had suffered no accident and was in sound condition of health after she had instituted this action, and after the alleged accident. The whole course of the testimony in this trial was directed to the ascertainment of that very fact. It is not pretended in these affidavits that she had written in these answers herself. They were written in by the agents of the insurance company and all that she appears to have done in the matter was to sign her

name to the application with these answers written in. In the light of the many cases of like character which have been before our court it does not seem probable that the production of these applications, signed by plaintiff, would have produced a different result with the jury, in the light of the testimony produced at this trial.

[5] Second. Another reason why these affidavits and the testimony sought to be adduced show no grounds for a new trial, is that this testimony is cumulative only. Defendant all through the trial was insisting that plaintiff had not been hurt in the first place, and in the next place, that her present condition and her condition since that time was simulated; that she was malingering. Defendant even introduced testimony to the effect, as testified to by one of the physicians, a witness for defendant, that plaintiff was what he designated a "dope fiend," addicted to the use of morphine, her mental powers consequently impaired, and that her hurts and sufferings were imaginary. This proposed testimony would only have been cumulative to that offered by defendant as bearing upon the fact of the alleged injury and its consequences. Evidence is said to be cumulative when it is of the same import as that given upon the trial and when that is so, it is not sufficient to authorize the court to grant a new trial, on the same issue already passed upon by the jury. *Beauchamp v. Sconce*, 12 Mo. 57; *Boggs v. Lynch*, 22 Mo. 563; *Wells v. Sanger*, 21 Mo. 354, loc. cit. 359; *Cook v. St. Louis & Keokuk R. R. Co.*, 56 Mo. 380, loc. cit. 384. These, it is true, are old cases, but the rule they announce has never been departed from in later decisions.

[6] Finally, this proposed testimony can be classed as of no other than impeaching evidence.

An accepted authority on the law of evidence, treating of the impeachment of witnesses and of their evidence, states that in addition to usual testimony to show bias or peculiar relations of the parties, or their disparaged character, "there are also three other modes of impeaching the credit of a witness: (1) By disproving his statements, made in court, by the testimony of other witnesses; (2) by proving statements of the witness, made out of court, inconsistent with or contradicting those made by him on the witness stand." *Jones on Evidence* (2d Ed.) sec. 844, p. 1074. Tested by this rule the newly discovered evidence is purely impeaching evidence: evidence to impeach the credibility of plaintiff by showing that outside of court she had made statements contradictory to those she made in court. True she was not asked as to contrary statements made out of court, but she was examined at great length, on the same matter—the fact of the accident and her subsequent condition. *State*

*v. Welsor*, 117 Mo. 570, loc. cit. 582, 21 S. W. 443; *State v. Nickens*, 122 Mo. 607, loc. cit. 612, 27 S. W. 339; *State v. Stewart*, 127 Mo. 290, loc. cit. 297, 29 S. W. 986; *State v. McKenzie*, *supra*.

For these reasons our conclusion is that the action of the trial court in sustaining the motion on the ground of newly discovered evidence was wrong.

It is true that the attorney for defendant, in his affidavit filed, states that the evidence which can be produced at another trial is not impeaching, is not cumulative, and if introduced would produce a different result. These are mere conclusions: their accuracy is to be tested by the proposed evidence itself and not by the conclusions of counsel as to its effect.

The order of the circuit court sustaining the motion for new trial is reversed and the cause remanded to that court with directions to reinstate the verdict of the jury and enter up judgment thereon as of date of rendition of the verdict.

NORTONI and ALLEN, JJ., concur.

EWEN et al. v. HART et al. (No. 13,377.) (St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

1. PLEADING (§ 93\*)—ANSWER—INCONSISTENT DEFENSES.

In an action for trespass, there was nothing inconsistent in joining with a general denial defenses of a license from plaintiff and an entry by virtue of lawful condemnation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.\*]

2. TRESPASS (§ 44\*)—EVIDENCE.

In an action for trespassing on plaintiff's land and constructing a sewer, where defendants pleaded a general denial, further defenses that the sewer was laid with plaintiff's consent and on a right of way condemned for sewer purposes did not shift the burden of proof, or relieve plaintiff of the burden of proving that all the defendants participated in the trespass.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. §§ 112-115; Dec. Dig. § 44.\*]

3. TRESPASS (§ 31\*)—PERSONS LIABLE.

Where parties are present or assist in the commission of a trespass, all who participate therein are liable either jointly or severally.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. § 70; Dec. Dig. § 31.\*]

4. TRESPASS (§ 46\*)—SUFFICIENCY OF EVIDENCE—OWNERSHIP.

In an action by a husband and wife for trespass, evidence held insufficient to show that the wife had any interest in the property as tenant by the entirety or otherwise; and hence the husband's written consent to the defendant's acts was admissible though not signed by the wife.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. §§ 123-127; Dec. Dig. § 46.\*]

5. HUSBAND AND WIFE (§ 14\*)—TENANCY BY ENTIRETY—CONTRACTS WITH THIRD PERSONS.

A husband could grant a license or permission to lay a sewer on land owned by him and his wife by the entireties, which was good as

against both during their joint lives, and absolute as against the husband if he survived.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. § 14.\*]

**6. TRESPASS (§ 45\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

In an action for trespassing on plaintiffs' land and laying a sewer, in which defendants pleaded plaintiffs' permission and a condemnation of the land, city records relating to the construction of the sewer and the condemnation of the land were properly admitted.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 116-122; Dec. Dig. § 45.\*]

**7. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING DEFENSES.**

In an action for trespass, an instruction that if defendants entered on plaintiffs' premises and laid a sewer without rendering plaintiffs adequate compensation, and if the sewer was constructed and then running, the jury should take into account the way in which it ran and that it created an easement, and, in arriving at its verdict, take into account the damages to the lots for building purposes, and, if the total building value was taken away, fix such damages as they believed were reasonable compensation, was properly refused, as it purported to cover the whole case, and ignored the issues presented by the pleadings and the evidence that the entry and construction of the sewer were either under a valid ordinance of condemnation or by plaintiffs' permission.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**8. TRIAL (§ 260\*)—ACTIONS—INSTRUCTIONS.**

In an action against a city and others for trespassing on plaintiffs' premises and constructing a sewer, an instruction that the action was against three defendants, charging a joint trespass, and that the answer was that the city duly condemned a right of way for the sewer, and that, if a trespass was committed, all who encouraged, advised, or assisted in the trespass at the time the act was committed were guilty, whether they were present or not was properly refused, where the court had properly charged that there was no evidence against the city and one of the other defendants.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**9. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING DEFENSES.**

Such instruction was also properly refused, because it omitted the defense that the entry and construction of the sewer were with plaintiffs' permission, raised by the pleadings and the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**10. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERRORS FAVORABLE TO APPELLANT.**

In an action against a city and others for constructing a sewer on plaintiffs' premises, in which defendants pleaded the condemnation of a right of way, the refusal of an instruction that the burden of proving condemnation was on plaintiff was not ground for reversing a judgment for defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**11. TRESPASS (§ 68\*)—ACTIONS—INSTRUCTIONS.**

In an action for trespassing on plaintiffs' property and constructing a sewer, in which defendants pleaded plaintiffs' consent to the construction of the sewer and the condemnation of a right of way, and there was evidence to support such allegations, an instruction that

if plaintiffs were in possession of the premises, and if without the consent of plaintiffs, or either of them, defendants entered thereon and excavated a trench and laid a sewer pipe, to find for plaintiffs, and in arriving at the damages to take into account the diminution in value by reason of the laying and construction of the sewer, was more favorable to plaintiffs than they were entitled to, and could not be complained of by them.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 151, 152; Dec. Dig. § 68.\*]

**12. TRESPASS (§ 68\*)—ACTIONS—INSTRUCTIONS.**

In an action for trespass, where the court had properly charged that there was no evidence against two of the defendants, an instruction to find for plaintiff under certain circumstances properly directed that such finding should be against the third defendant alone.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 151, 152; Dec. Dig. § 68.\*]

Error to Circuit Court, St. Louis County; G. H. Wurdeman, Judge.

Action by Mathias Ewen and others against Edward S. Hart and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Eugene Hale, of St. Louis, for plaintiffs in error. S. D. Hodgdon, of Clayton, and E. G. Curtis, of St. Louis, for defendants in error.

**REYNOLDS, P. J.** This is an action by plaintiffs, who state in their petition that they were "lawfully possessed of and in possession of" certain real estate, consisting of three lots in Tuxedo Park in the city of Webster Groves, and that defendants, on the day named, with force and arms, entered upon the premises of plaintiffs and dug and excavated for the laying off, and did lay, a sewer, or sewers, diagonally across the premises, contrary to the form of the statute in such case made and provided; that by reason of the excavation and laying of the sewer or sewers, the premises have been made totally unfit for building purposes, and plaintiffs have been damaged in the sum of \$1,500. They ask judgment "for treble damages as were occasioned by the acts of defendants, together with costs."

The abstract sets out that the defendants, "further answering," aver that the sewer was laid along a natural water course, with the consent of plaintiffs and on a right of way condemned by the city of Webster Groves for sewer purposes. It appears by the briefs and statements of counsel that the answer also contained a general denial.

The reply filed was a general denial. The cause went to trial before the court and a jury and resulted in a verdict in favor of defendants. Filing a motion for new trial and excepting to that being overruled, plaintiffs sued out a writ of error from this court.

There are eight points made in support of the contention that the action of the cir-

cult court should be reversed and the cause remanded.

[1-3] The first is, that the court erred in sustaining a demurrer of defendants, the city of Webster Groves and Hart, at the close of plaintiffs' case in chief. In support of this contention it is urged that the general denial is overcome by a subsequent confession and avoidance, and that as the evidence showed that these two defendants were present from time to time in superintending and encouraging the work, they were joint trespassers. The first of these propositions cannot be sustained. There is nothing inconsistent in joining with the denial of having committed a trespass, an averment of facts which, if true, as for instance, a license or a lawful condemnation, controverts the averment of no trespass. Nor did these denials shift the burden of proof. As to the second proposition above, it is true that where parties are present or assist in the commission of a trespass, all who participate in it are liable, either jointly or severally, but in the case at bar when plaintiffs closed in chief there was a total failure of evidence connecting either the city of Webster Groves or defendant Hart with any trespass upon this property, so that the demurrer to the evidence, so far as they were concerned and as the evidence then stood, was properly sustained.

[4, 5] The second point made is that the court erred in the admission of defendants' Exhibit "No. 1," in evidence, for the reason, as it is alleged that one of the plaintiffs in the case, Mrs. Kate Ewen, is not shown, either by this exhibit or by any other evidence to have been connected with that paper or assented to its execution. This Exhibit "No. 1" referred to, is a communication addressed to Mr. Hart, the mayor of the city of Webster Groves by Mr. McMahon, the contractor for the construction of the sewer, in which Mr. McMahon sets out that his contract calls for the placing of the ground over the ditches in which the sewers are laid in as good condition as before work was begun, and that "in regard to the laying of the sewers through the properties of J. C. Davison and M. Ewen in 'Block 18'—I will remove all spauls (spalls) from premises, level all ditches, and repair all damage caused to fences or property, including the replacing of any fruit trees that may be damaged by the work or workmen, to the satisfaction of yourself and the sewer commissioner." Below this was a note addressed to Messrs. J. D. Davison and M. Ewen, signed by the mayor, in which he writes: "I think this statement should be satisfactory to you both and should remove any prejudice against the sewer work being done." On the other side of this paper was written after the date: "This agreement is satisfactory to me," and this is signed by Messrs. J. D. Davison and M. Ewen.

It was in evidence that there was a con-

troversy between the city authorities and the owners of lots in this block about the construction of this sewer through their premises and at a conference between the parties, at which plaintiff Mathias Ewen was present, the above agreement was signed.

The objection on the part of learned counsel for plaintiffs in error to the reception of this in evidence, and to its probative value, is that the plaintiff, Mrs. Kate Ewen, had not signed it. It is stated in the abstract that plaintiffs, husband and wife, "through deeds vesting title by entirety in both plaintiffs" to the lots had instituted this suit and it is alleged, in the statement and argument of counsel for plaintiffs, that this had been proved. We are compelled to say, on a very careful reading of the testimony as abstracted by that learned counsel, that there is nothing whatever in the testimony to sustain this contention. The nearest approach to it occurs in the testimony of the plaintiff, Mr. Ewen, who, under direct examination, stated he was 61 years old; lived in Webster Groves; had lived there over four years, and he then says: "We own four lots in Tuxedo Boulevard, and two lots on Clara Avenue,—lots 29, 30 and 31, situate in block No. 18." That is no proof of title in himself and wife and is the only testimony in the whole record where the word "we" occurs, with reference to the ownership of the lots. It is not even alleged in the petition, or in evidence, that plaintiffs were husband and wife, so that who "we" refers to is a matter of mere guess and conjecture. Moreover in the examination of witnesses, these lots were continually referred to as the "lots of Mr. Ewen." Mrs. Ewen was a witness but was not asked if she was the wife of plaintiff Ewen; did not testify to that effect and made no statement whatever in regard to ownership; did not refer in any way to the property as property in which she was interested. All that her testimony amounts to is that she had never signed this paper or consented to the construction of this sewer. Counsel for plaintiffs himself, in rebuttal and in examination of a witness, Davison, asked him to tell the court and jury if he was acquainted with the lay of the land there "of Mr. Ewen's property." Further examining this same witness, that counsel asked him to look at the paper which was before him and to tell the court whether or not he had ever discussed with a Mr. Jarvis "the lots of Mr. Ewen individually." The witness asked if he meant of Mr. Ewen, and counsel said, "Well, the general property." Counsel then asked that witness: "What is the valuation of Mr. Ewen's property?" This same line of inquiry on the part of counsel himself appears all through the testimony, so that there is absolutely no evidence whatever in the case that plaintiff Kate Ewen had any interest whatever in this property. Whether this paper which was offered and read in

evidence had been signed by Mrs. Ewen, or whether she had consented to the construction of the sewer through the property, is entirely immaterial, as far as the evidence of any title in her is concerned.

Over and above this, however, that evidence of consent or permit, signed by Mr. Ewen alone is good and admissible as against both plaintiffs. Assuming, as stated by the learned counsel for plaintiffs, that the title to these lots was in the plaintiffs, husband and wife, as an estate in entirety, it does not follow that this license or permit, which the husband undoubtedly gave to the contractor here (McMahon) to enter upon the land and construct the sewer, is void as against the husband or wife, because not signed by the wife. Nor is it true that it was necessary for the wife to join her husband in that license. "At common law the right to the possession and control of the joint estate during the lives of the husband and wife is in the husband, the same as when the wife is sole seized; and this right of the husband is not affected by statutes enabling married women to hold and dispose of their property as if sole, unless expressly so stated; but he cannot defeat the right of the wife in the estate on surviving him." 3 Kerr on Real Property (Ed. 1895) sec. 1976.

In a very careful and thorough consideration of this question, our Supreme Court, speaking through Judge Sherwood, in *Hall v. Stephens*, 65 Mo. 670, commencing at page 676 (27 Am. Rep. 302), after stating that "husband and wife, at common law, to whom a grant or devise was made, took per tout et non per my, and the survivor took the whole," has said: "Our statute has wrought no change in this particular, as has been expressly and repeatedly adjudged. *Gibson v. Zimmerman*, 12 Mo. 385 [51 Am. Dec. 168]; *Garner v. Jones*, 52 Mo. 68; *Shroyer v. Nickell*, 55 Mo. 264." This is reiterated by our Supreme Court in *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689, where Judge Valliant, delivering the opinion of the court, referring to *Hall v. Stephens*, supra, and *First National Bank of Plattsburg v. Fry*, 168 Mo. 492, 68 S. W. 348, holds that the common law doctrine of estates in entirety is the law in this state. In *Frost v. Frost*, supra, it is said (200 Mo. loc. cit. 481, 98 S. W. 528, 118 Am. St. Rep. 689): "Modern legislation has done much to destroy the unity of husband and wife, yet in spite of such legislation it has been held in this state and elsewhere that estates in entirety remain as at common law." So that the husband undoubtedly had a right to grant this license or permission to make this entry and it is certainly good as against both husband and wife during their joint lives; if the wife should die before her husband, it is absolute as against the husband.

The defendant McMahon, entering upon the premises and constructing the sewer under the sanction of the husband, if he did so,

cannot be held to be a trespasser and that applies to the other defendants, even assuming that there was evidence that they entered upon the lots.

[6] The third, fourth and fifth assignments are to the introduction in evidence of certain records of the city of Webster Groves, relating to the construction of this sewer and condemnation of the land through which it was passed. We see no error in the action of the court in admitting these records in evidence.

[7] The sixth point made is that the court erred in refusing three instructions asked by plaintiffs. The first, in substance, undertook to tell the jury that if it believed that defendants jointly or severally entered upon the premises of plaintiffs in the month of March, 1908, and excavated and laid a sewer diagonally through the lots in question without rendering plaintiffs adequate compensation therefor, and that if the jury further believed from the evidence that the sewers are now constructed and running through the lots, the jury should take into account the way in which the sewer runs and the fact that it creates an easement of the city of Webster Groves in the lots, and that in arriving at its verdict the jury will take into account the fact that the lots are damaged for building purposes and give due consideration to the fact as to whether or not the lots can be used for building purposes, and if the jury found that the total building value is taken away by the sewer and easement running through them, the jury will fix the damages at such value as it may believe is reasonable compensation for the injuries. This instruction purports to cover the whole case and is defective for many reasons, mainly in that it entirely leaves out of view the issues presented by the pleadings and evidence, that the entry upon the land and construction of the sewer was under either a valid ordinance of condemnation or by permission of the plaintiff.

[8, 9] The court was asked by the second instruction to direct the jury, "that this is an action against three defendants, charging a joint trespass on the real estate of the plaintiffs, and that the defendants' answer is that the defendant, the City of Webster Groves, duly condemned the right of way for the sewer described in plaintiffs' petition, and defendants answer that as a defense the property was duly condemned, if it appears that a trespass has been committed, that all who encouraged, advised, or assisted in the trespass at the time the act was committed are guilty, whether they were present or not."

As the court had already instructed that there was no evidence against the city and Mr. Hart, the Mayor, this instruction could not be given; moreover, it omits the defense of permission.

[10] The third instruction asked by plaintiffs was to the effect that the burden of

proving condemnation was on plaintiff. We see no reversible error in the refusal of this instruction. As touching all the instructions asked by plaintiff and refused, we see no error to the prejudice of appellant. The case was fairly submitted to the jury.

The seventh point is that the court committed error in giving instructions numbered 2 and 4 at the instance of defendants. We find no error in these instructions. They were correct statements of the law, warranted by the facts in the case.

[11, 12] The final point made is that the instruction given by the court of its own motion is erroneous. That instruction told the jury that if it believed from the evidence that before and at the time of the construction of the sewer across the premises, plaintiffs were in actual, peaceable possession of the lots described, and that without the consent of plaintiffs or either of them, defendants entered upon their premises and excavated a trench or trenches and laid a sewer pipe diagonally through the lots, they should find for plaintiffs and against the defendant John J. McMahon, and that in arriving at the damages, if any, sustained by plaintiffs they would take into account the diminution of value, if any, by reason of the laying and construction of such sewer.

If anybody can complain of this instruction it is McMahon, the defendant in error. As Mr. McMahon was the only defendant left in the case, it was proper, in directing a finding for plaintiffs, to direct it to be made against McMahon alone. Surely this instruction, given by the court at its own motion, was very favorable to plaintiffs, more so than they were entitled to have. Certainly they are in no condition to complain of it.

The verdict in the case is supported by substantial evidence. Even if all the testimony as to the condemnation of the right of way is excluded, the evidence as to entry having been made and the work having been done under the permission of Mr. Ewen is certainly strong and substantial, if not conclusive, and sufficient, if believed by the jury, to support the verdict.

We find no reversible error to the prejudice of plaintiffs and the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

GRATZ et al. v. CITY OF KIRKWOOD et al.  
(No. 13,350.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

1. MUNICIPAL CORPORATIONS (§ 296\*)—STREET IMPROVEMENTS—ESTIMATES—RIGHT TO CONSULT ENGINEER.

The mayor of a city, when acting as the officer to make and file an estimate of the cost

of a street improvement, as required by Rev. St. 1909, § 9407, may consult an engineer and adopt as his own an estimate prepared wholly or in part by the engineer, provided he gives the matter such attention that the estimate filed reflects his own judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 792-795; Dec. Dig. § 296.\*]

2. EVIDENCE (§ 83\*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

In the absence of evidence to the contrary, it will be presumed that the mayor of a city, who consulted an engineer when making estimates for a street improvement, satisfied himself of the correctness of the estimate prepared by the engineer, so that it reflected his own judgment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

3. MUNICIPAL CORPORATIONS (§ 296\*)—STREET IMPROVEMENTS—ESTIMATES—OFFICERS ENTITLED TO MAKE.

Where a city has no city engineer, the mayor, though not an engineer, may be designated by the council as the officer to make estimates of the cost of street improvements, within Rev. St. 1909, § 9407, providing that estimates shall be made by the "city engineer or other proper officer."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 792-795; Dec. Dig. § 296.\*]

4. MUNICIPAL CORPORATIONS (§ 340\*)—STREET IMPROVEMENTS—ESTIMATES OF COST—CONTRACTS—VALIDITY.

A contract for a street improvement expressly made a part thereof ordinances providing that the work should be paid for at the contract price, but in no event in excess of the preliminary estimates, and required the contractor to do the work at the price bid. The bid merely stated the price per unit at which the contractor proposed to do the work, and did not refer to the amount of the various items, nor state the total sum. *Held*, that the contract was not invalid, as fixing a contract price in excess of the estimate in violation of Rev. St. 1909, § 9407, providing that no contract shall be entered into for a price exceeding the estimate, though the contract fixed the price per unit for one item in excess of that of the estimate, where the prices of some of the remaining items were less than the estimate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 869; Dec. Dig. § 340.\*]

5. MUNICIPAL CORPORATIONS (§ 304\*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

A provision, in a street improvement ordinance providing for plans and specifications, that a committee of the council may make alterations in the grade, plan, or dimensions of the work, either before or after its commencement, is invalid, because violative of the statute, as attempting to authorize changes after the adoption of plans and specifications and the giving of public notice of them, and after the letting of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811-816; Dec. Dig. § 304.\*]

6. MUNICIPAL CORPORATIONS (§ 284\*)—AUTHORITY OF CITY COUNCIL—DELEGATION OF POWER.

The provision is also invalid as an attempt by the council to delegate to a committee power conferred on it by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.\*]

**7. MUNICIPAL CORPORATIONS (§ 303\*)—STREET IMPROVEMENTS — ORDINANCES — CONTRACTS — INVALIDITY IN PART—EFFECT.**

The invalidity of the provision in a street improvement ordinance, embodied in the contract for the work, that a committee of the council may alter the plans and specifications either before or after the commencement of the work, does not invalidate the entire ordinance or the contract, on the ground that the provision operated to deter contractors from bidding because of the reserved right of the city by the committee to make alterations in the work, so as to render the extent and character thereof indefinite and uncertain, for it must be presumed that bidders were not ignorant of the invalidity of the provision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 808-810, 821; Dec. Dig. § 303.\*]

**8. MUNICIPAL CORPORATIONS (§ 359\*)—STREET IMPROVEMENTS — PROCEEDINGS — STATUTORY COMPLIANCE.**

The rule that the mandatory provisions of the statute governing street improvements and the issuance of special tax bills to pay therefor must be fully complied with does not permit the raising of objections of a purely technical character, where the contractor did the work in good faith, and where the substantial rights of the citizens were fully safeguarded.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 891; Dec. Dig. § 359.\*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney and G. A. Wurde-man, Judges.

Action by Laura C. Gratz, revived after her death in the names of Anderson Gratz and others, her devisees, against the City of Kirkwood and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Davis Biggs, of St. Louis, for appellants. Robert C. Powell and Thos K. Skinner, both of St. Louis, for respondents.

ALLEN, J. This is a suit in equity to cancel a certain tax bill and remove the cloud thereby cast upon the title to appellants' property. The decree below was for the defendants, and the case is here upon plaintiffs' appeal. The suit was begun by Laura C. Gratz, the owner of certain real property fronting upon Taylor avenue, a public street in Kirkwood, a city of the fourth class. During the pendency of the suit plaintiff departed this life, and the cause has been duly revived in the names of the devisees under her will.

The tax bill in question was issued for a special assessment levied against appellants' property for the improvement of said Taylor avenue. A resolution was duly passed by the board of aldermen of the city of Kirkwood, and approved by the mayor of said city, declaring it necessary to improve a portion of said Taylor avenue, in the manner therein specified, and in accordance with specifications contained in certain ordinances, which resolution was duly published according to law; and an ordinance was duly enacted, known as "Ordinance No. 754," providing

that such portion of the above-mentioned street be so improved. This ordinance, among other things, authorized and directed the mayor to prepare and file an estimate of the cost of doing such work, there being at such time no one holding the office of city engineer, and further provided that all matters connected with the work should be governed by the general provisions of a general improvement ordinance of the city, being Ordinance No. 572, in so far as the same were applicable, and that the work should be paid for by the issuance of special tax bills in accordance with the provisions of such general ordinance. Thereupon advertisement was duly made for bids for doing the work, and a preliminary estimate of the cost thereof was filed by the mayor. Thereafter the defendant contractor, Henry Winter, submitted a bid, and at a meeting of the board of aldermen such bid, being the only bid filed, was accepted, and an ordinance was duly enacted contracting with Winter for doing such work. The latter ordinance, among other things, provided that when the work should be fully completed in accordance with such contract ordinance, and duly accepted, the city would pay the contractor therefor, in accordance with his accepted bid, "by issuing special tax bills as provided in Ordinance No. 572 and not otherwise."

Before the contractor filed his bid he received notice from plaintiff's counsel that plaintiff would contest the validity of any tax bill issued against her property for such improvement of said Taylor avenue; such notice not stating, however, any of the matters relied upon as rendering such tax bills invalid. The above-mentioned work was duly performed by the contractor, and a final estimate of the cost thereof was filed by the then city engineer. Thereupon the city accepted the work, and an ordinance was enacted levying a special assessment upon the property of plaintiff and others to pay the costs thereof, and providing for the issuing of special tax bills therefor.

The case was tried upon an agreed statement of facts, in which the aforesaid resolution, special ordinances, estimates, bid, etc., are fully set out, together with so much of general Ordinance No. 572 as pertains to the issues herein. It is unnecessary to incorporate this entire statement of facts into the opinion, but we shall later refer to such further details thereof as may be necessary to the determination of the questions involved in the appeal, in considering the reasons urged why the tax bill here in question is claimed to be illegal and void.

[1, 2] I. It is first contended that the tax bill is void for the reason that there was no legal estimate of the cost of said improvement, as is required by section 9407, Revised Statutes 1909, applying to cities of the fourth class. The latter section provides as follows: "Before the board of aldermen shall



make any contract for building bridges, sidewalks, culverts, or sewers or for paving, macadamizing, curbing, guttering or grading any street, avenue, alley or other highway, an estimate of the cost thereof shall be made by the city engineer or other proper officer and submitted to the board of aldermen, and no contract shall be entered into for any such work or improvement for a price exceeding such estimate." The estimate which was filed conformed to Ordinance No. 572, above mentioned, in that it gave the estimated amounts and prices of the various items of the work, stating also the estimated total cost thereof. It was signed by J. H. Knierim, Mayor. In the agreed statement of facts it is stipulated and agreed that this estimate, though signed by the mayor, "was in truth and fact made by one Joseph M. Wilson, a private citizen and not a proper officer of said city"; that said Wilson was an educated and experienced civil engineer, and afterwards became the city engineer of said city; and that "he was consulted by the mayor before the filing of said estimate."

It is contended that this was a plain violation of the statute, wholly unwarranted, and that it renders the tax bill absolutely void. It is argued, for one thing, that the fact that the mayor signed the estimate did not make it his estimate, for the reason that, if he could lawfully make it at all, then it devolved upon him to do so personally, exercising his own judgment in the premises. But we think it clear that if the mayor was a proper officer to make and file the estimate, within the meaning of the statute, he could rightfully consult a skilled engineer concerning the same, and adopt, as his own, an estimate prepared wholly or in part by such engineer, or, at any rate, that he could do so, provided he gave the matter such attention, and so far informed himself as to the same, that the estimate filed may properly be said to reflect his own judgment in the premises, and not alone that of a private individual, not bound by the sanctity of an oath of office. And in the absence of evidence to the contrary, it must be presumed that the officer performed his duty in this respect, for such is the presumption which obtains in such a case.

The case is not like that of *Paving Co. v. O'Brien*, 128 Mo. App. 287, 107 S. W. 25, where the ordinance made it the duty of the city engineer to prepare the plans and specifications, but such engineer accepted plans and specifications made and presented by one of the bidders. It was held that to thus bestow an advantage upon a favored bidder was sufficient in itself to make the act unlawful; but the court further held against the validity of the tax bill, "on the ground that the engineer could not delegate the performance of a duty so important to a private person, whether or not such person was interested in the proposed improvement as a

prospective bidder or otherwise." The language just quoted, however, we think is not applicable to the facts of the case before us, for the reason that it does not here appear that the mayor attempted to altogether delegate the performance of his duty to a private person, but rather that he called to his aid a skilled and disinterested engineer, who, it is to be inferred, made the actual computations, but with whom the mayor consulted before filing the estimate which was adopted as his own. Other questions were involved in *Paving Co. v. O'Brien*, supra; and on the whole the facts were there such as to make the decision, we think, not persuasive authority upon the question under discussion.

Neither is the decision in *Rich Hill v. Donnan*, 82 Mo. App. 386, here controlling. It is there said: "In this case an estimate was made in the name of the proper officer of Rich Hill, but it was not made by him. He delegated that duty to one or two other persons. \* \* \* In answer to a question whether he made an estimate he answered: 'Mr. Tedford did for me, because I was working and probably away at that time; but if anything came up he was to attend to it, and, if my name was put to it, Mr. Tedford or Mr. Bird did it.' This was a wholly unwarranted proceeding. Instead of an estimate being made by the officer designated by law, we have one gotten up, for aught appearing to the contrary, by one of two private persons." It thus appears that in that case the estimate was in no sense made by the officer whose duty it was to make it; that he did not sign it, nor, for aught that appears, had he anything whatsoever to do with it. Manifestly he could not wholly delegate the performance of such duty, and authorize a private person to sign his name to any estimate which the latter might prepare.

Neither is what is said in *Boonville v. Stephens*, 95 S. W. 314, of consequence here. The language of the opinion referred to by appellants' counsel was used by the Kansas City Court of Appeals in passing upon the validity of an estimate made by a city engineer, which merely stated "that the work should be done at a cost not to exceed \$1.47 per square yard." The latter court held such estimate to be insufficient. The cause, however, was certified to the Supreme Court (see *Boonville v. Stephens*, 238 Mo. 339, 141 S. W. 1111), where the decision of the Kansas City Court of Appeals was reversed; the Supreme Court holding the estimate to be sufficient.

In the instant case, not only must the presumption be indulged that the mayor performed his duty with respect to the estimate signed and filed by him, but the agreement contained in the agreed statement of facts tends to confirm this, in that it appears that the mayor consulted with the engineer in question before filing the estimate. From this it is fair to conclude that the mayor sat-

ified himself as to the correctness of the estimate before he adopted and filed the same. If he did so, we think that he so far performed his duty in the premises that no error can be said to inhere in the proceedings in this respect.

[3] It is also earnestly insisted by learned counsel for the appellant that the mayor, who was not an engineer, was not a "proper officer" to make the estimate, within the meaning of the statute. At this particular time the city of Kirkwood had no city engineer. The statute provides that such estimate shall be made by the city engineer, or other proper officer, and it is contended that by "other proper officer" is meant an officer having special knowledge and skill with respect to such matters. It is true that there are opinions of the Kansas City Court of Appeals which contain language lending much support to this contention. In *Boonville v. Rogers*, 125 Mo. App. 142, 101 S. W. 1120, the only estimate of cost was: "Not to exceed \$300." It was held that this estimate was not a compliance with the statute; the court saying: "It was the intention of the lawmakers to protect the rights of the property owner, who has no voice in the making of such contracts, for which his property is taxed, from the ignorance or inexperience of the ordinary councilman in such matters and from the cupidity of contractors, and in furtherance of that intention has required, before any contract for improvements of the kind shall be made, an estimate of an engineer or other proper officer of skill with special knowledge of such matters and who are thereby enabled to give information approaching accuracy. An engineer is supposed to know, in the construction of a sewer, how much earth is to be excavated, how much material it will take to construct the sewer itself, how much dirt will have to be returned to the excavation, and all the minute details of the work; and by means of his knowledge and experience he is enabled to judge the probable costs of performing the work and the costs of the material to be used. These are matters of which the ordinary person has little or no knowledge." See, also, what is said in *Weesner v. Bank*, 106 Mo. App. 670, 80 S. W. 319, and in *Paving Co. v. O'Brien*, supra.

But despite such expressions of our Brethren of the Kansas City Court of Appeals, in cases where the precise point was not involved, the question appears to have been definitely decided by that court, contrary to appellants' contention, in *Fayette v. Rich*, 122 Mo. App. 145, 152, 99 S. W. 8, 10. There the court said: "If the city had an engineer, the statute did not in terms impose the duty on him of making an estimate of the cost of the sidewalk. Section 5985 [section 9407, supra] provides that such estimates may be made by the city engineer or other proper officer. It is left to the council to say what

officer shall make estimates of the cost of city improvements. Whoever that body selects, he, being an officer of the city, will be presumed to be qualified for the duty." This we think states the true rule upon the subject. The lawmakers evidently contemplated that many cities of the fourth class in this state would not have city engineers, and hence provided that the estimate might be made either by the city engineer or any other proper officer. It is quite clear that it must be made by an officer, acting, in the performance of his duty, under his oath of office. But it also seems quite clear that any officer designated by the board of aldermen must be presumed to possess the requisite qualifications for performing such duty. The making of such an estimate does not necessarily involve great technical skill, and it does not appear that the Legislature intended that it could be done only by an officer who is also an engineer. If this were true, many cities of this class would doubtless experience great difficulty in making public improvements.

[4] II. It is also urged that the contract price for the improvement in question exceeded the preliminary estimate, contrary to the provisions of the statute. Section 9407, supra. The statute provides that no contract shall be entered into for a price exceeding the estimate. And if the statute was violated in this respect, the contract was void and the tax bill necessarily invalid. The estimate filed by the mayor, in accordance with the provisions of Ordinance No. 572, supra, gave the estimated amount of each item of labor and material—i. e., for grading, macadam, gravel, curb and gutter, and for rolling the surface—together with the estimated prices thereof, per unit, and the total estimated price of each of such items, making the total estimated cost \$2,751.80.

The contractor's bid, upon which the contract with him was based, merely stated the prices, per unit, at which the contractor proposed to do the work; i. e., per cubic yard of grading, per square (100 cubic feet) of macadam and gravel, per lineal foot of curbing and guttering, and per day for rolling. These prices were less than those of the estimate, except for grading and gravel; that for grading being the same as the estimate, and the price for the gravel being 25 cents per square higher than the estimate. No amounts of the various items were specified in the bid, and no total or lump sum was stated. Neither did the city, in accepting the contract, specify any total amount for which the contract was entered into.

The record shows that the total cost of the work at the contract rates was \$2,628.72, being \$123.08 less than the total estimated cost. It was estimated that 67 squares of gravel would be necessary, whereas 72.4 squares thereof were required. Likewise there were 48.7 squares of macadam used,

while the estimate was 37 squares. The amounts of the other items were the same as or less than the estimates. It is contended that the bid was indefinite and uncertain, and that it might or might not have exceeded the total amount of the estimate, and that as the price of gravel in the bid was higher than in the estimate, and the contract ordinance agreed to pay the contractor the prices mentioned in his bid, the contract was in contravention of the statute.

But we are of the opinion that the contract entered into cannot be said to have been "for a price exceeding such estimate." The statute does not in terms require a bidder to name a specific price or gross sum. It merely provides that no contract shall be let for a price exceeding the estimate. The contract entered into was to the effect that the contractor should do the work in question at the prices mentioned in his bid, but without reference to the amount of the various items. It cannot be said that the contract was let for a price exceeding the estimate for the reason alone that the price per unit for one item was greater than that in the estimate, when the prices of the remaining items were less than those of the estimate, with the exception of one, which was the same. And though no total amount was stated in the bid, or the contract based thereupon, the amount agreed to be paid the contractor was limited to the total of the preliminary estimate by the contract ordinance and the other ordinances expressly called into the contract ordinance and made a part of the contract; that is to say, the contract ordinance provided that the work should be done in accordance with the provisions of Ordinance No. 574, *supra*, stating that the latter ordinance was made a part of the contract, and also provided that the work should be paid for, at the contract prices, by issuing special tax bills, "as provided in Ordinance No. 572, and not otherwise." Ordinance No. 574 provided that all matters connected with the work should "be governed by the general provisions of Ordinance No. 572," and that tax bills therefor should be issued in accordance with the latter ordinance. And section 26 of Ordinance 572 provided as follows: "In no event shall the sum to be paid to the contractor under his contract exceed the aggregate of the preliminary estimate made by the engineer or other proper officer."

The amount to be paid to the contractor was thus limited to the "aggregate of the preliminary estimate." In no event could he have received more. The total cost of the work was in fact less than the total of the preliminary estimate. And we think it clear that the statute was not violated, in that the contract entered into was for an amount exceeding the preliminary estimate. And we see no valid objection to the making of such a contract by the city. It permits the contractor to receive pay for the amount of la-

bor and material actually furnished by him, at the contract price, provided the total thereof does not exceed the total estimated cost of the work. On the other hand, it would appear that such a contract may be of advantage to the city, or to the property owners who ultimately pay for such work, in preventing the letting of the work at a lump sum higher than the reasonable cost of the labor and material entering into the same; for it is reasonable to suppose that a contractor, in bidding upon such work at a lump sum, will allow a reasonably safe margin, over and above his estimated cost of the whole, in order to guard against unforeseen difficulties arising in the progress thereof, or by way of allowance for errors in computation. We think that the contract made cannot be said to be contrary to either the letter or the spirit of the statute.

[5-7] III. It is further urged that the plans and specifications provided for in the ordinances above mentioned were so uncertain and indefinite "as to the line, grade, plan, form, and dimension of the work" as to render the tax bill void. The specifications provided were quite definite and explicit, and there is no contention that any error inhered in the proceeding in this respect, otherwise than because of the provision of section 16 of Ordinance 572, *supra*. That section provided as follows: "The street and alley committee shall have the right to make alterations in the line, grade, plan, form or dimensions of the work herein contemplated, either before or after the commencement of the work. If such alterations diminish the quantity of the work to be done, they shall not constitute a claim for damages or for anticipated profits on the work dispensed with; if they increase the amount of work, such increase shall be paid for according to the quantity actually done and at the price or prices stipulated for such work in the contract."

The street and alley committee was a committee of the board of aldermen, composed of three members thereof. And it is argued that the plans and specifications provided by the ordinances were rendered so uncertain and indefinite by reason of being subject to such changes and alterations as this committee might make in the work, even after the commencement thereof, as to render the entire proceeding void and invalidate the tax bill. It is true that it devolves upon the city authorities to determine upon definite plans and specifications for the proposed work, in order to impart definite information to prospective bidders respecting the improvement, and prevent favoritism and corrupt practices, and in order, as well, that property owners may have an opportunity to arrest the proceedings by a protest against it in the manner provided by the statute. See *Excelsior Springs v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701; *Ramsey v. Field*, 115 Mo. App. 626, 92 S. W. 350. But we think that the

proceedings here in question were not rendered invalid, and the tax bill void, by reason alone of the presence of section 16 in Ordinance No. 572, *supra*. It is true that that section attempts to authorize changes to be made after the plans and specifications have been adopted, and public notice given of them, and even after the letting of the contract. For this reason it is in plain violation of the mandatory provisions of the statute. Furthermore, this section is void because the board of aldermen thereby attempted to delegate to a committee the power conferred upon them by statute. See *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460; *Ramsey v. Field*, *supra*.

It quite clearly appears that this section is void, and it only remains to see what effect this should have upon the matter in hand. That it does not invalidate the entire ordinance of which it forms a part we think is likewise clear, for it may be altogether eliminated without in any manner affecting what remains. See *Haag v. Ward*; *Ramsey v. Field*, *supra*. Though, as a part of Ordinance 572, it was called into the contract, it was a void provision, and must be treated as a nullity. It is argued that its effect would be to deter contractors from bidding, because of the fact that the city thus undertook to reserve to itself the right, through the street and alley committee, to make alterations and changes in the work, rendering the extent and character thereof indefinite and uncertain. But all men are presumed to know the law, however violent such presumption may be; and it would seem that prospective bidders must be presumed to have known that this section was inoperative and void, and that their bids upon the work could not be thereby affected. And we think that it would be fair to assume that no one would be deterred from bidding upon the ground that the city might undertake to assert the right to make subsequent changes in the work under this section. The latter, being ineffectual and void, would furnish no protection whatsoever to the city in attempting to deviate from the definite and explicit plans and specifications which had been adopted. And it must be presumed that bidders would not be ignorant of this.

We are therefore of the opinion that a tax bill is not rendered void by reason of the presence of this section in the ordinance in question.

[§] IV. Much is said by learned counsel for the appellant to the effect that in a proceeding of this sort every provision of the law must be strictly followed. But this should be taken to mean, not a highly technical compliance with the requirements of the law, but rather a fair and reasonable observance of its provisions. With respect to this question it is said by Lamm, J., in *Gist v. Construction*

Co., 224 Mo. loc. cit. 379, 380, 123 S. W. 921, 924: "It is a fundamental proposition that laws, whether state or municipal, are presumed passed in a spirit of justice and for the welfare of the community. It follows they should be so interpreted, if possible, as to further that purpose. Therefore, while laws and ordinances anent the improvement of streets should be subjected to reasonable analysis and construction, yet they should not be subjected to an overnice analysis or to any unfriendly construction, springing from the notion that the contractor is prone to mischief or that street improvements are evils to be judicially circumvented."

It is true that the proceeding is in invitum, and the courts have ever jealously guarded the rights of the property owner, and required that the mandatory provisions of the law be fully complied with before his property shall be burdened with a special tax assessment for a public improvement. But this should not be regarded as meaning that questions raised with respect to such a proceeding, of a purely technical character, and wholly lacking in substance, should be allowed to prevail and to defeat a tax bill for work done by a contractor in good faith, and where the real and substantial rights of the citizen, which the law seeks to protect, have in fact been fully safeguarded. See, also, *Meyers v. Wood*, 173 Mo. App. 564, 158 S. W. 909; *Delmar Investment Co. et al. v. Lewis et al.*, 162 S. W. 675.

A consideration of the proceedings had upon which the tax bill here in question is predicated, as shown by the agreed statement of facts, has led us to the conclusion that there was in fact no failure to comply with the law, and that the tax bill should be held to be valid. It follows that the judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

#### GRIFFITH v. SUPREME COUNCIL OF ROYAL ARCANUM. (No. 13,577.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

#### 1. INSURANCE (§ 724\*)—FRATERNAL BENEFIT INSURANCE—WAIVER OF BY-LAWS.

Where the by-laws of a fraternal benefit society prohibit the local organizations from waiving any provision thereof, no waiver or estoppel may be invoked against the society based upon the acts of the local organizations or their officers, unless it has, through its general officers, authorized or recognized such waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866–1868; Dec. Dig. § 724.\*]

#### 2. INSURANCE (§ 755\*)—FRATERNAL BENEFIT INSURANCE—PAYMENT OF DUES—WAIVER.

A fraternal benefit society may waive its by-laws requiring prompt payment of assess-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ments, and declaring a forfeiture for failure to make prompt payments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

**3. INSURANCE (§ 756\*)—FRATERNAL BENEFIT INSURANCE—PAYMENT OF DUES—WAIVER OF TIME.**

If a fraternal benefit society by continued conduct induces a member to fall into the habit of delaying payment of dues until beyond the time at which the by-laws provide a member shall be suspended for nonpayment, it cannot, without warning to the member, suspend him and forfeit his rights for nonpayment at the time provided in the by-laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

**4. CORPORATIONS (§ 428\*)—AUTHORITY OF AGENTS—NOTICE.**

Notice to a corporation of matters affecting its rights will be deemed communicated to it if reported to any agent having authority to act for it in the particular matter, or whose duty it is to convey the information to the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\*]

**5. CORPORATIONS (§ 428\*)—OFFICERS—KNOWLEDGE.**

Corporations will be taken to have been advised as to facts within the knowledge of its officers, especially with respect to that part of the corporate business over which the officer has some control.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\*]

**6. INSURANCE (§ 695\*)—FRATERNAL BENEFIT INSURANCE—WAIVER OF BY-LAWS—NOTICE.**

In view of a by-law of a fraternal benefit society providing that the Supreme Treasurer shall perform all duties relating to the widows' and orphans' benefit fund, as prescribed in the general laws of the order, and of the fact that the benefit fund was derived solely through assessments on the members, and that the Supreme Treasurer knew of the practice of accepting assessments after they were due, knowledge by him of such practice is imputed to the society so as to authorize a finding of waiver by it of a provision of the by-laws suspending a member for nonpayment of assessments when due.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.\*]

**7. INSURANCE (§ 756\*)—FRATERNAL BENEFIT INSURANCE—NONPAYMENT OF DUES—ESTOPPEL.**

A fraternal benefit society which had knowledge, through its Supreme Treasurer, of the custom of a local council in not forfeiting the rights of members for nonpayment of assessments when due, pursuant to the by-laws, is estopped from invoking the by-law to forfeit the rights of a member without first giving notice to him and an opportunity to pay an overdue assessment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Action by Theo Buckner Griffith against the Supreme Council of the Royal Arcanum. From a judgment for plaintiff, defendant appeals. Affirmed.

F. H. Bacon, of St. Louis, for appellant. John H. Matthews and Joseph A. Wright, both of St. Louis, for respondent.

**NORTON, J.** This is a suit on a certificate of life insurance. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff, an infant, who sues by her next friend, is the daughter of George S. Griffith, the insured, and the beneficiary of the fund under the provisions of the certificate.

The insured defaulted in the payment of a monthly assessment of \$2.12 a few days before his death, and it is insisted plaintiff may not recover for the reason the insurance was forfeited, because of that fact, through the operation of defendant's by-law. But there is evidence tending to prove defendant waived this by-law in that it permitted a course of dealing between Compton Hill Council and the insured member which induced him to believe a forfeiture would not be invoked, and the assessment would be paid for him by the council, unless he was notified to the contrary. There is no controversy about the facts of the case, and the question for consideration relates alone to the waiver of the by-law referred to through a course of dealing well known to one of defendant's superior officers, its Supreme Treasurer, A. S. Robinson, a member of Compton Hill Council, and a consequent estoppel against defendant to assert the contrary, in view of the fact that the insured, plaintiff's father, relied thereon.

Defendant is a fraternal beneficiary society, incorporated under the laws of the state of Massachusetts, but duly qualified to do business here under the laws of Missouri. The society it represents is composed of a Supreme Council and numerous local, or subordinate, councils, one of which is Compton Hill Council, located in the city of St. Louis. Compton Hill Council consists of 1,056 members. The officers of the local, or subordinate, council elected by it are, among others: A secretary, who keeps a record of the proceedings of the semimonthly meetings; a collector, who collects the assessments; and a treasurer, who receives the money so collected by the collector and in turn pays it over to the Supreme Treasurer of the Supreme Council, A. S. Robinson, whose office is in the city of St. Louis. As before stated, A. S. Robinson, the Supreme Treasurer of the order, is a resident of St. Louis and a member of Compton Hill Council. The powers and duties of a subordinate council of the order, such as Compton Hill Council, are prescribed by the by-laws of the Supreme Council, among which is the following: "The council and its officers, in performing the duties and administering the powers provided by the laws of the order, shall be the agent or agents of the members thereof, and not of the Supreme Council, and no act or failure to act by the council, or by any officer or member thereof, shall create, or be construed so as to create, any liability on the part of the Supreme Council. Neither the council

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or its officers, or any one or more thereof, shall waive the performance of, or compliance with, any law or requirement of the Supreme Council, and such waiver shall be inoperative to bind, or create any liability upon, the Supreme Council."

The fund from which benefits are paid by the order is derived from the proceeds of monthly assessments. The assessments are payable to the collector of the subordinate council monthly, without notice, on or before 10 o'clock p. m. of the last day of each calendar month, and the penalty for nonpayment within the prescribed time is ipso facto suspension under defendant's by-law which, it is asserted, in the instant case, is waived.

Another by-law of defendant provides that a subordinate council is authorized out of a fund provided by it for that purpose to pay for its members an assessment or assessments as a loan or gift. But with respect to this matter it is also provided by defendant as follows: "A by-law or resolution whereby a council agrees to pay an assessment for a member as a loan is not binding upon the Supreme Council, unless it is complied with, and no claim of a member, in case the assessment is not paid, shall be recognized or valid. If the collector shall omit to pay, within the prescribed time, an assessment for a member, in compliance with such resolution or by-law, the member stands suspended at the expiration of the time for payment."

Compton Hill Council had established a code of by-laws under the powers conferred upon it by the Supreme Council, and one article of these, that is, the laws of the local council, provided for a special relief fund out of which the collector of the council was authorized to pay one assessment for any member who failed to pay his assessment within the prescribed time, and, if such assessment were paid out of such fund, to render a bill to the member for the amount, plus 25 cents fee for the use of this loan fund. No member was entitled under the by-law to the use of the fund for a second failure to pay, unless he had refunded the council the amount of the previous assessment paid by it for him. This fund belonged to the local council and was under its control, and not the property of the Supreme Council. Section 5 of the by-law of the local, that is, Compton Hill Council, relating to the special relief fund, is as follows: "The council shall not pay for any member's assessment from the special relief fund, unless he is recommended to be carried by the suspension committee as provided for in this article, or any member for more than two quarters' dues, except upon the personal application of a member or the written report of a brother in good standing to the effect that the delinquent is sick or in distress, and this application or report shall be made for each assessment or quarter's dues which a delinquent member is unable to pay."

The evidence is conclusive to the effect that, though these by-laws obtained, no heed was paid to them by Compton Hill Council and its officers, for it carried members and paid the assessments for those who were many months in arrears. Indeed, it is said by the secretary of the council that some members owed as much as \$50 in assessments at a time, and the council paid for them. Moreover, of the 1,056 members of Compton Hill Council, probably 100 were usually in arrears. It appears, too, the Supreme Treasurer of the order, A. S. Robinson, who was a member of Compton Hill Council, and attended its meetings as often as once a month, knew of and acquiesced in this custom and practice, for it had obtained from 12 to 14 years without protest from any one.

Though defendant's general by-law provides that each assessment shall be paid on or before 10 o'clock p. m. of the last day of the current month, and in event it is not so paid the membership and the insurance in the order were ipso facto forfeited, and though the by-law of the local council provided that no member's assessment should be paid from the relief fund, unless it be recommended by the suspension committee that such member be carried, the local council, with the knowledge of the Supreme Treasurer, A. S. Robinson, by its practice and established custom, reversed the latter rule entirely, for it appears that all members, though in default, were carried indefinitely, and the payment of assessments made by the council for them, unless the suspension committee recommended otherwise.

The evidence is conclusive, and no one denies it, that the local council had for years permitted its collector to pay out of its relief fund the assessment of every member in default, unless the suspension committee decided that such member should be no longer carried, instead of only paying for the members recommended for that purpose by the committee. Thus the by-law of the council touching this matter was reversed by the practice and custom which obtained, and it appears the insured here had been permitted to fall behind one time more than \$20 in his assessments. Indeed, he owed that amount on the 1st of January and paid a part or all of it some time thereafter before his death. It is conceded, however, that at the time of his death he owed but one assessment of \$2.12, which should have been paid, according to the by-laws, before 10 o'clock p. m. of June 30th, and he died suddenly on July 5th, but five days in default.

Although the local council permitted members to thus become several months in arrears and paid for them, the Supreme Treasurer for the Supreme Council received every month the money due for the assessment of every member of the council, except those the suspension committee had decided the council should not carry, as such members, it

is said, were suspended. In other words, the council would pay the assessment for all members who omitted to pay it themselves within the proper time, with the exception of those that the collector had been instructed by the suspension committee were suspended.

Plaintiff's father, George S. Griffith, became a member of Compton Hill Council and the order in January, 1903, and continued such for more than eight years, until he died, July 5, 1911. It appears that he had not attended the meetings of the council for some time, and that he was frequently in arrears with respect to the payment of his assessments.

Griffith had but recently been in arrears about \$20, and the secretary wrote him a letter in March that, unless he paid up, he would be suspended. Griffith informed the secretary he would pay up soon, and requested that his insurance be not forfeited. It appears that either Griffith or some one for him paid the amount of the arrears, and it is conceded that at the time of his death all of his assessments were paid save the one falling due in June, which was payable by the terms of the by-law not later than 10 o'clock p. m. on June 30th. The suspension committee met each month, but at no fixed date, and determined what members in arrears the council should not further carry. The practice was to make a list of such members as suspended and furnish it to the collector. This committee did not meet in June; but at the meeting July 3, 1911, of the council the suspension committee assembled and decided to drop several members, including the insured, Griffith, and he was accordingly entered on the list then made as suspended. He died suddenly two days thereafter, with the June assessment unpaid, and without having received any notice whatever of the action of the committee towards suspending him from the order.

It is insisted on the part of plaintiff that, though it appears her father, the insured, was in arrears as to the \$2.12 assessment from and after 10 o'clock p. m. on June 30th, his insurance and membership in the order were not ipso facto forfeited by virtue of defendant's by-law to that effect, for that the established custom of the local council with respect to such assessments, which, it is said, was well known to defendant, through the knowledge of its Supreme Treasurer, A. S. Robinson, both operated a waiver of the terms of such by-law and estopped defendant to assert the contrary until it notified the insured that the council would no longer pay his assessment, and thus afforded him an opportunity to secure his rights in the premises by paying for himself.

[1-3] On the part of defendant it is urged that neither a waiver appears nor an estoppel obtains in the case, for it is said the local council was expressly forbidden and inhibited from waiving the defendant's laws or afford-

ing a basis for an estoppel by the general by-laws of the order above set forth. There can be no doubt that such is the force and effect of the by-laws of the order relied upon, and, if nothing more appeared, the argument would prevail. Where it appears, as here, that the order pointedly inhibits the local council from waiving its rights, or affording a basis for an estoppel against it with respect to matters arising on its insurance contracts, except it appears the order has in some manner authorized the local council in that behalf, no waiver or estoppel may be predicated against it in respect of the acts of such local council or its officers alone. See *Clair v. Royal Arcanum*, 172 Mo. App. 709, 155 S. W. 892; 2 *Bacon's Benefit Societies*, etc. (3d Ed.) § 434a. But, though such be true, no one can doubt that defendant order may waive its by-law requiring prompt payment of the assessment, and declaring a forfeiture for a failure in that behalf, if it sees fit to do so. So, too, may the order become estopped by a course of conduct on its part toward the insured members with respect to the payment of assessments whereby such members are led to believe that a forfeiture of the insurance will not be declared for an omission to pay an assessment promptly, and especially is this true when a long course of dealing under an established custom to the contrary is revealed. The ground of estoppel is fraud, either actual or constructive, and the principal proceeds to either alleviate or repel it. It is said to permit the insurer, after having long dealt with the insured, by allowing assessments to be paid after defaults, to terminate the practice without warning whatever, and declare a forfeiture for a failure to promptly pay, would entail a fraud upon the member so led by usage to rely upon the prior conduct of the insurer. Therefore, if the order by its conduct induces the insured to fall into the habit of delaying the payment beyond the time its law stipulates as the day of suspension, it cannot, without warning to him of a change in its business conduct, inflict the penalty of a suspension and forfeit the member's rights. See *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384; *Courtney v. St. Louis Police Relief Ass'n*, 101 Mo. App. 261, 73 S. W. 878; 2 *Bacon's Benefit Societies* (3d Ed.) § 431. That such is the rule which obtains with respect to the order itself is not to be doubted.

[4-7] But it is said in the instant case the order possessed no knowledge of the custom which obtained for so many years in Compton Hill Council by which the by-law of the local council was reversed, and members were carried, through utilizing the relief fund of the council even though many months in arrears, for the payments were always made each month by the council on account of all members not suspended. It is true defendant order was unadvised with respect to this unless

the knowledge of Mr. A. S. Robinson, for more than a year its Supreme Treasurer, should be imputed to it. It appears Mr. Robinson was an active man in the order, and had been a member of Compton Hill Council for many years, and the evidence is positive that he was fully advised concerning this custom which had been followed in the council for 12 or 14 years. He attended, it is said, about every other meeting of Compton Hill Council, and was familiar with its course of dealing with members. Besides being the Supreme Treasurer of the order, Mr. Robinson was a member of its executive committee, which possessed the powers of a board of directors of a corporation under the laws of Massachusetts. As we understand it, he was, besides being Supreme Treasurer, a member of its board of directors as well, for such was the executive committee. It is the established law that notice to a corporation will be regarded communicated to it if communicated to any agent having authority to act for it in the premises, or to any agent whose duty it will be to convey the information to its board of directors. See 2 Thompson, Corporations (2d Ed.) § 1647. See, also, Hayward v. National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400. No one can doubt the duty of Mr. Robinson as a director of the corporation to convey such notice as he had concerning this practice to the board of directors, of which he was a member. Moreover, the principle is well established that a corporation will be regarded as being advised with respect to the knowledge of facts possessed by one of its officers during the time engaged in its business, and especially as to such facts as pertain to that branch of the corporate business over which the particular officer has some control. 3 Cook, Corporations (7th Ed.) § 727. The by-laws of defendant order provide that "the Supreme Treasurer shall perform all duties relating to the widows' and orphans' benefit fund, as prescribed in the general laws of the order." The benefit funds were derived solely through the assessment on the members, and it is certain that the practice with respect to collecting them was within the purview of the office of the Supreme Treasurer. It is therefore clear that the knowledge of the practice and custom which obtained in Compton Hill Council, possessed by its Supreme Treasurer, Mr. Robinson, is to be imputed to the defendant order, and especially is this true in view of the decisions in this state. In McMahon v. Maccabees, 151 Mo. 522, 52 S. W. 384, the knowledge of the Deputy Supreme Commander, charged with the duty of enforcing the laws of the order, was declared by the Supreme Court to be notice to the defendant order. So, too, in Burke v. Grand Lodge, 136 Mo. App. 450, 118 S. W. 493, knowledge of the Deputy Grand Master Workman, who, on one occasion, spoke in the lodge and indorsed its generous conduct toward the members,

was imputed to the order itself. In Oldham v. M. B. A., 170 Mo. App. 564, 157 S. W. 92, the knowledge of the state manager of the order with respect to the course of conduct of a local council in collecting the dues and assessments after due was imputed to the order itself. These cases appear to be conclusive on the question here in judgment, and especially so in view of the fact that Mr. Robinson acquiesced in the custom of Compton Hill Council in carrying its members without regard to the by-law declaring a forfeiture of their rights if the assessments were not promptly paid, for it is said he never at any time protested or complained about it. Under the rule of decision which obtains in Missouri, it is obvious it was competent for the jury to find, as it did, the automatic feature of defendant's by-law terminating the insurance at 10 o'clock p. m. on the last day of the month, if the assessment of the member was not then paid, was destroyed, that is, waived, by the established custom so acquiesced in by the order through its Supreme Treasurer. And, moreover, having thus eliminated this by-law, defendant is estopped from invoking it to forfeit the rights of the insured without notice to him by which an opportunity to pay the assessment was afforded. See Burke v. Grand Lodge A. O. U. W., 136 Mo. App. 450, 459, 118 S. W. 493; McMahon v. Maccabees, 151 Mo. 522, 52 S. W. 384.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE ex rel. JONES, Circuit Atty., v.  
HOWE SCALE CO. OF ILLINOIS.  
(No. 14,224.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

1. PENALTIES (§ 16\*).

Rev. St. 1909, § 3040, providing that foreign corporations failing to comply with the law shall "be subject to a fine" to be recovered in proceedings instituted by the prosecuting attorney, is not strictly criminal in character, but is remedial as well, and, while it may be an information would lie, the penalty may be recovered in a civil action, as the offense is not denounced as a misdemeanor like the offenses described in other sections relating to the same subject-matter, the word "penalty" being used interchangeably with that of "fine," and the direction to the prosecuting attorney to "institute proceedings to recover" such fine is suggestive of civil rather than criminal proceedings.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. §§ 13, 15, 16; Dec. Dig. § 16.\*]

2. PENALTIES (§ 1\*)—NATURE—"FINE"—"PENALTY."

While the word "fine" implies punishment for a criminal offense, it also implies a penalty, sometimes recoverable by civil action, and, while both words are suggestive of punishment, "pen-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



alty" is of broader significance, being a generic term which includes both fines and forfeitures.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2811-2816; vol. 6, pp. 5272-5276; vol. 8, p. 7750.]

### 3. STATUTES (§ 205\*)—CONSTRUCTION—GENERAL RULES—STATUTES IN PARI MATERIA.

While the court in interpreting a statute must ascertain and expound the intention of the Legislature from its words and context, other sections in pari materia, especially when part of the same act, may be looked to for aid in arriving at the true meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 252; Dec. Dig. § 205.\*]

### 4. DISTRICT AND PROSECUTING ATTORNEYS (§ 9\*)—POWERS.

A civil action to recover a penalty under Rev. St. 1909, § 3040, providing that proceedings to collect the same shall be instituted by the prosecuting attorney of the county, may be brought by the circuit attorney in the city of St. Louis, as the word "county" includes the city of St. Louis, which exists under an organization similar to that of a county, and, while it possesses a prosecuting attorney, his duties relate solely to criminal prosecutions, and under section 975 the circuit attorney in that city is charged with the same duties as prescribed by the article of which it is a part for prosecuting attorneys elsewhere, and section 1007 in the same article requires prosecuting attorneys to commence and prosecute all civil actions in which the state may be concerned.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 36, 37; Dec. Dig. § 9.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by the State, on the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis, against the Howe Scale Company of Illinois. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 161 S. W. 780.

McPheeters & Wood and Wm. R. Gilbert, all of St. Louis, for appellant. Seebert G. Jones and Forrest G. Ferris, both of St. Louis, for respondent.

**NORTONI, J.** This is a suit under the statute for a penalty. Defendant interposed a demurrer to plaintiff's petition, which was overruled by the court. Upon its demurrer being thus overruled, defendant declined to plead further and suffered judgment to go against it, as is frequently done in such cases. The appeal is prosecuted from this judgment, and the questions for consideration arise on the face of plaintiff's petition. The petition, omitting formal parts and signature, is as follows: "The state of Missouri, at the relation of Seebert G. Jones, circuit attorney of the city of St. Louis, for first amended petition states that in 1906 and up to the date of institution of the suit, the Howe Scale Company of Illinois was a corporation for pecuniary profit, organized under the laws of Illinois, and not a railroad nor an insurance company; that it was engaged, other than through drummers and

traveling salesmen, in manufacturing and selling scales, machinery, etc., in the state of Missouri, and that its principal office within the state was located in St. Louis; that defendant neglected and failed to file in the office of the Secretary of State of the State of Missouri a copy of its charter and articles of association duly authenticated by the proper authority, together with a sworn statement under its corporate seal, particularly setting forth the business of the corporation which it was engaged in carrying on or which it proposed to carry on in this state, and its principal officer or agent in Missouri had failed to make and forward to the Secretary of State, with the affidavits required, a statement sworn to of the proportion of the capital stock of said corporation represented by its property located and business transacted in Missouri, setting out the location of its principal office or place of business in this state for the transaction of its business where legal service might be obtained upon it, and had neglected to pay into the state treasury any incorporating tax or fee; 'whereupon plaintiff states that defendant is subject to a fine of not less than \$1,000,' as provided by section 1026, R. S. 1899, for which plaintiff asked judgment."

[1] The suit was instituted in the circuit court of the city of St. Louis, which possesses jurisdiction in civil cases alone, as, under certain provisions of the statutes, cases involving misdemeanors are committed to the court of criminal correction, and felonies to a separate division of the circuit court, possessed of jurisdiction in criminal cases. Because of this, it is urged on the demurrer that the court possessed no jurisdiction whatever over the subject-matter of the action, and the argument proceeds in the view that the offense for which the penalty is sought to be recovered is a misdemeanor under our statute because it is denounced through levying a fine therefor. The question thus presented is to be disposed of on a consideration of the statute declaring the penalty and authorizing its recovery. The statute on which the suit predicates is parcel of the provisions relating to foreign corporations which, in substance, prescribes conditions upon which they may be authorized to transact business in the state. The suit predicates on section 3040, R. S. 1909, which is as follows: "Every corporation for pecuniary profit, formed in any other state, territory or country, now doing business in or which may hereafter do business in this state, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than one thousand dollars, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the secretary of state, immediately after August 1, of the year 1891, and as often thereafter as he may be advised

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that corporations are doing business in contravention to sections 3037 to 3041, inclusive, to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and the prosecuting attorney shall, as soon thereafter as is practicable, institute proceedings to recover the fine herein provided for, which shall go into the revenue fund of the county in which the cause shall accrue; in addition to which penalty, on and after the going into effect of said sections no foreign corporation, as above defined, which shall fail to comply with said sections, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort: Provided, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this state; nor to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident."

[2] Because this statute declares such corporations as fall within its terms "to be subject to a fine," it is urged that it creates and denounces a misdemeanor which may be prosecuted alone in St. Louis in the court of criminal correction on information by the prosecuting attorney. The entire argument proceeds on and from the use of the word "fine," and this, too, on the theory that a fine obtains only as punishment for such an infraction of the law as constitutes a misdemeanor. It is true that the word "fine" in and of itself implies punishment for a criminal offense, but it is not true that this fact excludes every remedy other than a criminal prosecution to recover it. Indeed, the word "fine" implies as well penalty for the infraction of a statute prescribing an offense which, in some cases, may be recovered by civil action. Bouvier's Law Dictionary, in considering the word "fine" as it obtains in criminal law, says it intends "pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. It may include a forfeiture or penalty recoverable in a civil action." For a further consideration of the question, see *Hanscomb v. Russell*, 11 Gray (Mass.) 373; *Atchison & Neb. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356. It appearing, therefore, that the employment of the word "fine" in the statute does not in and of itself exclude the use of all remedies for its recovery, other than that by information on the part of the prosecuting attorney, as in strictly criminal cases, the argument is to be further considered by an interpretation of the statute to the end of ascertaining the intention of the Legislature in that behalf. When the statute is thoughtfully considered, it is to be noted first that it does not in terms denounce the offense contemplated therein as a misdemeanor. No apt words are employed to enforce such a conclu-

sion. Moreover, in a subsequent portion of the section the statute uses the word "penalty" interchangeably with that of "fine." However, this is of but slight significance in that penalty is a generic term which includes both fines and forfeitures. Both words are suggestive of punishment, but penalty is of the broader significance. See 13 Am. & Eng. Encyc. Law (2d Ed.) 53, 54.

[3] While in interpreting a statute it is the duty of the court to ascertain and expound the intention of the Legislature from its words and context, other sections in *pari materia*, and, especially, when parcel of the same act, may be looked to for aid in arriving at the true meaning. Upon considering some of the other sections in *pari materia* with this one, it appears certain omissions are therein expressly declared to be misdemeanors, whereas no such word appears here. By section 3044, R. S. 1909, it is expressly declared that the violation of any of the provisions of sections 3042 to 3047, inclusive, by any corporation "is hereby made a misdemeanor." But this does not include section 3040, now under review. It thus appearing that other sections in *pari materia* do not reveal an intention on the part of the Legislature to create a misdemeanor, so as to expressly require the penalty to be pursued by information as in criminal cases, the question is to be determined alone by reference to section 3040. It is true by that section the duty of collecting the penalty for the state is cast upon the prosecuting attorney of the county in which the business of such corporation is located, but that officer may invoke civil remedies on behalf of the state, as well as others, in proper cases. The direction to the prosecuting attorney with respect to the precise fine or penalty involved here is that "the prosecuting attorney shall \* \* \* institute proceedings to recover the fine herein provided for." These words are suggestive of civil rather than criminal proceedings in that the proceeding is to be instituted to recover. See *Stockwell v. U. S.*, 13 Wall. (80 U. S.) 531, 543, 20 L. Ed. 491. From the words and the context of the statute, it cannot be said to be designed entirely as strictly criminal or penal in character, but is rather intended to be remedial as well. Therefore, while it may be that an information would lie, it is competent to pursue and recover the penalty by a civil suit as here. See *Stockwell v. U. S.*, 13 Wall. (80 U. S.) 531, 20 L. Ed. 491; *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739; *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777; *United States v. Regan*, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. —; *Western U. Telegraph Co. v. State*, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82. Obviously the circuit court possessed jurisdiction of the subject-matter. Both this court and the Kansas City Court of

Appeals have proceeded in this view heretofore, as will appear by reference to State ex rel. Folk v. Missouri Exploration, etc., Co., 97 Mo. App. 226, 70 S. W. 1107; State ex rel. Nelson v. Pond Co., 125 Mo. App. 81, 115 S. W. 505.

[4] The demurrer challenges the right of the circuit attorney of the city of St. Louis to prosecute this suit under the statute, for it is said the prosecuting attorney alone is authorized to do so. The statute is a public one, designed to apply to the entire state, and employs the words "prosecuting attorney of the county." In such acts, the word "county" includes the city of St. Louis, which exists under a separate organization possessing similar attributes to those enjoyed by the counties in the state. It is true there is such an officer as the prosecuting attorney in the city of St. Louis, but his duties relate alone to the prosecution of misdemeanors and preliminary examinations with respect to felony charges in the court of criminal correction. By a general statute (section 975, R. S. 1909) the circuit attorney of the city of St. Louis is charged "with the same duties that are prescribed by this article for prosecuting attorneys throughout the state." But it is said the words "prescribed by this article" limit the duties of the circuit attorney of the city of St. Louis as by inhibiting him with respect to the instant case in that the statute (section 8040, R. S. 1909), above set forth, is not parcel of the article. It is true that section is not a part of the article referred to in section 975, but section 1007 is of the same article as is section 975, above referred to, and relates to the duties of prosecuting attorneys. By section 1007, the prosecuting attorney is required to commence and prosecute all civil actions in the respective counties in which the state may be concerned, and, of course, section 975, above referred to, charges the circuit attorney of the city of St. Louis with this duty as well. No one can doubt that the state is interested in the enforcement of its laws and especially those which present a penal character. Manifestly, the circuit attorney is charged with the duty of prosecuting this civil suit under section 1007, for the duties of the prosecuting attorney of the city of St. Louis are by other statutes carved out so as to relate alone to matters falling within the purview of the court of criminal correction. It seems that a suit similar to this one proceeded heretofore to judgment in this court in the case of State ex rel. Folk, Circuit Attorney, v. Missouri Exploration, etc., Co., 97 Mo. App. 226, 70 S. W. 1107, under a statute identical with this one, in so far as the precise question in judgment is concerned, and it was there said the circuit attorney of St. Louis was the proper officer to move in the premises.

Other questions presented by the brief are

concluded here by the judgment of the Supreme Court in this identical case, as will appear by reference thereto. See State ex rel. Jones v. Howe Scale Co., 161 S. W. 789. The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### STATE v. HUMFELD. (No. 14,225.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

##### 1. INDICTMENT AND INFORMATION (§ 110\*)—STATUTORY OFFENSE—EXCEPTION OF CLASS.

An indictment in the words of Rev. St. 1909, § 8315, forbidding the practice of medicine or surgery or the treatment of the sick, or representing or advertising oneself to be authorized to treat the sick, without a license from the state board of health, with a proviso that physicians registered on or prior to March 12, 1901, should be regarded as licentiates and registered physicians under the law, was sufficient, though it omitted the negative averment that defendant was not registered on or prior to that date, since that was matter of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

##### 2. INDICTMENT AND INFORMATION (§ 111\*)—STATUTORY OFFENSE—DESCRIPTION OF OFFENSE.

When a statute creating and defining an offense contains an exception or proviso constituting part of its description, it is essential to negative such proviso in the information, since the offense may not be described without so doing.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.\*]

##### 3. CRIMINAL LAW (§ 1037\*)—NECESSITY OF EXCEPTION—CONDUCT OF ATTORNEY.

To preserve for review statements of the prosecuting attorney alleged to be unwarranted by the evidence, a party must object to the improper remarks when made, call the attention of the court thereto, and, if the court fails to rebuke counsel as the circumstances may require, save an exception to the court's failure in that respect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

Appeal from Circuit Court, Franklin County; R. A. Breuer, Judge.

William C. Humfeld was convicted on a charge of practicing medicine and treating the sick without a license from the state board of health, and he appeals. Affirmed. See, also, 161 S. W. 735.

Jesse H. Schaper, of Washington, and Morris & Hartwell, of La Crosse, Wis., for appellant. Attorney General John T. Barker and Assistant Attorney General W. T. Ruth-erford, for the State.

NORTONI, J. Defendant was convicted on a charge of practicing medicine and treating the sick without a license first had and obtained from the state board of health, and this appeal is prosecuted from that judgment.

The principal question for consideration here relates to the sufficiency of the information in that it omits a negative averment to the effect that defendant was not registered on or prior to March 12, 1901, as is contemplated in the proviso to the statute under which the prosecution is had. The statute is as follows: "Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense. Any person filing, or attempting to file as his own a license of another, or a forged affidavit of identification, shall be guilty of a felony, and, upon conviction thereof, shall be subject to such fine and imprisonment as are made and provided by statutes of this state for the crime of forgery in the second degree. Said fines to be turned into the state treasury when collected: Provided, that physicians registered on or prior to March 12th, 1901, shall be regarded for every purpose herein as licentiatees and registered physicians under the provisions of this article." Laws 1901, p. 207, § 7, amended Laws 1907, p. 358, § 1; section 8315, R. S. 1909.

It will be observed that, by the proviso contained in the concluding lines of the statute, physicians registered on or prior to March 12, 1901, are exempted from the penalties prescribed in that they are to be regarded as licentiatees in accordance with other provisions of the article of which the section quoted is parcel. The information against defendant, and on which he was convicted, charges an offense in the language of the statute, but omits to negative the exception reflected in the proviso thereof. Because of this fact it is urged the information is insufficient in law, and that it should be so declared here. It appears that heretofore the court took this view of the matter and so declared the rule in *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035; *State v. Brand*, 153 Mo. App. 27, 131 S. W. 923; *State v. Hoelcher*, 163 Mo. App. 352, 143 S. W. 850. But the Supreme Court decision portraying

a contrary view in *State v. O'Brien*, 74 Mo. 549, was not called to our attention at that time. The case last cited is in point on the question now in judgment, for it presented the matter of an indictment preferred against one on the charge of practicing medicine under a statute containing a proviso very similar to the section above set forth.

[1, 2] When a statute creating and defining an offense contains an exception or proviso which constitutes a part of its description, it is essential to negative such exception or proviso in the information or indictment for the reason that the offense may not be described without so doing. See *U. S. v. Cook*, 84 U. S. (17 Wall.) 168, 21 L. Ed. 588. For a case highly illustrative under this rule and calling for a negative averment in the indictment, see *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427. Indeed, the doctrine obtains alike, though such proviso or exception is contained in a subsequent section, for, if it is descriptive of the offense, then negative words concerning it are to be employed in the information, to the end of bringing the charge within the exception or proviso and describing the offense with that clearness to which the accused is always entitled. See *State v. Hamlett*, 129 Mo. App. 70, 107 S. W. 1012. But, however this may be, in the instant case the proviso asserted as the exception is parcel of the statute creating and denouncing the offense. Touching such a statute and such a proviso, the Supreme Court thus stated the rule in *State v. O'Brien*, 74 Mo. 549, 551: "Whenever an exception is contained in the section defining an offense, and constitutes a part of the description of the offense sought to be charged, the indictment must negative the exception, otherwise no offense is charged. *State v. Meek*, 70 Mo. loc. cit. 357, 35 Am. Rep. 427; *State v. Shiffett*, 20 Mo. 415, 64 Am. Dec. 190. But where, as in the case at bar, the section which defines the offense contains a proviso exempting a class therein referred to, from the operation of the statute, it is unnecessary to negative the proviso, but the exemption therein contained must be insisted on by way of defense, by the party accused. *State v. Cox*, 32 Mo. 566; *State v. Shiffett*, 20 Mo. 417, 64 Am. Dec. 190, and authorities there cited."

The rule thus stated has been but recently quoted and affirmed by our Supreme Court in a case very similar to this one, involving a prosecution under the identical statute before us, as will appear by reference to *State v. Smith*, 233 Mo. 242, 253, 254, 255, 135 S. W. 465, 33 L. R. A. (N. S.) 179. See, also, to the same effect, *Kelley's Criminal Law & Practice* (3d Ed.) (Lee) § 193. It is entirely clear that the information is sufficient, though it contained no negative averment touching the subject-matter of the proviso, for as to this it devolved upon defendant to show the fact in defense. In so far as a contrary

rule is declared in *State v. Hellscher* and *State v. Brand* and *State v. Hoelcher*, *supra*, those three cases should be overruled.

[3] In concluding his argument for the state, the prosecuting attorney made some statements which it is said were unwarranted by the evidence, and it is urged the judgment should be reversed because of this fact. But these matters may not be reviewed here, for the reason no objection or exception was made to such remarks at the time. In order to preserve matter of this kind for review on appeal under our practice, it is incumbent on defendant to object to the improper remarks of the counsel at the time they are made and by calling the attention of the court thereto, and then, if the court fails to rebuke the counsel in such a manner as the circumstances may require, an exception should be saved respecting the failure of the court in that behalf. This course was not pursued here, and the subject-matter complained of must be regarded as waived by defendant, and thus precluded from review on appeal. *State v. Phillips*, 233 Mo. 290, 307, 135 S. W. 4; *State v. Groce*, 230 Mo. 702, 706, 132 S. W. 237.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

# AMERICAN SURETY CO. OF NEW YORK v. FRUIN-BAMBRICK CONST. CO. (No. 13,580.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

## 1. ASSUMPSIT, ACTION OF (§ 6\*)—GROUNDS—EXPRESS CONTRACT.

Plaintiff cannot recover in indebitatus assumpsit on the quantum meruit, where there is an express contract yet open that is not rescinded or executed; but, where such contract has been fully performed by him, and nothing remains except for defendant to pay money in consideration thereof, plaintiff need not declare specially on the contract, but may recover on an indebitatus assumpsit account as for the reasonable value; plaintiff in such case not repudiating the contract, but, under the common count, offering it in evidence to sustain his case and as proof of compliance with its terms.

[Ed. Note.—For other cases, see *Assumpsit*, Action of, Cent. Dig. §§ 27-36; Dec. Dig. § 6.\*]

## 2. ASSUMPSIT, ACTION OF (§ 25\*)—EVIDENCE—CONTRACT.

Defendant company in 1895 entered into a contract with a city for the construction of a street, and for its maintenance for 15 years after construction, and procured from plaintiff a surety bond conditioned for its faithful performance, and agreed to pay reasonable compensation therefor by way of a premium; such reasonable value being a premium amounting to \$800 for the full term, payable \$100 in advance for the first year and \$50 in advance per annum thereafter, and paid such premiums to the year 1898, after which they were paid until 1906 by its assignees. *Held*, upon a count in indebitatus assumpsit as for a quantum meruit

for premiums for 1907, 1908, and 1909, brought after plaintiff's performance of the surety contract, that it was competent to look to the contract between the parties to determine the time the premiums sued for were due.

[Ed. Note.—For other cases, see *Assumpsit*, Action of, Cent. Dig. §§ 153-155; Dec. Dig. § 25.\*]

## 3. ASSUMPSIT, ACTION OF (§ 28\*)—MEASURE OF DAMAGES—CONTRACT.

In such case the contract controls, and recovery must be ascertained according to its terms but for the reasonable value, not exceeding the contract price; and the contract alone affords sufficient prima facie evidence of the reasonable value.

[Ed. Note.—For other cases, see *Assumpsit*, Action of, Cent. Dig. §§ 156-161; Dec. Dig. § 26.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by the American Surety Company of New York against the Fruin-Bambrick Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. Mayner Wallace and Barclay, Orthwein & Wallace, all of St. Louis, for appellant. Geo. E. Egger, of St. Louis, for respondent.

NORTONI, J. This is a suit on an implied contract to reasonably compensate plaintiff for executing certain surety bonds at the instance of defendant and for its benefit. Plaintiff recovered, and defendant prosecutes the appeal.

The suit, in the first count, proceeds to recover the three last annual installments of the premium on the surety bonds in quantum meruit, and the matter for consideration presents the question as to whether or not it is competent to look to the contract between the parties to determine the time the several installments sued for were due. Defendant seems to concede the obligation to pay the premium in the first instance, but pleads the statute of limitations, on the theory that the debt is an entire one which accrued in August, 1895, when the surety bonds were executed, and that in this form of action the special contract between the parties, fixing its payment in annual installments, may not be reckoned with whatever.

It appears plaintiff is a surety company incorporated and doing business in the state of New York, while defendant is an incorporated company under the laws of Missouri, engaged in the business of constructing streets under contracts with municipalities. In 1895, defendant embarked in business in the city of New York, and entered into several contracts with that city for the construction and maintenance of a number of streets. Defendant entered into 22 separate contracts with the mayor and board of aldermen of the city of New York for the construction and maintenance of as many streets, and it became its duty thereunder to furnish a bond in connection with each contract, with satisfactory surety thereon, for the faithful discharge of such contracts. The contracts re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quired not only the construction of the streets, but their maintenance as well by defendant for a period of 15 years after such construction was completed. Having entered into such contracts with the city of New York, defendant procured the services of plaintiff surety company in executing 22 separate bonds, conditioned for their faithful performance, and agreed to pay reasonable compensation to the surety company therefor by way of a premium which, it appears from the evidence, was payable in annual installments for the term. This suit proceeds in 22 separate counts for certain annual installments of premiums due and unpaid on each of the 22 separate bonds so executed by plaintiff at the instance and request of, and to the benefit of, defendant. However, by a stipulation in the record, it is provided that, as the same questions arise on all of the counts of the petition, the case made on the first one alone is to be considered, and the others should abide the result.

The surety bonds appear to have been executed on the 17th day of August, 1895, and it is said the reasonable value of the services of the surety with respect to the \$10,000 bond mentioned in the first count of the petition was a premium amounting to \$800 for the full term, payable \$100 in advance for the first year, and \$50 in advance per annum thereafter. All of the installments of the premium on this bond were paid, save the three last; that is to say, one installment of \$50 due November 25, 1907, one installment of premium due November 25, 1908, and one installment of premium due November 25, 1909. The three installments last mentioned were not paid, and the cause of action declared upon in the first count of the petition is for \$150 as the reasonable value for the services of the surety during the three last years prior to the expiration of the maintenance period for which it stood surety under defendant's contract with the city. Of course, if defendant paid the several installments of premium as they fell due from 1895 until 1906, no question under the statute of limitations could possibly arise, for such payments would toll the statute. But it is insisted by defendant that it made no payment of premium whatever after the year 1898. It appears that, although defendant, Fruin-Bambrick Construction Company, entered into the contracts in New York in 1895, and executed the bonds with plaintiff as surety thereon, at that time, in the year 1898, it sold its business to another company—that is, the Fruin-Bambrick Paving Company, a New York corporation—and withdrew entirely therefrom. Thereafter the New York corporation, the Fruin-Bambrick Paving Company, sold its business, including the same contracts, to the Barber Asphalt Company, and it is said all of the installments of premiums on the bonds for which defendant had become liable in the first instance were paid during the years 1899, 1900, 1901, 1902,

1903, 1904, 1905, and 1906 by the two latter companies. Because of these transfers, and because of the fact that defendant made no payment on the premium after 1898, it is insisted the five-year statute of limitations obtains in its favor with respect to the installments of premium here sued for—that is, those falling due November 25, 1907, November 25, 1908, and November 25, 1909—for that the payments made during the years between 1898, when defendant withdrew from New York, and 1906 were made by the other companies which continued the contracts, and not by defendant, so as to toll the statute of limitations, in so far as its rights are concerned. This argument predicates, of course, upon the proposition that the entire premium of \$800 became due and payable and the right to sue therefor accrued when the bond was executed August 17, 1895. It is obvious that the argument is unsound in the instant case; for it appears in the evidence that, by the contract between the parties, the premium was payable in annual installments, and that a reasonable compensation for the services was \$100 for the first year and \$50 per annum thereafter. Indeed, in furtherance of the contract to pay in installments, defendant made the first payment of \$100 at the time the bond was executed, and \$50 annually thereafter during the years of 1896, 1897, and 1898. So much is conceded in the case.

But, it is argued, in this form of action declaring upon the implied contract to pay the reasonable value for services rendered, the compensation is to be regarded as due and payable, and the cause of action therefor accrued at the time the service is rendered, and the contract specifying the contrary as by fixing installment periods may not be looked to at all. The argument predicates upon and proceeds entirely from what is said in *Reifschneider v. Beck*, 148 Mo. App. 725, 735, 736, 129 S. W. 232, to the effect that, if a party sues on a quantum meruit, he cannot recover on a special contract, if one is proven. But this statement is broader than the law warrants.

[1] It is well settled that a plaintiff cannot recover in *indebitatus assumpsit* on the quantum meruit where there appears an express contract yet open; that is, not rescinded or executed. See *Stollings v. Sappington*, 8 Mo. 118. But beyond this the rule is without avail; for, where an express contract has been fully performed by plaintiff on his part, and nothing remains to be done, except for defendant to pay money in consideration of plaintiff's performance, plaintiff need not declare specially on the contract, but may recover on an *indebitatus assumpsit* count as for the reasonable value. See *Ingram v. Ashmore*, 12 Mo. 574; *Stout v. St. Louis Tribune Co.*, 52 Mo. 342; 4 *Ency. Pl. & Pr.* 923; *Mansur v. Botts*, 80 Mo. 651; *Redman v. Adams*, 165 Mo. 60, 65 S. W. 300; *Williams*

v. Chicago, etc., R. Co., 112 Mo. 463, 491, 20 S. W. 631, 34 Am. St. Rep. 403. In such a case it is said the plaintiff does not repudiate the contract nor seek to avoid it, but, under his common count in indebitatus assumpsit as for a quantum meruit of compensation, he offers the contract in evidence to sustain his case and his proof of compliance with its terms. See *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463, 491, 20 S. W. 631, 34 Am. St. Rep. 403. In all such cases, where the plaintiff sues in indebitatus assumpsit as for quantum meruit, on the theory that he has fully performed the contract, and nothing remains but for the defendant to pay him, his recovery is to be for the reasonable value, but not exceeding the contract price. See *Mansur v. Botts*, 80 Mo. 651; *Plummer v. Trost*, 81 Mo. 425, 430; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; *Monarch Metal Weather-Strip Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858.

[2] It is conceded that plaintiff's contract was fully performed in the instant case, and the evidence is that the entire premium charged, divided in installments for payment, is reasonable compensation for the services rendered. From what has been said, it is entirely clear that the evidence tending to prove the contract between the parties to the effect the premium was to be paid in installments on the 25th day of November each year is entirely competent, though the suit proceeds on the implied promise for reasonable compensation, and that such stipulation with respect to the time of payment must control as to the rights of the parties in judgment here. The authorities sustaining this view are abundant, and all to one effect. In *Neenan v. Donoghue*, 50 Mo. 493, our Supreme Court said that the contract between the parties in such a case is to be "used as an instrument of proof." See, also, to the same effect, *Stockman v. Allen*, 160 Mo. App. 229, 232, 142 S. W. 744; *Stout v. St. Louis Tribune Co.*, 52 Mo. 842. In *Dermott v. Jones*, 2 Wall. (69 U. S.) 1, 9, 17 L. Ed. 762, the Supreme Court of the United States expressly decided that, in a case in indebitatus assumpsit on quantum meruit, the contract is proper in evidence, and that it is to determine the rights of the parties. To the same effect is *Mansur v. Botts*, 80 Mo. 651, 655; *Plummer v. Trost*, 81 Mo. 425, 430. So, too, in *Beagles v. Robertson*, 135 Mo. App. 306, 324, 115 S. W. 1042, this court declared that, a special contract having been established: "The rights of the parties were to be determined in accordance with it." See, also, to the same effect, *Fox v. Pullman Pal. Car Co.*, 16 Mo. App. 122.

[3] Then, too, in the leading case of *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 406, the court, in discussing the plaintiff's count in indebitatus assumpsit as for a quantum meruit,

put the question as to what effect the contract in evidence should be given, and answered that it must control. The court said: "Having held that plaintiffs, under the allegations of their petition, could show the amount and value of their labor, not exceeding the contract price, the question necessarily arises: What effect is to be given the contract in such a case? We answer that the contract must still control." Further on it is said, in the same opinion, that the recovery must be ascertained according to the terms fixed by the parties in the contract but for the reasonable value, not exceeding the contract price. Moreover, it is abundantly established, too, that, in the absence of other evidence, the contract may be looked to for the price, and that it alone affords sufficient evidence prima facie of the reasonable value. *Rude v. Mitchell*, 97 Mo. 385, 11 S. W. 225; *Redman v. Adams*, 165 Mo. 60, 65 S. W. 300; *Monarch Metal Weather-Strip Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858. From this array of authorities on the subject, it appears to be entirely clear that it was competent for plaintiff to prove, as it did, that, by the terms of the contract, the installments of premiums here sued for were not due until November 25, 1907, November 25, 1908, and November 25, 1909.

This being true, it is obvious the statute of limitations is beside the case and without avail, for the cause of action concerning them did not accrue until then.

The judgment should be affirmed.

It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J., concurs in the result and in all of the opinion, except as to what is said about the rule being stated too broadly in *Reifschneider v. Beck*, 148 Mo. App. 725, 129 S. W. 232. Standing alone, the statement of the rule is too broad, but, considering those words in connection with the context, he does not think they are.

#### HARRIS v. MISSOURI PAC. RY. CO. (No. 13,803.)

(St. Louis Court of Appeals. Missouri. Jan. 6, 1914. Rehearing Denied April 24, 1914.)

#### 1. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A brakeman on a work train, who goes beneath a car of the train to make slight repairs without giving any of the trainmen notice of his intention so to do is guilty of contributory negligence, precluding a recovery for injuries caused by a movement of the train, unless the trainmen knew the facts or the circumstances were such as to imply notice to them, or unless they were charged with the duty of warning the brakeman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

**2. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—NEGLIGENCE.**

A conductor in charge of a work train standing on a siding waiting for the passing of a passenger train, who directed a brakeman to couple the cars of the train, separated to permit a crossing, and who also stated that on the arrival of the passenger train the work train would shove out, did not thereby assure the brakeman that the train would not be moved without giving him notice, and he was not justified in going under a car to make slight repairs without giving notice to any of the trainmen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

**3. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—NEGLIGENCE.**

A brakeman, suing for injuries caused by a movement of the train while he was under a car repairing defects, may not show the custom as to starting trains among railroad crews with which he has worked, but may show either a universal custom or the custom of the conductor in charge of the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**4. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE.**

Evidence that a conductor in charge of a work train generally noticed where his men were before he gave signals to start the train, and that it was his duty to know where his men were, did not show a custom of the conductor not to start his train before notice to the crew of his intention to do so, and did not relieve a brakeman, going under a car of the train to repair defects, of the charge of negligence for his failure to give notice to the trainmen of his intention so to do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**5. EVIDENCE (§ 471\*)—LEGAL CONCLUSION OF WITNESS.**

The statement of a witness that it was the duty of the conductor in charge of a work train to know where his men were before signaling the train to start was but a legal conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**6. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—CUSTOM.**

Evidence that the engineer in charge of a work train, on receiving a signal from the conductor to start, generally whistled and then looked for a signal from the crew to let him know where they were, and that the conductor was alone authorized to give such signal, did not show a custom of the engineer to wait for a second signal before starting, on receiving a signal from the conductor, so as to relieve a brakeman, going under a car to make repairs, of the charge of negligence because of his failure to notify any of the trainmen of his intention so to do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**7. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

Where, in an action for injuries to a brakeman going under a car of a train to make slight repairs, caused by a movement of the train on a signal by the conductor, there was evidence that the engineer, a short time before receiving the signal to move, had heard a noise made in the air pump on the engine, but such noise did not indicate that an employé was be-

neath a car, but would indicate that an employé, engaged in looking after the air-brake connections, could not be beneath a car, but might be between cars, and that one could adjust the air-brake connections without placing himself in any danger, the engineer was not, as a matter of law, guilty of negligence in starting the train on the signal of the conductor without first giving signals to the train crew of his intention to move the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**8. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

A brakeman on a work train, who, in the line of his duty to inspect the cars while the train was standing on a siding, went under a car to make repairs without giving notice to any of the trainmen, while in such cases the engineer was notified so that the train might not be moved, was guilty of contributory negligence, as a matter of law, precluding a recovery for injuries caused by a movement of the train, especially where each member of the crew was supposed to look out for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

**9. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

An employé may not rely entirely on the obligations of others to observe care for his safety, and himself disregard the dictates of prudence, but he must use reasonable precautions for his own safety, and then, in the absence of knowledge to the contrary, he may act on the presumption that others will not be negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Edgar B. Harris, against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

James F. Green, of St. Louis, for appellant. George Safford, of St. Louis, for respondent.

ALLEN, J. This is an action to recover damages for personal injuries suffered by plaintiff, while in the employ of defendant company, and alleged to have been sustained by reason of the negligence of defendant's agents and servants. Plaintiff recovered, and the case is here upon defendant's appeal.

At the time of plaintiff's injury, to wit, August 21, 1909, he was employed as brakeman upon a "work train" of defendant, and had been so employed and working with the train crew thereof since the ninth of the same month, a period of 12 days. Upon the day in question this work train consisted, it seems, of about 21 cars and the engine and caboose, and prior to the time when plaintiff received his injury, it had been standing for some time upon a siding at Bushong, Kan., waiting for a passenger train, known as No. 4, to pass that place. It appears that the tracks at this point extend nearly east and



west, and that the train was standing west of the station at this place, the caboose being near the latter. It seems that, as the train was then made up, there were three cars between the caboose and the engine; then came the engine, which was headed west, and beyond or west of that was what is termed a "ledgerwood" car, which is a work car, equipped with certain machinery, and beyond that about 17 "flat" cars. While the train was thus waiting at this place, it had been separated in order to leave open a public crossing a little distance west of the depot. In other words the train crew "cut the crossing," as it is termed, leaving the "ledgerwood" car, and all the other cars beyond that, west of the crossing, and the engine, three cars and caboose east thereof.

It appears that the train was thus standing on the side track, about noon of the day in question. Plaintiff testified that the conductor and other members of the train crew left it to go to lunch, but that he remained in the caboose and ate his lunch there, and afterwards shaved himself; that while he was shaving the conductor returned, and told him to go and "couple up the crossing" when he had finished shaving, saying that when No. 4 came they would "shove out." When plaintiff had finished shaving he "coupled up the crossing," i. e., caused the cars to be moved together and coupled. It appears that thereafter plaintiff started to "go over" or look over the train, going along and testing the air-brake connections, etc. He thus went along nearly the entire train until he came to the second or third car from the "head end," i. e., the west extremity of the train, which was about 14 or 15 car lengths from the engine. He testified that he saw some loose taps on the "draft timbers" beneath this car, such timbers being situated above the trucks at the west end of the car. He thereupon crawled under the car to tighten these taps, without notifying any one of his intention so to do. This placed him, it seems, immediately in front of or east of the wheels of the west truck of the car.

It appears that after the conductor had directed plaintiff to "couple up the crossing," the latter consumed perhaps 10 or 15 minutes in completing his shaving, then coupled the cars at the crossing. What time elapsed after that before he was injured is a matter in dispute, but plaintiff testified at the trial that it was about 10 minutes. During this latter period, i. e., after the crossing had been coupled up, and while plaintiff was going over the train, the conductor received word that passenger train No. 4 had been "ditched," and he thereupon signaled the engineer to pull out the train toward the east. The engineer, after blowing his whistle three times in quick succession, as it seems, at once proceeded to move the train toward the east, or to "pull out," as the trainmen called it, since the greater part of the train was

then back of the engine as it thus moved. Plaintiff at this time was underneath the car aforesaid, and situated immediately in front of the rear trucks thereof. He attempted to get out from under the car, but in doing so his arm was caught under the wheels and mangled so that it was necessary to amputate it. And this suit is for the damages and loss thereby sustained.

Appellant's brief before us is directed chiefly to the action of the trial court in overruling its demurrer to the evidence, though other assignments of error are made. And appellant's position is that no negligence was shown on the part of its agents and servants in charge of the train, and that plaintiff, in going under the car as he did, without notice to the conductor, engineer, or any one else of his intention to do so, was guilty of such negligence as to preclude a recovery for the injuries thereby sustained. Plaintiff introduced in evidence a statute of the state of Kansas, in force at the time of the injury, the essential part of which is as follows: "Every railroad company organized or doing business in the state of Kansas shall be liable for all damages done to any employé of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damage; provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury; provided, however, that where an action is commenced by the injured person within said eight months, it shall not be necessary to give said notice." This action was begun in the circuit court of the city of St. Louis, returnable to the April term, 1910, of said court, and within eight months after plaintiff received his injuries. Defendant, on the other hand, placed in evidence a decision of the Supreme Court of the state of Kansas, showing that the doctrine of comparative negligence does not obtain in the courts of said state, but that the latter recognize and enforce the doctrine of contributory negligence prevailing in this state; said case being that of *Mo. Pac. R. R. Co. v. Walters*, 78 Kan. 39, 96 Pac. 346.

[1] I. There can be no doubt, we think, that the general rule must obtain that unless those in charge of a train or locomotive know that an employé is beneath a car, or unless the circumstances are such as to imply notice to them that such may be the case, or they are in some way charged with the duty to warn such employé, the latter in going beneath a car, without any notice whatsoever of his intention so to do, is guilty of such negligence as to preclude a recovery for injuries sustained by reason of said car being moved in the course of the conduct of the railroad company's business. On this question, in

general, a text-writer says: "Just as it is contributory negligence for a stranger to climb over stationary cars, because of the great danger involved in the undertaking, it is held contributory negligence for an employé or third person to crawl under a car or locomotive without first notifying the party in charge of it of such intention on his part." 1 White, Personal Injuries on Railroads, § 415. But whether or not an employé should be held guilty of negligence as a matter of law in going beneath a car without notice or warning to others of his presence there must of course depend upon the circumstances involved. The case before us differs considerably from those in which a car repairer or car cleaner is at work upon a car, which forms no part of a train, but which has been placed upon a side track, or somewhere in the railroad company's yards, for the purpose of being repaired or cleaned, though it is somewhat analogous to such cases. There may, of course, be either a rule or an established custom to the effect that men so working about or beneath detached cars, standing upon side tracks or in railroad yards, are to be notified or warned of the movement or disturbance of such cars; and, under such circumstances, they may rely upon such warning being given. On the other hand, it may be the rule or custom for an employé so working upon or beneath a car to put out a flag or other signal to indicate his presence there; and, where such is the case, he is generally, if not universally, held guilty of negligence as a matter of law where he fails to give such warning.

In *Kettlehake v. Car & Foundry Co.*, 171 Mo. App. 528, 153 S. W. 552, the action was for the death of a car repairer who, while working under a car, was run over by reason of a train of cars striking the same. The evidence went to prove an established custom on the part of the defendant's employés in charge of its trains to give warning of the approach of a train or locomotive to cars situated as was the one that was being repaired; and there was evidence pro and con as to whether this custom had been complied with. This court held that the facts were sufficient to make out a case for the consideration of the jury; it not appearing that the deceased was required to give notice of his presence beneath the car, but that defendant's employés in charge of its train should have known that he was there, repairing the car which had been placed there for that purpose, and, under the facts in evidence, were charged with a duty to warn him.

And in *Weaver v. Railroad*, 170 Mo. App. 284, 156 S. W. 1, the plaintiff was injured while cleaning a Pullman car standing in the yards of the defendant railroad company. There was evidence tending to show that it was an unusual practice, and one of which the plaintiff had not been informed, and of

which she had no knowledge, for a train to be backed against one of these cars while it was being thus cleaned. There was no rule or custom shown requiring any flag or other signal to be displayed showing that cleaners were at work in the car; but the cars were left upon this track for this express purpose, which the defendant's employés in charge of its train knew. The Kansas City Court of Appeals held that the defendant railroad company owed plaintiff the duty of not moving the train in a manner to endanger the safety of plaintiff and other cleaners at work upon the train, without giving them warning of such intended movement thereof.

In *Illinois Central Railroad Co. v. Paneblango*, 227 Ill. 170, 81 N. W. 53, the plaintiff, a track laborer, lived in a "boarding car," which was standing upon a side track coupled with others and with the brakes set. He was injured while crawling beneath the car in going for water for cooking purposes, as was the custom of such laborers at the time. It was held that the defendant company owed him the duty of not suddenly moving the cars without notice or warning, when it knew, or was charged with notice, that he and other such laborers were accustomed to crawl under the car in going for water.

But in *Van Camp v. Railroad*, 141 Mo. App. 344, 125 S. W. 530, a car repairer was killed by reason of the car upon which he was working being struck by another car switched upon the same track by the defendant's servants. The company's rules provided that one at work repairing such a standing car should put out a blue flag as a warning to others not to disturb the car. The deceased, at the time in question, was at work upon the car without putting out such flag; and he was held to be guilty of negligence, a matter of law, precluding a recovery by his widow for his death.

And in *Renfro v. Railway Co.*, 86 Mo. 302, the deceased, a car repairer, likewise went under a car for the purpose of repairing it without putting out a flag, or having some one on watch, as the rules required, and it was held that because of his negligence in the premises the plaintiff, his widow, could not recover for his death.

In *Alabama, etc., Ry. Co. v. Roach*, 116 Ala. 360, 23 South. 52, plaintiff was a car inspector, and on the day of the accident several cars were standing upon a track in defendant's yards. Other cars were being continually run in upon the various tracks. Plaintiff went under one of the standing cars to inspect it, without giving notice to the yardmaster, switch foreman, or any one else of his intention to do so, and without putting out any signal or warning, and was injured by reason of other cars being run against the car which he was thus inspecting. It was held that he was guilty of such negligence as to preclude a recovery. The court said: "The rule is well settled

upon sound principles of law that the proximate contributory negligence of a plaintiff will defeat a recovery based upon the simple negligence of the defendant. \* \* \* If these facts do not show contributory negligence as a matter of law, the rule had better be abolished." See, also, *Southern Pacific Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 838, 40 L. Ed. 485.

II. It will be readily seen that the cases to which we have just referred turn upon the question as to whether, under the facts of the particular case, it was the duty of the deceased or injured employé to give warning of his presence upon or beneath the car, or whether it was the duty of the defendant's servants in charge of its locomotive or train to give warning of any movement or disturbance of the car in question. In the instant case the car upon which plaintiff attempted to make some slight repairs formed a part of a train standing upon a siding, with locomotive attached and all coupled up and connected, in condition to be moved at any time. Plaintiff admits that he notified neither the conductor nor the engineer of his intention to go beneath the car; and all of the evidence tends to show that no one about the train knew that he had done so. His case, however, is bottomed upon the theory that the circumstances were such as to show negligence on the part of the conductor and the engineer; and that they should have known that it was likely or probable that he would place himself in a dangerous position, in the performance of his duty in "going over" the train; and that therefore they were guilty of negligence in moving the train, without giving him sufficient warning to enable him to get out of danger; and that he was guilty of no negligence, under the circumstances.

In *Spencer v. Railway Co.*, 130 Ind. loc. cit. 183, 29 N. E. 916, an employé went beneath a locomotive for the purpose of cleaning it, while it was standing upon a "switch track," and was injured by the engineer putting the locomotive in motion; the court said: "It was not negligence on the part of the persons under whose direction he [plaintiff] was working to order him to clean the engine, which at the time was standing still on the track. They had the right to presume, although he was inexperienced in the work, that he would exercise some degree of care to avoid injury. They did not order him to go under the engine, or, for anything that appears in the complaint, had any reason to suppose that he would place himself in that dangerous position. *Atlas Engine Works v. Randall*, 100 Ind. 293 [50 Am. Rep. 798]. It is not alleged that he notified the engineer or other persons in charge of the engine that he was going under it, or that they had any notice or knowledge of that fact. Under these circumstances it does not appear that the employés in charge of the engine were guilty of negligence in putting it in motion;

but it does appear that the appellant was guilty of negligence, contributing to the injury, in placing himself in this dangerous position without first warning the engineer. It was the assumption of a needless risk on his part. The general averment of want of negligence on his part is controlled by the specific allegations of fact which show that he was negligent."

In *Norfolk R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604, the plaintiff was injured while in defendant's employ as a helper to the "overhauler" in the defendant's railway yards. He went beneath a car, to which a locomotive was attached without the knowledge of the engineer in charge thereof and was injured by the movement of such locomotive and car. The court said: "He [plaintiff] was in a position to see all and to hear all that occurred, and when he went under the car he must have known that he was going into a place of danger, and that no one had been charged with any particular duty to look out and warn him of approaching danger. To go under a car, under such circumstances, to which an engine was attached, without notifying the engineman of his purpose, was an act of negligence. The facts in proof establish that the peril he incurred in going under the car was such that a man of ordinary intelligence must have seen and understood. This indiscretion on his part was the immediate cause of the injury which he sustained."

In *Wilkinson v. Railroad*, 105 Minn. 300, 117 N. W. 611, a fireman went under a locomotive to clean out an ash pan, after side switching had been done at a station and the train made up, without notifying the conductor or brakeman of what he was doing. Some one connected the air brakes in such a manner as to force a piston rod down upon his leg, whereby he was injured. It was held that he was guilty of negligence, and that the trial court properly ordered judgment for the defendant, notwithstanding a verdict for plaintiff.

[2] III. In the instant case respondent contends that the conductor was negligent in giving a signal to move the train, in view of what he had previously said to the plaintiff when he directed the latter to couple up the crossing, and also in violating an alleged custom not to give a signal to move the train without seeing that the various members of the crew were in places of safety. As to the first of these, the theory is that the conductor had assured plaintiff that the train would not be moved until passenger train No. 4 had arrived, and, furthermore, that the train would be *shoved* out and not *pulled* when it did move. And it is argued that plaintiff was entitled to rely upon the assumption that the train would not move until No. 4 passed, and that when it did so it would proceed in the direction opposite from that in which it was actually moved. It is true that had the passenger train not

been "ditched," and had this train continued to wait for its arrival, plaintiff would doubtless have escaped injury. And it may be that had the train been *shoved* out instead of *pulled*, plaintiff would have had time to escape from beneath the car before the trucks at the further end thereof reached him. But, nevertheless, we think that what the conductor said to him with respect to the intended movement of the train was nothing in the way of an assurance to him as to the future movements thereof. In fact it was neither a direction nor an assurance to him. The only order or direction given him was to couple up the crossing. The conductor then added that when No. 4 arrived they would leave, or, as plaintiff says, would "shove out." As an experienced railroad man, plaintiff must have known that the movements of the train were subject to such orders or reports as the conductor might at any time receive. It appears that this work train had no time schedule, but that it was moved by orders of the trainmaster or superintendent, given to the conductor; and plaintiff testified that the entire train was under the control of the conductor. It cannot be well believed that, at the time these words in question were spoken by the conductor, there was any idea involved of an assurance to plaintiff that the train would in no event be moved until the passenger train should arrive, so that plaintiff would be justified in placing himself in such a dangerous position as he did. Plaintiff doubtless knew, as well as any one else, that they were then waiting for the passenger train to pass; but he also should have known that contingencies might arise which would cause his train to be moved sooner. According to his testimony it must have been nearly, if not quite, half an hour after the conductor directed him to couple up the crossing before he went under the car in question; and, according to the defendant's evidence, the period of time must have been considerably longer. And we think that he did not have the right to place himself in such a perilous position, relying solely, if he did so rely, upon the assumption that the train would not be moved until the passenger train should pass, or that the train, when moved, would proceed west and thus give him some opportunity to escape the wheels.

[3-5] IV. And so far as concerns the alleged custom on the part of the conductor to look out for members of the train crew, we may say that no custom was here shown such as to relieve plaintiff of negligence in going under the car without notice to any one of his intention to do so. And no rule of defendant company in the premises was shown. It appears that plaintiff had been with this train crew for a period of but 12 days; that during this time two Sundays intervened upon which they did not work, leaving but 10 days in which he had worked as a member of this crew. He had previously worked else-

where for the greater part of two years as a brakeman. He undertook to show what had been the custom with other crews with whom he had worked; but the trial court properly refused to allow this, requiring plaintiff to show either a general, universal custom, or the custom of the conductor in charge of this crew. As to the latter, an effort was made to show that it was the established custom for the conductor of this train to see that members of the crew were in places of safety before he gave a signal to move the train. But even if such a custom, extending only over the short period of 10 days, could here avail plaintiff anything (as to which we express no opinion), we may say that no such custom was in fact shown. With respect to the giving of a signal by the conductor to move the train, plaintiff testified: "Well, the conductor generally notices where his men are before he gives it. Q. What is that? A. I say the conductor generally notices where his men are before he goes, or, because if he did not, he is liable to leave somebody. \* \* \* Q. It is his duty to know where the men are? A. Yes, sir." This is the sum and substance of plaintiff's evidence on this score; and which we may say is diametrically opposed to that adduced by defendant respecting this question. And this cannot be said to constitute any evidence of a custom such as plaintiff here invokes. So far as concerns the last question and answer, it does not go to prove a custom, but attempts, in a general way, to show what was the *duty* of the conductor in the premises. It is based upon no rule or custom shown, and is a mere legal conclusion of the witness, and without probative force.

[6] V. Plaintiff also attempted to show that the engineer was negligent in starting the train as he did, without waiting for another signal after he had sounded his whistle. And in this connection plaintiff testified that, during the time that he was working with this crew, the engineer, upon receiving a signal to move the train, "generally whistled," and that after doing so he looked for a signal from the crew to let him know where they were. He was then asked: "Who of the crew were authorized to give him that signal?" He answered: "The conductor. Q. Anybody else? A. No, sir. Q. What is that? A. No." This does not show such a custom as would entitle plaintiff to rely thereupon and subject himself to great peril; but it accords with plaintiff's other testimony (and which must in the nature of things be true) to the effect that the movements of the train were controlled entirely by the conductor. That two signals were to be thus given the engineer is refuted by all the other evidence in the case; but, giving plaintiff the full benefit of his testimony on this score, it is quite apparent that it does not show that the engineer was required to wait for signals from the various other members of the train

crew after receiving a signal or signals from the conductor to move the train. And while it might be shown that the conductor thus violated a rule or established custom to see that members of the crew were all in places of safety before giving a final signal to move the train (which, as we have said, was here not made to appear), the engineer could not be convicted of negligence in putting the train in motion, in obedience to the conductor's orders, unless indeed it appear that the engineer then knew, or should have known, that plaintiff was in a dangerous position, so that to so move the train would be likely to injure him.

[7] VI. And in this connection plaintiff further relies upon the alleged negligence of the engineer in this: That in going over the train plaintiff from time to time broke the air connections, and that the latter caused a noise to be made in the air pump on the engine, which informed the engineer that some one was "going over the train." And there was evidence to the effect that the engineer, a short time before receiving the signal to move the train, had heard such a noise. This, however, can avail the plaintiff nothing, for the reason that it appears that such noise might be likewise made, and was often made, by the operation of a valve upon the caboose, and, further, for the reason that the evidence is quite clear that such noise could in no way indicate that an employé was beneath a car. On the contrary, it would indicate that an employé thus engaged in looking after the air-brake connections could not be beneath a car, as was plaintiff, but that he might be between the cars. It appears that one could test or adjust the air-brake connections without placing himself in any great danger; and that, in case he had stepped between two cars to reach the same, when the engineer whistled, indicating that he was going to move the train, he could readily step from between the cars without injury. The engineer knew this, and knew that the noise which he had heard a short time before did not indicate that any one was, even at that time, in danger by the movement of the train, at least if he blew his whistle, as he was required to do. As to the latter, all of the evidence is that he did sound his whistle three times. Plaintiff himself says that he thought he heard the whistle; at least that he thought that he heard "something like the whistle," and which caused him to start to get out from under the car.

[8] VII. Plaintiff's evidence went to show that it was in the line of his duty to inspect the cars when the train stood upon a siding or switch track and to make repairs, if necessary; but it did not show that it was his duty to crawl beneath a car under such circumstances, without notice; and the other evidence in the case is to the effect that in such cases the engineer was notified, so that

the train might not be moved, and that each member of the crew was supposed to look out for his own safety. The evidence as a whole, and viewed in the light most favorable to plaintiff, as it should be viewed for the purposes of the demurrer, we think fails to show that plaintiff's injuries resulted from negligence on the part of defendant's agents and servants in charge of its train. It is conceded that plaintiff placed himself beneath the car without notice to any one of his intention to do so. It was an extremely hazardous undertaking, and one we think of such a character as to be termed reckless. He was not justified in taking such a risk, relying merely upon the assumption that the train would not be moved when and as it was moved, or that the precautionary signals adopted by defendant for the movements of its trains would lessen such danger, when he knew that there was a perfectly safe course to pursue, viz., to notify the engineer of his intention. See *McKee v. Railroad Co.*, 96 Mo. App. 671, 70 S. W. 922.

[9] No one has the right to rely entirely upon the obligations of others to observe care and caution, and himself neglect and disregard the dictates of prudence. He must use reasonable precautions for his own safety, and then in the absence of information to the contrary he may act upon the presumption that others will not be negligent. "The obligation to exercise due care is mutual and correlative. It does not mean that one may disregard all the laws of prudence himself and yet require of his neighbor to observe caution in protecting him against his own negligence." *Clark v. Ry. Co.*, 127 Mo. loc. cit. 213, 29 S. W. 1013, 1017.

If there can be said to be any negligence here shown on the part of defendant's servants in charge of its train—which we think the evidence fails to establish—nevertheless the plaintiff's own case shows contributory negligence on his part precluding a recovery for the injuries so unfortunately sustained by him. Or to put it differently, but which amounts to the same thing, his own negligence, and not that with which defendant is charged, must be regarded as the proximate cause of his injury.

It follows that the judgment should be reversed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

In re DAVIS. (No. 10,170.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914.)

1. ATTORNEY AND CLIENT (§ 49\*) — DISBARMENT PROCEEDINGS—NATURE.

A proceeding to disbar an attorney is neither a civil nor a criminal action, but is a proceeding *sui generis*, the object of which is not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the punishment of the offender but the protection of the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 48, 66; Dec. Dig. § 49.\*]

**2. ATTORNEY AND CLIENT (§§ 51, 59\*)—DISBARMENT PROCEEDINGS—COSTS.**

It is not only the right but the duty of an attorney to institute proceedings to disbar another attorney for professional misconduct, and, when he acts in good faith, he cannot be mulcted in costs or otherwise punished, though accused be acquitted.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 67, 76; Dec. Dig. §§ 51, 59.\*]

**3. COSTS (§ 3\*)—NATURE OF RIGHT—DEPENDENT ON STATUTE.**

Costs were not recoverable at common law, and are peculiarly a statutory creature, and none may be taxed unless authorized by statute, and such statutes must be strictly construed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.\*]

**4. ATTORNEY AND CLIENT (§ 59\*)—DISBARMENT PROCEEDINGS—COSTS.**

Where an attorney who was being prosecuted in the federal court for a criminal offense instituted disbarment proceedings against the United States District Attorney, charging him with prostituting his office for private gain, and against another attorney charged with being an accomplice and sharing in the illicit gains, not for the purpose of purifying the bar, but to aid his own position as an accused person, and to have revenge against his prosecutor, the costs of the unsuccessful proceedings were properly taxed against him.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 76; Dec. Dig. § 59.\*]

Original proceeding for the disbarment of George L. Davis, an attorney, in which a judgment for costs was rendered against the petitioner, Ernest D. Martin, and others. On motion to quash execution and set aside the judgment. Overruled.

Ernest D. Martin, of Kansas City, in pro. per. Chas. M. Bush, of Kansas City, for respondent.

JOHNSON, J. On the 18th day of August, 1911, proceedings were begun in this court by Ernest D. Martin, an attorney at law, as informant and complainant for the disbarment of George L. Davis, a licensed and practicing attorney in the courts of this state. At the same time proceedings were filed by the same complainant against Leslie J. Lyons, another attorney who was United States District Attorney for the Western District of Missouri. Lyons was charged with prostituting his office for private gain, and Davis was charged with being an accomplice and sharing in the illicit gains. Citations were issued and served upon the respondents, and on October 12, 1911, an order was entered in each proceeding authorizing its prosecution "by the attorney who may be selected by the petitioner herein," and appointing a special commissioner to take testimony in each case "and return the same to this court, together with a summary of the evidence, without stating any conclusions of fact or of law

herein." On November 21, 1911, the petitioner, Martin, as principal and certain others as sureties presented to this court a bond for costs in the Davis Case, in which they obligated themselves "to pay all costs which the Kansas City Court of Appeals may adjudge shall be paid by the undersigned in the prosecution of the proceedings in the above-entitled cause." By order of court this bond was approved November 23, 1911. Thereafter the commissioner heard evidence in each case and reported the same. The evidence was very voluminous, and the costs of the proceedings in the Davis Case, including a reasonable charge for the services of the commissioner, amounted to \$858.25. After the commissioner filed his reports the cases were set for hearing, and the Lyons Case was argued and submitted. In an opinion written by Ellison, J., we reviewed the facts, including those relating to the alleged illicit relations between Lyons and Davis, and dismissed the proceedings on the ground that the charges were not supported by the evidence. It appeared from the evidence that Martin, at the time he began the proceedings, was being prosecuted by Lyons in the federal court for a criminal offense, and we found as a fact that his controlling motive was not to purify the bar, but that "smarting under a prosecution which he declares unjust has allowed his feeling of resentment to lead him to an attack on the district attorney." See In the Matter of the Disbarment of Lyons, 162 Mo. App. loc. cit. 711, 145 S. W. 844. It may be added that the reported evidence in both cases abundantly sustains the conclusion we have reached that Davis was made the object of attack merely as an incident to the dominating motive of wreaking vengeance upon Lyons. The Davis Case was set for hearing; but the petitioner failed to appear, and we rendered judgment February 17, 1913, dismissing the proceedings for want of prosecution, and for costs against the petitioner and his sureties on the bond in the sum of \$858.25. Execution was issued and delivered to the marshal. Afterward, on March 15, 1913, the petitioner filed a motion to quash the execution, and to set aside the judgment for costs.

[1, 2] It may be conceded that a proceeding to disbar an attorney is neither a civil nor a criminal action, but is a proceeding *sui generis*, the object of which is not the punishment of the offender but the protection of the court; that it not only is the right but the duty of an attorney, as an officer of the court, to institute proceedings to disbar another attorney for professional misconduct; and that, whenever it appears that the petitioner has acted in good faith, he cannot be mulcted in costs or otherwise punished on the acquittal of the accused. See *In re Bowman*, 7 Mo. App. 567; *State ex rel. v. Harber*, 129 Mo. 271, 31 S. W. 889; *State ex rel. v. Fort*, 178 Mo. 518, 77 S. W. 741; *Ex parte*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

Wall, 107 U. S. loc. cit. 273, 2 Sup. Ct. 569, 27 L. Ed. 552; In re Watt & Dohan (C. C.) 154 Fed. 678; Morton v. Watson, 60 Neb. 672, 84 N. W. 91; In re Wilson, 79 Kan. 450, 100 Pac. 75; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[3] Our statutes relating to such proceedings contain no provisions for assessing costs against either party. At common law no costs were recoverable, and, since costs are peculiarly a statutory creature, none may be taxed unless authorized by statute, and such statutes must be strictly construed. See *Ex parte Nelson* (Sup.) 162 S. W. 167, and authorities cited. That was a habeas corpus case in which the petitioner, who was being held by the sheriff under a commitment for contempt regularly issued, was released on the ground that the commitment should not have been ordered by the court. The court says: "The officer, who was the sheriff of Jackson county, held petitioner under a writ regular on its face, which had been issued by a court having jurisdiction of the subject-matter. This was ample to protect the sheriff, and there is therefore no authority for the taxation of the costs against him, nor is there authority for the taxation of same against the petitioner. In addition to the absence of a statute, there is a manifest injustice in burdening the successful party to a proceeding with the costs of same, especially in a habeas corpus suit where the purpose of the action is to secure the liberty of the petitioner."

[4] This rule would control the disposition of the present motion if the petitioner had instituted the disbarment proceedings in good faith. But he acted in bad faith. He set in motion the machinery of justice for the selfish purposes of aiding his position as an accused person, indicted for crime, and of having revenge against his prosecutor. The rule, as stated in 4 Cyc. 917, is that, "in the absence of express legislation, no costs or disbursements can be recovered by either party, except where the court finds that such proceedings have been instituted in bad faith, when it may order costs against the party who instituted them."

And the Court of Appeals of New York said, in *Matter of Kelly*, 59 N. Y. 595: "We think the court had power to make the order appealed from by virtue of its authority over the conduct of its attorneys and officers, independent of the provisions of the Code. The proceeding is of a public nature and quasi criminal, and when instituted by an attorney in bad faith, as was found by the General Term, it was competent for that court to provide indemnity to the aggrieved party by imposing the burden upon the accuser."

In the principal case relied upon by the petitioner (*State v. Fisher*, 82 Neb. 361, 117 N. W. 882), the Supreme Court of Nebraska

recognized the rule that the disciplinary authority courts possess over their officers includes that of assessing the costs of an unsuccessful disbarment proceeding against the attorney who began and prosecuted it in bad faith.

We approve this rule, and applying it hold that the judgment for costs against the petitioner and his sureties was properly rendered, and that the motion to set it aside and to quash the execution should be overruled. It is so ordered. All concur.

ROBINSON v. KANSAS CITY et al.  
(No. 10981.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914.)

MUNICIPAL CORPORATIONS (§ 759\*)—TORTS—  
DEFECTS IN STREETS—PARTIALLY IMPROVED  
STREET.

Where a strip in the center of a platted street had been cut down to the established grade, leaving the remainder thereof about six feet above the grade, the city extended no invitation to the public to use that portion which had not been graded, and therefore was not liable for injuries received by one who was coming down a path from the top of the bank to the graded portion of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1595-1600; Dec. Dig. § 759.\*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by J. Q. Robinson against Kansas City and another. From an order sustaining plaintiff's motion to set aside an involuntary nonsuit after the court sustained demurrers to the evidence, and granting a new trial, the defendants appeal. Reversed.

A. F. Evans, Jas. W. Garner, and Hunt C. Moore, all of Kansas City, for appellant Kansas City. Ball & Ryland, of Kansas City, for appellant Parker-Washington Co. Botsford, Deatherage & Creason, of Kansas City, for respondent.

JOHNSON, J. Plaintiff sued to recover damages he sustained in consequence of personal injuries to his wife which, he alleges, were caused by negligence of defendants in failing to guard an embankment and excavation in one of the public streets of Kansas City which had been recently graded by the defendant the Parker-Washington Company under contract with the defendant city. Separate answers were filed; each containing a general denial and a plea of contributory negligence. At the close of plaintiff's evidence the court sustained demurrers to the evidence offered by the respective defendants, whereupon plaintiff took an involuntary nonsuit, and afterward the court sustained his motion to set it aside and ordered a new trial. Both defendants appealed.

The injury occurred about 8 o'clock p. m.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

November 8, 1906, at the intersection of Brighton avenue and Twenty-Third street, a locality in a remote residence district of the city. Brighton avenue runs north and south, Twenty-Third street east and west; the platted width of the latter street being 60 feet. There were numerous residences in the vicinity; but neither street had been graded until several months before the date of the injury, when the city had caused Brighton avenue to be graded to the established grade from Twenty-Third street south. The established grade at the intersection was 6 feet below the natural surface, and the contractor had extended the grading far enough into the intersection to enable him to cut a narrow approach in Twenty-Third street to the crossing. Shortly after this work was done the city let the contract to the Parker-Washington Company to grade Brighton avenue north from Twenty-Third to Twentieth street to the established grade. The contract contained the provision: "Approaches to all intersecting streets and alleys shall be graded under this contract whenever and in whatever manner indicated by the engineer, and they shall be measured and estimated as a part of and in the same manner as the roadway grading." This contract had been nearly, if not entirely, performed by the contractor on the date in question, and under the direction of the engineer the cut for the approaches on Twenty-Third street had been widened to about 20 feet, and was in the middle of that street. South of this cut the ground was not graded, and from the southeast corner of the intersection of the east cut with Brighton avenue (which had been graded to its full width) a strip of ground 15 to 20 feet wide had been left in Twenty-Third street. This strip, which was on a level with the adjoining property, ended at Brighton avenue in an abrupt bank 6 feet high, and was bounded on the north by a bank facing the cut in Twenty-Third street. There was a building occupied by a grocer at the southeast corner of the platted intersection. It fronted on Brighton avenue, and had been built on the surface grade. The grading of the avenue left its first floor 6 feet higher than the street, and between the north wall and the cut in Twenty-Third street was the strip of untouched ground we have described, which, of course, was within the bounds of that street as platted and dedicated. The entrance to the store was at the northwest corner, which had been recessed so that the door faced northwest, and was at the base line of a small triangular platform within the lines of the recess. The west and north walls of the building were on property lines, and no steps or means of ingress and egress were provided by the grocer for the use of his patrons and other invitees. The grading of the streets had compelled those who sought the store to walk up the embankment facing Brighton avenue, and a sinuous path about 2 feet wide led

from near the sidewalk on Brighton to the triangular platform. Owing to erosions of the bank, the end of the path was in Twenty-Third street, a foot or two east of the avenue, and on a line perhaps 5 or 6 feet north of the corner of the entrance platform. Plaintiff and his wife, living a block north on Twenty-Second street, first visited a drug store at the corner of Twenty-Fourth street and Brighton avenue, and then proceeded to the grocery store, where they made some purchases. In leaving the store plaintiff came first, carrying a number of bundles, and proceeded down the path, followed by his wife, who was some distance behind. The night was dark, and the electric lamp at the corner was not burning. Mrs. Robinson left the path and fell down the bank near the intersection of the cut on Twenty-Third street with Brighton avenue.

We have stated only such facts as are necessary to the view we have of the case, and have not attempted to be accurate in such details as distances and measurements. For example, we have said that the strip of ground in the street on the south side of the cut in Twenty-Third street was 15 or 20 feet wide, since the cut was in the middle of a platted street 60 feet wide, and itself was 20 or 25 feet wide. But in our view of the case it is immaterial whether this strip was 20 or only 6 feet wide, or whether the path to the store began in Brighton avenue or Twenty-Third street. The controlling and all-important fact of the case is that Mrs. Robinson was injured, not while using a part of a public street the city had invited her to use, but while on a part the city had left in a state of nature, and therefore had not thrown open to the use of the public. A city's duty towards persons using its public streets springs from invitation, express or implied, and, unless the city does something from which such invitation reasonably may be implied, it cannot be said to have assumed any duty towards the public with respect to merely platted or dedicated streets. The city had a right to prepare a way only 20 feet wide in the middle of a dedicated street of 60 feet, without assuming any duty or liability with respect to the portions of the street left in a state of nature. *Curran v. St. Joseph*, 143 Mo. App. 618, 128 S. W. 203; *Conner v. Nevada*, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; *Downend v. Kansas City*, 71 Mo. App. 529; *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168. In the last case cited it is said: "The city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street; it was not required to grade and improve the whole 80-foot space and build sidewalks on it, and therefore is not liable for not having done so. The path through the weeds and over the uneven surface spoke for itself and told every one that there was no sidewalk there, and it invited no one to use it at the city's expense. The



city was not responsible for the condition of that path, and therefore it will not be necessary to decide whether, by the plaintiff's own evidence, he was negligent in traveling the path under the circumstances."

So in the present instance the bank spoke for itself and told plaintiff and his wife that it was a part of the street the city did not invite them to use, and which, so far as the city and its contractor were concerned, they would go upon at their own risk of injury. A city is under no duty to travelers to fence off or otherwise guard portions of streets thus left in a state of nature.

The demurrers to the evidence were properly sustained, and the court erred in granting a new trial.

Reversed. All concur.

### MCGINN v. INTERSTATE NAT. BANK. (No. 11,016.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914.)

#### 1. INTERPLEADER (§ 9\*) — RIGHT TO INTERPLEAD.

Where a bank issued cashier's checks in payment of a certified check, it may require an indorsee of the cashier's checks, who took without consideration, to interplead with a claimant, who asserted he was entitled to the proceeds of the certified check; for, while there can be no interpleader unless the adverse claims are dependent on or derived from a common source, the claims of both of the parties are based on the original check which was the consideration for the issuance of the cashier's checks.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 10; Dec. Dig. § 9.\*]

#### 2. INTERPLEADER (§ 8\*)—INDEPENDENT LIABILITY.

The issuance of cashier's checks to the payee of a certified check, the proceeds of which were claimed by another, does not render the bank independently liable to the payee, thus defeating the bank's right to demand that the claimant and the payee's indorsee without consideration interplead, for payment of the cashier's check was promised only if the payee had good title.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 8, 9, 11; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by L. P. McGinn against the Interstate National Bank. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

David Ritchie, of Salina, Angevine, Cubbison & Holt, of Kansas City, Kan., and Ellis & Yale, of Kansas City, Mo., for appellant. C. W. Burch, of Salina, and Beardsley, Schleich & Beardsley, of Kansas City, Mo., for respondent.

TRIMBLE, J. This is a suit brought against the defendant bank on a cashier's check for \$500 issued by defendant, payable

to J. B. McGinn & Co. and by it indorsed to the plaintiff. The defendant bank filed an answer and bill of interpleader setting up certain facts and praying that plaintiff and one Charles W. Hartung be required to interplead for the amount due on said check. Plaintiff, claiming that interpleader would not lie, moved for judgment on the pleadings. The court sustained this motion and rendered judgment for plaintiff, and defendant has appealed.

The answer praying for an order of interpleader sets up the following facts: On January 24, 1912, J. B. McGinn indorsed and delivered to the defendant bank a certified check for \$1,985.98 drawn by Walcott, Beers & Grant on the First National Bank of Kansas City in favor of said J. B. McGinn. Defendant thereupon paid McGinn \$485.98 in cash, and, as to the remaining \$1,500, at McGinn's request, it issued to him three cashier's checks for \$500 each payable to the order of J. B. McGinn & Co. Two of said checks were duly paid. The third is the basis of the present suit brought by plaintiff, who claims to hold said check as indorsee of J. B. McGinn. The defendant further set up that one Charles W. Hartung claims that the certified check for \$1,985.98 above referred to was the proceeds of mules owned by him and sold by McGinn to Wolcott, Beers & Grant, and that said certified check belonged to and was the property of said Hartung; that the \$485.98 and the three cashier's checks for \$500 each issued by defendant, one of which is the check in suit, were the proceeds of said certified check, and all were the property of said Hartung and were received by said McGinn in trust for his benefit, and said McGinn had no right or authority to indorse or transfer the same; that L. P. McGinn is the wife of said J. B. McGinn; and that the indorsement to her of said check was made by J. B. McGinn as J. B. McGinn & Co. without consideration. And defendant further set up that said Hartung has notified defendant that he is the owner of the cashier's check on which this suit is brought, and that he will hold defendant for the amount thereof; that said Hartung further claims and has notified defendant not to pay the money called for in said check to J. B. McGinn nor to L. P. McGinn, that she is not the owner thereof and paid no consideration therefor. Defendant further set up that it did not know whether said claims were true or not, nor whether Hartung or L. P. McGinn or J. B. McGinn is the owner of said cashier's check, on which the suit is brought, or the proceeds thereof; that it admits it executed the said check and owes the amount thereof to the true owner and is willing to pay same but does not know to whom payment should be made; wherefore it prays that it be allowed to pay said cashier's check into court and that said Hartung

and L. P. McGinn be required to interplead, etc.

The sole question for our determination is: Should defendant's prayer for an interpleader be granted? The plaintiff insists that interpleader will not lie for two reasons: (1) Because there is no privity or relation existing between Hartung and plaintiff in their opposing claims to the property. (2) Because the bank by issuing the cashier's check to J. B. McGinn has incurred an independent personal liability to one of the claimants.

[1] The right to the equitable remedy of interpleader depends, according to early equity jurisprudence at least, upon four essential elements. As applied to this case they may be stated thus: (1) The same thing, debt, or duty must be claimed by both parties who are asked to be made to interplead. (2) Their adverse claims must be dependent or derived from a common source. (3) The defendant (who is asking the interpleader here) must not claim any interest in the subject-matter. (4) The defendant must have incurred no independent liability to either of the claimants. These four essential elements are laid down by Mr. Pomeroy, in his *Equity Jurisprudence*, vol. 4 (3d Ed.) § 1322, and by many decisions.

Of the above-named essential elements, the first, third, and fourth are inherent in the nature of the remedy and are necessary to its proper application and use. The second, which requires that there be privity of estate, title, or contract between the claimants, or that their claims must be derived from a common source, is not so inherently necessary to the proper administration of the remedy, and there has been a disposition to relax the rigidity of the rule in this regard, both in England and America, in later times. In 11 *Am. & Eng. Ency. of Pl. & Pr.* 449, 451, it is said that some authorities are exacting in the requirement that, in the absence of privity, the suit cannot be maintained, but that doctrine seems to have been abrogated in England partly by judicial decisions, and in the United States, according to high authority, the rule and its validity has been regarded as doubtful in ordinary actions of interpleader. See the remarks made in the case of *Wells, etc., v. Miner* (C. C.) 25 Fed. 533, loc. cit. 538, and in the case of *Crane v. McDonald*, 118 N. Y. loc. cit. 656, 23 N. E. 992, where it is said, "While the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether." And Mr. Pomeroy, in a note to section 1324 of his fourth volume on *Equity Jurisprudence*, in speaking of the fact that the remedy is limited to those cases where there is privity of title between the claimants, says: "It is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation,

and loss from conflicting independent claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands."

It is not necessary, however, for us to say whether the rule as to privity has been relaxed, nor are we required to base our action in this case upon any relaxation of the rule. It will be noticed that, even in the statements of the law upholding the rule in all its strictness, it is only in cases where there is "no privity" between the claimants, and that only when the title one asserts is "wholly paramount" to, and "independent" of, the other, that the remedy is denied. And an examination of the cases denying the right of interpleader on this ground will disclose that what is meant is that the conflicting titles and claims are so wholly independent of, unrelated, and antagonistic to, each other as to destroy, contradict, or defeat the right by which the one asking for the interpleader holds possession of the thing in controversy. For example, a tenant owing rent to his landlord cannot maintain an interpleader suit against his landlord and a stranger who claims under a title antagonistic and paramount to that of the lessor. That would, in effect, be a denial or a questioning of his landlord's title, and it would be destroying the obligation he was under to pay rent to the very one he had agreed to pay it at all events. And the reason why such a suit cannot be maintained is because, in the very nature of things, there is an independent personal liability with respect to the subject-matter, of the tenant to his landlord, which the maintenance of the suit would destroy. But such is not the case in the suit at bar. When J. B. McGinn delivered the certified check for \$1,985.78 and received the cashier's check in controversy, the agreement of the bank was made on the supposition and implied understanding that he was the owner of and entitled to the possession of the money. There was no agreement on the part of the bank to pay it to him at all events. And under the allegations in the pleadings, there is no question of an innocent purchaser involved. Mrs. McGinn stands in the same situation as J. B. McGinn, no better and no worse. According to the pleadings, and in this case we must accept them as true, the certified check for \$1,985.78, which was the only consideration for the defendant's cashier checks, belonged to Hartung, and consequently the cashier's checks and the proceeds of them belonged to him. Whether the sale of the mules by J. B. McGinn was rightful or wrongful makes no difference, since Hartung has ratified the sale by claiming the proceeds. Hartung can trace the proceeds belonging to him into the check in controversy, and, since the check has not come into the hands of an innocent purchaser, the

equitable title, at least, remains in Hartung, and he has the equitable right to pursue the funds into the hands of the bank and receive them from it. If now the bank, with knowledge that the funds belong in reality to Hartung and not to the McGinns, pays the same out to one not the owner nor entitled to receive them, it will be in danger of being required to pay again. In 4 Pom. on Eq. Jur. (3d Ed.) § 1320, it is said: "Where two or more persons whose titles are connected by reason of \* \* \* being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader."

It would seem that the bank is in the situation here indicated. It was J. B. McGinn's duty, according to the pleadings, to deliver the cashier's checks to Hartung. Instead of doing so, he wrongfully indorsed the one in suit to Mrs. McGinn without consideration. The bank is notified of this and is threatened with suit if it pays the check to the McGinns. The bank therefore stands ready to pay the check, but does not know to whom it belongs, or at least to whom the money represented by it belongs. It has done nothing wrongful. Must it be compelled to decide the controversy on its own responsibility and at its own risk? We think not. Suppose, for example, that the bank should receive money from a train robber who had stolen it, and, unaware that the money belonged to the persons or company robbed, the bank should issue cashier checks to the robber for the amount, and these checks should be assigned by the robber to some one, without consideration; can it be said that the bank could not demand that, as it did not know the facts and the truth of the conflicting claims, the parties should interplead for it?

Under the circumstances of the case at bar, there is sufficient relation, privity, or common source of title, whatever you may choose to call it, between the two claimants to entitle the bank to ask an interpleader. At least, the titles of the two claimants to the fund are not so wholly independent and distinct as to prevent the exercise of the equitable remedy of interpleader. Both claim title from the same source. Mrs. McGinn from her husband, J. B. McGinn, by indorsement, and Hartung from J. B. McGinn as his agent and the duty the agent owes to pay over his principal's money. Mrs. McGinn may have the naked legal title to the check by reason of the wrongful indorsement, but Hartung is the owner of the equitable title, and as Mrs. McGinn is not an innocent holder for value, according to the pleadings, the equitable title is superior to her title, and both claim through the action

of J. B. McGinn. Which claimant is right? Ought the bank be made to bear the responsibility of deciding?

[2] It cannot be said that the issuance of the cashier's check was the creation of such an independent liability to one of the claimants as will defeat the right to an interpleader. The bank did not agree to pay the check at all events, but only on the implied understanding that it would do so to the one lawfully entitled thereto. The money in the bank represented by the check is claimed by Hartung as his property. The issuance of the cashier's check did not change the title thereto so long as it did not get into an innocent holder's hand. The equitable title to the check also passed to Hartung, and the wrongful indorsement of it to some one else, without consideration, did not deprive him of that title or of the right to enforce that title.

In the case of *Wells Fargo & Co. v. Miner* (C. C.) 25 Fed. 533, loc. cit. 538, it was contended that, because the bank had issued a certificate of deposit to one under circumstances much like the present case, the bank had entered into an independent contract, and hence interpleader would not lie. The court, however, held that the issuance of the certificate did not create an independent liability. The title to the certificate was the only source of the liability, and that was the very issue between the conflicting claimants. In that case the naked legal title to the certificate was in one of the claimants, while only the equitable title thereto was in the other. It will be noticed that, while the case was governed by a statute of California providing that the title of the claimants need not have a common source, yet the court intimates that without that statute it would still be one for interpleader. And on the question of the independent liability created by the issuance of the certificate the statute had no bearing, since it did not cover that element essential to an equitable interpleader.

The case of *Commerce Trust Co. v. Bank of Willow Springs*, 161 Mo. App. 431, 143 S. W. 531, is not applicable to the case here. There, clearly under the admitted facts, there was but one duty for the bank to perform, since one of the claimants, Thomas, had paid the money without imposing restrictions, and therefore could not recall it.

Again, it will be noticed that the independent liability spoken of as defeating a right to demand an interpleader means a liability beyond the liability which arises from the title to the property in controversy. The mere fact that a contractual obligation or relation exists between the party seeking the interpleader and one of the claimants requiring its payment to such party will not, of itself, defeat the right of interpleader. *Bechtel v. Sheaffer*, 117 Pa. 555, 11 Atl. 889; *Love v. Insurance Co.*, 153 Mo. App. 144, loc. cit. 154, 132 S. W. 335. The reason of the rule as to independent liability defeating

a right of interpleader is that, where there is such an independent liability, a decision as to which of the conflicting claimants was right would not absolve the party asking for an interpleader from performing his independent contract. He would still be liable on that, and hence nothing would be gained for him by an interpleader. If that were allowed, he would be in the position of compelling others, without any possible benefit to him, to litigate a question in which he really has no interest. The independent liability here spoken of means that the party asking for the interpleader must have "bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction." 4 Pom. Eq. (3d Ed.) § 1326.

The bank in this case had incurred no such independent liability as would defeat the right to demand an interpleader. Under the circumstances disclosed by the pleading, it occupied the position of what might be called a disinterested stakeholder, impartial so far its conduct was concerned, acting in good faith, and having reasonable cause for a real doubt as to which of the claimants were entitled to the check or the money represented by it. It was therefore entitled to have the claimants interplead. *Little v. Union Trust Co.*, 197 Mo. loc. cit. 291, 94 S. W. 890. To hold that the bank in this case is not entitled to have the parties interplead would, in the opinion of the writer, greatly impair the rights and safety with which banking operations are carried on in our present day commercial civilization.

The judgment is reversed, with directions to order an interpleader so that it may be determined to whom the check and the money it represents rightfully belong and can be safely paid. All concur.

STATE ex rel. LASHLY, Pros. Atty., v.  
WURDEMAN, Circuit Judge.  
(No. 14,271.)

(St. Louis Court of Appeals. Missouri.  
April 7, 1914.)

**1. DISTRICT AND PROSECUTING ATTORNEYS (§ 8\*)—RIGHT TO REPRESENT COUNTY IN GENERAL.**

Under the direct provisions of Rev. St. 1909, § 1007, it is the duty of a prosecuting attorney to prosecute and defend all civil and criminal actions by or against the county, and under the statute the offices of judge of the county court and prosecuting attorney are separate, and neither is subservient to the other, and therefore the right of the prosecuting attorney to appear in and control actions to which the county is a party cannot be superseded or ignored by the county court.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.\*]

**2. DISTRICT AND PROSECUTING ATTORNEYS (§ 8\*)—RIGHT TO REPRESENT COUNTY—MANDAMUS AGAINST COUNTY COURT JUDGES.**

Under Rev. St. 1909, § 1008, providing that the prosecuting attorney shall prosecute or defend "all civil suits in which the county is interested," a county was interested in a mandamus suit against the judges of the county court to compel them to hear and determine an application for a dramshop license, so as to entitle the prosecuting attorney to appear in and control such suit, as the matter of dramshop licenses affects the county's revenue, and because the sale of intoxicating liquors is of special interest to the county.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.\*]

**3. DISTRICT AND PROSECUTING ATTORNEYS (§ 8\*)—CONSTRUCTION—CONSTRUING STATUTES TOGETHER.**

Rev. St. 1909, §§ 1007, 1008, both pertaining to the duties of prosecuting attorneys, being in pari materia, are to be read together in determining the duties and rights of prosecuting attorneys.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.\*]

**4. INTOXICATING LIQUORS (§ 6\*)—POWER TO CONTROL TRAFFIC—STATES.**

The state may exercise its police power with respect to the sale of intoxicating liquors, because of its tendency to deprave public morals.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

**5. DISTRICT AND PROSECUTING ATTORNEYS (§ 8\*)—RIGHT TO REPRESENT COUNTY—MANDAMUS AGAINST COUNTY COURT JUDGES.**

A writ of mandamus to compel the judges of the county court to hear and determine an application for a dramshop license is not purely personal, but reaches the office, so that the county had an interest in a suit for such a writ, which under Rev. St. 1909, § 1008, providing that the prosecuting attorney shall prosecute or defend "all civil suits in which the county is interested," entitled the prosecuting attorney to appear in and control such suit in behalf of the county.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.\*]

**6. COURTS (§ 231\*)—APPELLATE COURTS—MISSOURI—CONSTITUTIONAL QUESTIONS.**

The Court of Appeals was not deprived of jurisdiction of a suit for mandamus to compel the district court to allow relator to appear as prosecuting attorney in a mandamus suit against the judges of the county court of such county, because a constitutional question was raised in the return of such judges, as the only question to be determined was whether the prosecuting attorney was entitled to appear in such suit, and did not involve its merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**7. COURTS (§ 231\*)—APPELLATE COURTS—MISSOURI—CONSTITUTIONAL QUESTIONS.**

Where the county judges, in making their return to a writ of mandamus, excluded the prosecuting attorney, who was the proper officer to set forth the interests of the county, a constitutional question raised therein is not to be deemed within the record, in a suit for mandamus to enforce the prosecuting attorney's right to appear in and control such suit, so as

to deprive the Court of Appeals of jurisdiction thereof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**8. MANDAMUS (§ 160\*)—PROCEEDINGS—AMENDMENT OF ALTERNATIVE WRIT.**

Where an alternative writ of mandamus is broader than the law warrants, it may be amended, and the peremptory writ awarded for so much of the relief as is proper.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.\*]

Reynolds, P. J., dissenting.

Original petition for mandamus by the State, on the relation of Arthur V. Lashly, Prosecuting Attorney of St. Louis County, against Gustavus A. Wurdemann, to compel respondent, as Judge of the Circuit Court of said County, Division No. 2, to allow relator to appear in and control a certain mandamus suit pending in said court against the judges of the county court of said county. Case certified to Supreme Court.

Arthur V. Lashly, Pros. Atty., and George Barnett, Asst. Pros. Atty., both of Clayton, and E. R. Chappell, Asst. Pros. Atty., of St. Louis, for relator. Sam D. Hodgdon, J. C. Kiskaddon, R. H. Stevens, and F. E. Mueller, all of Clayton, for respondent.

**NORTONI, J.** This is a proceeding in mandamus. The alternative writ issued in virtue of the original power of this court in that behalf provided. The relator is the prosecuting attorney of St. Louis county, duly elected and qualified. The respondent is judge of the circuit court of the same county and presides in division No. 2 of that tribunal. The question for consideration relates to, and the writ is invoked with a view of vindicating, the right of the prosecuting attorney to appear in the circuit court and defend a suit in which the county is interested. The relevant facts out of which the controversy arises are as follows:

It appears that one Hornberg presented to the county court of St. Louis county his application for a dramshop license in proper time and in due form and the county court declined to consider or act upon it; that thereafter, on the same day, Hornberg sued out an alternative writ of mandamus against the judges of the county court, John Wiethaupt, William Buermann, and Albert Wilmas, commanding them to appear in the circuit court, division No. 2, and show cause, if any they had, why they, as judges of the county court, should not proceed and act upon the petition of Hornberg for a dramshop license. To this mandamus proceeding so instituted in division No. 2 of the circuit court over which the respondent here, Judge Wurdemann, presides, the respondents in that proceeding—that is, the judges of the county court, Wiethaupt, Buermann, and Wilmas—made their return in writing through counsel other than relator, the prosecuting attorney of the coun-

ty. Upon the coming in of the return of the judges of the county court in that case, relator, prosecuting attorney, appeared and moved the circuit court to permit him to assume control of the defense in the matter on the ground that it was one in which the county was interested, and that, therefore, the statute made it incumbent upon him to do so. This motion and request the court denied as though it were competent for the county judges to exclude the prosecuting attorney with respect to the matter of the defense of that case and employ other counsel to control and manage it. It is in assertion of his right to control and manage the defense of the mandamus suit pending in the circuit court against the judges of the county court with respect to the subject-matter of the application of Hornberg for a dramshop license that the prosecuting attorney, as relator, sued out the writ of mandamus here involved, and it is insisted the respondent, as judge of the circuit court, denied to him a clear legal right in refusing to permit the prosecuting attorney to assume control and manage the defense of that case.

[1] In disposing of the question in judgment, it is essential to consider the relevant sections of the statute prescribing the duties of the prosecuting attorney, and to consider, too, the interests involved in the mandamus suit pending in the circuit court against the judges of the county court of St. Louis county. It is to be said, first, that under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people; but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney is that he shall be so learned. By statute certain judicial duties and certain other ministerial and administrative duties are committed to the county court while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county. In respect of the latter, sections 1007 and 1008, R. S. 1909, are to be here considered.

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county and in such cities by the proper authorities of the city." (Section 1007, R. S. 1909.)

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties." (Section 1008, R. S. 1909.)

It is to be observed that section 1007, above copied, makes it the duty of the prosecuting attorney to defend all suits against the state or county, and, indeed, it is conceded in the instant case that if the mandamus proceeding in the circuit court against the three judges of the county court were a suit against the county that no one could deny or gainsay the right of the prosecuting attorney to control and manage the defense therein. Touching this question, it is said in the brief of respondent: "If an action is brought against the county, the

prosecuting attorney can defend it, and no county court has power to compel him to act otherwise than his judgment dictates. He can also institute an action for the county and in his conduct of the case he is absolutely independent of all control." We quote this as a concession in the argument here, but it is said it does not apply to the instant case, in which the prosecuting attorney insists upon his right to appear.

In Kansas, the statutes concerning the county commissioners and the county attorney are similar to those which obtain with respect to our county courts and prosecuting attorney. The matter of a suit against the county of Leavenworth being under consideration in that state, the Supreme Court stated the doctrine precisely as we understand it touching the question of the right of the county commissioners or the prosecuting attorney to control the case in court. Of this the court said, in *Clough & Wheat v. Hart*, 8 Kan. 487, 494: "The county attorney is elected by the people of the county, and for the county. \* \* \* He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves. The county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him." The doctrine of that case was affirmed in *Waters v. Trevillo*, 47 Kan. 197, 27 Pac. 822, and has never been questioned, so far as we have been able to ascertain. Other courts either quote and approve it or proceed in the same view on fundamental reasons, as will appear by reference to the following cases in point: *Board of Com'rs of Logan Co. v. Jones*, 4 Okl. 341, 51 Pac. 565; *Board of Com'rs of Logan Co. v. State Capital Company*, 16 Okl. 625, 86 Pac. 518; *Brome v. Cuming County*, 31 Neb. 362, 47 N. W. 1050; *Clark & Grant v. Lyon County*, 37 Iowa, 469.

[2-4] But in the instant case St. Louis county is not a party to the record in the mandamus proceeding pending in the circuit court against the judges of the county court in which the prosecuting attorney insists upon his right to appear, and the right asserted here by the prosecuting attorney proceeds on the ground that, though not a party, the

county is "interested" in that suit. This is true, it is said, because, though the judges of the county court are respondents in the mandamus against them, the suit proceeds to enforce the performance of a public duty on the part of the county court, of which they are members, pertaining to the matter of the dramshop license petitioned for on the part of Hornberg. In an early case in this court, the prosecuting attorney of the same county declined to permit the use of his name in a certiorari proceeding against the county court to remove and review the record of a dramshop proceeding, for that he deemed it his duty under the statute to represent the interests of the county through appearing for the county court in the matter, and this court affirmed such to be the correct view of the duty of the prosecuting attorney. *State ex rel. Campbell v. Heege*, 37 Mo. App. 338, 345. Obviously such is the sound law of the question, for, though the judges of the county court themselves are respondents in the mandamus suit pending in the circuit court, it is clear the county is interested therein. The statutes (sections 1007 and 1008) are to be read together, for they are in *pari materia* and pertain alike to the duties of the prosecuting attorney, which they annex to his office, and the officer is required by virtue of his oath to perform them. While section 1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is "interested." It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court, by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court as individuals, apart from their office and the franchises which inhere in it, could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court rather than against the office of the county court *eo nomine*. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute.

To say that St. Louis county is not even interested in such a proceeding involves but a partial view of the subject-matter. Under our statutes the county is peculiarly interested in the matter of dramshop licenses,

for a portion of the revenue received therefor goes into its treasury. Moreover, since the case of *Austin v. State*, 10 Mo. 591, the sale of intoxicating liquors has been deemed unlawful in Missouri because of its tendency to deprave public morals, and because of this fact the police power is to be exercised with respect to it. Under the statute only a law-abiding, assessed, taxpaying male citizen above 21 years of age may be licensed as a dramshop keeper at all. By other statutes, the dramshop keeper, though licensed, may be prosecuted for infractions of the law touching the sale of liquors as for misdemeanors, and the duty pertaining to such prosecutions is within the purview of the county as the unit of government. Then, too, the statutes expressly recognize and confer the right upon taxpaying citizens of the county to remonstrate against the issue of a dramshop license and thus endeavor to prevent the opening of such a place in the immediate locality. No one can doubt that these provisions obtain in the view that a dramshop tends to corrupt the morals of the people and entail injury through the depreciation in value of private property near or about it. When it is remembered the county is the unit of government with respect of such matters, it appears to be clear enough that it is interested in a civil suit against the judges of the county court which proceeds with a view of enforcing them *ex officio* to act upon an application for a dramshop license. Therefore, the county being interested in the subject-matter of the mandamus suit against the judges of the county court, the statute (section 1008) imposed the duty upon the prosecuting attorney to control and defend that case. His right no one can dispute, for the statute pointedly prescribes and affixes it as a duty upon him in all cases in which the county is interested, and this, too, in addition to the duties affixed by the prior section (1007) where the suit is against the county.

[5] But it is said the mandamus against the judges of the county court of St. Louis county is a personal proceeding against them, and does not run against the court as the representative of the county. The case of *State ex rel. v. Burkhardt*, 59 Mo. 75, is urged upon us in support of this view. But it is obvious the question suggested was not decided there. It appears in that case that both a school district and Moniteau county claimed certain money, taxes collected and then in the hands of the collector of taxes for the county. The school district sued out a mandamus against the county collector to enforce the payment to it. The county collector made his return to the writ, by which he set forth the controversy about the money in his hands as though he were a mere disinterested stakeholder, and prayed that the county of Moniteau might be heard by its prosecuting attorney in that case. Thereupon the county,

by its prosecuting attorney, filed what was termed an "interplea" to be *made a party to the mandamus suit* against the collector. It is to be noted from this that the return of the county collector was in the nature of a bill of interpleader, whereby it was sought to bring the several claimants for the fund before the court *and as parties to the action*, to the end of acquitting him of responsibility while such claimants litigated the subject-matter. Then, too, in the interplea filed, Moniteau county prayed the issuance of a peremptory writ of mandamus commanding the county collector to pay the money to the county. On a hearing the circuit court gave judgment dismissing the "interplea" of Moniteau county and awarded a peremptory writ of mandamus to the relator—that is, the school district—against Burkhardt, the collector, commanding him to pay the relator the sum of \$280.89. From this judgment the county perfected its appeal to the Supreme Court, but the respondent collector did not, and it was there ruled the county had no standing in court in that case.

Manifestly, this judgment was a proper one, for the case was neither one of interpleader nor was it competent for the county to become a party thereto in the manner pursued. The court declared, and the rule is well established by numerous decisions to the same effect since that case: "The general provisions of the practice act, authorizing all persons having or claiming an interest in the subject-matter of the controversy to be made parties plaintiff or defendant, do not apply to proceedings by writ of mandamus"—and this alone is the substance of the decision. However, in that case the Supreme Court recognized the subject-matter as one in which the county was interested and said: "The county, through its prosecuting attorney, with the consent of the defendant, Burkhardt, might, in a return in his name, have urged as a defense most, if not all, the matters set out in the petition filed by it in the cause." But though the court said that as the county was interested in the matter the prosecuting attorney might, "with the consent of Burkhardt," set forth its claims in a return of the respondent, Burkhardt, it did not decide *either that it was not the duty of the prosecuting attorney to do so or that he could not do so without the consent of Burkhardt*. The county being interested in the subject-matter there involved in the mandamus between the school district and the county collector, it was certainly competent for it to be heard in the case, and this, too, by utilizing the name of its officer, the collector, in making its defense in the return preferred by him. Moreover, it is true, too, as the court said, that the prosecuting attorney could set forth the county's claim with the consent of Burkhardt, the collector, in the return of that officer; but the mere fact that the court said this could be

done with his consent does not conclude the matter to the contrary, for that was all it became necessary for the court to decide in disposing of the controversy then in hand, in that no question was made with respect to the right of the county to utilize the collector's return without his consent.

From a study of the case, it appears clear enough that the Supreme Court recognized the county was interested in the subject-matter of that suit, and recognized, too, that it was competent for the prosecuting attorney to appear in its behalf and assert its defense touching the same; but the method pursued to do so was not a proper one under the practice act, for that no warrant appeared to enable the county to become a formal party to the suit, and as Burkhardt, the collector against whom the judgment in the circuit court was given, had not appealed, Moniteau county could not do so. In concluding the opinion, the court said: "Moniteau county cannot legally complain of a judgment rendered solely against another party, and this court has no authority whatever on the appeal of Moniteau county to affirm or reverse that judgment." This case in no wise decides that it is not the duty of the prosecuting attorney to appear in a mandamus case in which the county is interested. Neither does it decide that mandamus is purely a personal proceeding, which may not touch the office when the officer is sued as such concerning the alleged failure to perform an official duty. On the contrary, it appears to hold that the office is touched, and because of this fact it is the duty of the prosecuting attorney to appear in such a case for the county and defend its interests. But to do so the prosecuting attorney should set forth the county's defense to the mandamus against its officer in the return of the respondent county officer, as he seeks to do in the instant case. Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return. The point is the Supreme Court did not decide that the prosecuting attorney could not set forth the interests of the county in the respondent collector's return without his consent, but decided that such officer's return was the proper pleading in which to set forth the interests and defend the county, and merely remarked that he could do so with his (the respondent, collector's) consent, and no one will dispute the proposition thus stated.

The case of *U. S. v. Boutwell*, 84 U. S. (17 Wall.) 604, 21 L. Ed. 721, is also urged upon us in support of the argument that the writ



of mandamus is purely personal and does not reach the office. That was a mandamus which proceeded against Boutwell, the Secretary of the Treasury, and after he resigned that office the question presented related to the right to substitute Richardson, his successor, as respondent therein. The court denied this right on the theory that the duty sought to be enforced was a personal one to Boutwell and said: "The writ does not reach the office." Though that case has been approvingly cited, a limitation on the doctrine it asserts is now well recognized in subsequent cases in the same court. In discussing the Boutwell Case, the Supreme Court of the United States says, in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 33, 17 Sup. Ct. 225, 227 (41 L. Ed. 621): "The cases, in which it has been held by this court that an abatement takes place by the expiration of the term of office, have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were." To the same effect is *United States ex rel. v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873, where it is pointed out that the duty considered in the Boutwell Case was one which, though omitted by a public officer, partook of a personal character, in that it involved a discretion peculiar to him which might be otherwise exercised by his successor. Then, too, in *Thompson v. U. S.*, 108 U. S. 480, 26 L. Ed. 521, the Boutwell Case and the rule it reflects in respect of such personal duties is discussed and distinguished from such duties as appertain to and lie in such an office as a board of commissioners. As to such commissioners, it is said the duty savors rather of a public character, and may be enforced even against their successors in office, and concerning this the court says: "To say otherwise would be a sacrifice of substance to form."

The case of *Leavenworth County v. Sellew*, 90 U. S. 624, 25 L. Ed. 333, was a mandamus involving the board of commissioners of a county in Kansas. It was argued on the authority of the Boutwell Case that the writ of mandamus did not reach the office, but went alone to the members of the board of commissioners, and was, therefore, purely personal in character. In answer to this the court says: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's Case may be avoided. *In this way the office can be reached* and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure

to do what the law requires of them as the representatives of the corporation." (The italics are our own.)

These more recent cases in the Supreme Court of the United States are referred to merely to portray that the idea the proceeding in mandamus is personal in character is not to be extended beyond the sense of the rule, when to do so would sacrifice the substance of its efficacy to mere technical words or form. However this may be, with us in Missouri there can be no doubt on the question here in judgment, for the Supreme Court has pointedly determined it in a recent case, as will appear by reference to *State ex rel. v. Fraker*, 166 Mo. 130, 140, 65 S. W. 720, 722. In that case the court says: "Ever since *Platte County Court v. McFarland*, 12 Mo. 166, mandamus has been regarded as the proper proceeding to compel a recalcitrant county court to do its duty. See, also, *Riley v. City*, 31 Mo. App. 439. Besides, the writ of mandamus is, in modern practice, treated as an ordinary writ of right, issuable as of course upon proper cause shown." It is true the proper practice is to direct the writ against the justices of the county court by name, as judges of the county court; but when this is done, as is true in the instant case, the office is touched if the subject-matter is one within the purview of that tribunal. *State ex rel. v. Fraker*, 166 Mo. 130, 65 S. W. 720; *Leavenworth County v. Sellew*, 90 U. S. 624, 25 L. Ed. 333. See, also, *State ex rel. v. Gates*, 22 Wis. 210, 214, where it is said on this subject: "So far as the advancement of the principal remedy is concerned, it is to be regarded as a proceeding against the officer, and not against the individual." See, also, *State ex rel. v. Warner*, 55 Wis. 271, 285, 286, 9 N. W. 795, 13 N. W. 255; *People v. Collins*, 19 Wend. (N. Y.) 56; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *People v. Champion*, 16 Johns. (N. Y.) 61; *Pegram v. Commissioners*, 65 N. C. 114.

[6, 7] Touching the argument that there is a constitutional question involved in the mandamus suit pending between Hornberg, relator, and the county judges, which precludes the jurisdiction of this court in the present controversy in which the prosecuting attorney is relator, it is to be said that it is not sought to invoke an order of this court in or pertaining to the merits of that case. The only right sought to be vindicated here is that of the relator, prosecuting attorney, to appear in his official capacity in the case against the county judges as the duly elected and qualified representative of St. Louis county. Moreover, if the prosecuting attorney is the proper officer to set forth the defense of the interests of the county in that case, then the constitutional question asserted is to be treated as not within the record in that case at all, for the reason the proper officer of St. Louis county to raise or prefer such question has not done so. In other words, the return of the county judges, made in their own be-

half, through excluding the prosecuting attorney from participation therein in behalf of the county, is to be treated as without avail.

[8] If it be true that the mandate of the alternative writ is broader in its terms than the law warrants, the question is not a serious one under the practice which now obtains, for it is competent to amend it and award the peremptory writ for so much of the relief as is proper. See *State ex rel. v. Baggott*, 96 Mo. 63, 71, 8 S. W. 737; *State ex rel. v. Hudson*, 226 Mo. 239, 264, 126 S. W. 733. Therefore, it appearing that it is the clear legal right of the prosecuting attorney to appear in and to control, manage, and defend the mandamus suit pending in division No. 2 of the circuit court of St. Louis county against the judges of the county court as such, the alternative writ of mandamus will be modified, so as to vindicate this right only, and, as thus modified and amended, made peremptory to that extent alone.

It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J. dissents.

Judge REYNOLDS deems the decision of the court contrary to the cases of *State ex rel. v. Nortoni et al.*, 201 Mo. 1, 98 S. W. 554, *State ex rel. Morse v. Burkhart*, 87 Mo. 533, *State ex rel. v. Burkhardt*, 59 Mo. 75, *State ex rel. v. Fraker*, 166 Mo. 130, 65 S. W. 720, and *State ex rel. v. Broadus*, 207 Mo. 107, 105 S. W. 629, and therefore requests that the cause be certified to the Supreme Court for final determination; and it is so ordered.

REYNOLDS, P. J. (dissenting). One Hornberg, on January 21, 1914, filed with the clerk of the county court of St. Louis county his petition, bond and affidavit for a dramshop license. These being duly presented to the county court, that court refused to try, hear, or determine the right of applicant to a license. Thereupon Hornberg filed a petition in the circuit court for a writ of mandamus against the judges of the county court to compel them to proceed in the matter of his petition and to hear, try and determine his right to a dramshop. This petition was duly assigned to Division No. 2 of the circuit court of St. Louis county, over which the respondent here, the Honorable Gustavus A. Wurdemann, presides. That judge, apparently in open court, ordered an alternative writ to issue commanding the judges of the county court by name to proceed to hear, try and determine the right of Hornberg to a license as a dramshop keeper or to show cause why they should not so do. The judges of the county court, over their own signatures, made return to this alternative writ, admitting that Hornberg had filed his petition and application for a license to keep a dramshop, together with his bond and affidavit with reference to the ad valorem tax,

and that it had remained on file for the time provided by law, and that they had entered up an order refusing to further hear, try and determine the right of Hornberg to a dramshop license, because and for the reason that the Legislature had passed a law, approved by the Governor (Laws 1913, pp. 199-202), providing for the appointment of a Board of Excise Commissioners in St. Louis county (setting the law out in full), "which act, if constitutional, deprives this court of jurisdiction to try, hear and determine applications and petitions for dramshop licenses." That while not learned in the law, they acted on the theory that it was a valid law and had refused to act upon the application. On the coming in of this return Hornberg filed a motion for judgment on the pleadings, setting up that the law creating the board of excise commissioners was null and void as special legislation in violation of section 53, article 4, of the Constitution of Missouri. This return and motion, it appears, was filed in the circuit court on February 5, 1914, and on application of relator here the matter was passed until February 6th. On that day, this relator presented his petition to the circuit court, entitled, in the cause of *State ex rel. Hornberg, Relator, v. John Weithaupt, William Buermann and Albert Wilmas, Judges of the County Court of St. Louis County, Missouri, Respondents*, setting out that he is the duly elected, qualified and commissioned prosecuting attorney within and for the county of St. Louis and represents and shows to the court that the proceeding in the cause wherein Hornberg was relator, and John Weithaupt, William Buermann, and Albert Wilmas, judges of the county court of St. Louis county, were respondents, is a civil suit, "in which the county of St. Louis is interested and that under and by virtue of the laws of the state of Missouri it is his right and duty to appear herein in behalf of the respondents, as judges of the county court and to attend to all matters pertaining to this proceeding for and on behalf of the respondents. That respondents have refused to permit your petitioner to file a return to the alternative writ heretofore issued herein for and on their behalf and refused to consult with him concerning the matters of law and fact connected with this proceeding and have refused to furnish him with any information about it. That he was not consulted about and had nothing to do with the preparation and filing of the paper heretofore filed herein purporting to be the return of John Weithaupt, William Buermann and Albert Wilmas to the writ directed to the same persons as judges of the county court. That the said pretended return was procured as a result of the connivance and collusion between the relator and respondents. That the relator has an undue influence over the respondents and that by the exercise of the said undue influence respondents were induced to and did

employ other counsel than your petitioner to prepare and file the said pretended return with the sole purpose in view of preventing your petitioner from preparing a proper return to the writ herein and from taking any part in this proceeding. That the pretended return does not properly present the issues of law and fact arising in the case and that unless your petitioner is permitted to present a proper return raising all the said issues the process of said court will be abused and the ends of justice perverted.

"Now, therefore, your petitioner prays that the pretended return of the said John Welt-haupt, William Buermann and Albert Wilmas be stricken from the files for the following reasons, to wit:

"First. That it fails to state that it is made by respondents as judges of the county court and is therefore not responsive to the writ.

"Second. That the said pretended return was procured by collusion between the parties.

"Third. That it does not properly present the issues of law and is not a correct statement of the facts.

"Fourth. That your petitioner was not permitted to prepare the said pretended return or consulted with reference thereto.

"Your petitioner further prays that an order may issue directing him as the legal adviser of the county court and of the judges thereof in their official capacity to prepare and file a proper return to the alternative writ herein for the reason that it is by law made the duty of your petitioner to represent the respondents in suits of this character and that your petitioner is the only person authorized by law to so represent them. Your petitioner further prays that the document heretofore filed herein, entitled 'Motion for Peremptory Writ' be also stricken from the files for the reasons above set forth."

On that day, February 6th, the respondent here, Hon. G. A. Wurde mann, as judge, and during the session of the court, having before him this motion of the prosecuting attorney, denied it, the court, however, granting relator here permission to appear "as a friend of the court" in the hearing of the cause.

On the forenoon of that day, however, and before the motion of the prosecuting attorney had been filed and acted upon by the circuit court, the prosecuting attorney presented his petition to one of the judges of our court and that judge issued the alternative writ, it being recited in the petition for the writ that the relator had before them presented his motion or petition to the circuit court and that his petition had been denied. In point of fact it appears that the motion or petition had not been presented to and denied by the circuit court when application was made to us for the issue of the alternative writ. That occurred afterwards, the alter-

native writ being served on the circuit judge on the same day but after that court had acted. The return having been duly filed in our court to the alternative writ, relator moved for judgment. The cause has accordingly been submitted to us on the writ and return.

It is settled law in this state that a writ of mandamus "will not issue commanding an inferior court, tribunal or ministerial body to act until it is first established by the evidence that said court, tribunal or ministerial body has been legally requested to act, and that it has illegally declined to do so." State ex rel. Abbott et al. v. Adcock et al., 225 Mo. 335, loc. cit. 363, 124 S. W. 1100, 1109. Here the lack of demand and refusal to act prior to presentation of the application of the petition for the writ is clear, but on that being suggested by counsel for respondent, on the coming in of the return, the Honorable Judge, respondent here, in person and in open court, waived this defect, on our suggestion that we would, if it was insisted upon, quash the alternative writ and issue a new one. So that the question that the application to us was premature and our writ issued prematurely, is out of the case.

It is clear that if the return of the county judges, as made by them, is to remain in the case, a constitutional question is presented in this case by that and by the motion for judgment on it, interposed in the circuit court by the relator in that case; indeed the return of the judges discloses that a constitutional question was presented in the county court. So that under the decision of our Supreme Court in State ex rel. Sale v. Norton et al., Judges, etc., 201 Mo. 1, 98 S. W. 554, we would have no jurisdiction in this cause. If, however, that return is withdrawn by the relator here and a new return is made with that question entirely eliminated, the majority of my Associates are of the opinion that the cause is within our jurisdiction. Speaking for myself, and on the record before us, I cannot see how we can treat that return as a nullity, or that its withdrawal eliminates the constitutional question. We have no power by mandamus to order the circuit court to strike that return out, even if we order that court to allow the relator here, as prosecuting attorney, to appear and conduct the Hornberg Case for the judges of the county court. As said by our Supreme Court in State ex rel. Union Electric Light & Power Co. v. Grimm, 220 Mo. 483, loc. cit. 490, 119 S. W. 626, 627: "Of course, this court has no right or power in a proceeding by mandamus to direct what its ruling should be, but we have the right, and it is our duty, to require the circuit court to exercise its jurisdiction." But we cannot anticipate what the action of the court or of the prosecuting attorney will be, and I am unable to see, with all due deference to my brethren, how it is possible for us to shut our eyes to the fact that, as the case is presented to us, the constitutional

question, that is a question calling for the determination of a constitutional claim, is in the case. With that view of it, my own opinion is that the alternative writ should be quashed for want of jurisdiction in our court to issue it in this case at all. As to that, as I understand, I am in disagreement with both of my learned brethren.

The fundamental question in the case, however, is the right of the prosecuting attorney of the county of St. Louis to require the respondent, as judge of the circuit court, to strike from the files the return which has been made by the county judges, they themselves signing that return, and to allow him to appear in the case, draw up and file the return therein for these judges, even if contrary to their views, and manage and control all further proceedings in the case. That is the real point involved here, and that is the point to which my learned Brother NORTONI has chiefly directed his opinion. I cannot agree to the view that the prosecuting attorney has the right.

The relator claims the right to do this because the county is interested.

In the first place the county, as a county, is not a proper party to this proceeding. Our court has said, in *Bell v. County Court*, 61 Mo. App. 173, loc. cit. 176, that the alternative writ in that case had been directed to the county court; that this was error; that the writ should have run against the justices of the county court by name.

In *State ex rel. v. Burkhardt*, 59 Mo. 75, it is said (loc. cit. 78): "It is not perceived upon what principles, or by what authority the county of Moniteau was made a party to the original proceeding. The writ of mandamus is in form a command in the name of the state, directed to some tribunal, corporation or public officer, requiring them to do some particular thing therein specified, and which it has been previously determined that it is the duty of such tribunals or other person to perform." This same proposition was decided at an early date by our Supreme Court in *Platte County Court v. McFarland*, 12 Mo. 166. There it appeared that the cause then before the court was docketed as one against the county court of Platte county, and was a proceeding against the county court to compel that court to perform its duty respecting the opening of a public road. It appears by the statement of the case that McFarland and others, being the commissioners to survey and mark out a state road, made a report of their proceedings to the county court, filing a report of their survey. This report was rejected by the court for its alleged irregularity and further time was given the commissioners to make a new report. On the coming in of this latter, certain objectors resisted it and the county court again refused to receive it. On this the commissioners sued out a writ of error from the circuit to the county court. That writ was directed to the justices of the coun-

ty court. On the return of the writ to the circuit court, it appears that the cause was docketed as one against the county court and on the hearing of it the judgment of the county court, rejecting the report of the commissioners, was reversed by the circuit court and a judgment for costs rendered. On this judgment a writ of error was sued out from the Supreme Court. Says Judge Scott, speaking for the Supreme Court (12 Mo. loc. cit. 168), in disposing of the contention that the writ should have been directed to the county court, not to the justices: "It is impossible to discover any principle on which the county court of Platte could have been made a party to the writ of error."

The statutes relating to the duties of the county attorney or prosecuting attorney, sections 1007, 1008, Revised Statutes 1909, are set out by my Brother NORTONI, so that it is not necessary for me to repeat them in full. They expressly provide that the prosecuting attorneys "shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county," etc., and that he "shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof." I find nothing in these statutes which throws upon him the duty of acting in court for the judges of the county court, when not required by them to so act; he is required to give his opinion in writing to the county court or any judge thereof, only "when demanded." Here the relator avers that his opinion was never asked in this matter; that he was never consulted. I find no authority in law which requires the county judges, even the county court, to demand and secure his opinion before acting, or on his giving his opinion to act only as he advises. Suppose a claim against the county is before the county court for action. The prosecuting attorney resists it and advises and argues against its allowance. Will it be pretended that the county court must determine the cause as he suggests? That would be to assert a new doctrine in Missouri. I find in the omission from the statutes of any command on the judges of the county court to be controlled by the written opinion of the prosecuting attorney, a distinct legislative expression of intention, that this is a matter which is to be left to the county judges; is one of the responsibilities of their official position. For if it is true that the judges of the county court are compelled, willy nilly, to accept the opinion of the prosecuting attorney on a matter submitted to them, the responsibility

of the judges would entirely disappear and the will and the opinion of the prosecuting attorney, an adviser merely of the court, would be substituted for the opinion of the judges of the county court.

In many matters, and especially in the most material matters relating to the issuance of dramshop licenses, these judges act judicially. That in acting judicially they are to be controlled by the prosecuting attorney surely is a new doctrine in our state. That they do act judicially in many matters and in the final act of granting the license, see *State v. Evans*, 83 Mo. 319; *State ex rel. Smith v. County Court of Platte County*, 83 Mo. 539; *State ex rel. Campbell v. Heege*, 37 Mo. App. 338, loc. cit. 346; *State ex rel. Pulliam v. Fort*, 107 Mo. App. 828, 81 S. W. 476.

But it is said that the right of the prosecuting attorney to interfere in this matter and take charge of this litigation, is to be found in these words: "He shall prosecute or defend, as the case may require, all civil suits in which the county is *interested*, represent generally the county in all matters of law," etc. In point of fact, the claim made by the relator here, that as prosecuting attorney he has a right to control the proceeding, rests solely upon the proposition that the county is *interested*; he does not, in so many words, claim that he is in all cases attorney for the judges. These cases of *State ex rel. Gordon v. Burkhardt*, *State ex rel. Conran v. Williams*, 96 Mo. 13, 8 S. W. 771, and *State ex rel. Baker v. Fraker et al.*, are in point here, as I think, for the reason that they hold that having an interest does not authorize one to interplead or interpose in a proceeding by mandamus. As the relator asserts his right to control the mandamus upon the ground that the county has an interest in the proceeding, I think that these cases are against his claim. While it may be that the county and the people thereof are interested in the collection of the fees for dramshop licenses and in the issue of dramshop license, they have no more interest in that than in dozens of other matters pertaining to the general public. The interest referred to in the statute and which the prosecuting attorney is to protect, must appear in and by the pleadings, or, if not so disclosed, must be capable of being brought before the court by way of intervention by the county in a pending action. This may be done in any ordinary civil action. But while mandamus is now treated as a civil action, our statute (R. S. 1908, §§ 2146, 2555), being practically that of Queen Anne (9 Anne, c. 200), it is the settled law of this state that parties not of record, no matter what their interest, cannot intervene in a proceeding by mandamus. That was expressly decided in *State ex rel. Gordon v. Burkhardt*, *supra*. In that case, at page 78 of 50 Mo., it is said, the writ having been addressed to Burkhardt, as sheriff and ex of-

ficio collector alone: "The county had no right to make any return to an alternative writ not directed to it, if indeed the writ could be directed to a county as such. Under the statute, issues can only be made in this proceeding between the person to whom the writ is directed and delivered, and the party suing or prosecuting such writ. Although the county or the people of the county at large may have had an interest in the result of the proceeding, it could not be made a party thereto. The general provisions of the practice act, authorizing all persons having or claiming an interest in the subject-matter of the controversy to be made parties plaintiff or defendant, do not apply to proceedings by writ of mandamus. The county, through its prosecuting attorney, with the consent of the defendant, Burkhardt, might, in a return in his name, have urged as a defense most, if not all, the matters set out in the petition filed by it in the cause. Having been improperly permitted in the first instance to assert its claims to the funds in controversy in this action, no error was committed by the circuit court in dismissing its petition or interplea."

In *State ex rel. v. Williams*, 96 Mo. 13, loc. cit. 18, 8 S. W. 771, 772, *State ex rel. v. Burkhardt*, *supra*, is expressly affirmed on this point, it being reiterated "that the general provisions of the practice act allowing all persons having an interest in the suit to be made plaintiffs or defendants had no application to proceedings by mandamus. It is, therefore, clear that the return must conform to the common law rules; and this is none the less so because the relator may plead to or traverse all or any of the facts stated in the return."

In *State ex rel. Baker v. Fraker et al.*, Justices of the County Court, 166 Mo. 130, loc. cit. 142, 65 S. W. 720, 723, the Burkhardt Case and Williams Case, *supra*, are cited approvingly as establishing as the law of this state, that "the provision of the general practice act requiring all parties in interest to be made plaintiffs or defendants, does not apply to proceedings by mandamus." As far then as concerns the right of the prosecuting attorney to appear and control this cause by reason of the county having an interest, being a party in interest, although not a party of record, it seems to me conclusively established by the decisions of our Supreme Court in the three cases last above cited that, by reason of that interest, even if it exists, the prosecuting attorney has no right to assert it in the Hornberg Case, or to interfere in and control that case; in the *interest* of the county, the county not a party, he cannot interfere in the mandamus proceeding.

This seems to be clear also from another point of view. That is, that the respondent in the case of *State ex rel. Hornberg v. Judges of the County Court*, is an action in which they, as Judges, it is true, but individually, must make the return as they did in this

case. It is true that it was alleged in the application which was made to us for the writ by the relator here, that that was filed in court by attorneys other than himself but that is entirely immaterial. The return is made by the judges themselves; is their return; is not the return of the county; is not the return of any attorney; but it is the return of the individuals against whom the writ was directed and which commanded them to make the return.

The alternative writ is not only directed to the person occupying the office but the return must be made by him. Says High on Extraordinary Legal Remedies (3d Ed.) § 446: "When the aid of a mandamus is invoked against an inferior court, it would seem to be sufficient, ordinarily, to address the writ either to the court as such, or to the individual judges composing it. But when there are other judges authorized to hold the term of the court, the mandamus should be addressed individually, since in case of disobedience to the writ the power of enforcing obedience is exercised over the judges personally."

The old and often followed case of *St. Louis County v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355, is cited in support of this. In the *Sparks* Case it was urged that the writ having been addressed to the justices of the county court and severally served on them in vacation, that there was no warrant for this; that it should have been addressed to the court. Answering that, our Supreme Court said (10 Mo. loc. cit. 120, 45 Am. Dec. 355): "A mandamus in the alternative may be served on the officers composing the court in vacation, and \* \* \* a delivery of a copy of the process showing the original, is a sufficient service. \* \* \* It seems it may be addressed to the court or to the individuals composing it." Since that decision it has been the invariably approved practice to issue these writs against the judges composing the court, and the writ is served on them, not in term time but on the judges in chambers or in vacation, as other writs against individuals are served. That has always been so in the case of writs served upon the judges of this court by direction of the Supreme Court and we have invariably followed it in our own practice.

So fully has the rule that the direction of the writ is to the individual and that he is the one who is to make the return, been recognized, that where the return of the judge or judges or court is signed by attorney, it has been challenged for lack of individual signature. Thus in *State ex rel. Wittenbrock v. Wickham*, Judge, 65 Mo. 634, the return was challenged on the ground that it was not the bona fide answer of the judge but a defense made and set up by an attorney. Answering this contention, our Supreme Court said (65 Mo. loc. cit. 636), that as the law does not require the return to be sworn to, and as the judge was represented before the

Supreme Court by responsible attorneys of the court who have filed his return, "we cannot on the mere suggestion of the relator, say that this is not Judge Wickham's return." This undoubtedly means that if it had been shown that it was not the return of the judge but merely of the attorney, it would not have been sufficient.

This was followed by our court in *State ex rel. Castillo v. Edwards*, Judge, 11 Mo. App. 152.

In *Douglass v. Circuit Judge*, 42 Mich. 405, loc. cit. 497, 4 N. W. 225, 226, it is said: "The answer filed is not signed by the circuit judge. It purports to have been drafted by attorneys and not to have been submitted to the respondent for approval by him. We do not consider, therefore, what appears therein, but have treated the case as on demurrer to the showing made by the relator." That is to say, the Supreme Court of Michigan treated a return not signed by those to whom it was directed, or by some attorney by their authority, as a nullity. What that court, in line with our own court, has held in the *Edwards* Case, *supra*, and our own Supreme Court in the *Wickham* Case, *supra*, would hold as to a return made by an attorney, which is not only not submitted to the respondent but, by which, as here it is expressly stated, it is intended to repudiate the return of the respondents in the *Hornberg* Case, and is to be a return, set up and devised by the attorney himself, without the assent and contrary to the wishes of the judges of the county court, is not difficult to determine.

I think that the case at bar, on this point falls directly under what is said by the Supreme Court of the United States in the case of *United States v. Boutwell*, 17 Wall. (84 U. S.) 604, 21 L. Ed. 721.

It is claimed that the decision in that case, as to this point, has been disapproved or qualified by later decisions of that court. An accepted text-writer, 2 *Bailey on Habeas Corpus*, p. 786, treating as well of mandamus and of other extraordinary writs, in commenting on a decision of the Supreme Court of Wisconsin as adverse to that of the United States *v. Boutwell*, *supra*, the Wisconsin court holding that the Supreme Court of the United States had receded from the decision in the *Boutwell* Case, says: "It will appear, however, from a reading of the case cited in the federal court (*Leavenworth County v. Sellew*, 99 U. S. 624, 25 L. Ed. 333), that the position first assumed by it has not been changed in the subsequent case. It will also appear that that court assumes the very opposite of the premises assumed by the Wisconsin court." Mr. Bailey then quotes extensively from *United States v. Boutwell*, *supra*, thus: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way

or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards, and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty is an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. \* \* \* Thus it is the personal default of the defendant that warrants impetration of the writ, and if peremptory mandamus be awarded, the costs may fall upon the defendant." The decision in the Boutwell Case is distinctly affirmed by the Supreme Court in Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621. That is substantially in line with the decisions of our own Supreme Court, to which we have referred, and to which we shall hereafter refer in treating of the office of the writ of mandamus. The case of Leavenworth County v. Sellew, supra, on its facts bears no analogy to the Boutwell Case, nor to the case before us. The principle announced in the Boutwell Case, it was held, is not applicable to the Sellew Case, for in the Boutwell Case respondent, an individual, was proceeded against, true as an officer, while in the Sellew Case the writ was against the respondents as a body, "*a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced.*" The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, *but the peremptory writ was ordered against the corporation alone.* As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required." (Italics ours.)

It is hardly necessary to say that the Judges of the County Court of St. Louis County are in no sense a corporation, nor would service upon the clerk of the county court have brought these defendants into court, or a peremptory writ issued with service upon that clerk have been binding upon the judges, or that disobedience to it by them under such form of service would be punished on them as for contempt. Nor would the county be

liable for costs if the case is determined against the respondents. The respondents, as said in the Boutwell Case, supra, and others cited, are presumably liable for costs and subject to attachment for contempt in case of refusal to make any return or to obey the writ, and these are reasons given why the proceeding is against the individual and not against the office. As well might it be said that where the writ of mandamus issues from the Supreme Court to our court that service of the writ upon the clerk of our court will be good service upon us as judges. While no decision passing upon that question has ever arisen, the invariable practice since the creation of this court in 1876, has been to serve such writs individually upon the judges of this court.

In some jurisdictions it is held: "A continuing duty may be enforced against successors of the officer originally in default," as illustrated in State v. Cornwall, 97 Wis. 565, 73 N. W. 63; in others it is held that "it will not lie against such successors when not themselves in default for the failure of their predecessors to perform the duty." So it is held in People v. Burns, 106 App. Div. 36, 94 N. Y. Supp. 196; State v. Cincinnati, 7 Ohio Dec. (reprint) 326; Holdermann v. Schane, 56 W. Va. 11, 48 S. E. 512, 3 Ann. Cas. 170.

Referring to the cases cited in support of the position of the relator, and first taking up State ex rel. Campbell et al. v. Heege et al., Judges of the County Court of St. Louis County, 37 Mo. App. 338, I am unable to see that it lends any support to the contention of counsel for the relator. All that is said as touching the propriety of the application for certiorari being made by citizens of St. Louis county instead of by the Attorney General or the prosecuting attorney of the county, is that the reason the petitioners, tax payers and citizens had appeared in our court and asked special leave to institute the proceeding in their names, was that they had applied to the Attorney General of the state and to the prosecuting attorney of St. Louis county for permission to make the application at their relation respectively but that in both instances permission had been refused. Referring to this last statement our court said (37 Mo. App. loc. cit. 345) that it had not been controverted and that the prosecuting attorney of St. Louis had assented to the truth of it in so far as he was concerned. Our court then says: "We understand that the reason why the Attorney General refused the use of his name was that he regarded it as a local affair which should be prosecuted in the name of the prosecuting attorney; and that the reason why the prosecuting attorney in like manner declined the use of his name was that there is a statute requiring him to appear in such cases for the county court,—which rendered it inconsistent with his views of duty to act at once as the prosecuting officer and as counsel for the respondents. We

incline to think that his views of duty were correct, and, in consequence of the refusal of the Attorney General and prosecuting attorney of the county to institute the proceeding, we also think that, to prevent a possible failure of justice, it was within our discretion to grant the writ upon the application of assessed tax-paying citizens of the township." That is all that is said in the opinion that can be claimed to have any bearing here. In a way it is obiter and certainly is not decisive of the question that is here presented. If any inference is to be drawn from it, it would seem to be that the prosecuting attorney, being the official adviser of the county court, could take no position antagonistic to it in court,—which is just what the relator here seeks to do.

*Clark & Grant v. Lyon County*, 37 Iowa, 469, another case referred to in support of the right of the county attorney to appear in an action to which the county was a party, is an action directly against the county eo nomine to compel the payment of certain warrants. It appeared that the board of supervisors of the county were the same persons who had issued the warrants and, it was charged, issued them for an illegal purpose and without consideration. In an action brought on these warrants against the county, it appeared that the board of county commissioners, ignoring the county attorney, had employed other attorneys whom it was understood would not contest the validity of these warrants. The district court, on the application of the district attorney, who was also ex officio county attorney, applied for leave to file and make the defense in the above case in behalf of the county. The district court declined to allow the district attorney to appear and file an answer in the case. From this refusal the district attorney appealed to the Supreme Court. The court held that it was the right and duty of the district attorney to appear for any county in his district, "in all matters in which it may be a party or interested, in the district court of his district." The use of the word "interested" here is of no particular significance, for in the proceeding before the court the county was a party of record. The court, however, as we have elsewhere noted, held that the matter of the refusal must be brought to the Supreme Court only by appeal. The court further said: "We do not hold, that if the district attorney had been allowed to appear and defend in the court below, and had been unsuccessful, he could, of his own motion, and against the wishes, and in opposition to the judgment of the board of supervisors, appeal the cause to this court and protract the litigation."

Neither *Clough & Wheat v. Hart*, 8 Kan. 487, nor *Waters v. Trovillo*, 47 Kan. 197, 27 Pac. 822, are particularly in point here. Both were actions on contracts of employment of private attorneys by the county commission-

ers. The point in decision in each was the power of these bodies to employ outside attorneys and contract for their payment by the county when the commissioners, as representing the county, were parties. The decision of the court was that as the statutes of Kansas made no provision for the employment or pay of any outside attorney to assist in the prosecution or defense of claims against the counties or cities, that the contracts were ultra vires and payment thereunder could not be enforced against the county.

In *Board of County Commissioners v. Jones*, 4 Okl. 841, 51 Pac. 565, practically the same point is decided, and that was the sole question involved, namely, the authority of the county authorities to employ and pay out of the public funds special attorneys. The decision is, that no such authority existed. While in the discussion of this matter a good deal is said, both as original matter and by way of quotation, about the county attorney being elected by the people and his authority to appear in all cases in which the county is employed, as a matter of fact, it is obiter.

The *Board of County Commissioners v. State Capital Co.*, 16 Okl. 625, 86 Pac. 518, does support the contention of relator here as to his authority to appear and conduct all cases in the court in which the county is a party, and even goes to the extent of holding that the county attorney is not bound to follow the direction and advice of the county commissioners in regard to the conduct of the litigation against the county. This decision stands alone on that proposition. We doubt if the rule there announced has ever been recognized in practice, certainly not by judicial decision, in our state. Judges of our county courts, as well as prosecuting attorneys, are elected by the people and are the agents of the people, each within their own sphere. But it has never been even suggested heretofore that the judges of the county courts were subordinate to the prosecuting attorney, or that the will of the latter should govern in matters within the ministerial, judicial, or even quasi judicial powers of the county court. The Oklahoma decisions certainly are against the idea, so far as I know heretofore universally entertained in this state on that matter. While the prosecuting attorney is the law officer of the people, and in the proper discharge of his duties is responsible to none but the people, the judges of the county court are no less the agents of the people within well defined limits and responsible for their acts to the people alone. Both however, that is the judges and the attorney, are after all confined to their own lines. The prosecuting attorney may possibly control the acts of the county judges through the courts, by proper proceedings, but not by his own will. When acting for the county court or its judges, he is in the position of any other lawyer to-



ward his client. If his views are not those of the judges of the county court on a matter within their jurisdiction and authority, he should follow the course approved by our court in *State ex rel. Campbell v. Heege et al.*, County Judges, *supra*, and keep out of the case. He can always reach the acts of the county court in some other way: as here, for instance: if a license is unlawfully issued to conduct a dramshop, its issue does not prevent the prosecuting attorney from prosecuting the keeper. As to the relation of attorney and client, it has been well said in *Allen v. Stone*, 10 Barb. (N. Y.) 547, loc. cit. 550: "That a man's rights may be affected, and he, perhaps, ruined by the act of an attorney whom he never employed, and may never have known, and without any notice whatever, is a position that must be sustained, if at all, by mere force of authority. It has no foundation in reason or justice, is intolerable in practice, and contrary to a fundamental principle that every man should have a day in court. \* \* \* It also violates another principle, that one cannot act for another without authority express or implied."

Coming to the action of respondent, Judge Wurdemann, in overruling the motion of relator to strike the return of the judges from the files, and declining to allow the relator, as prosecuting attorney of the county, to take charge of the pending proceeding before the court in which the judges of the county court were the respondents, as we have seen, it was held in *Clark & Grant v. Lyon County*, 37 Iowa, 469, that on the refusal of the district court to allow the public officer, the district attorney, to appear and control the case in which the county was a party, that the appellate jurisdiction of the Supreme Court was ample and adequate to reach the matter; that being so that mandamus would not lie.

The general rule that mandamus will not lie when there is an adequate remedy, as by appeal, is stated in 26 Cyc., p. 158, par. 2, to be that it, "will not lie to control or review the exercise of the discretion of any court, board, or officer, when the act complained of is either judicial or quasi-judicial." See also *Am. & Eng. Ency. of Law* (2d Ed.) p. 753. And it is further said in Cyc. (p. 158, par. 3): "While mandamus may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in any particular way." *State ex rel. v. Jones*, 155 Mo. 570, 56 S. W. 307, is cited for this. It is further said in 26 Cyc. 188, that: "While a writ of mandamus will not as a general rule issue to review an exercise of judicial discretion, it may be employed to compel an inferior tribunal to act or to exercise its discretion, although the particular method of acting or the manner in which the discretion shall be exercised will not be controlled. But as a general rule it will not issue for this purpose where there is a remedy by ap-

peal or other method of review." In 26 Cyc. page 140, par. C, it is said: "The writ is employed only in unusual cases where other remedies fail, and it is hedged about by many conditions totally inapplicable to the ordinary suit at law. \* \* \* The issuing of the writ therefore is generally, almost universally, considered discretionary, and to this extent only is the proceeding a prerogative one." So it is said in 19 *Am. & Eng. Ency. of Law* (2d Ed.) p. 751. Many decisions by our Supreme Court are to the same effect, as see *State of Missouri ex rel. Ensworth v. Albin et al.*, 44 Mo. 346; *State ex rel. v. Wilson*, Judge, etc., 49 Mo. 146; *State ex rel. Morse v. Burckhardt*, Judge, 87 Mo. 533; *State ex rel. Campbell v. Cramer*, 96 Mo. 75, 8 S. W. 788; *State ex rel. Herriford v. McKee*, Judge, 150 Mo. 233, 51 S. W. 421; *State ex rel. v. St. Louis*, 158 Mo. 505, 59 S. W. 1101; *State ex rel. v. Fraker*, 166 Mo. 130, 65 S. W. 720; *State ex rel. v. Gibson*, 187 Mo. 536, 86 S. W. 177; *State ex rel. Missouri Glass Co. v. Reynolds et al.*, Judges, etc., 243 Mo. 715, 148 S. W. 623.

In *State ex rel. Morse v. Burckhardt*, *supra*, while a proceeding for prohibition in which the writ was denied, Judge Henry, speaking for our Supreme Court, discussed the question of mandamus at considerable length, referring particularly to *State ex rel. Fitzpatrick v. Meyers*, 80 Mo. 601. The *Meyers Case* was a proceeding by mandamus, to compel the county court of Nodaway county to issue a dramshop license to the relator. The question of the controlling effect of what was known as the "Downing Law" was involved. Referring to the *Meyers* decision in the *Burckhardt Case*, *supra*, our Supreme Court says in the latter (87 Mo. loc. cit. 537): "Whether the county court was authorized to grant a dramshop license for a saloon, within three miles of the State University, depended upon the effect of the 'Downing Law' upon the three mile act. If the 'Downing Law' repealed it, the county court had, and if not, it had not authority to grant the license. The circuit court in the mandamus proceeding had jurisdiction to determine that question, and that it erroneously decided it, if such should be our opinion, does not affect the jurisdiction of the court. Whenever a court errs in expounding a statute, it gives or denies a right, which it is not strictly speaking, authorized to do; and in every case, with as much propriety as in this, it might be said that the court had no right to render the judgment entered. The question is not whether the court was authorized to render the judgment entered, but whether it had jurisdiction to enter any judgment at all. \* \* \* No man has a right to anything contrary to law, but courts frequently err in declaring one to have a right which, on a proper construction of the law, would be denied him. \* \* \* If the circuit court, in its judgment against the county court, erred, an appeal or

writ of error might have been prosecuted to reverse it; and it is no answer to this that the judges of the county court refused to prosecute an appeal or writ of error. This court cannot interfere by this extraordinary writ to save the people of the district within which dramshops are prohibited from the consequences of the obstinacy, or whatever it may have been, which prompted the county judges to refuse to prosecute an appeal." Even a stronger case is *Martin v. State*, 12 Mo. 471, where at page 475, it is said: "A circuit judge, therefore, discharging (a prisoner under habeas corpus) against this provision of the statute, may be considered as acting indiscretely, even erroneously; yet having jurisdiction over the subject, his order discharging must be considered a justification to the jailor in turning out the prisoner thus ordered to be discharged." This case is cited and extensively quoted from with approval in *State ex rel. Herriford v. McKee*, Judge, 150 Mo. 242 and 243, 51 S. W. 421. Even stronger on this is *State v. Wear*, 145 Mo. 162, loc. cit. 190 and 203, 46 S. W. 1099.

Applying the principle announced in these cases to the case at bar, the determination of the right of the prosecuting attorney of St. Louis county to appear in this case to allow him to withdraw the return made by the judges of the county court and substitute one of his own, and to take charge of that case on the ground that the county was interested and that he, as prosecuting attorney of the county, was entitled to control the case, is an attack upon the judicial action of the circuit judge in a matter in which he had a right to err, and the correction of his error rests not by the extraordinary writ of mandamus but by appeal. In short, the action of the circuit judge was judicial, was over a matter within his jurisdiction and not such an action as can be controlled by the writ of mandamus. In line with the decision in the *Burckhardt* Case, supra, see

also *State ex rel. Springfield Traction Co. v. Broadbuss*, 207 Mo. 107, loc. cit. 121, 105 S. W. 629, and following, 105 S. W. 629. This latter case was a decision in banc concurred in by all of the judges except Judge Gantt.

The circuit judge did not decline to hear the prosecuting attorney on his motion; did not strike that motion from the files, but hearing it, considering it, acted on it and overruled it. That was judicial action. The question then is, can we reach that action of the honorable Circuit Judge by mandamus? His court is one of general jurisdiction. He had power to issue the writ of mandamus then before him, and had jurisdiction over the subject-matter. Even if he erred in his action in overruling the motion or petition of the prosecuting attorney, relator, he was acting within his judicial power. He had a right to err. That error cannot be reached by mandamus. So an unbroken line of decisions of our Supreme Court all say.

For these reasons I am clearly of the opinion that the alternative writ should not have been issued and that having been issued it should be quashed and the respondent circuit judge discharged therefrom. On these two grounds, therefore, first, the grave doubt as to the jurisdiction of our court in this case at all, under the decision of the Supreme Court in *State ex rel. Sale v. Norton et al.*, 201 Mo. 1, 98 S. W. 554; and second, under *State ex rel. Morse v. Burckhardt*, 87 Mo. 533; *State ex rel. Gordon v. Burkhardt*, 59 Mo. 75; *State ex rel. v. Williams*, 96 Mo. 13, 8 S. W. 771; *State ex rel. Baker v. Fraker*, 166 Mo. 130, 65 S. W. 720; and *State ex rel. Springfield Traction Co. v. Broadbuss et al.*, 207 Mo. 107, 105 S. W. 629, I think that we are bound to quash the alternative writ.

Deeming the decision rendered by the court contrary to the decisions of the Supreme Court in the cases last above cited, I ask that this cause and proceeding be certified and transferred to the Supreme Court.

**VINSON et al. v. W. T. CARTER & BRO.**  
(App. No. 8629.)

(Supreme Court of Texas. April 22, 1914.)

**1. APPEAL AND ERROR (§ 345\*)—PROCEEDINGS  
—WRIT OF ERROR TO COURT OF CIVIL AP-  
PEALS—MOTION FOR REHEARING.**

The Supreme Court will not refuse a petition for a writ of error because of the failure of the Court of Civil Appeals to act directly upon the motion for the rehearing, which was not filed in time, where the Supreme Court has jurisdiction, and it is sufficiently shown that the failure to file a motion for a rehearing was due to accident or some cause other than the negligence of the applicant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.\*]

**2. APPEAL AND ERROR (§ 338\*)—PROCEEDINGS  
—ERROR TO COURT OF CIVIL APPEALS—LIM-  
ITATION.**

It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. § 338.\*]

**3. APPEAL AND ERROR (§ 345\*)—PROCEEDINGS  
—ERROR TO COURT OF CIVIL APPEALS—LIM-  
ITATION.**

The overruling by the Court of Civil Appeals of a motion for leave to file a motion for rehearing, which was not filed within the time specified, is equivalent to an overruling of the motion for rehearing, and fixes the time from which the period for filing the petition and writ of error begins to run.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.\*]

Trespass to try title by John F. Vinson and others, against W. T. Carter & Brother and others. A judgment for defendants was affirmed by the Court of Civil Appeals (161 S. W. 49), and plaintiffs petition for writ of error. Petition dismissed.

V. A. Collins and Lipscomb & Lipscomb, all of Beaumont, for applicant.

**PHILLIPS, J.** It is shown by the petition for writ of error that no motion for rehearing was filed in the Court of Civil Appeals within the time prescribed by the statute. It is stated that the failure to file such motion within the proper time was due to an undue and unanticipated delay in its transmission by express. A motion for leave to file the motion for rehearing as of time was overruled by the court on January 8, 1914. A second motion of the same nature was thereupon filed, and overruled on January 22, 1914. The petition for writ of error was filed in the Court of Civil Appeals more than 30 days after the overruling of the first motion for leave to file the motion for rehearing, but within 30 days from the overruling of the second motion.

[1-3] We would not refuse to consider the petition for writ of error, notwithstanding

the Court of Civil Appeals had not acted directly upon the motion for rehearing, if we had jurisdiction and were of the opinion that it was sufficiently shown that the failure to duly file the motion for rehearing was due to accident or some cause other than neglect of the applicant. *Sams v. Creager*, 85 Tex. 497, 22 S. W. 399. It is apparent, however, that we are without jurisdiction. It is essential to the jurisdiction of this court to grant a writ of error that the petition for the writ be filed in the Court of Civil Appeals within 30 days from the overruling of the motion for rehearing. *Schleicher v. Runge*, 90 Tex. 456, 39 S. W. 279. Where under such circumstances as are shown here the Court of Civil Appeals declines to consider the motion for rehearing, its action in overruling a motion for leave to file it necessarily fixes the time from which the period prescribed for the filing of the petition shall be reckoned, as in such case the overruling of the motion for leave to file amounts to overruling the motion for rehearing. A different rule would permit an extension of the time fixed by the statute for the filing of the petition for writ of error simply through the filing of successive motions of the same character.

Petition dismissed for want of jurisdiction.

**SOUTHWESTERN TRACTION CO. v. MEL-  
TON.** (No. 5320.)

(Court of Civil Appeals of Texas. Austin.  
March 25, 1914.)

**APPEAL AND ERROR (§ 635\*)—JUDGMENT—  
FAILURE OF TRANSCRIPT TO CONTAIN JUDG-  
MENT.**

Under Rev. St. 1911, art. 2078, authorizing appeals from final judgments, an appeal must be dismissed, where the transcript contains no judgment entered on the verdict, because of want of jurisdiction of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

Appeal from Bell County Court; W. S. Shipp, Judge.

Action by W. I. Melton against the Southwestern Traction Company. There was verdict for plaintiff, and defendant appeals. Dismissed.

G. M. Felts, of Belton, for appellant. Durrett & Dyess and Edmund Heinsohn, all of Temple, for appellee.

**JENKINS, J.** This suit was brought by appellee against appellant to recover damages on account of the alleged negligent killing by appellant of a horse belonging to appellee. Notwithstanding it appears from the briefs of the parties and from the record that there was a jury trial resulting in a verdict in behalf of appellee, still the transcript contains no judgment entered thereon, for which reason we have no jurisdiction of

the attempted appeal. See article 2078, R. S. 1911.

It therefore becomes our duty to dismiss the appeal, and it is accordingly so ordered. Appeal dismissed.

### POULTER v. WEATHERFORD HARDWARE CO. (No. 7864.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 21, 1914. Rehearing Denied March 28, 1914.)

#### 1. CHATTEL MORTGAGES (§ 114\*)—FUTURE INDEBTEDNESS.

A chattel mortgage will secure a future indebtedness of the mortgagor if that be the intention of the parties.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 191; Dec. Dig. § 114.\*]

#### 2. CHATTEL MORTGAGES (§ 114\*)—INDEBTEDNESS COVERED.

Defendant, a farmer, executed a chattel mortgage to plaintiff, the W. Hardware Company, for the purpose of securing the payment of certain promissory notes named in the mortgage and to secure, a line of credit with the mortgagee, and the mortgage provided, after reciting the notes secured, that it was to be for "all other amounts I may now be due, or hereafter become due to the W. Company or their assigns, such as book accounts, notes, or in any manner whatsoever, it being the intention of this mortgage to not only secure the debt created by me this day, but also to serve as a basis of credit with the grantees herein, or their assigns." Held, that the mortgage did not cover a judgment rendered against the defendant in favor of a third party which plaintiff purchased, so that plaintiff could not foreclose the mortgage to secure payment of such judgment.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 191; Dec. Dig. § 114.\*]

Appeal from Parker County Court; T. F. Temple, Judge.

Action by the Weatherford Hardware Company against Ed Poulter. From a judgment for plaintiff, defendant appeals. Affirmed in part and reversed and rendered in part.

Jno. L. Poulter, of Ft. Worth, for appellant. H. C. Shropshire, of Weatherford, for appellee.

**SPEER, J.** This suit was instituted by the Weatherford Hardware Company against Ed Poulter to recover a balance of \$32.35 due upon a promissory note and to foreclose a chattel mortgage lien for the satisfaction of such balance, together with the amount of a judgment against the defendant in favor of Lowe & Co., which judgment had been purchased by the plaintiff. The honorable county judge, before whom the case was tried, rendered a judgment in favor of the plaintiff foreclosing the lien as prayed for, and the defendant has appealed.

We adopt the trial court's findings of fact and affirm his judgment in so far as the same is personal, but reverse and render judgment in favor of appellant in so far as the judg-

ment seeks to foreclose the chattel mortgage lien as to the Lowe & Co. judgment. The disposition of the case involves a construction of the chattel mortgage. That instrument, in so far as it is necessary to quote, is as follows: "This conveyance is intended as a mortgage to secure the payment of my indebtedness to the said grantees in the sum of two hundred and twenty-five dollars, as evidenced by seven certain promissory notes bearing even date with this mortgage, and more particularly described as follows: 1 note for \$25 maturing August 1, 1911, 1 note for \$25 maturing September 1, 1911, 1 note for \$25 maturing October 1, 1911, 1 note for \$25 maturing November 1, 1911, 1 note for \$25 maturing December 1, 1911, 1 note for \$50 maturing September 1, 1912, 1 note for \$50 maturing October 1, 1912, all bearing ten per cent. interest from date and providing a collecting agent's fee of twenty-five per cent. if not paid when due, or if sued upon, and payable at Weatherford, Texas, and for all other amounts I may now be due, or hereafter become due to the Weatherford Hardware Company, or their assigns, such as book accounts, notes, or in any manner whatsoever, it being the intention of this mortgage to not only secure the debt created by me this day, but also to serve as a basis of credit with the grantees herein, or their assigns, to secure any other amount I may now owe, or hereafter owe, as if the same were specifically described herein."

[1] It cannot be doubted that a chattel mortgage will be operative to secure a future indebtedness of the mortgagor where such is the intention of the parties. That principle is not assailed in this decision, but the question is purely one of interpretation. If an indebtedness like the Lowe & Co. judgment was in contemplation of the parties at the time of the execution of the instrument being considered, then undoubtedly the lien would be security for it; but otherwise it would not be.

[2] Even ordinarily the provision for the application of the mortgage to "all other amounts I may now be due or hereafter become due" would be held to apply to debts of the general kind of that specifically secured. But in the present case all doubts as to this being the real intention of the parties are removed by the further stipulation contained in the instrument, "it being the intention of this mortgage to not only secure the debt created by me this day, but also to serve as a basis of credit with the grantees herein, or their assigns." Thus we have an exegesis by the parties themselves of the meaning of the language which otherwise might at most only be ambiguous. It is apparent from the situation of the parties, one being a merchant and the other a farmer in need of supplies, and the language employed in the mortgage, that the purpose of the par-

ties was that the mortgagor was to secure a line of credit with the mortgagee, and that the chattel lien should extend to those credits which were given in furtherance of the purpose of the parties. Appellant in no manner requested appellee to take up the Lowe & Co. judgment, and the voluntary purchase by appellee would not authorize it to have a foreclosure of the chattel mortgage executed designably to serve as a basis of credit with it. *Martin v. Halbrooks*, 55 Ark. 569, 18 S. W. 1046.

The judgment of the county court foreclosing the chattel mortgage lien as to the Lowe & Co. judgment is therefore reversed and here rendered for appellant, but in all other respects the judgment is affirmed, except that appellant is awarded the costs below by reason of his tender of the full amount due on the mortgage indebtedness.

### MENEFEE v. BERING MFG. CO. (No. 7876.)

(Court of Civil Appeals of Texas. Ft. Worth. March 7, 1914. Motion for Leave to File Motion for Rehearing Denied April 11, 1914.)

#### 1. EVIDENCE (§ 178\*)—TELEGRAM—ADMISSIBILITY.

A telegram received by a party in response to a letter addressed and mailed to the adverse party is properly received in evidence as against the adverse party who purported to have signed the telegram without other evidence that he had signed it except that disclosed by the face of the telegram, where the original telegrams of the company transmitting them had been destroyed pursuant to orders of the Interstate Commerce Commission.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

#### 2. MONEY PAID (§ 9\*)—PERSONS LIABLE—CONTRACTS—EVIDENCE.

Where an action for money paid for freight, unloading, and demurrage charges, was based on defendant's implied promise to reimburse plaintiff, and the undisputed testimony of a witness showed that defendant had agreed to pay the same and that he never questioned his liability, a judgment for plaintiff was authorized, though a telegram from defendant to plaintiff directed unloading and promised reimbursement for "freight charges," which term must have been intended to include all the charges sued for.

[Ed. Note.—For other cases, see *Money Paid*, Cent. Dig. §§ 27-29; Dec. Dig. § 9.\*]

#### 3. TRIAL (§ 139\*)—PEREMPTORY INSTRUCTIONS—WHEN AUTHORIZED.

Where plaintiff under all the evidence was entitled to a recovery of a part of the sum demanded, if not the entire amount demanded, a peremptory instruction for defendant was properly denied.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Error to District Court, Tarrant County; R. H. Buck, Judge.

Action by the Bering Manufacturing Company against O. R. Menefee. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wray & Mayer, of Ft. Worth, for plaintiff in error. Gillespie & Altman, of Ft. Worth, for defendant in error.

DUNKLIN, J. The Bering Manufacturing Company entered into a contract with O. R. Menefee for the purchase from him of a lot of railroad ties to be shipped to a certain place. Menefee shipped some 17 cars of ties in excess of the amount ordered by the purchaser, who declined to receive them. The ties contained in the excess shipment were held by the railroad company at the place of destination awaiting delivery and the payment of freight, unloading, and demurrage charges. Finally, the Bering Manufacturing Company paid those charges to the railroad company and instituted this suit to recover the same of Menefee, alleging the facts above recited, and further that it paid the charges not only for the use and benefit of Menefee, for which he impliedly agreed to reimburse it, but also at his special instance and request and upon his express promise to reimburse plaintiff for such expenditures. From a judgment in favor of the plaintiff for \$2,231.60 freight, \$167.25 demurrage charges, and \$95.21 expenses for unloading, aggregating \$2,493.97, the defendant has prosecuted this writ of error.

The principal controversy upon the trial was whether Menefee was liable for the demurrage and unloading charges, or whether his liability was confined to the amount paid by plaintiff for freight only.

It seems that prior to the payment by plaintiff of the charges in controversy there had been considerable correspondence between the parties relative to the payment of the charges in controversy. What purported to be a part of this correspondence was a telegram addressed to plaintiff's manager at Dallas, Tex., dated at Ft. Worth, Tex., with defendant's name signed thereto, reading as follows: "Unload our ties. Will reimburse you freight charges." This telegram was admitted in evidence over defendant's objection that there was no proof other than appears on the face of the telegram that Menefee sent it. The telegram was dated December 22, 1909, and the manager who received it testified that it was a reply to the following letter written by him as manager for plaintiff December 21, 1909: "Menefee Bros., Fort Worth, Texas—Gentlemen: Referring to conversation had with you about the ties rejected by Gulf, Texas & Western Ry., beg to state we have been working continually on this matter since we saw you, and now have the matter where we can get the ties unloaded and held for adjustment, provided the freight and unloading charges are immediately refunded the Ry. Co.—that is, they will draw on us for the amount. This seems to be the best adjustment that can be reached, and if it is agreeable to you, we want you to give us your written authority to have the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

cars unloaded and held for further adjustment and your statement that we shall immediately draw on you for the charges for unloading, and freight, demurrage, etc. Unless you wish to do this, we shall simply have to return you invoices for all cars refused and charge same back to you, and you can refund amounts we may over paid you. Please let me hear from you at once, as this matter cannot be allowed to drag further. I think there is small doubt the adjustment above suggested will be the easiest way out as by unloading the cars we will stop charges, and when the matter is finally adjusted we will then pay for the ties. Bering Manufacturing Company."

Dixon, plaintiff's manager, testified without contradiction that, shortly before he wrote the letter above referred to and received the telegram, he had a conversation with the defendant, during which conversation the latter promised to pay the charges for unloading and for demurrage as well as for freight, and that after those charges had been paid Menefee never questioned his liability therefor; defendant did not testify upon the trial at all.

[1] It further appears that the manager of the telegraph office from which the telegram was sent to plaintiff's manager at Dallas testified that the original of that telegram had been destroyed in obedience to a regulation established by the Interstate Commerce Commission requiring the destruction of all original telegrams more than one year old. Under the circumstances recited above, we are of the opinion that there was no error in admitting the telegram. *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Ullman-Lewis Co v. Babcock*, 83 Tex. 68.

It is insisted that the manager, Dixon, did not testify expressly that he mailed the letter copied above in the United States mail, properly stamped and addressed to the defendant, and that therefore the letter could not be considered in determining whether or not a proper predicate had been laid for the introduction of the telegram. A sufficient answer to this is that it does not appear that any objection was urged to the introduction of the letter, and further that it was quite apparent from Dixon's testimony that the letter was in fact sent through the mail according to the usual custom.

[2] The court charged the jury as follows: "If you find and believe from a preponderance of the evidence in this case that on or prior to December 22, 1909, the defendant requested the plaintiff or requested Wm. Dixon, as manager of the plaintiff, Bering Manufacturing Company, to pay the freight charges on 17 cars of ties shipped the Gulf, Texas & Western Railway Company, by said defendant, and in the name of and for the benefit of plaintiff, and that said defendant,

O. R. Menefee, promised and agreed to reimburse said plaintiff for the amount so paid out by it, then your verdict will be for the plaintiff as follows: For per diem or demurrage charges \$167.25; for freight \$2,231.51; and for cost of unloading, \$95.21—making a total of \$2,493.97. But if you do not so find and believe from a preponderance of the evidence, your verdict will be for the defendant." Under an assignment of error addressed to the charge is the following proposition: "If it be conceded that the telegram was properly in evidence, then the basis of the plaintiff's suit was its contents, and inasmuch as it only contained a proposition to reimburse the defendant in error in the payment of freight, the submission of the item of demurrage and charges for unloading was error."

The cause of action alleged in plaintiff's petition was as indicated above; it was not based upon the contents of the telegram. In view of the letter to which the telegram was a reply, the undisputed testimony of Dixon that the defendant shortly prior to the date of the telegram agreed to pay the demurrage and unloading charges, as well as the freight, that defendant never at any time after the same were paid questioned his liability therefor, and the further fact that those charges were owing by the defendant and not by the plaintiff, we are of the opinion that the language "freight charge," used in the telegram, was meant to include all of the charges for which the suit was instituted.

[3] A further assignment is presented to the refusal of the court to give a peremptory instruction in favor of the defendant. This assignment must be overruled, for, if the telegram had not been introduced, then, under the undisputed testimony of Dixon that defendant had agreed to pay all of the charges, plaintiff would have been entitled to a peremptory instruction for a verdict in its favor for all of those charges; and, even if the telegram be construed as a limitation of Menefee's agreement to pay the freight charges only, the plaintiff would at least have been entitled to a recovery to that extent.

The judgment is affirmed.

ST. LOUIS, S. F. & T. RY. CO. et al. v.  
ARMSTRONG. (No. 7,878.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 7, 1914. Rehearing Denied  
April 11, 1914.)

1. APPEAL AND ERROR (§ 742\*)—QUESTIONS  
REVIEWABLE—INSTRUCTIONS—STATEMENT.

Where the statement, under an assignment complaining of an instruction on the measure of damages for delay in the transportation of live stock, consisted of the instruction, but did not point out anything to indicate that the jury awarded excessive damages, the record did not show that the error, if any, in the instruc-

tion objected to as allowing double damages was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**2. APPEAL AND ERROR (§ 750\*)—QUESTIONS REVIEWABLE—OBJECTIONS TO INSTRUCTIONS—PLEADINGS.**

Where the court sustained an exception to allegations of the answer, but error was not assigned to the ruling, assignments of error could not be based on the refusal of a special charge submitting the defense presented by the allegations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

**3. CARRIERS (§ 213\*)—DELAY IN TRANSPORTATION OF LIVE STOCK—JUSTIFICATION.**

An unreasonable delay in the transportation of live stock is not justified by the maintenance by the carrier of a schedule resulting in such delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.\*]

**4. EVIDENCE (§ 543½\*)—OPINION EVIDENCE—COMPETENCY OF EXPERT.**

A witness who knew the market value of cattle, and who was qualified by reason of his wide experience to give his opinion of the rate of decline in value of cattle because of their stale and drawn condition, caused by a delay in their transportation, was competent to give his opinion of the aggregate amount of damages caused by delay in transporting cattle for the market.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2359; Dec. Dig. § 543½.\*]

**5. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—DELAY—DAMAGES—EVIDENCE.**

Where, in an action for delay in the transportation of cattle for sale at stock markets, market reports covering the time involved were received in evidence without objection, and the shipper testified to the classes and conditions of the cattle in the several shipments, and gave market prices at several periods, stating that the shipments would be included in the range of such prices, a prima facie case of market values was shown to justify the jury in awarding damages for decline in market price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by George W. Armstrong against the St. Louis, San Francisco & Texas Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Andrews, Ball & Streetman, Thompson & Barwise, J. M. Chambers, W. H. Francis, and Lockett & Rowe, all of Ft. Worth, for appellants. Alexander, Power & Ridgway, of Ft. Worth, for appellee.

CONNER, C. J. At various dates, beginning December 10, 1910, and ending June 9, 1912, appellee delivered in separate lots to the St. Louis & San Francisco Railroad Company and the St. Louis, San Francisco & Texas Railway Company some 1,312 head of cattle for transportation to cattle markets of the country. Nine of the shipments were from Scullin, Okl., to the National Stockyards, Ill., two from Roff, Okl., to the same place, three from Roff to Kansas City, and

two from Roff to Ft. Worth, Tex.; there being 16 separate shipments in all. Appellee alleged unreasonable delays in the several shipments, resulting in loss in weight, depreciated value in appearance, and a 10 per cent. decline in market price as to several shipments. Each shipment was separately presented, showing the number in the lot, the loss in weight, the amount of depreciation in value, and the entire damage to the shipment. The total damage so claimed to the 16 shipments aggregated \$3,691.06. A trial before a jury on the issues presented in the court's charge resulted in a verdict for appellee. The verdict in assessing the damages followed the plan of the plaintiff's pleading; that is, the verdict specified the several shipments on account of which the jury assessed damages, and stated the amount of the damage thereto. On 3 of the shipments it was found there was no damage. On 11 of the remaining shipments the several amounts found and assessed against the appellant St. Louis & San Francisco Railroad Company aggregated \$2,584.91. On the remaining 2 shipments the aggregate amount of damage found was \$134.43, which was assessed against appellant St. Louis, San Francisco & Texas Railway Company. The judgment followed the verdict, and both railway companies appeal.

In the third paragraph of the court's charge the jury were instructed that if they found negligent delay in the shipment from Roff to Ft. Worth, and that "thereby said cattle were caused to lose flesh and depreciate in market value," then the finding should be for the plaintiff and his damage, measured by "the difference in the market value of such cattle in the condition when they reached the market" and the market value in the condition the cattle would have arrived but for such delay. And further charged that in event of such negligent delay, and that the cattle thereby arrived at the market a day later than they would otherwise have arrived, and there was a difference in the market price in favor of the first day, "and that plaintiff was caused to receive for said cattle a lower price by reason of such delay, if any, than he would have received had he sold on the day previous, then you will allow the plaintiff such sum of money as in your judgment will be a fair and reasonable compensation for such loss, if any, to cover such decline in the market value of said cattle."

The fifth paragraph of the court's charge is substantially the same as the third paragraph except that it related to the shipments to Kansas City and St. Louis, and error is assigned to both paragraphs on the ground that thereby the jury were authorized to find "double damages to the extent of any decline in value as the jury might find to have occurred."

[1] The plaintiff's petition is very explicit in describing the elements of his damage. As

alleged, they were loss in weight, depreciated value because of stale and drawn appearance, and decline in market value as to some of the shipments, in view of which we are not inclined to think that the charges are to be construed as urged. The jury most probably understood the charges as the court evidently intended, that is, that in measuring the damages the increased loss in weight and the depreciated value in appearance caused by negligent delays should be allowed, to which might be added loss by reason of a decline in market price, if any, in the few instances in which a decline in the market was alleged. But if mistaken in this view, there is nothing in the statement under the assignments raising the question that indicates a prejudicial result. The statement consists wholly of the charges objected to. If there was any evidence of a decline in market on any occasion involved, or if the verdict included, or probably included, damages in any amount on this ground, the statement fails to point it out. Moreover, the consequences could but unduly augment the damages by adding loss by reason of a fall in market price on the few occasions alleged, and the amount of the excess, if any, is not shown, so that in no view of the question that we have been able to take do we think a reversal of the judgment should be ordered.

[2] Error is assigned to the refusal of the following special charge, viz.: "Gentlemen of the jury, if you find that the defendants had a schedule covering the movement of its live stock trains between Roff and Schullin, Okl., and Kansas City, Mo., and between Roff and Scullin, Okl., and St. Louis, Mo., and if you find and believe that such schedules were reasonable, and that any of the shipments in question reached their destination within the time limit of such schedules, then the plaintiff cannot recover anything as damages for delay as to any of such shipments so reaching destination." The court sustained an exception to all that part of the answer alleging reasonable schedules for its trains, and error has not been assigned to this action of the court, so that there is now no effective basis in the pleading for the special defense presented in the rejected charge.

[3] Moreover, the material question relating to the time occupied in the several transportations was not one of train schedule, but one of negligence vel non. If the time consumed was not unreasonable, the jury under the court's charge were not authorized to find for plaintiff. If it was, no schedule would justify. All assignments raising the question so presented must therefore be overruled. See *City of Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 762; *H. & T. C. Ry. Co. v. George*, 60 S. W. 813; *G., C. & S. F. Ry. Co. v. Porter*, 25 Tex. Civ. App. 491, 61 S. W. 343; *Tex. & Pac. Ry. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810.

[4] The witness Gibson who sold a number of the shipments in question was permitted

to testify that the cattle sold by him were stale, gaunt, and drawn, which condition rendered them less valuable on the market, and that in his opinion the cattle were damaged at least 10 cents per hundred pounds, stating the aggregate amount of damages to each shipment. This was objected to on the ground that the witness had not stated the market value of cattle at the several times about which he testified, and that his answer invaded the province of the jury. Neither objection is maintainable. The witness testified that he knew the market prices, and was shown to have wide experience and was qualified as an expert to give his opinion of the rate of decline in value because of a stale and drawn condition of cattle. The rate of decrease manifestly applied whatever the state of the market, and his opinion of the aggregate amount of damages was but a short rendition of the circumstances in each particular case. See *Railway v. Woods*, 31 S. W. 287; *Railway v. Halsell*, 85 Tex. Civ. App. 126, 80 S. W. 140; *Railway v. Richards*, 105 S. W. 236; *Railway v. Knox*, 151 S. W. 902; 17 Cyc. p. 53.

[5] The remaining assignments in one form or another question the sufficiency of the evidence. The evidence relating to the several shipments and to the case as a whole is entirely too voluminous to recite, but it has been considered with all of the care we have been able to devote to it, and our conclusion is that the evidence warranted the charges submitted and sufficiently supports the verdict and judgment. The evidence of negligent delays and consequent loss in weight and of depreciated value because of a stale and drawn appearance of the cattle is abundant. On the question of market prices and value many, if not all, of the witnesses failed to state market prices on the several days the several lots of cattle were sold, but many market reports were read in evidence, without objection, which covered in a general way the time involved, and some of which were for particular days of particular sales. Appellee also testified to the classes and conditions of the cattle in the several shipments, and gave market prices at several periods, stating that the shipments "would be included in the range of the prices quoted by him," all of which, it seems to us, sufficiently make a prima facie case of market values. That is, we think the general range of prices given should be held to apply to all shipments questioned, in the absence of evidence tending to show that on any one or more occasions market prices were variant from those shown. There is no such evidence. If the jury in any case assessed damages for loss in weight, depreciated value, or decline in market price without evidence to support the assessment, it has not been pointed out. On the whole, we think all assignments involving a consideration of the evidence must be overruled.

The judgment is affirmed.



## STATE v. GALLARDO et al. (No. 2296.)

(Supreme Court of Texas. April 29, 1914.)

## 1. PUBLIC LANDS (§ 210\*)—MEXICAN GRANTS—POWERS OF GOVERNOR—PRESUMPTION.

Where land in Texas, formerly within the Mexican state of Tamaulipas, was sold under the authority of the governor of that state, and the title was thereafter acquiesced in by the Mexican government as to the portion of such land remaining in Mexico, and not controverted by Texas as to the portion over which that state extended its sovereignty, it will be presumed that the sale by the governor had the previous approval of the supreme government, as required by regulation No. 13, decreed by the Mexican president ad interim under the provisions of the act of the Mexican assembly of October 3, 1835.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 659-665, 704; Dec. Dig. § 210.\*]

## 2. JUDGMENT (§ 710\*)—CONCLUSIVENESS—TITLE TO REAL ESTATE—CLAIMANTS UNDER THE SAME GRANT.

A judgment against one claiming land under a sale by the Mexican state of Tamaulipas, in special proceedings brought under the Act Aug. 15, 1870, c. 83 (Paschal's Dig. art. 7088, etc.), is not conclusive against other claimants under the same sale who were not parties to those proceedings or in privity with such parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 710.\*]

## 3. PUBLIC LANDS (§ 221\*)—DISPOSAL—STATUTES—CONSTRUCTION—RETURN OF SURVEYS.

Act Feb. 10, 1852 (Laws 1851-52, c. 69), requiring the field notes of surveys made prior to the passage of that act to be returned to the General Land Office, does not relate to nor affect Mexican titles or surveys, but only refers to surveys made under the laws of the republic or state of Texas.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 685-697; Dec. Dig. § 221.\*]

## 4. PUBLIC LANDS (§ 209\*)—SPANISH GRANT—DONATION TO TOWN—ABANDONMENT.

Whatever rights were acquired by towns under grants of "ejidos" from the Spanish king, such grants did not convey an indefeasible title, and, when the town was removed to another locality and the public use of the lands was abandoned, the lands reverted to the sovereignty and did not vest in the future inhabitants of the town who remained upon the site originally occupied by it.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 658; Dec. Dig. § 209.\*]

## 5. PUBLIC LANDS (§ 198\*)—MEXICAN GRANTS—PROTECTION BY TREATY.

In relation to property rights in that part of the Mexican state of Tamaulipas over which the state of Texas extended sovereignty on December 19, 1836, acquired before such sovereignty was extended, the treaty of Guadalupe Hidalgo has the force of law in Texas.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 198.\*]

## 6. PUBLIC LANDS (§ 198\*)—MEXICAN GRANTS—PROTECTION BY TREATY.

That treaty protects all titles to land within such territory which were good against the Mexican government at the date the sovereignty of Texas was extended over the territory.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 198.\*]

## 7. PUBLIC LANDS (§ 223\*)—MEXICAN GRANTS—SUFFICIENCY.

Where lands between the Nueces and Rio Grande rivers had been sold by a description sufficient to identify them, under the authority of the governor of the Mexican state of Tamaulipas, and the purchase price had been paid and a survey ordered, prior to the extension of the sovereignty of Texas over such territory, the purchasers had acquired a perfected right to the legal title, which was good against the Mexican government, and it will be protected by the Texas courts, even though the survey and actual conveyance of the legal title were not made until after the declaration of the sovereignty of Texas to such territory had been made, but before the extension of the sovereignty was accomplished.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 705-719, 721-725; Dec. Dig. § 223.\*]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Trespass to try title by the State of Texas against Jose L. Gallardo and others. A judgment of the trial court for the defendants was affirmed in part and reversed and rendered in part by the Court of Civil Appeals (135 S. W. 664), and the plaintiff brings error. Judgment of the Court of Civil Appeals affirmed.

Jewell P. Lightfoot, Atty. Gen., John L. Terrell, Sp. Asst. Atty. Gen., and Jas. D. Walthall, Asst. Atty. Gen., for the State. Frank C. Pierce, of Brownsville, Duval West, of San Antonio, Jas. B. Wells, of Brownsville, Don A. Bliss, of San Antonio, and Judge V. L. Brooks, amicus curiæ, of Austin, for defendants in error.

PHILLIPS, J. The suit was an action by the state in trespass to try title against Jose L. Gallardo and numerous other defendants, to recover two leagues of land in Hidalgo county, referred to in the petition as all of the certain tract, known as "Los Ejidos," that lies on the north side of the Rio Grande river. W. A. Boswell, L. D. Brooks, J. P. McDonald, and F. Spaeth were included as defendants under an allegation that they were asserting some character of claim to the land, which, according to their answer, was a claim of right to have the land awarded them by the state based upon applications to purchase. Against several of the defendants who had not answered, an interlocutory judgment by default was rendered. On the trial judgment was rendered against the state and in favor of all the defendants except Boswell, Brooks, McDonald, and Spaeth, as to whom the suit was dismissed upon the court's finding that the state had never had any title to the land, and accordingly there was no issue between them and the state to be determined. On the appeal of the state the judgment was in all respects affirmed by the honorable Court of Civil Appeals, except as to the defendants who had not answered; the judgment being reversed in that respect and rendered for the state.

The findings of the Court of Civil Appeals set forth in the able and exhaustive opinion of Chief Justice Key (135 S. W. 664), reveal a history of the title that may be summarized as follows:

The land in controversy is the portion lying on the north side of the Rio Grande river of four leagues granted by the government of Spain in 1767 to the town of Reynosa as "ejidos," or town commons; the town being upon the south side of the river, and the "ejidos" extending across it and lying in part upon its northern side. At a time not definitely shown, but probably in the year 1801, on account of the danger from floods of the river, upon petition of its citizens the municipality of Reynosa was removed by the government to another place about six leagues away that became known as "New Reynosa."

On August 31, 1836, when the land was within the territorial boundaries and under the political jurisdiction of the Mexican state of Tamaulipas, the alcalde of New Reynosa addressed a letter to the governor of Tamaulipas, recommending the sale of the "ejidos" of Old Reynosa, stating, among other reasons therefor, that disputes had arisen among the owners of certain tracts adjacent thereto as to their respective boundaries; that, upon the removal of the town, the "ejidos" had been abandoned and left to the exclusive use of the few who remained living there and could be easily sold to the owners of abutting porciones which had no river front on account of such location. The letter was referred to the departmental junta at the city of Victoria, which body recommended the sale by public auction to the highest bidder. On October 5, 1836, such sale was ordered by the governor of Tamaulipas. Pursuant to his order the sale of the "ejidos" was made, on November 9, 1836, at public auction by the alcalde to Fruto de Cardenas, the highest bidder, for \$210, which was paid on the same day. In making the purchase, Cardenas was acting for 96 inhabitants of Old Reynosa. On November 10, 1836, the alcalde who made the sale ordered that a deed of conveyance be made to the 96 purchasers. On July 24, 1837, the alcalde ordered the land surveyed before the issuance of title. After the survey, and payment of the surveyor's fees on September 23, 1841, a testimonio of title was issued on September 24, 1841, by the alcalde to the 96 purchasers, for whom Cardenas had acted in bidding in and paying for the land. It is conceded that Gallardo and his associates hold title under this sale.

In the year 1871 Noberto Garza, holding a title under this sale and relying upon it, brought a suit against the state for confirmation of such title under the act of August 15, 1870, in which judgment was rendered for the state and later affirmed by this court. 64 Tex. 670. This judgment was made the basis of a plea of *res judicata* urg-

ed by the state against the defendants' title.

While no occupancy of the land at the time of the sale of November 9, 1836, was established, the proof showed that many of the defendants, Gallardo and others, had been paying taxes each upon a specified number of acres of the land, ranging from 10 to 1,500 acres, from 1879 to the time of the trial in 1909; that some of them, and their ancestors under whom they claimed, had been in possession of the land, some on the Texas side and others on the Mexican side of the river, for 40 or 50 years; that for many years two or three villages had been upon the land composed largely of claimants under this sale and their families; and that there was a tradition in the locality that the ancestors of these defendants had, from the date of the sale, claimed and held possession of the land under it.

An official map of Hidalgo county, dated April, 1880, designates the land involved as "Los Ejidos de Reynosa," with delineation of the various porciones granted to individuals and adjacent to it, and also designating the old town of Reynosa immediately across the river on the Mexican side. Another official map, of the county, dated April, 1896, contains substantially the same designations, with certain characters indicating that at some time certificates had been filed on the land. Both maps are on file in the General Land Office of the state.

The Court of Civil Appeals has further found that there was proof tending to show the Commissioner of the Land Office for 1903-09 had treated the land as titled land; that in 1905 the defendants Brooks, Boswell, McDonald, and Spaeth had each made application to purchase four sections of the land from the state; and that the county surveyor of Hidalgo county had made surveys upon each application and returned them to the Land Office, but the Commissioner had taken no action on the claims asserted under these applications.

Other than its resistance through its Attorney General of the suit filed against it by Noberto Garza in 1871, seeking confirmation of a title to land asserted under the sale of November 9, 1836, the state had never contested the validity of the title held under this sale until the institution of the present suit in 1908.

As affecting the validity of the sale of November 9, 1836, under the Mexican law, the Court of Civil Appeals has further found as a fact that at that time the old town of Reynosa had been abandoned and the municipality of that name removed and established at a different place, which is supported by the proof; and that there was evidence affirmatively showing that the Mexican government had acquiesced in the validity of the title under the sale as it is related to that part of the "ejidos" lying on the Mexican side of the Rio Grande river. The land is-

a part of the territory lying between the Nueces and Rio Grande rivers, originally within the Mexican state of Tamaulipas, over which the Congress of the republic, as a consequence of the Revolution, asserted its sovereignty by the act of December 19, 1836, defining the Rio Grande as the southern boundary of the republic, and with respect to which the historic fact is that the jurisdiction of Texas was not in fact established or exercised, except along and near the Nueces river until after its annexation to the United States in 1845; the Mexican state of Tamaulipas continuing, during such period, to exercise its jurisdiction over that part of the territory on and near the Rio Grande, including this land. *State v. Sals*, 47 Tex. 307.

The main proposition upon which the state rests its claim is that the title to the land in fee was in the Mexican government, and the land passed to Texas as a part of the public domain acquired by the Revolution. This position controverts both of the propositions upon which the defendants Gallardo and others base their claims, viz.: (1) That the effect of the Spanish grant of 1767 to the town of Reynosa was to vest in its inhabitants such title or right to the "ejidos" included within it as to entitle the defendants, as their descendants and present inhabitants of the town, as against the state, to a continuance of the public use and benefit to which the "ejidos" as town commons was originally dedicated under the grant. Or, in other words, as descendants and present inhabitants of Old Reynosa, they have succeeded to the title to the "ejidos" held by the original inhabitants, which was a right to their public use incapable of divestiture by either the Spanish crown or Mexican government, and enforceable against Texas as the succeeding sovereignty on the cession of the territory. (2) That under the sale of November 9, 1836, the purchasers, under whom they claim and hold, acquired title to the land before the sovereignty of Texas attached to the territory, to which the courts should give effect.

[1] Apart from other questions in relation to the character of title conferred by the sale of November 9, 1836, the state urges the invalidity of that sale under the Mexican law upon the ground, it is said, of the want of any authority in the governor of Tamaulipas to order it, in the absence of affirmative evidence of a previous approval by the supreme government. This contention is based upon provisions of the law of October 3, 1835, enacted or decreed by the Mexican assembly and certain regulations decreed by the president ad interim in its connection, particularly regulation No. 13, to this effect: "Until the attributes of the government and departmental boards in what relates to the treasury are declared by law (which was not done until April 17, 1857), said governors shall make no sale of lands (fincas) or property (bienes) nor contracts nor extraordinary expenses for

said departments, without the previous approval of the supreme government." It is further said that the governor of Tamaulipas was without authority to make the sale under the treasury regulations of the Mexican government of July 20, 1831. It was this law of October 3, 1835, which reduced the Mexican states to the rank of departments, and transformed the federal system into a centralized government, denounced as an act of usurpation in the Texas Declaration of Independence. At this period Santa Anna had and used the power of a dictator in Mexico. The act of assembly continued the governors of the different states in office, subject to the supreme government of the nation. Whatever may have been the effect of the treasury regulations of 1831, if any force be given to the regulations decreed by the president ad interim under the law of October 3, 1835, as is urged should be done, it must be conceded, we think, that under regulation No. 13, above quoted, the power of the governors of the states to make sales of land was distinctly recognized, with only the limitation that, until the attributes of the government and the departmental boards in relation to the treasury were declared by law, the power should be exercised only upon the previous approval of the supreme government. In ordering the sale in question, the governor of Tamaulipas acted in his official capacity and under purported authority. His act was but the exercise of a power, not denied to him but recognized by the regulation quoted. The previous approval of the supreme government was necessary, it is true, to its exercise under the provisions of the regulation. But the question that here arises is: Should it not be presumed after this long lapse of years, in the light of our knowledge of the conditions that then obtained in that country, that such previous approval of the sale by the supreme government was given? We think so, under established principles in relation to the acts of public officers in their official capacity under purported authority, as to which legitimate rather than usurped authority is presumed. *United States v. Peralta*, 19 How. 343, 15 L. Ed. 678; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Railway v. Jarvis*, 69 Tex. 541, 7 S. W. 210. It would seem, from the terms of the law of the assembly and the edict of the president ad interim, that during this period that official was himself the supreme government of the nation; and, as is well observed in the opinion of Chief Justice Key, it does not appear but that such approval was subject to be given in a purely informal manner. It is familiar knowledge that, subsequent to the time in question, alcaldes, acting under the direction of the governors, issued titles in various states of Mexico, and the validity of such titles has been recognized by that government; and, as we have before said, there was evidence in this case tending to show affirmatively that it had acquiesced in the validity of the title

under this sale to that part of the land sold, lying on the southern side of the Rio Grande. The notorious claim under the title, the long-continued possession of the land in virtue of it, and the acquiescence in its validity by distinct governments for the period of time here shown, all combine to warrant the presumption that such approval by the Mexican authorities, as was necessary to the validity of this sale, was given. In one of his opinions in regard to the presumption of the issuance of a grant, Lord Kenyon speaks of a case being such as to justify the presumption of 100 grants, if necessary to sustain the right; and that observation might justly be applied here, so far as the case involves the question of the approval of this sale by the Mexican government.

[2] Two further propositions advanced by the state will be briefly discussed before passing to what we regard as the more important question in the case. One is that the judgment in *Garza et al. v. State*, by which the confirmation of a title to land resting upon this sale was denied, is conclusive of the validity of the title as to all land held under it, and binding upon these defendants. That suit was brought under an act making special provision for suits of that nature. There is nothing in the act that suggests that judgments rendered in such suits should affect the title of others than the parties to them and their privies, whose rights alone were put in issue, or that the effect of an adverse adjudication in respect to any certain title upon such proof as the particular plaintiff might offer was to invalidate it as to all other persons claiming thereunder, though not before the court and therefore without opportunity to be heard. As illustrating the injustice of such a holding the claimants in the *Garza Case* were denied a confirmation of their title because, as appears from the opinion, they failed to show any sale of the land prior to December 19, 1836, which, if shown together with payments of the purchase money, would have created a perfect title according to the opinion, whereas in this case the fact of the sale and such payment, both before December 19, 1836, was clearly established. It is sufficient to say that that judgment could have no effect upon the defendants here, between whom and the plaintiffs in that suit there is no privity.

[3] The other proposition of the state is that the title of the defendants, if ever valid, was rendered null and void because the field notes to the land were not returned to the Land Office on or before August 31, 1853, as required by the act of February 10, 1852 (Laws 1851-52, c. 69), which provided: "That the field notes of all surveys made previous to the passage of this act, shall be made out and returned in the manner now required by law, to the General Land Office, on or before the thirty-first day of August, 1853, or they shall become null and void, and the said surveys shall become vacant

land," etc. We do not think this act indicates any purpose of the Legislature to deal with titles issued by a former government, which upon just principles were entitled to be upheld by the courts of the state. It plainly has reference in our opinion to surveys made under authority of laws enacted by the republic or the state. Had the purpose of the act been to thus destroy titles issued under a former sovereignty and deserving of recognition under our own, it would have been written in broader terms, we think, than those having relation only to the field notes of surveys.

[4] We do not subscribe to the view that the title of the defendants should be upheld under the Spanish grant to the town of Reynosa of the "ejidos" in question. Under the Spanish law the title in fee to such lands granted to a town and dedicated to a public use remained in the crown, never vesting in the municipality or its inhabitants. It may be difficult to state with precision the exact nature of the title conferred upon towns under such grants, as said in *Townsend v. Greeley*, 5 Wall. 336, 18 L. Ed. 547; but it was clearly not an indefeasible title, and there was no ownership of the lands in the towns or their inhabitants. *Id.* The most that can be said for the title of the towns or their inhabitants under such a grant of land for town commons is that they acquired such right as to withdraw the land from commerce and render it inalienable by the king so long as it remained dedicated to an essentially public use. *Dittmar v. Dignowitty*, 78 Tex. 22, 14 S. W. 268. Upon the question of the nature of the right or title acquired by towns or their inhabitants under the Spanish law to lands of this character, no more than this is affirmed in *New Orleans v. United States*, 10 Pet. 662, 9 L. Ed. 573, or in *Lewis v. San Antonio*, 7 Tex. 317, and *San Antonio v. Lewis*, 15 Tex. 388, which quote from the decision of *New Orleans v. United States* with approval, and no further right in the municipalities or their inhabitants to "ejidos" or town commons under Spanish grants, as it existed under the Spanish sovereignty, can be grounded on the doctrine announced in those cases. It may be observed that the later decisions of the United States Supreme Court in *United States v. Santa Fé*, 165 U. S. 675, 17 Sup. Ct. 472, 41 L. Ed. 874, and *United States v. Sandoval*, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168, announce a different rule as deduced from the Spanish law upon this question as related to outlying lands, such as would seem to necessarily include town commons for pasturage, to which it might be considered a town was entitled under its grant, from that declared in *New Orleans v. United States*. In these cases it is said that under the Spanish law the power of the crown to dispose of such lands was unlimited so long as they were not affected by individual rights; a statement from the opinions being to the effect that

"the unquestioned power (was) lodged in the king of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant." The effect of these decisions is a plain denial of the proposition that under Spanish grants there is in such towns or their inhabitants such character of title to such lands as, in the absence of confirmation by its political authority, may be successfully asserted against the succeeding sovereignty. The legislation by Congress and of this state, in various instances expressly confirming to such towns their ancient commons under these grants, in addition to this authority, indicates this conception of the nature of their title and that their possession of any other than such right as was at best imperfect has never been recognized either by the United States or Texas. We are advised of no holding in this state to the contrary. In *Lewis v. San Antonio* it will be noted that by an act of the Congress of the republic the city of San Antonio had been expressly confirmed in its commons held under the original grant, an act of the political authority which undeniably foreclosed any contention that thereafter they could constitute any part of the public domain of the state. There is nothing in the opinion of Judge Lipscomb in that case which supports the view that in the absence of confirmation the city or its inhabitants would have had an absolute title to the lands as against the state.

Under any view the control and regulation of the use of such lands was in the government; and it is clear, we think, that upon the abandonment of their public use they reverted to the sovereign. We have in this case a distinct finding of the Court of Civil Appeals, supported by the proof, to the effect that, upon petition of its inhabitants, the location or situs of the original town of Reynosa was abandoned, the town removed and established by the government at a different place. This necessarily terminated the public use of the lands and relieved them of their former character. The fact that a few of the inhabitants clung to the old site and remained behind could not have the effect to preserve the public use for their benefit.

[5] The claim of the defendants, therefore, must necessarily rest upon such title as was acquired under the sale of November 9, 1836, authorized by the governor of Tamaulipas. Upon this feature of the case we do not deem it necessary to reopen the question urged by the able counsel for the state as to whether property rights within the territory, over which the sovereignty of Texas was extended, were within the protection of the treaty of Guadalupe Hidalgo. That, in relation to such rights, that treaty has the force of law in Texas has been repeatedly affirmed by this court. *State v. Sals*, 47 Tex. 307; *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Haynes v. State*, 100 Tex. 426, 100 S. W. 912.

[6] We furthermore regard it as establish-

ed in this state, under these decisions and others and in the light of the state's legislation, that a title to lands within the original Mexican state of Tamaulipas and the present boundaries of Texas that was good as against the Mexican government on December 19, 1836, the date of the act of the Congress of the republic defining the boundaries of Texas so as to include that territory, is within the protection of the treaty and entitled to recognition in the courts. The rights of the defendants should be determined, therefore, by the character of the title under which they claim as it existed on December 19, 1836.

[7] A thorough consideration of this question in the case has convinced us that, in a court of law and right whose duty it is to administer the justice of the law, no sound reason can be urged why a title shown to have been matured by acts of the sovereign government and conduct of parties in reliance upon such acts to the extent this title was on December 19, 1836, should not be protected and upheld. The application of the alcalde that the land be sold was made to the governor on August 31, 1836. This application was referred by him to the departmental junta for their approval, the status of the state being then that of a department of the general government, and that body recommended the sale. Upon this recommendation it may be assumed the governor ordered the sale on October 5, 1836. It was conducted in the manner ordered, and completed on November 9, 1836. The subject-matter of the sale was a body of land having a distinct identity under the law and in fact, with a survey only necessary to define its exact boundaries. The purchase was made by those under whom the defendants claim, acting through Cardenas, who bid in the land. The purchase money was paid on November 9, 1836, and on November 10, 1836, the alcalde making the sale ordered that a deed of conveyance be made to the purchasers. Everything necessary to make up and complete the right of the purchasers to receive the absolute legal title was done both by them and the government through its officials prior to December 19, 1836, and upon that date nothing was left undone by either that could constitute the substance of the right.

On December 19, 1836, the purchasers under this sale stood invested with a clear right to receive from the sovereign government the legal title to the land, not as a matter of grace, but of right, unless it be denied that individuals in the purchase of public domain from a government in the manner both authorized and pursued by it in the transaction can acquire any rights against it until its conveyance of the title, a proposition to which no court would give tolerance, much less its sanction. Unless importance be attached to the fact that no survey of the land had been made prior to December 19, 1836, what possible element was wanting to perfect the right

of the purchasers under this sale to receive the full legal title? As has been said, the land had its distinct identity as four leagues, and its general extent was known and recognized, and it was capable of having its exact boundaries defined, as was thereafter done. The direction for a survey in the order of the alcalde of November 10, 1836, wherein the conveyance was ordered to be made, plainly deals with the survey only as an incident of the sale rather than as in any manner affecting the right of the purchasers to the land, or to receive the deed of conveyance. The same is true in respect to his direction that the names of the purchasers be furnished. In *Fremont v. United States*, 17 How. 542, 15 L. Ed. 241, where a grant of a Mexican governor of California was simply of ten square leagues of land within a certain district, the same objection was urged that the grantee acquired no vested interest until the land was surveyed and the part to be granted severed by lines or known boundaries from the public domain; but it was held that, as between the grantee and the government, he had a vested interest in the quantity of land mentioned in the grant, and that the right to so much land, to be afterwards laid off by official authority in the territory described, passed from the government to him under the instrument. The description in this order is more definite than the description in that grant. The order directs the conveyance of "the four leagues which served as 'ejidos' to Old Reynosa," identifying the land by location as well as defining its quantity. If a grant in such terms would have passed a vested interest in the land, as against the government, notwithstanding there had been no survey, the right of these purchasers to receive the legal title from the government was not affected by the mere lack of a survey. In other words, the survey was not a condition precedent to the maturing of their right to the land. It was something to be done before the legal title passed, but it was not a condition to be performed before the vesting of the right to receive the legal title. Such right was matured by the purchase and the payment of the purchase money. That in virtue of such acts these purchasers were, on November 10, 1836, entitled to receive a deed of conveyance is evidenced and confirmed by the alcalde's order of that date that the deed be made. There is nothing in the order indicating anything less than a plain recognition of their right to receive the legal title, or, in respect to the survey and the listing of the names of the purchasers, anything more than a provision for the execution of a proper and sufficient deed for the conveyance of such title.

Following these acts in relation to this sale, as has been previously stated, on July 24, 1837, the alcalde ordered the land surveyed before the issuance of the title. Whatever construction be placed upon this order,

it could have no bearing in the case, since, prior to that time, the republic had asserted its sovereignty over the territory by the act of Congress of December 19, 1836. One of the contentions of the state is that the sovereignty of Texas over this territory attached at even an earlier date. To affirm the sovereignty of Texas over this territory on July 24, 1837, is, of course, to deny any effect to the order of that date of a Mexican official in relation to land within it, as the order could be of no force in respect to the title to land then under the sovereignty of Texas. However, the survey was made, the fees of the surveyor were paid on September 23, 1841, and a testimonio of title was issued to the purchasers on September 24, 1841, during which time the territory was in the actual possession of the Mexican government and under the administration of its political authority; the sovereignty of Texas over it not being accomplished in fact until the year 1846. There is presented, in other words, a case where prior to the assertion by Texas of its sovereignty, there was such perfection of the right as entitled those under whom the defendants claim to the legal title to the land, and where, prior to the accomplishment of its sovereignty in fact, the legal title was actually acquired.

It may be well doubted whether this title, as it stood on December 19, 1836, should be regarded as imperfect, even under a rigorous application of the rule that such titles are without standing in the courts of the succeeding sovereignty and must depend upon its political authority for recognition. It is clearly such a title as the Mexican government was in right bound to recognize, and as ought to have secured the full legal title at its hands but for the interruption of its sovereignty as the result of the act of the Texas Congress of December 19, 1836, and such as did in fact secure the full legal title from its accredited authorities before its sovereignty was actually supplanted; and unless it be true that under the rule referred to any title, however perfect in right and good in conscience, is imperfect and not entitled to judicial cognizance unless it be a full legal title, which may be questioned, we think a court would be slow in the use of its power to destroy a title of this character under the supposed sanction of such rule of decision. But if, in the strictest sense, it be treated as an imperfect and unconfirmed title, is not the question presented here under such conditions as lay within the prophetic vision of Chief Justice Hemphill, when, in 1 Tex., discussing the rule for which the state contends, he said: "It is not necessary, in this case, to express any opinion as to the equities which may arise from long possession under incomplete titles, or where the boundaries are sufficiently defined by description or survey, etc., and how far, and under and against what claims it might be in the power, of the

courts of justice to afford any protection, where action has not been taken by the political authority. Such questions can be determined when distinctly presented for review and decision." *Trimble v. Smithers*, Adm'r, 1 Tex. 809.

The court was confronted with the question in *Haynes v. State*, 100 Tex. 426, 100 S. W. 912, and determined it as we think it ought to be determined here. There citizens of this same Mexican state had, prior to December 19, 1836, done all that was necessary to acquire the right to have the legal title issued to them, but it had not been issued at that date, as is here the case. The legal title was issued in 1848, when Tamaulipas had lost actual sovereignty over the lands, whereas here it was issued while the actual jurisdiction of Tamaulipas endured. The same element of long possession under the claim of right was presented. In the suit by the state for the land it was held: "If, therefore, the evidence introduced upon the trial shows that Antonio Zapata was, on the 19th day of December, 1836, entitled to have a grant issued, the state ought not to recover the land in controversy, because such title would be protected by the treaty of Guadalupe Hidalgo. It is true that the Attorney General insists that the facts do not establish such a title as would be embraced in the terms and protection of that treaty, but we are of opinion that the position is not well taken. \* \* \* The facts of this case established that Zapata, under whom the plaintiff in error claims, had, on the 19th day of December, 1836, done all that the law required of him, and was entitled under the laws of Tamaulipas to receive from the governor of that state a grant for the five leagues of land. It follows from this conclusion that we must reverse the judgments of the district court and of the Court of Civil Appeals."

There is no substantial difference between the two cases. The title there considered, resting upon a right acquired before the date of the assertion of Texas sovereignty over the territory, had received no confirmation from the political authority of the state, and, under such application as the state here contends should be made of the doctrine we have above referred to, could have had no better standing in the courts than the title involved in this case. This is in one respect the stronger title, as here the payment of the purchase money for the land was clearly established, whereas in that case such payment was not shown but it was held should be presumed. That title was less than a full legal title on December 19, 1836, as is true in respect to this title on that date, though resting, as does this title, upon a perfected right to the legal title. Upon the same considerations that are present in this case, the considerations of good conscience, right and

simple justice, and a faithful observance of the obligations proceeding from a solemn treaty, this court held plainly and directly that such a title should not be destroyed by the courts but should be given effect. The ruling there announced cannot be regarded as other than conclusive of the vital question in this case.

We have given the case the careful consideration that we have felt it deserved. We are convinced that the judgment of the Court of Civil Appeals should be affirmed; and it is so ordered.

Affirmed.

HAWKINS, J., did not participate in this decision.

GLASS et al. v. POOL et al. (No. 2617.)

(Supreme Court of Texas. Feb. 18, 1914.)

1. CONSTITUTIONAL LAW (§ 48\*)—STATUTES—CONSTRUCTION FAVORING VALIDITY.

If a statute is not manifestly in conflict with some provision of the Constitution, it must be sustained by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

2. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

In testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it be susceptible of such interpretation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

3. CONSTITUTIONAL LAW (§ 70\*)—JUDICIAL POWERS—VALIDITY OF STATUTES.

Statutes cannot be declared invalid on the ground that they are unwise, unjust, unreasonable, immoral, or because opposed to public policy or the spirit of the Constitution, and hence, as Acts 36d Leg. c. 35, § 7, creating the Clifton independent school district does not conflict with any specific provision of the Constitution, it is not invalid, though its passage was procured by fraud, and it is unfair.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

4. STATUTES (§ 96\*)—PUBLIC SCHOOLS—STATUTE.

Acts 33d Leg. c. 35, § 7, creating the Clifton independent school district, and providing for the management of the affairs of the district by trustees, is not in violation of Const. art. 3, § 56, prohibiting local or special laws creating offices in school districts; school trustees being provided for by general statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. § 96.\*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 99\*)—PUBLIC SCHOOLS—POWERS OF DISTRICTS—PURCHASE OF SITES.

Under the constitutional provision authorizing an additional tax within the school districts for the erection and equipment of buildings, Rev. St. 1911, art. 2857, authorizing the purchase of sites and the issuance of bonds for that purpose, is valid; the right to build schoolhouses carrying with it the authority to purchase sites.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.\*]

**Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.**

Suit by Tom M. Pool and others against J. T. Glass and others. From a judgment for plaintiffs, defendants appealed to the Court of Civil Appeals, which certified questions to the Supreme Court. Questions answered.

S. P. Sadler, of Gatesville, and James M. Robertson, of Meridian, for appellants. H. J. Cureton and B. J. Word, both of Meridian, and W. F. Ramsey and C. L. Black, both of Austin, for appellees.

**BROWN, C. J.** We copy the statement submitted by the Court of Civil Appeals to this court:

"Tom M. Pool and the other appellees in this case filed their petition before the Hon. O. L. Lockett, judge of the Eighteenth judicial district, complaining of J. T. Glass and the other appellants, seeking to prevent by the aid of a writ of injunction the issuance and sale of certain bonds by the Clifton independent school district, and, from a judgment granting such relief, the defendants have appealed.

"Briefly stated, the complainants' petition alleges that the defendants Glass, Clements, Nelson, Olsen, Butler, and Parks are the acting trustees of the Clifton independent school district; the defendant Thomas is tax assessor of Bosque county; the defendant Moorland tax collector of Bosque county; defendant Looney is Attorney General and the defendant W. P. Lane comptroller of the state of Texas, respectively; that during the regular session of the Thirty-Third Legislature of Texas a special or local law was passed without the constitutional notice in advance creating the Clifton independent school district in Bosque county, Tex., with field notes as set forth in that act; that the complainants are owners of real estate subject to taxation situated within the boundaries of said proposed school district; that, in gross disregard of plaintiffs' rights and of the rights of other citizens of Bosque county, Tex., similarly situated, the Legislature in creating said district formed a district in an irregular, oblong shape of an average width of 1 to 1½ miles, extending north of the town of Clifton, which is situated within such district, for a distance of approximately 4 miles and south approximately 5 miles; that the lines of the district are so run as to follow approximately the contour of the rich valley of the Bosque river, including therein the valuable farming lands of the complainants and others, and carefully excluding therefrom the rough cheaper uplands upon which the plaintiffs reside, thereby excluding them from the benefits of the Clifton public free school and of the taxes to be raised by assessment on their property. The complainants allege, further, that many of those whose residences are situated within the district are at a distance so remote from the Clifton public

school building that it is impossible for them to patronize the same, and that, by reason of the narrow and irregular shape of said district, many other resident citizens of Bosque county who are just outside the territorial limits are yet so near to the Clifton school and so inconveniently and remotely situated from other school districts and schools as that it will be necessary for them to transfer annually to the Clifton independent school district, in which event such parents transferring their children will lose the benefits of such special taxes as may be levied upon their farm lands included in the district. They further allege that, by reason of the fact that the most valuable portions of their lands have been included in the Clifton independent school district, that it will be impossible for them to raise by taxation any reasonable sum for the maintenance of schools in any other independent or common school district which is in existence or may be created to include their residences. In short, upon this point the substance of the complaint is that a 'few citizens residing within the corporate limits of Clifton, conspiring to lay out a district solely for the benefit of the school children in the town of Clifton, and in high-handed and negligent disregard of any rights that scholastic populations within the local district had, willfully, and falsely, and knowingly represented to the Legislature, and willfully, falsely, and knowingly represented to the Governor, that the great majority of the people affected by said district were favorable to the same, and in so doing they caused the Legislature to perpetrate a legislative fraud, and have caused the same to attempt to create a district in violation of the rights of the school children of the farmers whose lands are taken into the district and attached to the town of Clifton for the selfish purpose of building up a school for the children of Clifton only.' The special act creating the Clifton independent school district is pleaded in *hæc verba* as it appears in the Local and Special Laws of Texas, Regular Session, Thirty-Third Legislature, p. 107.

"The complainants allege that the defendants named as trustees are making an effort to issue coupon bonds of said district in the sum of \$25,000, payable 40 years after date, with 5 per cent. interest, for the purpose of purchasing a site and erecting a school building in the town of Clifton; that an election for such purpose has been held and the result declared favorable; and that, unless a writ of injunction is issued restraining them and the Attorney General and the state comptroller, such bonds will be approved and registered and sold, and a lien thereby created for the full period of 40 years against complainants' land. The complainants attack the validity of the act of the Legislature creating the Clifton independent school district upon the ground that the same violates the following provisions of the state



Constitution, to wit: Section 1 of article 7, section 56 of article 3, section 3 of article 7, as well, also, as those provisions of the federal and state Constitutions against depriving any citizen of property, privileges, or immunities except by due course of law of the land. Const. U. S. amend. art. 5; State Const. § 19, art. 1. The complainants allege that, in the event the said special act creating the Clifton independent school district is not invalid, yet the attempt of the defendant trustees to issue bonds and thus create a lien upon complainants' property for the purpose for which such bonds are proposed to be issued, to wit, the purchase of a site for a public school building in said town of Clifton, is without authority in law and void, and they therefore are entitled to the relief sought. For a fuller statement of the issues and of the facts bearing upon them, your honors are referred to the pleadings and the agreed statement of the facts contained in the transcript which will accompany this certificate.

"The case was tried before the honorable district court upon appellants' demurrers and motion to dissolve upon an agreed statement of the facts, and, as already stated, judgment was entered perpetually enjoining the defendants from proceeding further in their efforts to procure and cause said bond issue. The agreed facts found in the record abundantly support the allegations of complainants' petition. The case is regularly before this court on appeal, and, in view of the importance of the questions involved affecting, as they do, not only the validity of the Clifton independent school district, but probably many others as well, we deem it proper to certify to your honors the following questions:

"First. Is the special act of the Thirty-Third Legislature creating the Clifton independent school district (Local and Special Laws of Texas, Thirty-Third Legislature, p. 107) invalid under the facts alleged and proved in this case? And,

"Second. If not, did the trial court err in perpetually enjoining the appellants from the issuance of the proposed bonds of the Clifton independent school district for the purposes named?"

[1] We answer that the act referred to in the first question was and is valid. And we further answer the trial court erred in granting and in perpetuating the injunction, thereby preventing the officers of the Clifton school district from issuing the bonds of the district, as authorized by the votes of qualified voters of that district.

We will discuss the two questions together, as both depend upon the validity of the statute incorporating the district which authorized the bond issue.

[2] If the statute is not manifestly in conflict with some provision of the Constitution, then we must sustain and construe it as we find it expressed. In testing the constitutionality of the statute in question, the language

must receive such construction as will conform it to any constitutional limitation or requirement, if it be susceptible of such interpretation, and the law here brought into question must be sustained, unless it be clearly in conflict with some provision of the Constitution.

In the form of counter propositions counsel for appellee present these grounds of invalidity of the law creating the Clifton independent school district: (1) The form of the district which excludes appellees from its benefits. (2) That the act does not provide an efficient system of free schools, and is void. (3) The Legislature has no power to create a school district in such form as to destroy adjacent districts, etc. Many decisions of other states are cited; but none of them is more pertinent than the case of Junction City School Incorporation v. Trustees of School District No. 6, 81 Tex. 148, 16 S. W. 742. That district was created by the county court, which had no authority except what the law granted; but in the present case the Legislature had all power not denied to it by the Constitution. The case of Parks v. West, 102 Tex. 11, 111 S. W. 726, is not in point, for there the Legislature formed a district embracing territory in more than one county, which this court held to be forbidden by the Constitution. Neither of the cases cited are in conflict with the validity of the act involved in this proceeding.

[3] Before discussing the provisions of the act creating the district which are assailed as rendering the act void, we will consider the charge of unfairness to plaintiffs and others in the creation of the district. The following statement of the law answers the plaintiff's attack fully, and needs no argument to show its conclusiveness: "Statutes cannot be declared invalid on the ground that they are unwise, unjust, unreasonable or immoral, or because opposed to public policy, or the spirit of the Constitution. Unless a statute violates some express provision of the Constitution, it must be held to be valid." 1 Lewis' Sutherland, Statutory Construction, § 85.

The law in this respect has not been shown to be in conflict with the Constitution in any particular; therefore no court in this state has power to right that wrong, if it be such. This conclusion embraces all of the objections which relate to the unfairness, injustice, and wrong to the complainants, whether they occurred through fraud, inadvertence, or want of information; all of these matters were settled by enacting the law. We will not discuss them in detail.

[4] Article 3, § 56, of the Constitution provides: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, \* \* \* creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts."

Counsel for appellees insist that the act

creating the district violates that provision in that it creates offices and names officers. The school trustee was not a new office within the meaning of the clause of the Constitution copied above. The act simply adopted the name and provided for the management of the affairs of the district by trustees, which office existed, being named in the general law and in many special acts. Neither did the Legislature appoint any officer, but within the authority to create the district continued the existing trustees in office until those provided for in the bill should be elected.

[5] With much earnestness counsel urge the proposition that the proposed bond issue is void, because the act provides: "That the Clifton Independent school district shall have and exercise, and is hereby invested with all the rights, powers, privileges and duties granted under and by the General Laws of this state, to independent school districts for free school purposes only, and the board of trustees of said Clifton Independent school district shall have and exercise, and are hereby invested and charged with all the rights, powers, privileges and duties conferred and imposed by the general Laws of this state upon the trustees of independent school districts." Special Laws, Regular Session, 1913, § 7, p. 109.

The general law regulating free schools contains this provision: "Art. 2857. Local Taxes; Bonds.—Trustees of a district that has been, or may hereafter be, incorporated under general or special laws, for school purposes only, shall have power to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax not to exceed twenty-five cents on the one hundred dollars for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such incorporated districts; provided that the amount of maintenance tax, together with the amount of bond tax of the district, shall never exceed fifty cents on the one hundred dollars valuation of taxable property. Said trustees shall have power to issue coupon bonds of the district for building purposes, to be made payable not exceeding forty years from date, in such sums as they shall deem expedient, to bear interest not to exceed five per cent. per annum; provided, that when such buildings are to be wooden the bonds herein provided for shall not run for a longer period than twenty years; provided, that the aggregate amount of bonds issued for the above named purpose shall never reach such an amount that the tax of twenty-five cents on the hundred dollars valuation of property in the district will not pay current interest and provide a sinking fund sufficient to pay the principal at

maturity; and provided, further, that no such tax shall be levied and no such bonds issued until after an election shall have been held, wherein a majority of the taxpaying voters voting at said election shall have voted in favor of the levying of said tax, of the issuance of said bonds, or both, as the case may be; provided, that the specific rate of tax need not be determined in the election."

Counsel assert that the law which authorizes the trustees of school districts, general and independent, to purchase "sites" for school buildings is void, because it is not authorized by this provision of the Constitution: "And the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts, heretofore formed or hereafter formed, for the further maintenance of public free schools, and the erection and equipment of school buildings therein."

The literal construction of the Constitution insisted upon would destroy the bonds heretofore issued by school districts and create confusion in the management of the public free schools. But we have no hesitancy in holding the granting of the authority to build schoolhouses implies the authority to purchase the land on which it is to be erected. 2 Lewis' Sutherland, Statutory Construction, §§ 502, 503, and 504.

There can be no controversy as to the power under that provision to purchase "sites," the land on which to erect the buildings. The plain words quoted answer the objection so earnestly pressed upon the court. Argument would be superfluous.

#### BOTSFORD, DEATHERAGE, YOUNG & CREASON v. HAMNER. (No. 7868.)

(Court of Civil Appeals of Texas. Ft. Worth. March 7, 1914. Rehearing Denied April 18, 1914.)

#### 1. ATTORNEY AND CLIENT (§ 145\*)—BREACH—FORFEITURE.

A judgment debtor pledged notes of third persons with defendant, the attorney of the judgment creditor, to secure the judgment, and thereafter transferred his equity to secure a debt which he owed plaintiffs, and subsequently transferred the notes to the judgment creditor, under an agreement between plaintiffs and the attorney that the latter should collect the notes and, after retaining his compensation, divide the balance between the judgment creditor and plaintiffs. The attorney sued in the name of the judgment creditor on the notes, and judgment was obtained on the original pleadings. *Held*, that the failure of plaintiffs to serve process in the action on request of the attorney did not justify the attorney in claiming a forfeiture of plaintiffs' rights under the contract, especially where proper service was procured in due time.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 334, 335; Dec. Dig. § 145.\*]

#### 2. ATTORNEY AND CLIENT (§ 129\*)—CONTRACT OF EMPLOYMENT—BREACH—FORFEITURE.

Where an attorney contracted to collect notes transferred to his client to secure a judgment in her favor, and divide the proceeds be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tween his client and plaintiffs after deducting his compensation, and the attorney collected the notes by action in the name of the client, but failed to pay to plaintiffs their share of the proceeds, an action by plaintiffs was properly brought against the attorney, and not against his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 284-291; Dec. Dig. § 129.\*]

Appeal from District Court, Nolan County; W. W. Beall, Judge.

Action by Botsford, Deatherage, Young & Creason against Ed J. Hamner. From a judgment for defendant, plaintiffs appeal. Reversed and rendered.

Crane & Bondies, of Sweetwater, for appellants. Geo. T. Wilson, of Sweetwater, for appellee.

DUNKLIN, J. This suit was instituted by Botsford, Deatherage, Young & Creason against Ed J. Hamner, and from a judgment in favor of the defendant, plaintiffs have appealed.

The defendant, as attorney for Mrs. Bettie F. Smith, recovered a judgment in favor of Mrs. Smith against R. B. Pyron, who, in order to secure payment of the same, hypothecated with Hamner three promissory notes, two for \$1,000 each and one for the sum of \$2,000, payable to the order of Pyron and executed by Sidney P. Allen and W. A. Rule. Pyron then transferred his equity in those notes to the plaintiffs, who were residing in Kansas City, as security for the payment of certain indebtedness which he owed to them. A correspondence then ensued between plaintiffs and Hamner, who resided in Colorado City, Tex., relative to the collection of the Rule and Allen notes held by Hamner, the face value of which was in excess of the judgment in favor of Mrs. Smith against Pyron; plaintiffs' purpose being to realize any amount that might be collected on those notes over and above the amount of Mrs. Smith's judgment. The correspondence began with a letter from plaintiffs to the defendant, dated July 8, 1908, calling attention to the fact of the assignment by Pyron to plaintiffs of his equity in the notes to secure his indebtedness to the plaintiffs, stating that Rule had assured plaintiffs that he would pay the notes in the near future, and requesting Hamner that he would remit to the plaintiffs any balance remaining after the payment of Mrs. Smith's judgment. A reply to this letter was written by defendant and dated July 10th, suggesting that plaintiffs make certain investigations relative to the notes, and inclosing copies of letters he had written to Rule and Allen relative thereto. On July 25th defendant wrote plaintiffs another letter, stating that the writer was of the opinion that the notes could be collected by suit, but that in order to do so it would be necessary for Pyron to transfer the title of the notes to Jack

M. Smith, plaintiff in the judgment for the payment of which the notes had been hypothecated, and that, if Pyron would execute such a transfer, the writer would proceed to collect the notes and, after deducting from the amount collected the expenses of collection, including all costs incurred and 10 per cent. attorney's fees,  $\frac{33}{40}$  of the balance remaining would be applied to the judgment in favor of Jack Smith and  $\frac{7}{40}$  would be applied to the debt which Pyron owed the plaintiffs. In this letter the defendant requested plaintiffs to see Pyron at once and have him execute such a transfer and to report to the writer promptly. It was shown beyond controversy that in this and all other letters from defendant to plaintiffs reference to the judgment as being in favor of Jack M. Smith was a clerical error; that the judgment was in fact owned by Mrs. Bettie F. Smith.

Thereafter numerous letters passed between the parties, indicating an effort on plaintiffs' part to get Rule and Allen to pay the notes without suit and a willingness on the part of plaintiffs to accede to the proposition made by the defendant in his letter of July 25th, in the event a suit should become necessary to collect the notes. On August 17th defendant addressed another letter to plaintiffs, insisting that Pyron execute the transfer of the notes, with an agreement to divide the proceeds as suggested in his letter of July 25th. On September 2d he wrote plaintiffs another letter, inclosing a transfer to be signed by Pyron in accordance with the proposition already made, and requesting that plaintiffs have Pyron execute the same, and that, when executed, it be returned to the writer. Plaintiffs replied to this letter, stating that the transfer had been forwarded to Mr. Pyron, with the request that he execute it at once. On October 8th Pyron did execute and acknowledge the transfer, and on October 13th plaintiffs inclosed the same in a letter to the defendant, reading as follows: "Bob Pyron arrived here two or three days ago, and while here he signed and acknowledged the instrument which you wanted in order to institute suit against Rule and Allen on the notes, and we herewith inclose the same. I saw Mr. Rule twice last week, and each time he made promises to pay the interest, but somehow he has never succeeded in paying over any money, and I don't know of anything to do, or that can be done, except to follow your line."

The transfer so executed reads as follows: "State of Texas, County of Mitchell.

"Whereas, the undersigned, R. B. Pyron, is indebted to Bettie F. Smith, plaintiff in cause No. 1111, in the district court of Mitchell county, Texas, against R. B. Pyron, wherein the said plaintiff on June 28, 1907, recovered judgment against said defendant for the sum of \$3,343.35, together with inter-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

est on said amount from that date until paid at the rate of 10% per annum; and, whereas, heretofore said defendant R. B. Pyron placed with Ed J. Hamner, Esquire, three (3) certain promissory notes executed by Sidney P. Allen and W. A. Rule on the 1st day of July, A. D. 1907, all of which said notes matured one year after date thereof, each being payable to R. B. Pyron or order at the National Bank of Commerce, Kansas City, Missouri, with interest from date thereof at the rate of six (6%) per cent. per annum, interest payable semiannually, said interest to be compounded if not paid as specified in the face of said notes, said notes being indorsed by me. The two notes for \$1,000.00 each have a credit on each note of \$30.00, and the one note for \$2,000.00 bears a credit of \$60.00, being the interest paid thereon for the first six months after their date, said credits being made on January 2, 1908. Said notes were given to said Ed J. Hamner by me as security for the judgment of said Bettie F. Smith, above mentioned. And, whereas, said notes have not been paid off nor satisfied, and it will be necessary to take proceedings to secure their payment:

"Now, therefore, I, R. B. Pyron, the owner of said notes, for and in consideration of one (\$1.00) dollar cash in hand paid by said Bettie F. Smith, and the agreements herein contained, do hereby sell, transfer, assign, and set over said notes to the said Bettie F. Smith, upon the following terms and conditions, to wit:

"First: Said Bettie F. Smith is to use due diligence to collect said notes, and after the payment of ten (10%) per cent. attorney's fees, and all expenses necessarily incurred in the exercise of due diligence to collect said notes, is to retain thirty-three fortieths ( $\frac{33}{40}$ ) of the proceeds of said notes, and is to remit to Botsford, Deatherage, Young & Creason, attorneys, at Kansas City, Missouri, the remaining seven-fortieths ( $\frac{7}{40}$ ).

"Second. The said Botsford, Deatherage, Young & Creason are to assist the said Bettie F. Smith with information, and in all other reasonable manner, to collect said notes, and so am I.

"Third. The said Bettie F. Smith is authorized to accept in lieu of said notes other notes to be executed by said Sidney P. Allen and W. A. Rule, payable on or before December 1, 1908, if the said Sidney P. Allen and W. A. Rule will execute the same and pay the interest due on said notes to that date.

R. B. Pyron."

After the receipt of the transfer, defendant instituted a suit in the name of Bettie F. Smith as plaintiff against Rule and Allen upon the notes so transferred by Pyron. After the institution of the suit defendant addressed a letter to plaintiffs, of date December 2, 1908, inclosing citations to be served upon the Boatmen's Bank of St. Louis, C.

H. Kohler, Sidney P. Allen, and W. A. Rule, of Kansas City, all of whom were made parties defendant in the suit, and requesting that plaintiff have the citations served upon those parties. On December 4, 1908, a letter was written to the defendant by one of the plaintiffs returning the citations and stating that, by reason of the fact that plaintiffs were attorneys for the Boatmen's Bank in quite a number of other important matters, it would be improper for plaintiffs "to act in this case in any manner whatsoever." On December 9th defendant wrote plaintiffs the following letter: "I have yours of the 4th inst., returning service on the Boatmen's Bank, etc. I regret very much the course you have pursued. It occurs to me that inasmuch as you are interested in the collection of these notes that it would have been entirely proper and would not have hurt you to turn this matter over to an officer, so that it could have been attended to and service not diverted. As it is now the parties have been advised that the suit is filed and will no doubt be trying to avoid service and defeat trial of this case in January. However, the damage has been done, if done at all. There is no use crying over spilt milk. Had you simply turned the papers over to an officer and let him serve them and return to me, it would have been a great deal better." On December 15th another letter was written to defendant, with the plaintiffs' name signed thereto, in reply to the letter last mentioned, stating that plaintiffs' letter of December 4th had been written by Mr. Botsford, who was ignorant of the particulars of the deal concerning the Rule notes, and that Mr. Botsford had written the letter without awaiting an opportunity to consult the other member of the firm, who was then out of the city. On December 18th defendant wrote to plaintiffs the following letter: "I have your favor of December 15th, and beg to advise that I obtained legal service upon all parties to the suit, returnable to the January term, 1909. My attachments are complete and I will obtain judgment. I understand, however, that Bush & Tillar will proceed to foreclose their vendor's lien against this land unless this suit is paid off and dismissed. Of course, if that foreclosure takes place, it leaves us nothing to attach, in which event I will proceed to put Allen and Rule in bankruptcy; but it occurs to me that the Boatmen's Bank will be very glad to pay this debt off to protect itself in the amount of money it is already out. If it does not, of course, when the bankruptcy proceeding is instituted, which I will do immediately, the bank will either have to back off from the entire indebtedness it holds, or come in and have to return to Rule the amount it has collected. At any rate, I think we are in a position to make your bank either settle this debt or back off, as they should do."

On January 6th a judgment was rendered

in favor of Mrs. Bettie F. Smith against Rule and Allen upon the notes so transferred by Pyron for the sum of \$4,244 and costs of suit. Thereafter the judgment was collected in full, amounting to \$4,845.30, out of which was deducted \$80.30, costs of suit, leaving a balance in defendant's hands of \$4,265, which represented the amount of the judgment, \$4,244, and interest accrued thereon from the date of the judgment to the date of its collection. Of this amount, on February 8, 1909, defendant remitted to plaintiffs \$107.26 in a letter reading as follows: "Herewith find my check for \$107.26, covering the balance due R. B. Pyron for payment on the Allen and Rule notes after deducting the Bettie F. Smith judgment therefrom, which amount I send you as per instructions from Mr. Pyron." At the time that judgment was collected, there was due upon the judgment in favor of Mrs. Bettie F. Smith against R. B. Pyron the sum of \$3,521.66, which judgment was satisfied in full by the defendant out of the money collected upon the Rule and Allen notes, and for his services in procuring the judgment against Rule and Allen defendant retained less than the 10 per cent. provided therefor in the transfer of the notes from Pyron to Mrs. Bettie F. Smith. The amount remitted by defendant to plaintiffs being less than the amount that plaintiffs were entitled to receive according to the terms of the transfer of the Rule and Allen notes by Pyron, they instituted this suit for the balance, alleging the transfer and claiming a right to a division of the amount collected according to its terms.

[1] Among other defenses, the defendant alleged the failure of plaintiffs to procure service of citation in the suit instituted by Mrs. Bettie F. Smith upon the Rule and Allen notes, as shown in the correspondence above noted, claiming that by reason of their failure so to do they were not entitled to recover under the terms of said contract—in effect, that by the failure to perform that service plaintiffs had forfeited all rights under the contract.

One of the instructions given by the court to the jury was, in effect, that if plaintiffs refused in any material respect to aid the defendant Hamner in the collection of the Rule and Allen notes when called upon to do so by Hamner, and that by reason of such refusal Mrs. Bettie F. Smith, or her attorney, Hamner, rescinded the contract evidenced by the transfer of the notes to Mrs. Bettie F. Smith by Pyron, and proceeded to collect the notes under the former contract with Pyron, then plaintiffs could not claim any benefits under the contract evidenced by the transfer of the notes by Pyron to Mrs. Bettie F. Smith. Error has been assigned to this charge, and also to the refusal of a peremptory instruction that plaintiffs' failure to procure the service of the process in the suit did not work a forfeiture of their rights under the contract.

The entire negotiations between plaintiffs and defendant were by correspondence which appears in the record, and there is nothing indicating any failure by plaintiffs to aid in the collection of the Rule and Allen notes in every manner possible, save and except their failure to procure the service of process, as shown in the correspondence noted. Nor is there any suggestion in that correspondence of any intention on the part of Mrs. Bettie F. Smith, or her attorney, to claim a forfeiture of plaintiffs' rights by reason of their failure to perform that service. It further appears from defendant's letter of December 18th that he had procured the service of process in time for the term of court during which he desired to try the case, and there is no suggestion in the correspondence, or otherwise in the evidence, that plaintiffs' failure to render the service requested had worked any hardship or loss whatsoever to Bettie F. Smith or her attorney, Hamner. Furthermore, the suit to collect the Rule and Allen notes, which had been instituted in her name under and by virtue of the transfer of the notes executed by Pyron to her, proceeded to judgment without any change in the pleading so far as shown in this record. There is no suggestion in the record of any notice to plaintiffs nor to Pyron of any rescission of, or attempt to rescind, the contract under which that suit was instituted; neither does the contract contain any stipulation indicating a right of forfeiture of plaintiffs' interest thereunder for such a minor breach of performance by plaintiffs as their failure to procure service of citation when requested so to do by the defendant. *Ryan v. Porter*, 61 Tex. 106.

[2] In fact, in appellee's brief no attempt is made to defend the charge given by the court upon the plea of rescission of the contract and forfeiture of the plaintiffs' rights thereunder; but it is insisted by the appellee that as the transfer from Pyron placed the title to the notes against Rule and Allen in Mrs. Bettie F. Smith, in whose name the judgment was recovered, the cause of action, if plaintiffs have any under the contract, would be against Mrs. Bettie F. Smith, and not against appellee, who acted for Mrs. Bettie F. Smith as attorney only. With this contention we are unable to agree. By the terms of the transfer of the notes the balance remaining after the payment of the expenses of collection was to be divided between plaintiffs and Mrs. Bettie F. Smith in the proportion stated. The effect of the transfer was to place title in  $\frac{3}{4}$  of such balance in Mrs. Bettie F. Smith and  $\frac{1}{4}$  in plaintiffs. In collecting the interest of plaintiffs in that balance, defendant necessarily did so as agent or attorney for plaintiffs, and not as attorney for Mrs. Bettie F. Smith, who had no title thereto. Under the undisputed evidence, judgment should have been rendered in favor of plaintiffs in accordance with the terms of that contract. From the

amount collected on the judgment, \$4,265, defendant was entitled to deduct 10 per cent. attorney's fees, \$426.50, which would leave a balance of \$3,838.50. Of this balance, Mrs. Bettie F. Smith was entitled to  $\frac{3}{4}$ , or \$3,166.76 $\frac{1}{4}$ , while plaintiffs were entitled to  $\frac{1}{4}$ , or \$671.73 $\frac{1}{4}$ . Deducting from the sum last named \$107.26, which defendant remitted to plaintiffs, we have a balance of \$564.47, for which judgment should have been rendered in favor of plaintiffs.

Accordingly, the judgment of the trial court is reversed, and judgment is here rendered in favor of appellants against appellee for the sum of \$564.47, with interest thereon at the rate of 6 per cent. per annum from February 2, 1909, the date of the collection of the judgment, up to the present date, together with costs of suit in the trial court, as well as the costs of this appeal.

### FIRST STATE BANK OF ARCHER CITY et al. v. POWER. (No. 7822.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 7, 1914. Rehearing Denied  
April 11, 1914.)

#### EVIDENCE (§ 459\*)—PAROL EVIDENCE AFFECTING WRITINGS—CONSTRUCTION OF INSTRUMENT—IDENTIFICATION OF PARTIES.

Where a contract for the sale of a bank was signed by two-thirds of the stockholders in order to bind the bank, reciting that it was executed by M. and others acting for the bank, "and hereinafter called second party," and it was evident that the term "second party" was sometimes used therein to refer to the bank and sometimes to the stockholders, there was such an ambiguity in the instrument as to authorize the admission of parol evidence to show whether the term "second party" in a provision requiring the "second party" to redeem the real estate, furniture and fixtures, was intended to refer to and bind the stockholders or only the bank.

[Ed. Note.—For other cases, see Evidence Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

Appeal from District Court, Archer County; P. A. Martin, Judge.

Action by F. M. Power against the First State Bank of Archer City and others. From a judgment for plaintiff, the defendants appeal. Reversed and remanded.

A. A. Hughes and Mathis & Kay, all of Wichita Falls, for appellants. W. E. Forgy, of Archer, and Carrigan, Montgomery & Brittain, of Wichita Falls, for appellee.

SPEER, J. This suit was instituted by F. M. Power against the First State Bank of Archer City, a private banking corporation, and L. F. Gragg, P. P. Langford, Joe W. Kimball, and C. E. Goodwin, based upon a written contract hereinafter set out; plaintiff contending that the defendants, other than the First State Bank, were personally and individually liable upon such contract

for their failure to comply with the latter part of section 9 of the contract, wherein it is stated: "And the second party will on or before the first day of January, 1912, redeem said real estate and furniture and fixtures at the said book value price." These defendants denied that they were individually liable on such contract, but contended that they, along with other shareholders in the bank, had merely signed the contract in order that the assent of the bank might be evidenced by the signatures of a majority of its stockholders. There was a trial before the court without the intervention of a jury, in which judgment was rendered for the plaintiff against all of the defendants as prayed for, and the individual defendants named have appealed.

The contract upon which plaintiff's suit is based is as follows:

"State of Texas, Archer County.

"Know all men by these presents: That this contract made and entered into by and between F. M. Power of Archer City, Texas, and hereinafter called first party, and Lon Morris, of Archer City, Texas, and such other parties as may fix their signatures here below and acting herein for the First State Bank of Archer City, Texas, and hereinafter called second party, witnesseth:

"(1) The first party will on January 25th, 1911, and subject to the limitations and conditions hereinafter mentioned, take over the entire business, including both assets and liabilities of the said First State Bank of Archer City, Texas, and will pay therefor the book value of the capital stock of said bank as shown by the books of said bank at the close of business on January 25th, 1911, subject, however, to the following conditions:

"(2) All notes and accounts that may be bearing interest from any date prior to the 25th day of January, 1911, to be computed and valued at the amount due on such notes and accounts on that date, including principal and interest and such interest due shall be added to the said book value or purchase price. And all notes and accounts bearing interest from any date subsequent to the said January 25th, 1911, to have deducted therefrom the amount of the unearned interest from that date and such unearned interest shall be deducted from the said book value or purchase price. That is to say, the purchase price of said bank is the book value of the capital stock thereof, plus the accumulated interest and less the unearned interest and all interest calculations to be made at the rate of ten per cent. per annum to and from January 25th, 1911.

"(3) Immediately after January 25th, 1911, the first party will pay to any and all the shareholders of the said bank 50 per cent. of one-half of the value of such stock, provided that the stock certificates are presented and have the amount of such payment indorsed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereon and the remaining portion of the said purchase price to remain on deposit in the Power State Bank of Archer City, Texas, to secure the payment of all notes and accounts included in said purchase and to secure and guarantee that the books and accounts are correct and show the true condition of such notes and accounts.

"(4) The first party will renew, extend and carry over any and all notes and accounts received by him in said purchase that may be desired by second party to the first day of January, 1912, but will not renew, extend or carry over any notes or accounts unless requested to do so in writing by second party, and in doing so will accept such notes and accounts as his own and second party will be discharged from any liability thereon, and second party will furnish request in writing for such extension or renewals from time to time and at any time demanded.

"(5) The first party will do and perform any and all things concerning said business, including keeping the books and looking after the collecting the notes and accounts and will use his best endeavor to get any and all of said business and keep it in proper form without charge of any kind against second party. And will institute and defend all suits and foreclosure proceedings that may be demanded by second party, the second party to pay the court cost and attorney's fees thereof. And the first party will not charge any shortage or default against said escrow account before January 1st, 1912.

"(6) The first party will pay the taxes due against second party and will pay all accounts for stationary and expenses due against second party, not to exceed the sum of two hundred dollars and charge the same to said escrow account as a proper charge against second party.

"(7) It is however understood and agreed that first party does not assume the payment of said taxes or expenses on his own account nor does he assume the payment of any money except such as is shown on the said books of said bank.

"(8) The first party will early in the morning of January 25th, 1911, place a credit deposit on the books of the Power State Bank to the credit of each and every depositor of the First State Bank as shown by their books at the close of the business on January 24th, 1911, an amount equal to such deposits and will pay to any and all of said depositors on demand any portion or all of such deposits and will issue to Lon Morris a duplicate slip showing the credit of each of said depositors.

"(9) The first party will not sell or otherwise dispose of any of the real estate or furniture and fixtures included in this purchase except on such terms and conditions as may be agreed upon by second party, but the second party may sell or dispose of any of the same at any time during the life of this contract, provided the sale is for cash and the

proceeds left in the aforesaid escrow account and provided if the sale should be for any other thing than cash, it will require the approval of the first party so that the securities obtained therefor will be available in said escrow account. And the second party will on or before the first day of January, 1912, redeem said real estate and furniture and fixtures at the said book value price.

"(10) The rents and revenues collected for the use of the real estate and furniture and fixtures will be the property of second party, but first party may use so much thereof as may be necessary to reimburse the escrow account for taxes and expenses paid out by first party out of said escrow account.

"(11) It is distinctly stipulated that this contract is binding on the said F. M. Power and Lon Morris, but will have to be acquiesced in by the shareholders or owners of at least two-thirds of the shares of capital stock of said First State Bank before it can bind said bank, and that in the event the required acquiescence of said two-thirds of the capital stock is not secured by their signatures, together with the amount of capital stock owned respectively by January 25th, 1911, then this contract shall be of no effect. But if the required two-thirds are secured by or before said date then and in that event, if either the said Lon Morris or F. M. Power should for any reason fail to fully keep and perform any portion of this contract, then the defaulting party shall pay to the other party by or before February 15th, 1911, the sum of one thousand dollars as liquidated damages.

"(12) The second party, by the appearance of their respective signatures hereto, do hereby sell, transfer and assign unto the first party the aforementioned business according to the aforementioned terms and will not any of them use the house or furniture and fixtures for banking purposes in Archer City, Texas, for the term of five years from this date.

"(12a) The second party do hereby appoint Lon Morris of Archer City, Texas, as their agent to do and perform any and all things necessary or incident to the complete winding up of this contract and the affairs of the said First State Bank and do hereby enter into voluntary liquidation of the said First State Bank.

"(13) The real estate herein mentioned is described as follows: Two lots or parcels of land situated in Archer City in Archer county, Texas, and being a resident place and a business place, and more particularly described as follows: The business place being a part of lot No. five (5) in block No. two (2) according to the plot of said Archer City and being twenty-three and one-half (23½) feet wide fronting south by one hundred and thirty (130) feet deep and being the house and lot upon which the said First State Bank now has its business located. The resident place being lots Nos. two (2), four (4) and

fourteen (14), all in block No. three (3), all in Hillside addition to the said town of Archer City, Texas, as shown, by the Deed Records of Archer county and known as the R. S. Morrison place.

"[Signed] F. M. Power,  
"First Party.

"Signatures of second parties:

Name.	No. of Shares Owned.
Lon Morris .....	54 shares.
L. E. Gragg .....	10 "
Fredd Gragg .....	5 "
M. A. Finley .....	10 "
Clark Melugin .....	10 "
J. C. Tandy .....	40 "
F. L. Rhodes .....	5 "
P. P. Langford .....	20 "
Joe W. Kimball .....	10 "
C. E. Goodwin .....	10 "

"State of Texas, Archer County.

"Before me, the undersigned authority, a notary public in and for Archer county, Texas, on this day personally came J. C. Tandy, president, and Lon Morris, cashier, of the First State Bank of Archer City, Texas, each of whom are known to me to be the persons whose names are subscribed to the foregoing instrument and each acknowledged to me that they had signed the same for the purposes and considerations therein expressed and in the capacity therein mentioned.

"Witness my notarial hand and seal this January 25th, 1911.

"W. I. Singleton,  
"Notary Public, Archer Co., Tex."

Upon the trial of the case the court excluded and refused to consider evidence of various witnesses offered by appellants which tended to support their defense; that is, to show that, at the time of the execution of the contract, it was clearly understood between the parties to it that the same was not the individual undertaking of these appellants and was not to be binding on them in respect to appellee's present contention, but that the same was the undertaking solely of the bank. This testimony, when offered, was objected to and excluded upon the ground that it served to contradict the legal contract, and the court sustained the objections and excluded the evidence, holding that the contract above set out was unambiguous and bound these appellants as individuals, and rendered judgment accordingly against each of them, as already stated.

The contract is not very artistically drawn, and we ourselves have had much difficulty in determining upon the proper interpretation to be placed upon it. In some parts of the contract "the second party" evidently refers to the bank, while in other parts it is equally obvious that the expression refers to the individual signers. It is not clear to our minds that the "second party" referred to in the last clause of the ninth paragraph, upon whom was imposed the obligation to redeem the real estate, furniture, and fixtures,

refers to appellants, as held by the trial court. On the contrary, considering the lax use of that expression in other parts of the contract, the matter is involved in such doubt as to create an ambiguity in the instrument which would authorize the introduction of oral evidence to show the real intention of the parties. We think the court erred in excluding the evidence tendered by appellants, and for this error the judgment is reversed, and the cause remanded.

Reversed and remanded.

ALLEN et ux. v. FRANKS et al. (No. 7889.)  
(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 14, 1914. On Motion for Re-  
hearing, April 11, 1914.)

FIXTURES (§ 5\*)—TITLE TO BUILDINGS—EREC-  
TION ON LAND CONVEYED SUBJECT TO CON-  
DITIONS.

Under Rev. St. 1911, art. 2822, providing that the trustees of school districts may receive gifts, grants, donations, or devises for the use of the public schools, article 2844, authorizing them to contract for the erection of school buildings and superintend their construction, article 2845, providing that no mechanic, etc., or other person can contract for or in any manner have or acquire any lien on a schoolhouse or the land upon which it is situated, article 2847, providing that schoolhouses shall be under the control of the district trustees, and article 2849, providing that all conveyances, devises, and bequests for the benefit of public schools shall when not otherwise directed by the grantor or devisor vest in the county judge or the trustees as trustees for those to be benefited thereby, and when not otherwise directed shall be administered by such officers under rules established by the state superintendent, where land was conveyed to school trustees upon the condition that it should revert to the grantors when it ceased to be used for school purposes, and a school building was erected thereon from contributions made by citizens of the community, the building did not become a part of the land so as to revert to the grantor and could be removed by the trustees when the land ceased to be used for school purposes, though the contributors and the trustees contemplated that the building should remain on the land permanently, since the contributors were chargeable with notice of the statutory provisions giving absolute control of the building to the trustees and prohibiting liens, while the trustees had no power to vest title to the building in the grantors without consideration or to bind their successors by such act, as this would be a breach of their trust and contrary to public policy.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. § 5.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by W. M. Allen and wife against J. A. Franks and others. From an order dissolving a temporary injunction, plaintiffs appeal. Affirmed.

Ramsey & Odell, of Cleburne, for appellants. J. K. Russell, O. T. Plummer, and W. E. Myers, all of Cleburne, for appellees.

DUNKLIN, J. W. M. Allen and wife executed a deed to certain land to the trustees



of school district No. 31 in Johnson county, and their successors, containing covenants of general warranty of title, but with the following stipulation contained in the deed, to wit: "Conditioned that when the above-described land ceases to be used as school purposes, the same shall revert to us." The school trustees procured the erection of a schoolhouse upon the land which was thereafter used for school purposes. Later, J. A. Franks, W. W. Wilson, and J. H. Yarbrough, successors to the former trustees to whom the deed was executed, decided to abandon the land upon which the house was originally built, to relinquish any further claim to that land, and to move the building to another location which had been selected by them for that purpose. W. M. Allen and wife instituted this suit to enjoin the removal, alleging that the building erected upon the land was a part of the realty; that the land had been abandoned by the trustees; and that by reason thereof the building, as well as the land, had reverted to them. A temporary writ of injunction was granted, but later was dissolved, and from the order of dissolution this appeal has been prosecuted by Allen and wife.

Appellant has cited many authorities, such as *Brown v. Roland*, 92 Tex. 54, 45 S. W. 795, *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286, and *Jones v. Bull*, 85 Tex. 136, 19 S. W. 1031, announcing the general rule that a house erected upon land becomes a part of the freehold, in the absence of any intention by the parties erecting it that the same shall not become permanently annexed to the land. The evidence shows that the money with which the building was erected consisted solely of contributions by the citizens of that community. Upon the hearing of appellee's motion to dissolve the writ, many affidavits were introduced of persons who contributed to the building fund. Allen was one of those contributors, and he and many others testified that the contributions were made with the distinct understanding with the trustees that the building was to remain upon the land permanently. Some of the same persons, including Allen and wife, testified that there was a further understanding with the trustees that the building should also be used as a place for public worship, as well as a schoolhouse. Two of the trustees who were acting as such at the time of the execution of the deed also testified that it was their intention at the time of the erection of the building that the same should remain upon the land permanently, while another trustee testified that it was his understanding and intention that the building should remain upon the land so long only as the trustees of the district might desire, and that they would have the right to remove the same to any other location whenever they thought it was necessary to the best interests of the school district to do so. The

present trustees also testified that it was not the intention of the former trustees at the time the building was erected that the same should remain a permanent fixture upon the land, and that the present trustees now deemed it advisable to consolidate the district with another district and to move the house upon another location for the convenience of all the patrons of the school. They further testified that, while they made no further claim to the land upon which the building had been erected, they had never abandoned the building and had no intention of doing so. Other witnesses testified that the house was not built for church purposes at all, but strictly for school purposes, and that the use of the same as a church was an afterthought.

Following are articles of our Revised Statutes:

"Art. 2822. The trustees of school districts provided for in the preceding articles of this chapter, and their successors in office, shall be a body politic and corporate in law, and shall be known by and under the title and name of district trustees of district number —, and county of —, state of Texas; and as such may contract and be contracted with, sue and be sued, plead or be impleaded, in any court of this state of proper jurisdiction, and may receive any gift, grant, donation or devise made for the use of the public schools of the district. All reports and other official papers shall be headed with the number of district and name of county."

"Art. 2844. The trustees of a school district shall contract for the erection of the buildings and superintend the construction of the same; and the county superintendent shall draw his warrant or warrants upon the school fund so appropriated only upon the accounts first approved by them.

"Art. 2845. No mechanic, contractor, materialman, or other person, can contract for, or in any other manner have or acquire, any lien upon the house so erected or the land upon which the same is situated; and all contracts with such parties shall expressly stipulate for a waiver of such lien."

"Art. 2847. All schoolhouses erected, grounds purchased or leased for a school district, and all other property belonging thereto, shall be under the control of the district trustees of such district."

"Art. 2849. All conveyances, devises and bequests of property for the benefit of the public schools made by any one for any county, city or town, or district, shall, when not otherwise directed by the grantor or devisor, vest said property in the county judge of the county, or the board of school trustees of the city or town, or the trustees of the school district, or their successors in office, as the trustees for those to be benefited thereby, and the same, when not otherwise directed, shall be administered by said offi-

cers under such rules as may be established by the state superintendent."

When the funds were donated for the construction of the building, the title thereto passed to the trustees, and the building erected with such funds became subject to the provisions of the statutes above quoted. When the contributions were made for the erection of the building, persons making such contributions must be held to a knowledge of the statutory provisions giving absolute control of the building to the trustees and prohibiting the fixing of a lien of any character upon the building. If they could control the location of the building and prohibit its removal, then they could set aside article 2847, which expressly provides that all schoolhouses shall be under the control of the district trustees. If no lien of any character could be placed upon the house, as provided by article 2845, then for a more cogent reason parties donating contributions to be used in the construction of the building would have no right to claim a forfeiture of title to the building, when the ground upon which it is located is abandoned, because of their understanding that at the time they made the donations the building was to remain upon its original location. See *Rhodes v. Maret*, 112 S. W. 433.

We are of the opinion that the judgment was correct, and it is affirmed.

#### On Motion for Rehearing.

Appellants insist that we were in error in holding that the schoolhouse did not become a part of the freehold and that the title thereto did not revert to them when the land upon which the building was erected was abandoned for school purposes. In other words, it is insisted that as appellees neither alleged in their answer to plaintiffs' petition, nor in their motion to dissolve the injunction, that it was not the intention of the trustees at the time the house was erected that the same should become affixed to the land as a part of the freehold, the general rule recognized in the original opinion that, in the absence of such intention, the house does become a part of the realty, would apply. No contention is made that it was one of the considerations for the conveyance by appellants of the land upon which the building was erected that the building should become a part of the realty and revert to them when the land should cease to be used for school purposes. Hence, if appellants are entitled to the schoolhouse erected thereon, such right is solely by virtue of the rule of law noted above. If, at the time of the erection of the house, the trustees could make it a part of the realty by their intention to make it a permanent improvement upon the land, or by erecting the same without forming any intention at the time that they or their successors in office might remove it from the land in the event of a decision to

abandon the land for school purposes, then they could control the title to the house indefinitely. Under express provision of the statutes title to the house became vested in the trustees and their successors in office as trustees for those to be benefited thereby "under such rules as may be established by the state superintendent." To give appellants' deed the construction insisted upon would, in effect, be to say that the trustees who received the deed would have the authority themselves to vest in appellants title to the schoolhouse without receiving any consideration therefor and would have authority to bind their successors in office to do the same. Clearly, this would not be in the interest of the patrons of the school and thus deprive them of title to school property would be a breach of trust and contrary to public policy. *Midland Co. v. Slaughter*, 130 S. W. 612; *Sanders v. Cauley*, 52 Tex. Civ. App. 261, 113 S. W. 560; *Jay County v. Taylor*, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160; *Shelden v. Fox*, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257, and notes; *Millikin v. Edgar Co.*, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447, and decisions there cited. In *Jay County v. Taylor*, supra, it was held that a contract by a board of county commissioners employing a legal adviser for a period of three years beginning three months subsequent to the expiration of the term of office of one member of the board and extending beyond the terms of office of all the members of the board was against public policy and void, and in that case the following language is used: "In *Craft v. McConoughy*, 79 Ill. 346 [22 Am. Rep. 171], the Supreme Court of Illinois said: 'Whatever is injurious to the interest of the public is void, on the ground of public policy.' This language is quoted and approved in the recent case of *People v. Chicago Gas Trust Co.* [130 Ill. 268, 22 N. E. 798], decided by the same court in a learned and exhaustive opinion. In *Wiley v. Baumgardner*, 97 Ind. 66 [49 Am. Rep. 427] whatever is injurious to public interest is recognized as contrary to public policy. It is evident that the contract involved in this litigation is of that character. It ties the hands of the board of commissioners, and is prejudicial to the free exercise of its power and functions for the public good. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527, the court says: 'The common law will not permit individuals to oblige themselves by contract either to do or not to do anything, when the thing to be done or omitted is in any degree clearly injurious to the public'—citing *Chappel v. Brockway*, 21 Wend. [N. Y.] 159. See *People v. Chicago Gas Trust Co.*, supra."

Certainly it was not within the spirit or intention of the statute that those who were beneficially interested in the building could be deprived of title thereto without receiv-

ing any consideration therefor by any arbitrary act of the trustees who erected it, when the purpose of such act was not to subserve any interest of the beneficiaries.

The motion for rehearing is overruled.

**CITY OF FT. WORTH v. CHARBONNEAU**  
et ux. (No. 7855.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 14, 1914. Rehearing Denied  
March, 1914.)

**1. EMINENT DOMAIN (§ 202\*)—EVIDENCE AS TO COMPENSATION.**

In condemnation proceedings, where, upon the issue of damages, the owner had testified as to the quality and character of the land condemned, and given his opinion of its value, the jury could properly consider the fact of plaintiff's long residence upon the land as bearing upon the weight of the testimony.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.\*]

**2. EMINENT DOMAIN (§ 202\*)—EVIDENCE AS TO COMPENSATION.**

In condemnation proceedings, upon the issue of the value and character of the property condemned, the jury could properly consider the fact that the owner had raised his family upon the land as showing its adaptability to home-stead uses.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.\*]

**3. EVIDENCE (§ 142\*)—VALUE OF LAND—SALES OF OTHER LANDS.**

While it is permissible, on the issue of the value of lands sought to be condemned, to show sales of similar lands in the vicinity at about the time of the condemnation, the court properly rejected testimony of a witness that he had sold 139 acres for \$40 per acre, where no similarity of condition was shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.\*]

**4. EVIDENCE (§ 142\*)—VALUE OF PROPERTY—SALE OF OTHER LAND.**

Upon the issue of the value of lands in condemnation proceedings, the court properly permitted a witness to testify as to the gross receipts from tracts of land, which, though located at different points, were similar to the land in controversy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.\*]

**5. APPEAL AND ERROR (§ 978\*)—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL—MISCONDUCT OF JURY.**

Since Rev. St. 1911, art. 2021, providing that, where the ground of motion is misconduct of the jury, etc., the court shall hear evidence thereof, and may examine the jurors, etc., and if the misconduct, etc., be material, a new trial may, in the discretion of the court, be granted, changes the common-law rule, the appellate court will not disturb the discretion of the trial court in denying a new trial asked on that ground, unless there was clearly an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.\*]

**6. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

The trial court, in condemnation proceedings, properly refused to grant a new trial on the ground of newly discovered evidence; no

legal excuse being presented why such evidence was not offered at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

Appeal from Tarrant County Court; Chas. T. Prewett, Judge.

Condemnation proceedings by the City of Ft. Worth against William Charbonneau and wife. From a judgment fixing the value of the property, plaintiff appeals. Affirmed.

McCart, Bowlin, Terrell & McCart and A. B. Curtis, all of Ft. Worth, for appellant. Bell & Milam and Flournoy, Smith & Storer, all of Ft. Worth, for appellees.

CONNER, C. J. This was a condemnation proceeding instituted in the county court by the city of Ft. Worth against William Charbonneau and his wife to condemn 298 acres of land described in the plaintiff's petition for the purpose of establishing thereon a water reservoir. The land sought to be condemned was situated in the valley of the West fork of the Trinity river near the city of Ft. Worth, and constituted a part of a tract of about 1,100 acres upon which the defendant and his wife had resided as a home for many years. Upon the trial the jury returned a verdict in favor of the defendants for \$22,686 as the value of the land actually appropriated by the city, and the further sum of \$3,000 as the damage to the remainder of the defendants' tract.

[1, 2] The fifth ground of appellant's motion for a new trial, which is presented as appellant's first assignment of error, complains of the action of the court in refusing the following instruction, viz.: "You are further instructed that, in estimating damages to the plaintiff by reason of the property's being taken and by reason of the damages, if any, to the remaining property, you will not consider, for any purpose, the fact that plaintiff has lived upon the property a long time, that the same is his home, or that he has raised his family upon said property." Appellant's contention is that it was entitled to this charge so as to exclude from the consideration of the jury, in assessing damages, any sentimental value of the lands involved in the controversy. In the court's charge on the subject, no sentimental value was authorized, and we think the special charge requested was properly refused on the ground, if for no other reason, that it required the jury to wholly disregard the fact that plaintiff had lived upon the property a long time and that the same was his home. A relevant inquiry, to which evidence pro and con was directed, went to the value and character of the land sought to be condemned. The defendant Charbonneau testified that it was bottom land; that it was susceptible to irrigation; that he uniformly raised good crops thereon; that in many years there had been but two overflows thereof; and gave his opin-

ion of its value. He further testified that his other land was principally adapted to grazing to which it was applied, etc.; and, as bearing upon the weight of his testimony in these particulars, we think the jury could properly consider the fact of the plaintiff's long residence, and his consequent familiarity with the subjects about which he testified. Even the fact that the defendant had raised his family upon the property tended to show the adaptability to homestead uses. But if immaterial, and as such should have been excluded, the charge required the exclusion of other facts recited, which we think were admissible and proper for the jury's consideration.

Appellant's twenty-eighth ground of the motion for new trial, also presented in its first assignment of error, complains of the defendant Charbonneau's testimony to the effect that the lands in controversy had been for about 30 years his home, and that he reared his family there and did not wish to part with it. This is also complained of as admitting the consideration of a sentimental value. We, however, conclude that nothing prejudicial has been pointed out in these respects. The objection to the evidence was to the whole, and, as we have pointed out, we think it was relevant for the defendants to show their long-continued residence and the adaptability of the land to homestead uses; and the court specifically instructed the jury that they should disregard his statement that he did not wish to part with it. Moreover, the very nature of the suit is such as to show that it was not a voluntary severance of his homestead. We see nothing in the charge, the evidence, or the argument, in relation to these matters, that justifies the conclusion that the jury in fact attached any sentimental value to the land in controversy.

[3] Objection was made to the exclusion of the evidence of J. F. Cook to the effect that he had sold a tract of land, about 139 acres, for cash, about the time of the institution of this suit, for the sum of \$40 per acre. While it is held that it is permissible on the issue of the value of lands sought to be condemned to show sales of similar lands in the vicinity at and about the time of condemnation, no such similarity was shown in the present instance as to make the rejection of Cook's testimony reversible error. The witness was permitted to give his opinion of the value of the Charbonneau land, and, in the testimony offered and rejected, it appeared that, of the 139 acres so sold by Cook, but 40 to 50 acres was bottom land, and that the rest was broken. It further appears that the tract was sold as a whole and located some three miles down the river from the Charbonneau land. It was not made to appear whether the bottom land was susceptible of irrigation, or whether it was in cultivation, or even susceptible of cultivation. So that, as stated, we cannot say that the court com-

mitted reversible error in the rejection of the testimony. *Newbold v. I. & G. N. Ry. Co.*, 34 Tex. Civ. App. 525, 78 S. W. 1079; *Dennis v. Dallas, etc., Ry. Co.*, 94 S. W. 1092; *Ft. W. Improvement Dist. v. Weathered*, 149 S. W. 550; *Chaney v. Coleman*, 77 Tex. 103, 13 S. W. 850.

What we have said in disposing of the testimony of the witness Cook applies as well to the testimony of E. S. Hill and others, which we need not, therefore, particularly discuss.

[4] Appellant's fourth assignment is as follows: "The court erred in allowing the witnesses Seyster and Germany to testify, over plaintiff's objection, as to the gross receipts from small tracts of truck land located many miles from the land in controversy, and not similarly situated; said witnesses not having testified as to the net receipts, and the same being an incorrect measure of damages." The witness Seyster testified that he had examined the Charbonneau land sought to be condemned, and that it could be irrigated by pumping water from the river; that he had had experience with lands irrigated in the same manner from the Trinity river; that he was at the time cultivating land near Randall's mill, located in the Trinity river bottoms some eight or ten miles below the land in controversy, upon which he had raised last year 200 bushels of potatoes per acre, and also \$105 worth of beans on one acre. The witness Germany testified that he owned some bottom land on the West fork of the Trinity river several miles west of Ft. Worth; that he irrigated four acres by pumping water out of the river and made on it \$250 per acre gross; that he made about \$500 per acre on pepper, \$200 per acre on cucumbers and beans, \$300 per acre on onions—these prices being realized on the Ft. Worth market. He was not able to state his exact expenses, but testified that the net profit was about one-half the gross income. We think this evidence was admissible. It tended to show the uses to which the Charbonneau land could be put, and was relevant on the issue of its value, irrespective of the costs of crop production. While located at different points, the land mentioned by the witnesses was shown to be similar to the Charbonneau land and, like the Charbonneau land, susceptible of irrigation, and we see no reason why the jury, in determining the value of the Charbonneau land, might not reasonably consider, among other things, its agricultural possibilities.

[5] In the fifth assignment complaint is made of alleged misconduct on the part of the jury, but we are not inclined to attach much importance to this, and for that reason will not set out in detail the long statement following the assignment. In substance we think it amounts to no more than mere argument on the part of the jurors relating to evidence actually before them, such a Charbonneau's having lived on the place a long

time and that it was his home; that, with the bottom land segregated from the rest, he would be deprived of timber, of which, in part, the bottom land was covered; that the natural gas might some time become exhausted, etc. Some of the statements were denied, and we feel no disposition to disturb the discretion exercised by the trial court in overruling the motion for a new trial on this ground. Article 2021 of the Revised Statutes provides that: "Where the ground of the motion is misconduct of the jury or of the officer in charge of same, or because of any communication made to the jury, or because the jury received other testimony, the court shall hear evidence thereof; and it shall be competent to prove such facts by the jurors or others, by examination in open court; and, if the misconduct proven, or the testimony received, or the communication made be material, a new trial may, in the discretion of the court, be granted."

Prior to the act of 1905 (Acts 1905, c. 18), of which the article of the statute referred to is a part, such grounds of relief were not available. For manifest reasons our Supreme Court adopted the broad rule that jurors should not in civil cases be allowed to attack their verdict by testifying to misconduct, irregularities, or impropriety on the part of themselves and their fellows occurring in the privacy of their deliberations, and this was said to be in accordance with the great weight of authority. See *St. L. S. W. Ry. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. 315. While the old rule was evidently regarded by our Legislature as too rigid, the reasons therefor would seem still to exist, and the Legislature, in enlarging the rule, has distinctly committed it to the "discretion" of the trial court who hears the matter. We therefore think that, to constitute a ground for reversal, it should be made plainly to appear that the misconduct of the jury was not only material, but such as to show an abuse of the trial court's discretion in declining to grant a new trial on such ground. See *Whitaker v. Browning*, 155 S. W. 1197; *Foley v. Northrup*, 47 Tex. Civ. App. 277, 105 S. W. 231; *M., K. & T. Ry. Co. v. Blalack*, 128 S. W. 708; *City of Ft. Worth v. Lopp*, 134 S. W. 825; *Kalteyer v. Mitchell*, 102 Tex. 390, 117 S. W. 792, 132 Am. St. Rep. 889; *H. & T. C. Ry. Co. v. Gray*, 137 S. W. 731; *M., K. & T. Ry. Co. v. Brown*, 140 S. W. 1172.

[8] After the trial court had overruled appellant's original motion for a new trial, it filed a supplemental motion to the effect that, as shown by the opinion of a resident engineer in charge of the construction of the reservoir, the reservoir would fill up with sediment or silt in the course of 30 or 35 years, after which the reservoir would have to be abandoned. The contention is that, this being true, the land would revert to Charbonneau, and that it would be manifestly unjust to

now allow Charbonneau the full value of the land, as was evidently done by the verdict of the jury.

Chapter 11, § 3, p. 53, of the charter of the city of Ft. Worth, gives the city power "to condemn property in any court of competent jurisdiction whenever deemed expedient with-in or without the limits of the city upon compensation duly paid, for any public or municipal use or purpose, and shall be governed in such proceeding by the general laws of the state relative to condemnations." Articles 1003, 1005, 6518, and 6519 of the Revised Statutes provide the method or procedure under the state laws. Article 6519 specially provides that, when "the whole of a person's real estate is condemned, the damages to which he shall be entitled, shall be the market value thereof in the market in which the same is located"; and this was the measure of damages authorized by the court's charge for defendants' land actually taken, to which, on this subject, no exception has been made. The engineer's statement is to the effect that: "In the course of years such silt will fill or nearly fill the storage capacity of the reservoir. \* \* \* Although purely a matter of opinion, I am inclined to the belief that 30 or 40 years is the probable length to the life of the West fork reservoir for a water supply for the city of Ft. Worth." To now reverse the judgment and award a new trial upon any such assumption would, it seems to us, be contrary to the statute and manifestly unjust to the defendants. Moreover, if in any event it could be said that evidence of the character indicated in the affidavit of the engineer was relevant on the issue of damages, no legal excuse whatever is presented why such evidence was not secured and offered in due course of the trial. While the verdict and judgment seem large, it is not complained of as excessive, nor indeed could it well be. The evidence of the value of the land actually taken varied from \$30 to \$300 per acre. The verdict shows that the jury allowed \$75. There was ample evidence also that the damages done to the defendants' remaining tract was in excess of the \$3,000 allowed by the jury. So that, on the whole, it cannot be said that the verdict and judgment is not amply supported. No reversible error having been pointed out, we conclude that the judgment should be affirmed.

Affirmed.

LESTER v. GATEWOOD et al.  
(No. 594.)

(Court of Civil Appeals of Texas. Amarillo.  
April 11, 1914.)

# 1. PLEADING (§ 8\*)—FACTS AND CONCLUSIONS.

An allegation that a judgment was void because altered by the parties before being recorded is a statement of a conclusion, which is not sufficient to authorize an injunction to restrain the enforcement of the judgment, with-

out allegations of facts which overcome the presumption of the validity of the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12 28½, 68; Dec. Dig. § 8.\*]

## 2. JUDGMENT (§ 21\*)—VALIDITY—CERTAINTY OF AMOUNT.

A judgment for the "sum of \$—, being the amount of" a replevy bond, was not void for uncertainty, if the bond was in the record and the amount thereof was fixed, under the rule that a judgment is certain which can be made certain.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 7, 8; Dec. Dig. § 21.\*]

## 3. JUDGMENT (§ 495\*)—EQUITABLE RELIEF—PLEADING—PRESUMPTIONS.

Where it was alleged that a certain judgment, execution upon which was sought to be restrained, was upon a replevy bond, and that it stated it was for the amount of the bond, it will be conclusively presumed that the bond was a record in the cause in which the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.\*]

## 4. JUDGMENT (§ 504\*)—EQUITABLE RELIEF—ISSUES—ERRONEOUS JUDGMENT.

In a collateral suit to restrain execution upon a judgment for the amount of a replevy bond, the question whether the judgment should have been for the amount of the bond or for the value of the property replevied cannot be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944-947; Dec. Dig. § 504.\*]

## 5. EXECUTION (§ 171\*)—EQUITABLE RELIEF—GROUNDS—ALTERATION.

Where a judgment was rendered for "\$—, being the amount of" a replevy bond, the filling in of the blank with the amount of the bond would not affect the rights of the parties to the judgment, and therefore would not be a material alteration which would authorize an injunction to restrain execution on the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

## 6. EXECUTION (§ 171\*)—EQUITABLE RELIEF—PRESUMPTIONS—ALTERATION.

Where a petition to enjoin the execution of a judgment alleged that the judgment originally read for "\$—, being the amount of" a replevy bond, but had been altered by the insertion of the figures 15,000 in the space left blank, it will be presumed, in the absence of allegations to the contrary, that the bond was for a fixed amount, and that the amount thereof was the same as that inserted in the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

## 7. JUDGMENT (§ 455\*)—EQUITABLE RELIEF—VENUE.

Rev. St. 1911, art. 4653, requiring injunctions to stay proceedings on a judgment to be returnable to the court in which the judgment was rendered, and Rev. St. 1911, art. 1830, subd. 17, requiring suits to enjoin the execution of a judgment to be brought in the county in which the judgment was rendered, do not apply to a void judgment, provided the nullity appears upon the face of the judgment or the record, but do apply where the ground of nullity is an alleged alteration which is not shown to be such a material change as to invalidate the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 860-862; Dec. Dig. § 455.\*]

## 8. VENUE (§ 46\*)—CHANGE OF VENUE.

A suit was brought in the county where plaintiff's land was situated to enjoin the enforcement of a judgment rendered in another county, and to remove the cloud cast upon plaintiff's title by the recording of an abstract of the judgment lien in the county where the land was situated, which suit was based upon an alleged alteration of the judgment prior to the recording of it, but the petition contained no allegations of facts to sustain the conclusion that the judgment was materially altered. *Held*, that the suit should be transferred in its entirety to the court where the judgment was rendered, under Rev. St. 1911, art. 4653, and article 1830, subd. 17, fixing the venue of suits to restrain execution upon a judgment, and not retained as to the removal of the cloud in the county where the land was situated, under the provisions of article 1830, subd. 14, fixing the venue of suits to remove a cloud upon title.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. § 46.\*]

## 9. DISMISSAL AND NONSUIT (§ 55\*)—JURISDICTION AND VENUE.

Where a suit to enjoin the execution of a judgment was not brought in the county in which the judgment was rendered, as required by Rev. St. 1911, art. 4653, and article 1830, subd. 17, the objection is one of venue, and not of jurisdiction, and it was proper to transfer a suit to the proper county, instead of dismissing it.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 115, 116; Dec. Dig. § 55.\*]

Appeal from District Court, Randall County; James N. Browning, Judge.

Suit by L. T. Lester against W. W. Gatewood and others. From an order of the district court granting a change of venue, the plaintiff appeals. Affirmed.

A. S. Rollins and Reeder & Dooley, all of Amarillo, and G. W. Barcus, of Weatherford, for appellant. Knight & Slaton, of Hereford, and W. Boyce, of Amarillo, for appellees.

HENDRICKS, J. We quote from appellant's brief as follows: "The appellant filed his suit in the district court of Randall county, Tex., in which he set up that the appellees were acting under and by virtue of a judgment of the district court of Deaf Smith county, which judgment was void by reason of the fact that it had been altered materially by the appellees, in vacation and without notice to the court or to the appellant." He further alleged that "subsequent to the fraudulent alteration of said judgment by appellees, that some one of them with full knowledge that said judgment was void procured an abstract of same and placed it of record in Randall county, Tex., thus making same a lien on all the real estate owned by the appellant in the said county."

Quoting from appellees' brief, the petition of appellant in this cause exhibits: "That on the 6th day of May, 1910, W. W. Gatewood and Knight & Slaton recovered a judgment in the district court of Deaf Smith county against various parties defendant for various sums of money on certain promis-

sory notes executed by such persons, with foreclosure of a chattel mortgage lien on 600 head of steers. It is shown (in said petition) that the cattle had been sequestered by the plaintiffs in that suit (in Deaf Smith county) and replevied by one E. F. Brown, and the present suit grows out of an attack on that part of the judgment which has reference to the replevy bond" and rendered in that cause, as follows: "And it further appearing to the court that the defendant Fulton Brown, by name of E. F. Brown, had replevied the cattle seized under writ of sequestration issued in the cause by giving a replevy bond conditioned as required by the statutes of Texas, with L. T. Lester and G. L. Abbott as sureties, and payable to W. W. Gatewood, Wm. M. Knight, and John P. Slaton, plaintiffs, and it further appearing that said cattle have been by the jury in their verdict valued at \$35 per head, it is therefore ordered, adjudged, and decreed by the court that the plaintiffs, W. W. Gatewood and Wm. M. Knight, and John P. Slaton, do have and recover of and from the defendants E. F. Brown, L. T. Lester and G. L. Abbott, jointly and severally the sum of \$——, being the amount of said replevy bond, for which execution may issue in favor of the respective plaintiffs to the amount of the several respective judgments."

The petition for injunction presented to the district judge of Randall county also alleged the issuance of an execution upon the judgment rendered by the district court of Deaf Smith county, by virtue of which the sheriff of Lubbock county, Tex., was levying upon certain bank stock owned by appellant as a stockholder of a national bank in the town of Lubbock, also upon certain real estate situated in said city. The district judge of the Forty-Seventh judicial district, in which Randall county is situated, ordered a "temporary writ of injunction, \* \* \* as prayed for, restraining the defendants \* \* \* from proceeding further with the sale advertised, or from making further levies or doing anything further under the said execution or judgment until final hearing," etc.

As stated by appellant in his brief: "Other allegations were made in the petition which it is not necessary to set out in order to arrive at the matters involved in this appeal"—the appellant abandoning, as we understand his brief, on account of his positions in this court, all other allegations stating additional grounds for injunction, except those directly germane, briefed, and assigned in this appeal. The district court sustained an exception to appellant's petition when the case was called for final hearing at a regular term of the district court of Randall county, and changed the venue of the cause, under the statute, to the district court of Deaf Smith county.

As stated, the judgment assailed is against

the appellant on a replevy bond, and it is noted that the judgment recites that the plaintiffs, in the proceeding in the district court of Deaf Smith county, "do have and recover of and from the defendants, E. F. Brown, L. T. Lester and G. L. Abbott, jointly and severally the sum of \$——, *being the amount of said replevy bond*, for which execution may issue in favor of the respective plaintiffs to the amount of the several respective judgments"; limiting the recovery, as indicated, to the amount of the other judgments recovered by plaintiffs against the various parties, and which judgments, we assume in this proceeding only, the judgment upon the replevy bond covered.

[1] In this case, as in any other proceeding for injunction, the consideration of the equities is referable to the allegations of fact, and not of conclusions, for the purpose of invoking the relief prayed for. The conclusion pleaded—that the judgment is void because of the alteration—is unavailable, if, upon consideration of the petition, sufficient allegations of fact are not made negativing its validity and overcoming the presumption ordinarily incident to the rendition of every judgment.

[2] Appellant also alleges that the judgment for the sum of "\$——," as quoted herein, rendered against him as an obligor on the replevy bond in the other proceeding, was, by the appellees, or some one of them, fraudulently altered by writing in said blank space the figures "15,000," making the judgment as to him read for the sum of "\$15,000." The appellant, however, does not inform us whether the correct amount, or an incorrect entry as to the real amount of the judgment, was inserted in the blank space.

[3] Evidently, the judgment, as it reads, was for "the amount of said replevy bond"; and appellant's allegation that it was a judgment upon a replevy bond conclusively presumes it to be a record in that cause. Neither does the appellant inform us of the amount of the replevy bond which he signed as surety in the other cause in Deaf Smith county.

[4] It will be remembered that, in this collateral proceeding, we are not concerned with the question whether the district court of Deaf Smith county pronounced an erroneous or correct judgment in decreeing the amount recovered by the plaintiffs against appellant upon said replevy bond as the amount designated in the bond, or that such judgment should have been for the amount of the value of the cattle, or some other amount. In this proceeding, under the allegations in plaintiff's petition, the judgment for the amount in the replevy bond is to us a correct amount, and, whatever the amount, could not be questioned by us, if the decree is to be regarded by us as sufficiently certain, viewing the petition, as the rendition of a judgment for any specific sum.

The case of *Luter v. Rose*, 16 Tex. 52, 53, was one upon appeal from the justice court to the district court, where the cause was tried de novo. The justice court judgment was for the plaintiff for \$73, and costs of suit. The district court judgment was as follows: "In this case it is ordered that the judgment of the court below (the justice court) be affirmed, with 10 per cent. damages," etc.—without any statement whatever in figures or letters of any amount rendered in the district court, except by reference to the justice court judgment, which did state the amount. That proceeding also involved the title to real property under a sheriff's sale, based upon the district court judgment, and, when the claimant, under the judgment above recited, introduced said judgment, the execution thereupon, and the deed by the sheriff, the trial court excluded all of the same, on the ground that the judgment was null and void. With this judgment, execution, and sale thereunder before the Supreme Court, Justice Wheeler said that, while the judgment was not as "full and formal as it might have been, \* \* \* it is not, therefore, necessarily void. Though it does not specify the sum for which it was rendered, yet that may be readily ascertained by reference to the judgment of the justice, which was before the court (the district court) when it gave judgment, and remains there of record; and, though it is not, in itself, certain as to the amount, it may thus be rendered certain." Justice Wheeler in that case further quotes from another case: "That the plaintiff recover of the defendant according to specialty, with 6 per cent. interest and costs, on a verdict for the plaintiff according to specialty, with 6 per cent. interest, the ad damnum being left blank in the declaration, but laid in the writ, is valid."

The case of *Roberts v. Landrum*, 20 Tex. p. 474, decided by Justice Roberts, was an action of debt upon a certain judgment previously rendered, for the purpose of reviving said judgment, in which revival, the amount was left blank, and which also seemed to be the condition of the original judgment, with no reference whatever to any record for a correct amount as to the recovery intended to be reinstated. The Supreme Court held the judgment void for the reason: "First, there is no amount specified; second, there is no reference to papers of record in the injunction suit by which the amount could be fixed, and there are blanks which leave undetermined what amount or interest was intended to be given; and, third, the clerk could not issue execution on it without reference to other records." The injunction suit mentioned in the findings of the court was the suit in which the previous judgment was originally attempted to be rendered. This case, although negatively presenting the principle, infers that, if there had been some record in the particular cause

definitely stating an amount, and referred to in the decree attempting to pronounce the amount, the judgment would have been sufficient.

Black on Judgments, vol. 1, § 118, in commenting upon the maxim "That is regarded as certain which can be made certain," says: "We are unable to discover any good reason why this maxim should not apply to the amount of a judgment as well as in any other case. An obscure or ambiguous designation of the parties, or the subject-matter involved, may be construed, as we have seen, with reference to the other parts of the record. And, if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake, it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision." Black cites the case of *Ellis v. Dunn*, 3 Ala. 632, where it is said that: "A justice judgment 'that the plaintiff recover the sum as claimed in the above case' will be sustained, notwithstanding its informality, when the record shows that the action was assumpsit for \$81, and defendant appeared and contested the claim." This author does say (section 118): "It must be admitted that the authorities hardly go to the length of sanctioning the rule here suggested, although the general principle of construing a judgment by the record is not disputed; but the cases certainly justify the statement that, if the judgment entry itself, without naming the amount of recovery, contains data which permits its calculation, a sufficient degree of certainty is attained." We think the authorities in this state, as well as of other states, clearly vindicate the rule, even stated as broadly as Mr. Black expresses it. Also *Martin v. Teal* (Civ. App.) 29 S. W. 691; *Posey v. Green*, 78 Ky. 162.

The replevy bond, to which the judgment referred as the amount of rendition, as well as the amount intended to be inserted in the blank space, we are entitled to presume, designated a definite figure, for which the obligors in that bond were bound; otherwise the pleader would have informed us it also was blank. If \$15,000 was the amount of the replevy bond, which appellant claims was inserted in the blank space, then, under the decisions and the authorities cited and quoted from, holding that a judgment is certain which can be made certain from the record, that is the amount of the judgment.

[5] If \$15,000 was the amount of the replevy bond, and the real amount of the judgment, was the insertion of such amount in words by the appellees, or by any other person at their direction, a material alteration of the judgment? assuming that appellant could analogize as to this insertion the principles of alteration of ordinary contracts, and declare the judgment void, because a contract, under similar circumstances, would



likewise be void. It is true it is held by the Supreme Court (*Otto v. Hall*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56) that the change in a note by the payee so as to make it bear interest from date, instead of from maturity, as recited in the note, in order to make it conform to an oral agreement of the parties, when altered without a fraudulent intent, invalidates the note, although the debt exists. Judge Brown said that the change for the purpose of making the note correspond to the real agreement "releases the case of any fraudulent intent"; and in this case appellant does not inform us that the judgment was altered from one amount to another. If a note should read that it was a promise to pay \$——, "the amount expressed on a certain deed," which was a consideration for land, would not the amount in the deed, by reference, constitute the amount of the note? And, if the payee should insert in the note the amount expressed in the deed, would the insertion be a material alteration? Justice Williams, when on the Court of Civil Appeals, in the case of *Marx v. Luling Association*, 17 Tex. Civ. App. 408, 43 S. W. 596 (writ of error denied), held that the legal effect of the signature "T. W. Pearce, Mgr.," was not materially altered by the erasure of the word "Mgr." He said: "The legal effect of the guaranty was the same after the erasure as it was before." If this judgment was corrected to the extent of an insertion in the blank space by the appellees of the figures "15,000" and that figure was the amount of the replevy bond, upon which the judgment was rendered, the legal effect of the judgment was not changed, and the insertion, if you could even call the same an alteration, was an immaterial one; as between the parties the legal effect of the judgment was the same.

[6] Appellant may say we are assuming when we use the figures and the hypothesis as indicated. As stated before, the statement of the conclusion in an equitable proceeding that this judgment is void is not an equity, but the question of its invalidity is solely referable to the allegations constituting its nullity. If the decisions and authorities are as we construe them, and if the record in this case states an amount certain and fixed, to which the judgment refers, in order to make a full disclosure to a court of equity, and present a material alteration of the judgment, that record should be shown; or, if it does not exist, should be negated; otherwise we must assume that such averments cannot be made and sworn to.

[7] The provisions of article 4653, R. S. 1911, requiring that writs of injunction, when granted to stay proceedings or execution on a judgment, shall be returnable to and tried in the court in which such judgment was rendered, and subdivision 17, art. 1830, of the Revised Statutes, providing that suits brought to enjoin the execution of a judgment shall be brought in the county in which

such judgment was rendered, do not mean a void judgment; but in a collateral proceeding, we understand the rule to be it must be shown that the nullity of the judgment sought to be enjoined in another court must appear from the judgment, or from the face of the record itself, and must not depend upon the establishment of facts aliunde the record. *Cotton v. Rea* (Sup.) 163 S. W. 2; *Ketelsen v. Pratt Bros. & Seay* (Civ. App.) 100 S. W. 1172; *Moore v. Vogt* (Civ. App.) 127 S. W. 234; *Wheeler v. Powell* (Civ. App.) 114 S. W. 689; *Adoue v. Wettermark*, 22 Tex. Civ. App. 545, 55 S. W. 513; *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 579; *Seligson v. Collins*, 64 Tex. 315. Hence, if the allegations with reference to the alleged change in the judgment are not such as to show that a material change was made as to invalidate the judgment, the court in which the record was made is the one that has jurisdiction to inquire into the fact by a direct proceeding brought for that purpose.

[8] Appellant however, contends that the abstract of judgment lien of record in Randall county, Tex., based upon the character of judgment exhibited in his pleadings, constitutes an incumbrance and a cloud upon the title to his property in that county, and could be, and should be, removed by the district court of that county.

The case of *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, was an injunction suit to prevent the execution of a judgment rendered in another jurisdiction: First, because the party whose property the officer was commanded to seize and sell was not named in the writ; and, second, because the property seized by the officer was exempt from, and not subject to, the execution. The Supreme Court, by Chief Justice Gaines, said that, if it be conceded that the court granting the writ were without power to restrain such execution because issued from another court, on account of the statute requiring injunctions to be tried by the court where the judgment was rendered, an exception to so much of the petition as sought that relief should have been sustained, "or the court should, of its own motion, have declined to try such issues, and should have dismissed so much of the cause." However, "when a petition states two causes of action," in so far as the plaintiff sought to restrain the sale of the exempt property, the district court granting the injunction did have jurisdiction, and "the court is not deprived of jurisdiction over one because it may have no jurisdiction over the other."

The Supreme Court of the state, in the case of *Cotton v. Rea*, 163 S. W. 3, by Justice Phillips, considered a cause to some extent similar in status to that considered in *Leachman v. Capps*, supra, except in the latter case the injunction in the district court was an attempt to restrain the enforcement of a judgment of another court because of inherent invalidity, and, as in the *Leachman-Capps* Case,

also because of the seizure of exempt property. The challenge in the petition for the injunction in the Cotton-Rea Case questioning the judgment was unavailable, because the pleading failed to show a void judgment; but the Supreme Court again said that, with reference to the other alleged cause of action, based upon the exemption of the property from forced sale, the same was sufficient to invoke the jurisdiction of the court granting the injunction; and rather significantly said, as applicable here, that a "determination that it (the property) was not exempt, while decisive of the right to the relief, would not affect the court's power to entertain and hear the cause"; and further declared that "this power, which constitutes the jurisdiction of a court, may exist, though the pleading under which the suit is instituted is insufficient to sustain the action"—clearly holding in that character of case the insufficiency of the proof or pleading must not be "confused therefore with that of jurisdiction." The court has jurisdiction of such an issue, and the same is severable from the other, whether the pleading and proof is sufficient or insufficient. The troublesome question in this cause is upon the following consideration: Appellant seeks two grounds of injunction: First, an attempt to restrain the enforcement of an execution upon property, issued upon a judgment rendered in another jurisdiction, which, according to our view, is not void, and with reference to which the district court of Randall county has no jurisdiction; second, he alleges that such judgment, which, under the pleading, is not invalid, is insufficient to support an abstract of judgment lien recorded in Randall county, and that the same constitutes a cloud upon his real estate in that county.

We have a statute (subdivision 14 of article 1830, R. S. 1911) which is also a venue statute, and which provides, that "suits for the recovery of lands or \* \* \* suits to remove encumbrances upon the title to land, suits to quiet the title to land \* \* \* must be brought in the county in which the land, or a part thereof, may lie."

In this case, when the appellant alleges that the abstract of judgment lien, based upon the judgment rendered in the cause litigated in the other jurisdiction, is a cloud upon the title to his property, though assuming that the allegations may not be sufficient upon the merits for the purpose of invoking the aid of a court of equity to remove the alleged incumbrance from his title, however, the question remains: Does the statute last quoted afford the criterion of jurisdiction applicable to these pleadings, or does some other statute or rule of law deny the jurisdiction to Randall county upon that issue, and require that part of the case, with the other, to be returned to the district court of Deaf Smith county, where the judgment was rendered? In accordance with the principles

enunciated in the Leachman-Capps Case and the Cotton-Rea Case, *supra*, if the allegations to remove cloud from title, based upon the alleged invalidity of the judgment rendered in the cause in Deaf Smith county, were of a nature to give Randall county original jurisdiction, it would be the duty of that court to retain jurisdiction, as to that feature of the cause, and also disregard the feature of the cause attempting to enjoin the execution and levy upon the property of appellant seized in Lubbock county, notwithstanding appellant resides in Randall county. Conceding, though not specifically deciding it, for the reason that the lower court has never decided it germane to the particular proposition, that the allegations upon the question of removing the incumbrance as a cloud are insufficient upon the merits for that purpose, if, however the district court of Randall county had jurisdiction for that purpose, its duty would have been, unless appellant had elected, to have held the case for the demurrers to the merits and sustain the same, and to have disregarded the other features of the cause. The court first obtaining jurisdiction, if the petition shows jurisdiction for any purpose, is the one that holds the cause. Justice Stayton, in the case of Bender v. Damon, 72 Tex. 92, 9 S. W. 747, touched somewhat upon the question. The pleadings there involved, referred to in the opinion, are obscure. We infer that the action was for the purpose of annulling the sale and sheriff's deed, made by virtue of a judgment rendered in a proceeding in another county. The trial court, in that case, sustained a general demurrer to the petition of the appellant, Bender. He had alleged that the judgment against him was a void judgment, because he was never cited to appear, and did not appear in person or by attorney in the other proceeding in which the judgment was rendered, and that he was a non-resident of the state, and that the judgment was void; for that reason—the void judgment—the district court of Ellis county had jurisdiction. He also "sought to remove cloud from his title, \* \* \* and, to obtain this relief, he undertook to show that appellees were claiming under a sheriff's sale and deed under an execution issued from the district court of Navarro county," and Justice Stayton further said: "Some of the facts which he alleged to show the *invalidity of that judgment*, execution, and sale were such as might entitle him, by a proper proceeding, to have had them vacated, but not such as to render them void." Again the Supreme Court said: "The fact that appellant may have sought specific relief that could not be given to him by the district court of Ellis county furnishes no reason why that court should not adjudicate the question of title to land situated in that county, without reference to the fact that the defendants were not residents of that county." It is noted that in that case the allegations seeking to remove the

cloud from the title were for the purpose of canceling a deed, we presume upon record, in Ellis county. We know from the briefs of counsel, reported in that cause, that the Supreme Court had under consideration the statute giving the jurisdiction to remove incumbrances upon the title to the district court of the county where the land lies; and it held that the allegations of fraud, for the purpose of impeaching the judgment and thereby attempting to remove the deed as an incumbrance, did not give the jurisdiction to the county in which the land was situated, but that the jurisdiction was referable to the county in which the judgment was rendered. The attempt to cancel the deed in that cause as a cloud upon the title to the land is somewhat analogous to the attempt in this cause to cancel the abstract of judgment lien of record. It has always been the rule, without the necessity of citing any authorities upon the particular subject, that, where a judgment has been obtained by fraud, and where there are irregularities in the process under which a sale of property has been made, the jurisdiction of the court rendering the judgment is the one to invoke, when the judgment is not absolutely void, and not so shown upon the record.

In this cause the plaintiff prays for a writ of injunction restraining the "defendants from proceeding further with the sale advertised, and enjoining them from making any further levies or doing anything further under the said judgment or execution until final hearing hereof, that the injunction be made permanent, and that said judgment be declared void, and that the cloud upon the title of the real estate of the plaintiff located in Randall county by virtue of the record of the abstract of judgment be removed, and said abstract of judgment be declared void"; and a further prayer for general relief. The court, in granting the temporary writ met this prayer in full; as noted in the order of the court heretofore quoted by us.

The statute of injunctions (article 4643, subd. 1) provides: "Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant." The comprehensive prayer and the broad order of the court in granting the temporary writ would have restrained the appellees from bringing an action on the judgment to foreclose the abstract of judgment lien, or issuing an execution upon such judgment to sell land in Randall county, divesting the lien by virtue of the recorded judgment. We presume, however, although a prayer is a very essential part of a petition for injunction, that appellant would contend that the "cause of action, under our system of pleading, depends upon the facts stated

in the petition that are appropriate for a recovery, rather than upon the particular breach laid or the specific relief prayed, where there is a general prayer for relief, \* \* \* whether the specific relief as specially prayed be granted or not." *Lee v. Boutwell*, 44 Tex. 151. Whether we regard the allegations alleging the abstract of judgment lien as an incumbrance, to be removed as a cloud upon the title, disassociated from the injunction and prayer, or whether we regard this whole suit as one of injunction, we think the district court was correct in sustaining the appellee's exception, and in changing the venue to the district court of Deaf Smith county.

[9] We do not agree with appellee that this cause sounds in jurisdiction as contradistinguished from venue, and that the district court of Randall county should have dismissed the cause instead of transferring it to Deaf Smith county; and, upon the record, the order of the district court is affirmed.

**LARRABEE et al. v. PORTER et al.**  
(No. 5212.)

(Court of Civil Appeals of Texas. Austin.  
March 4, 1914. Rehearing Denied  
April 8, 1914.)

**1. WILLS (§ 100\*)—JOINT AND MUTUAL WILLS  
—RIGHT OF HUSBAND AND WIFE TO EXECUTE.**

A husband and wife may make a joint and mutual will containing reciprocal obligations.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 238; Dec. Dig. § 100.\*]

**2. WILLS (§ 188\*)—JOINT AND MUTUAL WILLS  
—REVOCATION.**

A joint and mutual will, executed by husband and wife pursuant to a contract between them, which gives to the survivor a life estate in the entire property with remainder to their daughters, is executed on a valid consideration consisting of the reciprocal devise of the one to the other, and where on the death of the wife, acquiescing in the will, the husband probates it and goes into possession, he cannot revoke the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 449; Dec. Dig. § 188.\*]

**3. WILLS (§ 108\*)—JOINT AND MUTUAL WILLS  
—EXECUTION BY HUSBAND AND WIFE—ACKNOWLEDGMENT BY WIFE.**

A joint and mutual will, executed by husband and wife pursuant to a contract between them, which gives to the survivor a life estate in all their property, with remainder to their daughters, is not a conveyance and need not be separately acknowledged by the wife, but merely declares a trust in favor of the children to become effective after the death of the survivor.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 249-258; Dec. Dig. § 108.\*]

**4. TRUSTS (§§ 17, 18\*)—CREATION OF TRUSTS—NECESSITY OF WRITING.**

The statute of frauds does not require that trusts shall be evidenced by writing, but they may be established by parol.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.\*]

**5. WILLS (§ 100\*)—JOINT AND MUTUAL WILLS  
—VALIDITY.**

A joint and mutual will, executed by husband and wife in consummation of an oral agree-

ment between them for the equitable disposition of their property, which gives to the survivor their property for life with remainder to their daughters, is not void if regarded as a contract between husband and wife, but is enforceable on principles of equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 238; Dec. Dig. § 100.\*]

**6. APPEAL AND ERROR (§ 173\*)—DEFENSES NOT URGED BELOW—STATUTE OF FRAUDS.**

The statute of frauds is not available as a defense when not invoked in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

**7. FRAUDS, STATUTE OF (§ 129\*)—PART PERFORMANCE OF PAROL CONTRACT.**

A joint and mutual will, executed by husband and wife and a deed executed by them as a part of the same transaction, in consummation of a parol contract between them for the equitable disposition of their property between their children, constitute part performance of the parol agreement to take it out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 308-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

**8. WILLS (§ 100\*)—JOINT AND MUTUAL WILLS—REVOCATION—ESTOPPEL.**

Where a joint and mutual will executed by husband and wife, which gave to the survivor their property for life with remainder to their daughters, was executed in consummation of a parol agreement between them to make an equitable disposition of their property to their children, and the husband, on the death of the wife, probated the will and took possession of the property devised thereby, he was estopped from thereafter disregarding the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 238; Dec. Dig. § 100.\*]

**9. HUSBAND AND WIFE (§ 31\*)—MARRIAGE AGREEMENTS—CONSTRUCTION—WIFE AS BONA FIDE PURCHASER—NOTICE.**

Where a joint and mutual will executed by husband and wife was probated by the husband on the death of the wife, and he took possession of the property under the will, which devised the entire property of the parties to the survivor for life with remainder to their daughters, a woman subsequently marrying the husband pursuant to an agreement that if she would marry him, keep house, and care for him in his old age, he would convey to her his interest in the estate, was not an innocent purchaser for value without notice and acquired no greater rights against the daughters than the husband had.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig. § 31.\*]

**10. EVIDENCE (§ 171\*)—BEST EVIDENCE—PAROL EVIDENCE.**

A conveyance not forming the basis of plaintiff's cause of action, but which is merely a collateral matter, may be proved by parol notwithstanding the best evidence rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.\*]

**11. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where, in a suit by children to recover real estate as beneficiaries under the will of their deceased father and mother, who executed a joint and mutual will devising all their property to the survivor for life with remainder to the children, brought against the second wife of the father, claiming under a subsequent will and deed, which could not operate to revoke

the joint will, the inventory filed by the husband probating the joint will was introduced in evidence and disclosed that lands were scheduled thereunder as the separate property of the first wife, an instruction directing the jury not to consider the inventory as any evidence of interest in the first wife or as any evidence of title in the community estate of the husband and the first wife was not prejudicial to the second wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**12. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.**

It is not error to refuse a charge covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**13. HUSBAND AND WIFE (§ 235\*)—TRIAL—FINDINGS.**

Where the jury, in response to the question whether a husband gave to his wife a note as a gift or to reimburse her for money of hers that had been used, found that it was to reimburse her for her money and land used, the finding was a direct finding that the entire note was turned over to her to reimburse her for her land and money used, and not that it was intended to reimburse her only to the extent of her property used by him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 589, 849-852, 982; Dec. Dig. § 235.\*]

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Action by Rosa B. Porter and others against Laura B. Larrabee and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

T. O. Wilkinson, of Brownwood, and W. F. Ramsey and C. L. Black, both of Austin, for appellants. Harrison & Wayman, of Brownwood, for appellees.

**Statement of the Case.**

RICE, J. G. W. Larrabee and family, consisting of his wife, Ann Larrabee, one son and five daughters, emigrated from Ohio to Texas about 1876, settling near Hillsboro, in Hill county, where the wife then owned in her own right a half interest in about 620 acres of land out of the Ensworth surveys as well as another tract, adjoining which they purchased 320 acres more. Upon this last tract and part of the 620-acre tract they moved and made their home for many years. The husband before coming to Texas owned a small tract containing about 40 acres, but only a small part of which was in cultivation, and a small amount of personal property, but the record fails to show its value, nor is it shown whether such land was the separate or community property of Larrabee and his wife. The wife owned, besides the Hill county lands, a half interest in other lands in Texas, 109½ acres of which were situated in Ellis and 530 acres in Red River county. From time to time her lands were gradually sold, and the proceeds appear to have been mostly used in making improvements upon the home tract, paying off

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

incumbrances thereon, including purchase-money notes, and for other purposes. The family all lived together until the marriage of their son, which occurred prior to 1887. After the son's marriage, it is shown that Larrabee and his wife, after repeated consultation over the matter between themselves and their children, concluded that it was best that they should make a joint and mutual will, containing reciprocal provisions, whereby they should reserve to the survivor a life estate in all their property, with remainder to their daughters; but at the same time it was agreed that they should convey 100 acres of land to their son in full satisfaction of his interest in their estate, it being understood that he should relinquish all of his interest in the balance of their estate to his sisters, and execute a deed of acquittance to them therefor.

In pursuance of said agreement, G. W. Larrabee and his wife, Ann Larrabee, on the 21st of February, 1887, duly executed their joint and mutual will, by which they gave to the survivor a life estate in all their property, both joint and several, with remainder, share and share alike, to their five daughters, Allie, Lillie, Rosa, Oral, and Mertie Larrabee; with a further provision therein that all persons who under the laws of descent and distribution of this state might claim, demand, or have any title or interest in any part or parcel of the property of which they might die possessed, were thereby cut off and barred from said claim or demand forever. Simultaneously with the execution of said will, they likewise conveyed 100 acres off of the Ensworth survey (the separate property of the wife) to their son J. H. Larrabee, who at the same time, in consideration thereof, joined by his wife, Retta Larrabee, duly relinquished all of his interest to his sisters in the estate of his mother and father, in accordance with said agreement and understanding. Subsequently, the family, desiring to remove from Hill county, ascertained that they could purchase 800 acres of land in Brown county for what they conceived to be a bargain; whereupon it was agreed between Larrabee and his wife that said land should be purchased for a home. Prior to this, however, it appears that all of their land in Hill county had been sold to Pattie and Brockington for the sum of \$9,550, they paying \$500 in cash, assuming to pay off an obligation against the land for \$500, and executing their note for the balance \$8,550, secured by a vendor's lien on said property, which note was made payable to Mrs. Ann Larrabee; the evidence disclosing that this was done in order to reimburse her for her separate estate formerly used by her husband. Afterwards this note was collected by G. W. Larrabee, and, in pursuance of said agreement, the proceeds turned over to his wife, Ann Larrabee, with the understanding and statement that the same was to be her separate prop-

erty, and with which said Brown county land was paid for; the title, however, being taken in the name of the husband, he having stated, when his wife requested that the title be made to her, that it would make no difference, since the will provided that she was to have everything upon his death. After this purchase the father, mother, and daughters removed from Hill to Brown county, and thereafter made their home upon said land.

On July 14, 1894, Mrs. Larrabee died without revoking or making any effort to revoke said will, and G. W. Larrabee thereafter probated the same and continued to occupy said home and lands, using it and enjoying the rents thereof to the exclusion of his children. About two years after her death, to wit, on the 11th day of March, 1896, he married Laura B. Teveron, with whom he lived as his wife until his death, which occurred on the — day of March, 1911, using and occupying said premises as their home. Before this last marriage, however, it was agreed and understood between himself and his said wife that she would marry him in consideration of his giving to her by deed or will his entire interest in his estate, which it seems was to have been done prior to the marriage. In accordance with this understanding, the said G. W. Larrabee, some two days after his marriage to said Laura B. Teveron, to wit, on the 13th day of March, 1896, duly executed his second will, as well as a warranty deed and bill of sale to appellant, whereby in said first two instruments he gave to his said wife Laura B. Larrabee all of his property, both real and personal, of whatever kind or nature, owned or possessed by him, including the farm on which he then resided (it being what was known as the Cason or Larrabee place), together with all household and kitchen furniture, farming implements, and live stock, stating in said will that it was intended thereby to expressly revoke the former will made by him to his first wife on the 21st of February, 1887, appointing said second wife independent executrix, and directing that no bond or security be required of her. By said bill of sale he conveyed all of his personal property to her. This last will was propounded for probate in the county court of Brown county by Mrs. Laura B. Larrabee on the 27th of April, 1911. Thereafter, on the 29th of May, the appellees Rosa B. Porter and husband, R. S. Porter; Mertie O. Seward and husband, E. P. Seward; Allie Williams and husband, N. C. Williams; Oral J. Hubbard and husband, W. V. Hubbard; W. H. Fields; and Allie Nicks (who was the grandchild of Geo. W. and Ann Larrabee, deceased) by her next friend, R. S. Porter—filed their opposition to said application, asking that the first will be probated as the last will of G. W. Larrabee, deceased. The grounds upon which their opposition to the last, and their application for

the probate of the first, will, were based were the facts above outlined, whereby they claim that their father, G. W. Larrabee, and appellant were and are estopped to question or deny the validity or binding effect of said first will, and that he was without power to revoke the same.

Appellant excepted to appellees' contest and application to probate the first will, on the ground that said court had no jurisdiction to determine whether or not said joint and mutual will involved a contract, but had jurisdiction only to determine whether it had been revoked, which exception was sustained and their contest and application dismissed, and the application of appellant to probate the second will was granted, from which judgment an appeal was prosecuted by appellees to the district court.

Pending the proceeding in the county court, L. J. Mauldin and J. H. Hutchison were appointed temporary administrators of the estate of G. W. Larrabee, deceased, and qualified as such. On October 12, 1911, the above-named appellees filed another suit in the district court against appellant and the administrators of said estate, which contained four counts. The first was in the ordinary form of trespass to try title to recover the farm of 800 acres, and a lot situated in the town of Bangs, constituting all of the realty belonging to the estates, separate and community of G. W. Larrabee and his two wives, and also sought to recover all the personal property and money belonging to said estates. The second count presented the same matters as those contained in appellees' contest and application in the county court, setting up the facts above set forth with reference to the contract between G. W. and Ann Larrabee, the conveyance to their son J. H. of said 100 acres, his renunciation of all further claims on their estate, together with his relinquishment of all his right, title, and interest to appellees, the subsequent removal of G. W. and Ann Larrabee to Brown county, and the purchase of the Cason place with the proceeds of the sale of the Hill county lands; that by reason of all of which facts it was claimed by them that said first will was a binding and irrevocable contract, and that all of the property then owned or subsequently acquired by G. W. and Ann Larrabee became impressed with a trust in favor of appellees, and that upon the death of said Ann Larrabee they became its owners, subject only to the life estate of their father in said property, secured to him by said joint and reciprocal will. The third count alleged that on June 11, 1887, Ann Larrabee was the owner in her own separate right of all the A. S. Ensworth 480-acre survey, and the Thos. Reeves 320-acre survey in Hill county; or, if not such owner, that the community estate of herself and G. W. Larrabee was indebted to her for the proceeds of the sale of other portions of her separate estate, used in paying for, im-

proving, and discharging liens upon said surveys; that on that day they sold said lands, taking in part payment therefor a note for \$8,550, payable to Ann Larrabee or order, due November 1, 1887, which was secured by the usual lien; that said note was made payable to her at the direction of G. W. Larrabee and delivered to her by him as a gift, then in payment of said obligations due her by their community estate; that said note was paid about October 16, 1888, and its proceeds used by G. W. Larrabee in paying for the land in Brown county, known as the Cason place; that, by reason of these facts, said lands, excepting the lot in Bangs, became the property of appellees, subject alone to the life estate of their father. The fourth count recites the fact that G. W. Larrabee, after the death of Ann Larrabee, made a will in favor of Laura B., his second wife, by which he attempted to revoke the joint and reciprocal will, and under which, in connection with certain deeds in writing made by him to her, she is claiming all of his estate. Further alleging that if they are not entitled, by reason of said joint and mutual will, to hold the estate of G. W. Larrabee, it is because of his having made the second will, deed, etc., in favor of Laura B. and his consequent revocation and breach of the joint and mutual will and contract; and praying that in case they are held not entitled to recover said property as the separate property of Ann Larrabee, and that the will and deed in favor of Laura B. are effective to revoke said joint and mutual will, that they have judgment for damages for the value of G. W. Larrabee's interest in all the property in his possession at the time of his death, alleged to be of the value of \$35,000.

Appellant, answering, set up the fact that she had agreed to marry Geo. W. Larrabee and care for him in his old age, in consideration of the fact that he would convey all of his property to her; that this was brought about on account of the failure of appellees to live with and care for their father, from whom they had been estranged; and that, in consequence of her said marriage, said George W. Larrabee, in pursuance of his agreement, did make said second will, devising to her all of his property, and revoking the first will, and likewise conveyed to her by general warranty deed said Cason place, as well as all his community interest in the G. W. Larrabee and Ann Larrabee estate of whatsoever kind and nature, and likewise executed a bill of sale to her, conveying all of his personal property of whatsoever kind or nature, including his live stock, farming implements, household and kitchen furniture, all of which papers were duly executed and delivered to her by him; that, by reason of her marriage and the fulfillment of her agreement, she became the owner and was entitled to the possession of

said property, as well as an undivided one-half interest in and to all of said lands and tenements described in appellees' petition.

Appellees, by supplemental petition, urged several exceptions thereto, which were overruled, and among other things pleaded notice on the part of appellant of appellees' alleged rights at the time of appellant's marriage with their father; and also that said contract was in violation of the statute of frauds. The defendants Mauldin and Hutchison pleaded the facts showing their right to the possession and management of said property in controversy, and gave an account of their stewardship as temporary administrators.

On January 26, 1912, the case appealed from the county court and the case filed in the district court were consolidated by agreement, and the court sustained appellant's general and special exceptions to the opposition of appellees to her application to probate the last will and their application to probate the first will.

A jury trial, upon special issues submitted, resulted in findings upon which appellees asked judgment for the 800 acres of land, rents thereon collected since the death of their father and for one-half of all personal property; the appellant asked for judgment for the lot in the town of Bangs and all rents collected on it since the death of G. W. Larrabee, for one-half of the 800 acres, for one-half of the rents collected thereon since the death of her husband, and for all the other personal property. And the court, upon findings by the jury in favor of appellees upon the material issues submitted in their behalf, rendered judgment for them for said 800 acres of land; for \$1,869.29, as rents collected thereon since the death of G. W. Larrabee, less taxes and expenses; for one-half of certain items of personal property still on hand, and also for \$865.85, being one-half the money on hand and collections of notes on hand, as well as of personal property on hand at the time of the death of G. W. Larrabee, less certain expenses. The remaining property was adjudged to appellant Laura B. Larrabee, and the will in her favor was probated and admitted to record, from which judgment Laura B. Larrabee has appealed.

The above outline of the pleadings is taken from the statement thereof contained in appellant's brief, which is concurred in by appellees.

#### Opinion.

By the first five assignments of error it is in effect urged that the court erred in rendering judgment for appellees for the entire 800 acres of land, known as the Cason place, together with the revenues thereof since the death of G. W. Larrabee, and for one-half of the personal property involved in the suit, and for one-half of the money so involved, on hand at the date of his death;

and in not rendering judgment for appellant for one-half of said land and the rents thereof, and for all of the personal property, as well as for all of the money on hand at the time of his death; insisting by her several propositions thereunder that G. W. Larrabee, by reason of the execution of his last will, the warranty deed, and bill of sale, all of date March 13, 1896, by which he gave, granted, and conveyed to her all of his property and estate, revoked and abrogated the joint will made by him and his first wife, so far as his own property and estate was concerned; and that this is true, notwithstanding the contention on the part of appellees that the joint and mutual will of G. W. and Ann Larrabee was a contract, or made in pursuance of one, whereby it was irrevocable and enforceable against his estate, because she asserts (a) that Ann Larrabee, one of the parties to such will, was a married woman at the time of its execution, and there was no certificate of the proper officer, or other evidence, as to her privy examination as to its contents, or its execution, as required by law; (b) because her husband, G. W. Larrabee, being the party of the other part in said instrument, could not join her in its execution in the sense contemplated by the statute; (c) because Ann Larrabee was at the time of the execution of said instrument a married woman, and the same has no reference to matters over which she had power to contract; (d) because it appears that the contract, if any there was, in pursuance of which said will was made, or upon which it was founded, was without any legal or sufficient consideration.

[1] There seems to be no question but that husband and wife can make joint and mutual wills, containing reciprocal obligations; and with reference to their revocation the rule seems to be, as adduced from the authorities, that such will is "revocable by the testator at any time prior to his death, and this is so though he survives the other testator, provided he takes no advantage under the other will. While no legal obligation not to revoke is created by the mere execution of mutual wills, yet if the wills are executed pursuant to a contract, and either testator revokes without notice, the other may compel a specific performance of the contract; or, in case a specific performance is impossible, may recover damages for the breach of the contract." See 30 Am. & Eng. Ency. Law, p. 621.

In Theobald on Wills, p. 16, it is said: "It seems that two persons may agree to make mutual wills which remain revocable during their joint lives by either with such notice to the other as may enable him to alter his will also, but becomes irrevocable after the

death of one of them, if the survivor takes advantage of the provisions made by the other"—citing numerous cases in support of the text. See, also, the following cases: *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003; *Deseigneur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347; *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998; *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Sup. 961; *Dufour v. Pariera*, 1 Dick. 419; *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. (N. S.) 1196; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255; *Robertson v. Robertson*, 94 Miss. 645, 47 South. 675, 136 Am. St. Rep. 589, and note 592-605; *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107.

In *Frazier v. Patterson*, supra, where husband and wife made a joint and mutual will, devising a life estate in their property to the survivor, with remainder to their daughter during her natural life and after her death to her children; and after the death of the husband the will was filed by the survivor for probate, which was granted, and she entered upon and took possession of said estate, using and enjoying the benefits thereof, to the exclusion of the heirs of the husband, until the date of her death, her daughter having died prior thereto, it was held that she could not make different disposition of the property by a subsequent will attempting to revoke the first one; the court, among other things, saying: "Mutual wills—that is, where two persons execute wills reciprocal in their provisions but separate instruments—may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such mutual will it is necessary to prove, by clear and satisfactory evidence, that such wills were executed in pursuance of a contract or a compact between the parties, and that each is a consideration for the other; and, even in cases where mutual wills have been executed in pursuance to a compact or agreement between the parties, the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact and revoke the will as to him. A joint and mutual will is revocable during the joint lives by either party, so far as relates to his own disposition, upon giving notice to the other; but it becomes irrevocable after death of one of them if the survivor takes advantage of the provisions made by the other"—citing authorities. "When mutual or joint wills first came up for consideration, the courts of England, both common-law and spiritual, pronounced against them, and the same unfavorable position was taken by some of the earlier American cases; but the later and better opinions in both countries now sustain such wills where they have been executed with the necessary formality and

have not been revoked by some instrument. *Schouler on Wills*, 456, and cases there cited. The leading case in England on this subject is *Dufour v. Pariera*, supra. In that case it was held that a joint and mutual will might be revoked by both jointly, or that it might be revoked separately, provided the party intending it had given notice to the other of such revocation, but that neither of them could, during their joint lives, revoke it secretly, nor could it be done by the survivor after the death of the other; that such wills constituted a mutual contract between the parties which could not be rescinded by the survivor after the death of one, on the theory that the first that dies carries his part of the contract into execution. In such case the courts will not permit the other party to afterwards break the contract. The doctrine of this case has been approved in a number of well-considered cases in this country. *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347."

In *Edson v. Parsons*, supra, it is said: "I fully concede that there is no reason in law, nor any public policy, which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills; which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations; of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. The proposition is one which may be regarded as having been accepted generally"—citing *Jarmon on Wills*, p. 27; 2 *Story's Eq. Jur.* § 785; *Schouler on Wills*, 454; *Lord Walpole's Case*, 3 *Ves.* 402. "A court of equity would, in such event, proceed upon the ground that the survivor was bound, not merely in honor, but by his agreement and by the acceptance of the benefit, which that agreement procured for him. In such a case, obviously, no remedy at law would be adequate to the party, in whose interest, and for whose ultimate advantage, the testamentary agreement had been entered into. Therefore equity would perform its high function of supplying the relief, which the rules of law are not sufficiently elastic to comprehend; and recognizing the obligation, which, in conscience and in honor, rested upon the surviving party, would decree a specific performance of the testamentary agreement, by compelling those persons, into whose possession the property affected may have come, to account for and deliver it over to the complainant, for being impressed with a trust in his favor."

In *Baker v. Syfritt*, supra, it is said: "Coming a step nearer to the case in hand, we see no good reason why husband and wife may not agree to unite their separate estates in



the creation of a trust for the benefit of a third person, who shall come into the legal title and right of possession upon the death of the survivor. If to that end they execute a joint instrument, clearly expressing their purpose, then, whether it be called a contract, compact, will, or conveyance, we think it should be treated as a relinquishment of dower right; or, at worst, when the maker has died without attempting to revoke it, the other should be held estopped to set up any right which tends in whole or part to the defeat of the common purpose. A contract is none the less a contract because it contains provisions which are testamentary in character; nor is a will any less a will, if properly executed, because it embodies contractual features"—citing *Carmichael v. Carmichael*, supra, and *Scherneringer v. Scherneringer*, 81 Neb. 661, 116 N. W. 491.

In *Underhill on the Law of Wills*, p. 20, it is said: "If two testators, who have united in the execution of a mutual will, have devised their property to each other, so that the devises form a mutual consideration, neither, after the death of the other, and the probate of the will as to his property, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased him. The mutual will was made upon condition that the whole shall be but one transaction. If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled his part of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change his mind, because the first will is then irrevocable. It would have been differently framed, or perhaps not made at all, if it had not been for his inducement." In *Dufour v. Pariera*, supra, it was said: "It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution; will the court afterwards permit the other to break the contract?"

In *Brown v. Webster*, supra, as shown by the syllabus, "Where a husband and wife possessed of separate estates, orally agree that upon the predecease of either the survivor shall thereupon become the owner of all of the estate, both real and personal, of such decedent, and, at the same time and in pursuance of and for the express purpose of providing a proper method of carrying such agreement into effect, simultaneously execute reciprocal wills, in each of which the other spouse is made sole devisee and legatee, held: That the oral agreement and the execution of the wills constitute a single transaction, that each is an integral part of one contract, and

that such contract cannot be said to rest entirely in parol." It was likewise held in such case that the contract of each was a sufficient consideration for the contract of the other, and that wills thus executed were not ambulatory, and are not revocable by either party to such contract, as long as the other party continues to perform the contract on his or her part. It is further held in the same case that where either party to such contract commits breach of the same by subsequently executing another will, devising his property contrary to the terms of such contract, and dies, that the survivor, upon proof of the continued performance in good faith on his part, would be entitled to specific performance thereof as against the heirs, devisees, legatees, and executors of the decedent.

[2] In the instant case, if the will itself does not imply or import a contract to execute it (which we are inclined to think is the case), yet the evidence is clear, and the jury found that the same was executed by reason of a previous contract between the parties to make it, giving to each a life estate in their entire property, with remainder to their daughters. This will was executed upon a valid consideration, to wit, the reciprocal devise of the one to the other; and subsequent to the death of the wife, who had scrupulously acquiesced in its provisions, the surviving husband probated same, went into possession, and enjoyed the fruits of the entire property to the exclusion of the beneficiaries, his children, until his death, attempting, however, to revoke same during his life by the execution of the second will and deed to his last wife. We think the authorities quoted and cited are ample to sustain us in holding that this could not be done under the circumstances stated, unless one or more of the several contentions made by appellant with reference thereto can be sustained. This will necessitate a discussion of these objections.

[3] The first is that the separate acknowledgment of Ann Larrabee was not taken to said will, and that her husband, G. W. Larrabee, being the other party thereto, could not join in its execution in the sense contemplated and required by the statute. It is unquestionably true that, if this had been a conveyance instead of a will, this contention would be well taken, and the conveyance void under the statute and authorities cited by appellant; but such is not the case. The instrument merely declares a trust in favor of the beneficiaries thereunder, to become effective after the death of the survivor. See *Baker v. Syfritt*, supra; *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491, and cases there cited. No conveyance was necessary to create this trust; the title does not depart from the makers. As the nature and effect of a transaction of this character is that the legal title remains in the donor for the benefit of the donee, no transfer or as-

signment of the legal title is necessary. 89 Cyc. 66. "If the creator of the trust, by appropriate words or acts, fully and completely constitutes himself trustee, no change of possession is necessary, and he may also retain possession of the instrument creating the trust. Where the instrument creating the trust expressly provides that it shall be for the benefit of the grantor during his life, a retention of possession by him is not inconsistent with the trust." 89 Cyc. 77, 248.

[4] The Texas statute of frauds does not require that express or direct trusts shall be evidenced by writing, and it is settled in this state that they may be established by parol. *Brotherton v. Weathersby*, 73 Tex. 471, 11 S. W. 505, and cases there cited. This rule is also applicable to trusts in lands. *James v. Fulcro*, 5 Tex. 512, 55 Am. Dec. 743.

[5] Neither the will regarded as a contract, nor the oral agreement pursuant thereto and in consideration and consummation of which it was made, were void in the sense contended by appellant, because made by husband and wife. See *Bradshaw v. Mayfield*, 18 Tex. 21; *Kindrick v. Taylor*, 27 Tex. 695; *Ximines v. Smith*, 39 Tex. 52; *Pearce v. Jackson*, 61 Tex. 646; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Proetzel v. Schroeder*, 83 Tex. 687, 19 S. W. 292; *Sparks v. Taylor*, 90 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381; *Levy v. Mitchell*, 52 Tex. Civ. App. 189, 114 S. W. 172; *McClintic v. Midland Grocery Co. (Sup.)* 154 S. W. 1157; *Speer on Married Women*, § 49; 21 Cyc. 1663.

In *Ximines v. Smith*, supra, it is said: "The common law gives no sanction to postnuptial contracts; equity will sometimes enforce them, but to meet its sanction and approbation they must stand upon the broad principles of equity, and they must appeal to the conscience of the court for sanction."

In *Pearce v. Jackson*, supra, it is said: "Contracts between husband and wife have been seemingly recognized even in cases in which the separate estate of the wife was affected (citing *Kindrick v. Taylor*, supra). But it is probably true that transactions between them, whereby the separate estate of the wife is affected, are sustained on grounds other than the mere force of a contract between the husband and the wife."

In *Proetzel v. Schroeder*, supra, it is said: "Contracts of the class mentioned (postnuptial) did not receive the sanction of the common law, but were in some cases enforced by the courts of chancery, 'when they stood upon principles of equity, and appealed to the conscience of the court.' *Ximines v. Smith*, 39 Tex. 52. For the convenience and interest of families, they have been enforced, when fairly and honestly made. 'When feigned or inequitable, they should be defeated.' The comparative value of the estate conveyed to the wife by the husband, with that realized by her, will be considered in determining its validity. 1 *Bishop on Married Women*, §§ 724, 725, note 4, p. 274."

In *Sparks v. Taylor*, supra, Mr. Chief Justice Brown says: "The cases cited, as well as others which might be referred to, establish as the law in this state these propositions: (1) The husband may enter into contracts with his wife concerning their property rights; he may purchase land from her and may sell land to her; he may borrow money from her, and he may pay the debt, just as he would to any other creditor; he may become her trustee or agent for the investment of funds which belong to her, the same as he may assume those relations to any other person. In fact, his power to contract with her seems to be limited only by her incapacity to convey land to him because of the fact that he cannot join her in the conveyances. (2) A married woman may, when joined by her husband, sell or mortgage her separate property; she may with her separate funds buy real or personal property from her husband or another which will be her separate estate; she may borrow money, and, by mortgage, bind her separate estate for its payment, or she may make her separate property surety for her husband's debt or for the debt of a third person with her husband's concurrence. Thus it will be seen that the power of the husband and wife to contract with reference to their property rights is ample to sustain this transaction, and we can see no legal obstacle to the making of such contract in Texas."

In *McClintic v. Midland Grocery & Dry Goods Co.*, supra, it is said: "Mrs. Skeen and J. C. Skeen [husband and wife] had with McClintic an understanding that he was to furnish the money to cover all expenses and pay section 44 out, and the wife and husband had an understanding between themselves that the land should belong to her individually and to her children." The court, in passing on the question as to whether said property was separate or community, said: "Over against said presumption that said section 44 was community property are these 'controlling facts': (1) Section 44 was so purchased in the name of the wife, and the husband joined her in executing the obligation to the state for deferred payments thereon, all pursuant to said agreement between them that the land should belong to her."

We do not think it was necessary that the will should have been privily acknowledged by the wife, under the circumstances surrounding this case.

[§. 7] Nor is the statute of frauds available to appellant, because, first, that defense was waived, never having been invoked in any manner in the trial court. Besides, this will and the other instruments executed with it and as parts of the same transaction showed a contract in writing, or that they were the consummation of the previous parol agreement to make them; and the undisputed evidence shows such part performance as takes the case out of the statute. See *League v. Davis*, 53 Tex. 9; *International Harvester*

Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 98-99; Carmichael v. Carmichael, supra; Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580; Kofka v. Rosicky, 41 Neb. 323, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; Best v. Gralapp, supra; 39 Cyc. 52, 28-30, 41-43.

[8] Appellees insist that, notwithstanding such will at its inception was revocable, still, where the party laboring under the disability, as the wife in this case, has fully performed the agreement, and the other has received and enjoyed the benefits, he cannot avoid his obligations under it, even though the disability was such as to render the agreement at its inception ineffectual as a binding and mutually enforceable contract. See *Railway Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334; *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721; *Howe v. Watson*, 179 Mass. 30-40, 60 N. E. 415; *Holmes v. Holmes*, 107 Ky. 163, 53 S. W. 29, 92 Am. St. Rep. 345; *Rose v. Ry. Co.*, 31 Tex. 59-61; *Williams v. Rogan*, 59 Tex. 440; *Taber v. Dallas*, 101 Tex. 241, 106 S. W. 332; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 682-687; *Richards v. Doyle*, 36 Ohio St. 37, 38 Am. Rep. 550; *Louisville, etc., Ry. Co. v. Coyle*, 123 Ky. 854, 97 S. W. 772, 99 S. W. 237, 8 L. R. A. (N. S.) 433, 124 Am. St. Rep. 385, 386, and note; 36 Cyc. 629, 631, and note 49; 9 Cyc. 333 et seq.; 26 Am. & Eng. Ency. Law, 100; 3 Page on Contracts, § 1618, and authorities therein cited; 2 Page on Contracts, § 936; 2 Beach on Contracts, §§ 889, 890.

The will upon its face, we think, imported an agreement between the parties to consummate it, and it is shown by evidence allunde that it was made pursuant to and in consummation of the family agreement, for the purpose of making an equitable distribution of their estate after the termination of the life estate to the survivor, the conditions of which were observed by both until after the death of the wife, subsequent to which the acts of the husband in probating the will, taking possession of and enjoying the property thereunder to the exclusion of his children, shows such performance as would take the case out of the statute; and, as said in *Howe v. Watson*, supra, "We cannot see why, on principle, an actual performance is not as good as an obligation to perform." "If she has fully performed her part, all objection on the ground of mutuality in the remedy has disappeared." 36 Cyc. 629. And it is said in 26 Am. & Eng. Ency. Law, 100: "But where a contract has been fully performed by a married woman, the other party cannot defeat performance on the ground that performance of the contract could not originally have been compelled as against the

obligee." This disability of the married woman must be held to inure to her benefit, and it was not contemplated that it was created for the benefit of those who contract with her. *Holmes v. Holmes*, supra.

In *Railway v. Robards*, supra, the court says: "It is claimed that Mrs. Cain was a married woman at the time of its execution, and, as it was not privily acknowledged by her, that no recovery can be had for a failure to perform upon the part of the company." After stating the contentions of the company, the court continues: "But in this case it is not necessary to express an authoritative opinion upon either of these points. Nor is it thought necessary to determine the scope of the power conferred by the statute upon the husband in the management of the wife's separate property. For both from the evidence and finding of the court it appears that appellees had performed their part of the contract. Then it would seem to follow that, as the company had received the benefit of a performance upon the part of Mrs. Cain, it would not be hard to assert her coverture as a defense to the action and as justification for a refusal on its part to perform the contract. Any other doctrine would result in converting a rule of protection into an engine of destruction. It is for the protection of married women that the rule of inability to contract exists, and not for those who, knowing of the coverture, contract with them, and, after securing the benefits of a performance on their part would refuse performance on the ground of that coverture. In cases of specific performance of contracts, under some circumstances, the want of mutuality in the contract may be waived by the conduct of the person against whom the contract could not originally have been enforced. And it is said that 'where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by suit waive the want of mutuality and enforce a specific performance of the contract.' Fry on Spec. Perf. 201. Here the company has received the benefit of a performance, that is, the consideration for its own promises, and therefore has no grounds for a suit against appellees, for they have already voluntarily performed their stipulations."

In *Leon County v. Vann*, 86 Tex. 707, 27 S. W. 258, the court said: "Having received the benefit of the contract, he is estopped to deny its validity." In *Pryor v. Pendleton*, 92 Tex. 388, 49 S. W. 212, the court, on rehearing, applying the doctrine above announced to one taking under a will, said: "The rule of law laid down in the opinion is correct, and, when applied to the true facts of the case, necessarily produces an opposite result and requires us to hold that Kannie Pryor, by accepting property bequeathed to her by the will of her father, which property she would not have received otherwise than

through him, thereby accepted the will and estopped herself to contest any of its provisions." See, also, 16 Cyc. 787-789.

The holding in *Wyche v. Clapp*, 43 Tex. 543, cited and relied on by appellant, is differentiated from this case in that the facts are not the same. There the wife, who was laboring under disability, survived, and she did not take under the will.

The question here discussed is somewhat similar to that in *March v. Huyter*, 50 Tex. 243, wherein it was said that: "The case now before the court is not one where there was a mutual agreement to make a will, and which, as intimated in the above case, might not be binding upon the wife as a contract unless separately acknowledged by her, but one in which the will was executed, and, not having been revoked by the wife, was duly admitted to probate as her will after her death. Neither is any question raised here as to how far after her death the instrument became binding upon the husband as a compact in favor of the other beneficiaries under the will. 3 Wash. on Real Prop. (5th Ed.) 503; 1 Red. on Wills, 182; Shumaker v. Schmidt, 44 Ala. 454 [4 Am. Rep. 135]."

In this connection we quote the following pertinent remarks from the brief of appellee's counsel: "The result of the contentions of appellant, as contained in her third proposition and subdivisions 'a,' 'b,' and 'c,' stripped and standing before a court of justice, is utterly repulsive. It is this: A. contracts with B., who is laboring under such disability as to render the contract void, if you like; B. fully performs, A. receiving, retaining, and appropriating the fruits of B.'s performance. B. asks A. to perform. A. says, 'You could not legally bind yourself, and therefore I could not at the inception of the contract have compelled you to perform.' B. answers, 'But I have performed, and you have enjoyed the fruits of the contract.' A. replies, 'I admit that you have done all that the contract required of you to its smallest details, but, because at its inception I could not legally have compelled you to do what you have done of your own accord, I owe you nothing.' Does it lie in A.'s mouth to so answer B.'s request for performance? We think not. He was silent, when in common honesty, if he ever intended to, he should have spoken; he will therefore not now be heard to speak, when in common honesty he should be silent. The parties cannot be placed in statu quo; the deceased mother cannot by this tribunal be resurrected from the dead and be permitted to make such distribution of her property as she would have made had this family settlement never been agreed to and consummated."

We conclude that since the will was contractual as well as testamentary, under all the facts of this case that the husband was estopped and precluded from disregarding the same, and therefore his attempted revocation was illegal and void.

[9] If, as it seems clear from the authorities, G. W. Larrabee at any time prior to his death, after having probated the will and accepted the benefits thereunder, could not himself have abrogated it, then does appellant stand in any better attitude than he did with reference to this property? We think not. The record discloses that she lived in the same neighborhood with the Larrabees prior to the death of his first wife; that she knew that he had children and that the family had lived upon the Cason place for a number of years, and after Mrs. Larrabee's death appellant continued to live in the same neighborhood. It further appears from the evidence that her marriage with G. W. Larrabee was void of sentiment, and based solely on the proposition made by Larrabee that if she would marry him, keep house for him, and care for him in his old age, that he would will to her his entire interest in said estate. In pursuance of said proposition, and before her acceptance thereof, she sought and procured the aid and assistance of her brother and brother-in-law to represent her in seeing that Larrabee's proposal should be carried into effect before the marriage was consummated; and with this end in view, she, together with her representatives, repaired to Brownwood for the purpose of meeting Larrabee to ascertain if he had made such disposition of his property to her before the marriage. She, as well as these gentlemen, saw and conversed with Larrabee on this occasion and were assured by him that the papers had been prepared in accordance with their agreement, and were ready for their inspection at the courthouse. Relying, however, upon his statement to that effect, they failed to make further investigation and returned home. The marriage was consummated shortly thereafter; but it seems that the will and the deed were not signed until about two days after the marriage when they were delivered by him to her. She thereafter turned them over to him for safe-keeping. Before her marriage the first will had been probated, and was of record in Brown county. (The facts within her knowledge, if not sufficient to give her notice of its contents, were certainly sufficient to put her upon inquiry, which if pursued would have developed the true status of affairs, not only with reference to the claim of the children, but also as to the provisions of the first will as well.) Is she not estopped now to say that if she had known the facts she would not have entered into the marriage with Larrabee? We think so. See *O'Mahoney v. Flanagan*, 34 Tex. Civ. App. 244, 78 S. W. 246; *Jackson v. Waldstein*, 27 S. W. 28. We think the court did not err in submitting the issue as to whether or not the facts were sufficient to put appellant upon notice of appellee's rights; especially is this true in the absence of a request for more specific instructions. We therefore overrule appellant's tenth and eleventh assignments of error. See *Moore v. Pierson*, 100 Tex. 113,

84 S. W. 1132; York v. Hilger, 84 S. W. 1117. Notwithstanding marriage is a valuable and sufficient consideration to support a contract (6 Am. & Eng. Ency. Law [2d Ed.] 724), yet appellant is not in the attitude of an innocent purchaser for value without notice, and cannot rely upon such doctrine, because she could take no better title under the will than Larrabee himself had.)

Irrespective of whether the first will was revoked by the second still, since the verdict of the jury, considered as an entirety, in effect finds that the 800 acres in Brown county, known as the Cason or Larrabee place, was the separate property of Mrs. Ann Larrabee (which finding is supported by the evidence), the judgment of the court awarding the same to appellees is correct and should not be disturbed.

[10] The court did not err in permitting Mrs. Williams to testify, over appellant's objection, that her mother gave to her uncle John C. Campbell her half interest in the Ellis and Red River county lands for his half interest in the Hill county lands, because such conveyances did not form the basis of appellees' cause of action, but were merely collateral matters, to prove which parol evidence was admissible. See *Heidenheimer v. Beer*, 155 S. W. 355; *Railway Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1035; *Oaks v. West*, 64 S. W. 1033; *Dooley v. McEwing*, 8 Tex. 306; 2 Elliott on Evid. §§ 1264 and 1442; 17 Cyc. 469; *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; *Lecomte v. Toudouze*, 82 Tex. 213-214, 17 S. W. 1047, 27 Am. St. Rep. 870.

It is said in 17 Cyc., supra, p. 469, that "evidence relating to a matter which does not form the foundation of the case, but is collateral to the issue, does not properly fall within the best evidence rule, and, although secondary in its character, cannot be excluded on the ground that primary evidence was obtainable."

[11] Appellant introduced in evidence the inventory filed by G. W. Larrabee in the estate of Ann Larrabee, deceased; the court, however, instructed the jury not to consider such inventory as any evidence of interest in Ann Larrabee to the Cason lands, or as any evidence of title to said lands in the community estate of G. W. and Ann Larrabee. This charge is assigned as error. We do not think that appellant has any right to complain of this charge, because it appears from the recitals in said inventory that the Brown county lands were scheduled therein as the separate property of Ann Larrabee, deceased; and it seems that appellees alone could complain of such charge. At any rate, under the circumstances disclosed in the record, the charge, if error, was harmless.

[12] Appellant requested, and the court refused to give the following two charges, the refusal of which is made the basis of the

eighth and ninth assignments: "If you find that said note was made payable to Ann Larrabee by order of G. W. Larrabee or was given to her by him, then state if it was so given to her or made payable to her as a gift of the whole note, or only for the purpose of reimbursing her to the extent that he had used her money, if any." (2) "Was the note for \$8,550 intended as a gift to her by G. W. Larrabee of said note as an entirety, or was it intended as a gift of only so much thereof as was necessary to repay her for whatever means of hers had been used by G. W. Larrabee, if any?" These two charges were properly refused, because the main charge of the court in submitting this issue was sufficient on this subject.

[13] The jury were asked by it: "Did G. W. Larrabee give to Ann Larrabee the note for \$8,550? If so, was it a simple or pure gift, or was it for the purpose of reimbursing her for money of hers that had been used?" The jury returned the following answer to said question: "It was not a gift, but to reimburse Ann Larrabee for her land and money used." This was a direct finding, in our opinion, that the entire note was turned over to her by him to reimburse her for her land and money used, and was evidently so understood by the court and intended by the jury, for which reason we think said assignments should be overruled.

The remaining assignments have been duly considered, but are not regarded as well taken and are overruled.

Before closing we wish to commend the able and exhaustive briefs and argument filed herein by counsel for both sides, who seem to have spared no pains in presenting the authorities sustaining their respective contentions, and from which we have received much benefit in our investigation of the points urged.

Finding no reversible error in the judgment of the trial court, the same is in all respects affirmed.

JENKINS, J., not sitting.

JOHNSON v. CONGER. (No. 7844.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 21, 1914. Rehearing Denied  
March 21, 1914.)

# 1. DEEDS (§ 114\*)—CONSTRUCTION—DESCRIPTION.

Where plaintiff, in addition to the ordinary count of trespass to try title, prayed reformation of her deed, which, while reciting a conveyance of 160 acres, described only 80 acres, it was improper for the court to direct a verdict in her favor on the ground that the deed on its face showed a conveyance of 160 acres, for a particular description will govern a general one.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.\*]

## 2. EVIDENCE (§ 383\*)—RECITALS IN CONVEYANCE.

A recital in a conveyance by a husband that the land in question was not his homestead is competent evidence to show that at the time of the conveyance it had not been claimed by him as such.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

## 3. APPEAL AND ERROR (§ 1033\*)—REVIEW—HARMLESS ERROR.

Where an instruction improperly cast too great a burden on defendant but did not authorize a verdict for plaintiff under any circumstances, the error is harmless as to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

## 4. HOMESTEAD (§ 216\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where defendant claimed that the land in controversy had not passed to plaintiff because it was the grantor's homestead, and his wife had not joined in the conveyance, a charge on homestead is not erroneous because directing a verdict for plaintiff in case the grantor at the time that he moved from the land to another point intended to make his home at his new residence, for the jury must have understood that, by home, homestead was meant.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 400-403; Dec. Dig. § 216.\*]

## 5. HOMESTEAD (§ 125\*)—EXEMPTION—SCOPE OF.

The homestead exemption being limited to 200 acres, the owner of 320 acres cannot claim the whole tract as exempt. Hence his conveyance of 160 acres passes good title, though his wife did not join, where his homestead was upon the other half of the tract and he had not claimed as part of his homestead any particular 40 acres out of the quarter section conveyed.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 223; Dec. Dig. § 125.\*]

## 6. HOMESTEAD (§ 162\*)—EXEMPTION—ABANDONMENT.

Where the owner of a homestead sold part of the tract and removed to another locality, his mere intention to return at some indefinite time and take up his homestead upon the unimproved quarter section which he retained will not sustain a claim of a homestead exemption.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

## 7. APPEAL AND ERROR (§ 1172\*)—DETERMINATION.

Under rule 62a (149 S. W. 2), declaring that where the issues are severable the judgment shall be reversed only as to that part affected by error, a judgment in a suit to quiet title and to reform plaintiff's conveyance, where the court improperly directed a verdict of reformation, will be reversed only as to that issue; that error not affecting judgment in plaintiff's favor for the land included in her conveyance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.\*]

## 8. APPEAL AND ERROR (§ 708\*)—QUESTIONS PRESENTED FOR REVIEW.

Where the transcript did not show that any default judgment was ever rendered although containing an order purporting to set aside the default, the Court of Appeals cannot review an assignment complaining of the vacation of the default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2948; Dec. Dig. § 708.\*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by Mrs. M. F. Conger against J. M. Johnson and another. From a judgment for plaintiff, Johnson appeals. Affirmed in part, and in part reversed and remanded.

Mahaffey & Fulwiler, of Abilene, for appellant. Sayles, Sayles & Sayles, of Abilene, for appellee.

DUNKLIN, J. Mrs. M. F. Conger instituted this suit against J. M. Johnson, Mrs. C. R. Fenley, widow of W. T. Fenley, deceased, and the children of Mr. and Mrs. Fenley, in trespass to try title to 160 acres of land, the northwest quarter of section 8, block 3, Southern Pacific Railway Company survey, situated in Taylor county, and from a judgment in favor of the plaintiff against all the defendants, J. M. Johnson has appealed.

Plaintiff claimed title under a deed from W. T. Fenley, deceased, describing the property in controversy as follows: "The N. W.  $\frac{1}{4}$  of the N.  $\frac{1}{2}$  of section 8, block 3, certificate 17/366, granted to Southern Pacific Railway and purchased by D. W. Floyd on December 17, 1892, from the state of Texas under act approved April 8, 1889, and April 28, 1891, and said land was duly assigned and deeded to David Windsor by D. W. Floyd as appears of record in the clerk's office of Taylor county, Texas, in this conveyance, being 160 acres of land; the above-described land is not, nor never was, my homestead. The above land was also deeded to W. T. Fenley by David Windsor."

Defendant Johnson claimed under a deed from Mrs. C. R. Fenley executed some two years later than the deed to the plaintiff describing the land as the "N. W.  $\frac{1}{4}$  of section 8 in block No. 3, Southern Pacific Railway Company survey situated in Taylor county, Texas."

[1] It will be noted that in the deed to Mrs. Conger the land is described as the "N. W.  $\frac{1}{4}$  of the N.  $\frac{1}{2}$ " of the section. This description would embrace only 80 acres, while it is also recited in the deed that the conveyance is to 160 acres of land. The plaintiff's petition contained two counts; the first being in the usual form of trespass to try title. In the second count it was alleged that by mutual mistake of the parties to the deed the words "the N.  $\frac{1}{2}$ " were inserted in the deed, while as a matter of fact it was intended and understood between the parties that the land therein conveyed should be described as the "N. W.  $\frac{1}{4}$  of section 8," instead of "N. W.  $\frac{1}{4}$  of the N.  $\frac{1}{2}$ ," and plaintiff prayed that the deed be reformed so as to read as understood and intended, and that with this reformation of the deed she recover the N. W.  $\frac{1}{4}$  of the entire section. The prior deeds referred to in the conveyance to Mrs. Conger embraced the entire N.  $\frac{1}{2}$  of the survey. When the deed to Mrs. Conger was introduced in evidence, the trial court held that it showed on its face a conveyance of

the N. W.  $\frac{1}{4}$  of the entire survey and that no evidence would be heard upon the issue tendered in the second count of the petition for the reformation of the deed, and thereafter a peremptory instruction was given to the jury, in effect, that the deed to Mrs. Conger conveyed title to the N. W.  $\frac{1}{4}$  of the entire section. In view of the general rule of construction of deeds, that particular descriptions will control general descriptions, and particularly as plaintiff had sought in the second count of her petition to reform the instrument, we are of the opinion that this ruling was an error for which the judgment must be reversed. *Sanger v. Roberts*, 92 Tex. 312, 48 S. W. 1; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. 1003; *Schaffer v. Heidenheimer*, 43 Tex. Civ. App. 366, 96 S. W. 61; *Dalton v. Rust*, 22 Tex. 134. This ruling being in plaintiff's favor, no testimony was offered by the plaintiff to sustain the allegations in the second count of the petition, and evidence offered by appellant in rebuttal of the allegations contained in that count was rejected by the court because of the ruling already noted.

[2] Appellant also pleaded that the N. W.  $\frac{1}{4}$  of the land for which plaintiff sued was the homestead of W. T. Fenley and wife at the time the deed to Mrs. Conger was executed, and that, as Mrs. Fenley did not join in that conveyance, the same was a nullity. Several assignments of error are presented upon that issue, one of which is that the evidence conclusively shows that the property was such homestead at the date mentioned. In the deed to Mrs. Conger it is expressly stated that the property therein conveyed was no part of the homestead of the grantor, thus tending to show that he, as the head of the family, did not at that time claim the same as his homestead. This recital, together with other circumstances in evidence, was sufficient to warrant a finding by the jury against appellant's plea under the court's instruction upon that issue.

[3] The charge of the court upon the issue of homestead is criticised. Two of the criticisms are upon that portion of the instruction which warrants a verdict in favor of appellant upon that issue in the event certain facts are found to be true. The criticisms are to the effect that the same imposed too great a burden upon appellant in order to sustain his plea. A sufficient answer to this assignment is that the instruction was in appellant's favor, and, as it did not authorize a verdict against him, it cannot be said that he was prejudiced thereby. *Abilene Light & Water Co. v. Robinson*, 146 S. W. 1052, and authorities there cited.

[4] W. T. Fenley formerly owned the N.  $\frac{1}{2}$  of section 8, consisting of 320 acres; he resided upon the E.  $\frac{1}{2}$  of that tract where all of the improvements were located, and this tract he sold to F. H. Flowers, and moved to Buffalo Gap, where he purchased a residence and there lived until he died. The

court charged the jury that if it was W. T. Fenley's intention to claim the 160 acres in controversy as his homestead at the time he sold the other 160 acres and moved to Buffalo Gap, and that that intention was never abandoned, then appellant's plea of homestead should be sustained. In submitting the converse of appellant's contention on the homestead issue, the jury were told that if, at the time W. T. Fenley moved to Buffalo Gap, it was his intention "to reside there as his home, and that he acquired property in said Buffalo Gap upon which he and his family resided," then a verdict should be rendered against appellant's plea of homestead. The use of the word "home" instead of "homestead" is criticised as being improper, for the reason that a place of residence in Buffalo Gap might have been claimed by Fenley as his home even though he intended to occupy it only temporarily. When read in connection with other portions of the charge, we think it clear that the jury understood the expression "home" as synonymous with "homestead" used in other portions of the charge.

[5, 6] We are of the opinion further that the charge taken as a whole was unduly favorable to appellant for the following reasons: The homestead exemption was limited to 200 acres; he could not claim the entire 320 acres as exempt. The evidence tends strongly to show that the 160 acres sold to Flowers was a part of the homestead, and there is nothing in the testimony tending to show that any particular 40 acres of the tract in controversy was claimed by Fenley as a part of his homestead. Nor was there any testimony to show any acts of preparation by Fenley after his conveyance to Flowers to reside upon the 160 acres in controversy, upon which there were no improvements whatsoever. The most that can be said of the testimony offered by appellant to sustain his plea of homestead is that it would support the conclusion that Fenley at some indefinite time in the future intended to occupy the land in controversy as his homestead. It is well settled that the mere intention on his part to so use the unimproved property, unaccompanied with some act or acts of preparation looking to its actual occupancy for that purpose, would not be sufficient to sustain the plea. *Johnson v. Burton*, 39 Tex. Civ. App. 249, 87 S. W. 181, and decisions there cited.

[7] This issue of homestead is entirely separate and severable from all other issues in the case, and the judgment of the trial court upon that issue is affirmed; but for the erroneous ruling noted above the judgment is reversed and the cause remanded as to all other issues. Rule 62a, 149 S. W. x.

[8] Several cross-assignments have been presented by the appellee to orders made by the trial judge and appearing in the transcript purporting to set aside a judgment by default in appellee's favor against appellant

prior to the rendition of the judgment from which the appeal has been prosecuted. Independent of the question whether or not the court abused his discretion in setting aside the default judgment, if any had been rendered, these assignments must be overruled for the reason that there is no proper showing in the record of the rendition of such a judgment. Aside from an order purporting to set aside a judgment by default, the transcript fails to show that any such default judgment was ever rendered. The only proper showing for such a judgment would be an order to that effect appearing in the minutes of the court. *Withers v. Crenshaw*, 155 S. W. 1189.

Reversed and remanded in part; affirmed in part.

**EVANS v. SAN ANTONIO TRACTION CO.**  
(No. 5259.)

(Court of Civil Appeals of Texas. San Antonio.  
April 8, 1914. Rehearing Denied  
May 6, 1914.)

**1. APPEAL AND ERROR (§ 356\*)—PROCEEDINGS—LIMITATION—EFFECT OF DELAY.**

Where a petition for a writ of error was not filed within 12 months from the time final judgment was rendered, as required by Rev. St. 1911, art. 2086, the writ will be dismissed, since the requirement is jurisdictional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

**2. APPEAL AND ERROR (§ 345\*)—PROCEEDINGS—LIMITATION—EFFECT OF PENDING MOTION FOR A NEW TRIAL.**

Rev. St. 1911, art. 2086, requiring a petition for writ of error to be filed within 12 months from the time final judgment is rendered, means 12 months from the time the judgment was rendered, and not from the time the motion for a new trial was overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 845.\*]

Error to District Court, Bexar County; S. G. Tayloe, Judge.

Action between Lena M. Evans and the San Antonio Traction Company. From a judgment in favor of the traction company, Lena M. Evans brings error. Writ of error dismissed.

Will A. Morriss, T. J. Newton, and Rebel L. Robertson, all of San Antonio, for plaintiff in error.

**CARL, J.** This cause is brought to this court on writ of error from a judgment rendered on the 14th day of October, 1912. The motion for a new trial was overruled on November 30, 1912, and notice of appeal then given. The petition for writ of error was filed November 29, 1913.

Article 2086 (1389), Revised Statutes of Texas, reads: "The writ of error may, in cases where the same is allowed, be sued out at any time within twelve months after

the final judgment is rendered, and not thereafter."

[1, 2] Where a petition for a writ of error is not filed within 12 months from the time final judgment is rendered, as provided in article 2086 of the Revised Statutes of 1911 (article 1389, Rev. Stats. 1895), the writ will be dismissed, since the condition is jurisdictional. And this article of the statute has been construed to mean 12 months from the time the judgment was rendered, and not from the time the motion for a new trial is overruled. *Cooper v. Yoakum*, 91 Tex. 391, 43 S. W. 871; *Carlton v. Ashworth*, 45 S. W. 203; *Converse v. Trapp*, 29 S. W. 415; *Uvalde v. Uvalde*, 31 S. W. 327; *Schleicher v. Runge*, 90 Tex. 456, 39 S. W. 279; *Milo et al. v. Nuske et al.*, 95 Tex. 243, 66 S. W. 544.

The writ of error is dismissed.

**ABNEY v. ROBERTS et al.** (No. 5270.)

(Court of Civil Appeals of Texas. Austin.  
Feb. 25, 1914. Rehearing Denied  
April 15, 1914.)

**1. VENDOR AND PURCHASER (§ 351\*)—BREACH BY VENDOR—MEASURE OF DAMAGES.**

A contract by a vendor of land, who also owned a milldam and water power, to erect and maintain so long as the purchaser should demand an irrigation pump of sufficient capacity to deliver water for irrigation purposes and the necessary casing to extend from the pump to the second bank of the river and to furnish water for irrigating the land at an agreed price per acre, was not merely an agreement to furnish water, but called for a permanent and extensive improvement of the land, and for a breach thereof the purchaser was entitled to recover the difference between the value of the property as it would be if the contract had been performed and its value upon the vendor's failure to perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

**2. CONTRACTS (§ 10\*)—SALE OF LAND—AGREEMENT TO FURNISH WATER—MUTUALITY.**

Where a vendor, as a part of the transaction and as a part of the consideration for the purchase, agreed to erect and maintain at a milldam owned by him an irrigation pump, to connect therewith casing reaching to the second bank of the river, and to furnish water for irrigation purposes at a specified price per acre, and the purchaser agreed to furnish the necessary casing to extend the piping from the bank to the upland, to construct and maintain a reservoir, and to permit the vendor by pipe or ditch to convey any excess of water to the lands of other proprietors, and also agreed that the dam might be raised so as to overflow certain of his land, the agreement of the vendor to erect a pump and furnish water was not unilateral and unenforceable.

[Ed. Note.—For other cases see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

**3. LIENS (§ 10\*)—SALE OF LAND—BREACH OF CONTRACT—DAMAGES—RIGHT OF PURCHASER TO LIEN.**

Where a vendor of land, purchased by plaintiff, which vendor also owned a milldam and water power, agreed to erect and maintain an irrigation pump and casing connected therewith and to furnish water for irrigation purposes



at an agreed price per acre and subsequently conveyed the dam property to persons who assumed the performance of the contract with plaintiff, plaintiff had no lien, legal or equitable, on the dam property or his damages from the nonperformance of the contract.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. §§ 5, 5½, 6; Dec. Dig. § 10.\*]

#### 4. VENUE (§ 22\*)—RESIDENCE OF DEFENDANTS—CODEFENDANTS.

Where an action was brought in the county of the residence of one of the defendants, the other defendants' plea of privilege to be sued in the county of their residence was properly overruled.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 35-37; Dec. Dig. § 22.\*]

Appeal from District Court, Lampasas County; John D. Robinson, Judge.

Action by W. B. Abney against P. Z. Davis, Ingham S. Roberts, and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. C. Abney, M. M. White, and Matthews & Browning, all of Lampasas, for appellant. John B. Warren, of Houston, for appellees.

#### Statement of the Case.

**KEY, C. J.** The following statement of the nature and result of this suit contained in appellant's brief is conceded to be correct: "This suit was instituted by the plaintiff, W. B. Abney, on February 21, 1912, against the defendants P. Z. Davis, Ingham S. Roberts, B. F. Frymier, Jr., and B. F. Frymier, Sr.; the object of the suit being to recover damages from defendants by reason of their failure to erect and maintain an irrigating plant and furnish water for irrigation purposes to plaintiff under a contract between plaintiff and P. Z. Davis made on May 21, 1906, the plaintiff alleging that the other defendants had assumed to carry out said contract made with said Davis, and had become liable to plaintiff for all damages sustained by him by reason of said contract not being carried out. Plaintiff's cause of action is duly set forth in his second amended original petition filed on the 7th day of April, 1913, and in which petition the plaintiff alleged and asked the foreclosure of a lien on certain lands, which lien he claimed to hold as security for the performance of said contract. The defendants Ingham S. Roberts, B. F. Frymier, Jr., and B. F. Frymier, Sr., on said 7th day of April, 1913, filed their second amended original answer, which contained seven exceptions or demurrers to plaintiff's said amended original petition; one of them being a general exception. The defendant Davis by his answer admitted execution of the contract sued on and asked for judgment over against his codefendants in the event judgment was rendered against him in favor of plaintiff; said Davis alleging that, as part consideration for his conveyance of certain land described in plaintiff's second amended petition, his codefendants had as-

sumed performance of the contract sued on, and prays for the establishment and foreclosure of a lien on the land conveyed by him to Frymier for the amount of such judgment. On April 8, 1913, the court sustained all of said exceptions of defendants Ingham S. Roberts, B. F. Frymier, Jr., and B. F. Frymier, Sr., to which ruling of the court the plaintiff excepted and declined to amend. Thereupon the court rendered judgment dismissing plaintiff's suit and adjudged that all the defendants go hence without day and recover of plaintiff all costs. The plaintiff then excepted to said rulings and judgment of the court, gave notice of appeal to this court, and on the 5th day of May, 1913, perfected his appeal by filing his appeal bond and assignments of error."

The contract referred to in the plaintiff's petition reads as follows: "The State of Texas, Lampasas County. This agreement made and entered into by and between P. Z. Davis and W. B. Abney of Lampasas county, Texas, witnesseth: First. That said P. Z. Davis as owner of the Chadwick Mill property, dam and water power, situated, part on about 26½ acres of the Calvin Baker survey in S. W. corner of Mills county, Texas, with dam extending across the Colorado river, and including 12 acres out of the Phillip Bulger and Jas. H. Baker surveys in San Saba county, hereinafter more fully described, does hereby forever grant unto said W. B. Abney, his heirs and assigns, the exclusive right to use and enjoy said strip of land off said Bulger and Baker surveys, and all grass and pecans growing thereon, leaving all timber remaining standing thereon, such use, however, not to interfere in any manner with the right especially reserved by said Davis to use said strip in any manner beneficial to said Davis in maintaining and using his dam and water power, including the right of raising said dam higher, and thereby back water on said land. Second. The said P. Z. Davis hereby grants to W. B. Abney, his heirs and assigns, the right to construct and forever maintain at and below said dam a hydraulic ram to receive water from said dam so as to produce the power necessary to convey water for irrigation purposes from said dam to the lands conveyed by P. Z. Davis this day to said W. B. Abney out of said Phillip Bulger and Jas. H. Baker surveys in San Saba county, Texas, and the right to take the water from the Colorado river for the irrigation of said lands. Third. P. Z. Davis shall on or before January 1, 1907, erect and place in a suitable and proper place on the Colorado river at said Chadwick milldam, an irrigation pump of sufficient capacity to deliver not less than 350 gallons of water per minute on the upland now being grubbed on the Phillip Bulger and Jas. H. Baker surveys on west side of Colorado river, being the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

same land conveyed by P. Z. Davis to W. B. Abney on May 21, 1906, and said Davis shall connect with said pump enough iron casing, inside measure 5½ inches in diameter, and extend such casing to the second bank of the Colorado river, on said west side of the land of W. B. Abney, and shall furnish the necessary power to lift said water to said upland of W. B. Abney. The said W. B. Abney on his part agreeing to furnish the necessary casing of same size and character and extend such piping from said second bank of Colorado river to said upland. The said Davis hereby agreeing and binding himself to maintain said pump and power and casing connections to the second bank as long as the said Abney, his heirs and assigns shall demand the same 'and the said Abney agreeing and binding himself, his heirs and assigns to maintain said casing from said second bank to his upland above described, as long as said Davis, his heirs and assigns shall demand the same,' and said Davis shall furnish to said Abney, water through said pump and casing to irrigate all or any portion of said land purchased from P. Z. Davis, as aforesaid, whenever demanded by said Abney, his heirs and assigns, at the price of \$1.66½ per acre of land irrigated, payable at the end of each year irrigated. Any surplus water not used by said Abney, the said Davis shall have the right to conduct by pipe or ditch connecting with the casing laid by Abney, so as not to interfere with the tillable and cultivated land of said Abney, and deliver same to any proprietor south of said Abney, and such excess of water shall be the property of P. Z. Davis, his heirs and assigns. The said Abney is to construct and maintain a dirt reservoir, not less than 50x100 feet, with wall not less than eight feet at base, and a height of five feet from level of land, said walls to be built out of the excavations from said reservoir, in which reservoir water shall be pumped by said Davis through the casing furnished by Abney to connect at second bank with the casing furnished by said Davis, and the said water shall be on storage for irrigation of the land of said Abney, and any excess in said reservoir may be used by Davis on lands of lower proprietors, through a single ditch leading from reservoir. Fourth. The said W. B. Abney, as owner of the 101 acres of Jas. H. Baker survey in San Saba county, described in deed from Lee Oliver to P. Z. Davis, dated May 12, 1906, and conveyed by P. Z. Davis to W. B. Abney this day, hereby grants to P. Z. Davis, his heirs and assigns, the right and privilege of raising said dam at Chadwick Mill, as high as he or they may see fit to, provided only, that same shall not be raised so that in heavy rises in said river, the additional rise in the dam will have the effect of overflowing the land on the upper or second bank of land owned by said Abney, or any part of the land on said upper or sec-

ond bank. Fifth. The land on west bank of Colorado river referred to in item one of this contract, in which Davis reserves the right to use same in maintaining and using his dam and water power, is described as follows: (Here follows description of said 12-acre tract.) This May 21, 1906. P. Z. Davis, W. B. Abney."

We copy from appellant's brief the following fair summary of the facts alleged in his petition: "That the defendant Davis on the 21st of May, 1906, was the owner of the Chadwick mill property, consisting principally of land on the east bank of the Colorado river in Mills county, and of certain lands opposite them on the west side of the Colorado river in San Saba county. On that day he conveyed to the plaintiff the lands on the west side of the river and the contract attached to the petition was entered into between Davis and plaintiff; said contract and conveyance being each a part of the same transaction, and the execution by said Davis of said contract being part of the consideration which induced plaintiff to purchase from him the land on the west side of the Colorado river. By the contract Davis bound himself to erect or place in said river at said Chadwick milldam an irrigation pump of sufficient capacity to deliver not less than 350 gallons of water per minute on said lands so conveyed to plaintiff, and, by means of iron casing, convey such water to a point on plaintiff's land, and furnish the necessary power to lift said water to a reservoir to be built by plaintiff on his land, and to furnish plaintiff through such casing sufficient water to irrigate his said lands, the plaintiff to furnish a certain amount of casing for use on his said land. That if said contract had been complied with the plaintiff's land would have been greatly and permanently improved. The plaintiff further alleged that he furnished and laid the casing he contracted to furnish and lay, and built the reservoir he contracted to build, and that the work to be done and the material to be furnished by said Davis under said contract could only be done and furnished as an expense of not less than \$6,000. That by means of said irrigation plant, said Davis contemplated, as provided for in said contract, the irrigation of other lands from said reservoir, and that both plaintiff and Davis had in contemplation the permanent improvement of plaintiff's lands, but that the defendants, about February 1, 1912, abandoned their intention of carrying out said contract and had performed no part thereof. In said contract said Davis bound himself to 'maintain said pump and power and casing connections as long as said Abney, his heirs and assigns shall demand the same,' and said Abney was required to pay a stipulated price for water furnished for irrigation. Plaintiff further alleged that with said contract carried out by defendants his land would be of the value of \$9,600, and,

without said contract being carried out, it was only of the value of \$8,000, and for the difference of \$3,600 he asked judgment."

As to the measure of damages appellant's petition was in the alternative. He first sought to recover the difference in the value of his property with and without the improvement referred to, and then, in the alternative, either the difference in the rental value with or without the improvements, or such sum as placed at interest would produce such difference in rental value.

#### Opinion.

[1] We sustain appellant's first and second assignments of error, and concur with his able counsel in the proposition submitted thereunder, which reads as follows: "Under the allegations of plaintiff's petition he was entitled to recover of defendants such damages as he sustained by reason of the non-performance by them of the contract made the basis of the suit, and the measure of such damages was the difference between the value of plaintiff's land described in the petition with the contract complied with by defendants and the value thereof with the contract not complied with or performed by defendants."

In a well-prepared brief, appellees' learned counsel attempts to maintain the proposition that the contract sued on was merely an obligation on Davis' part to furnish appellant water for irrigation purposes, but we cannot concur in that contention, but agree with appellant's counsel that the contract called for a permanent and extensive improvement of his land, and in that class of cases the weight of authority holds that difference between the value of the property as it would be if the contract had been performed, and as it is in consequence of the failure to fulfill it, is the correct measure of damages. 2 Sutherland on Damages, p. 492; 40 Cyc. 686, 687; Louisville Elec. Ry. Co. v. Whipp, 118 Ky. 121, 80 S. W. 507; Rosenthal v. Taylor B. & H. Ry. Co., 79 Tex. 325, 15 S. W. 268; G. H. & S. A. Ry. Co. v. Haas, 37 S. W. 167; S. A. & A. P. Ry. Co. v. Mohl, 37 S. W. 22; Owens v. Railway Co., 67 Tex. 682, 4 S. W. 593; St. L. B. & M. Ry. Co. v. West, 131 S. W. 839; Fallon v. Amond, 153 Iowa, 504, 133 N. W. 771; Fin & Feather Club v. Thomas, 138 S. W. 150. We quote as follows from Sutherland on Damages, cited above: "This rule of rental value for delay, however, has been departed from where the delay would be indefinitely continuous, as where the execution of the contract has been abandoned; then the difference between the value of the property as it would be if the contract had been performed, and as it is in consequence of the failure to fulfill it. Where a railroad company was bound to build and maintain perpetually a side track in front of certain lots owned by the covenantee, on a breach of this covenant by abandonment, after the track

had been laid, it was held that the proper measure of damages was the difference in value of the plaintiff's lots with the side track operated and not operated, together with interest thereon from the abandonment up to the date of the trial, or not, at the discretion of the jury. This rule, says the court, 'renders the ascertainment of the damages easy, certain, and final; and limits them to what would surely be within the contemplation of the parties. Whereas, the annual rental value is more speculative and uncertain; is liable to great fluctuations from causes not within the scope of the contemplation of the parties, nor indeed within the range of their anticipations; besides, if the damages are apportionable, the measure of difference in annual rent would result in a multiplicity of suits; or, if not apportionable, then the result would be purely speculative (as to future rents) or the plaintiff be barred by one recovery from any other.'

[2] One of the exceptions sustained to the petition asserted that the contract was unilateral and therefore not enforceable, and we sustain the assignment which complains of the action of the trial court in sustaining that exception. The petition alleged that on the day of the execution of the contract Davis conveyed to plaintiff the lands out of the Phillip Bulger and James H. Baker surveys, referred to in said contract on the west side of the Colorado river, and that conveyance and the contract were each part of the same transaction, and altogether constituted one contract; the execution by said Davis of the contract being part of the consideration which induced plaintiff to purchase from said Davis said land on said Bulger and Baker surveys. The contract is set forth in full in the statement heretofore made, from which it will be seen that a part of the consideration thereof was the agreement by appellant to furnish casing to connect with that to be laid by Davis and extend same from such connection on the second bank of the Colorado river to a large reservoir to be built by appellant on his land, in which water was to be stored, not only for the use of appellant for irrigation, but also for the use of Davis for the irrigation of other lands. Another part of the consideration was the right granted by appellant to Davis to raise his dam so as to overflow in part appellant's land. Appellant further alleged that prior to the alleged defaults of appellees he performed his part of said agreement and constructed the reservoir and furnished and laid the casing from said second bank of the Colorado river to said reservoir and had ever been ready, willing, and able to pay for the water he was entitled to under said contract the said price of \$1.66 $\frac{2}{3}$  per acre for his land in cultivation. These averments show that appellant had already performed certain things of value to Davis, and that, by the terms of the contract, he was obligated to

perform others which would inure to the benefit of Davis. These averments refute the contention that the contract required much to be done by Davis and nothing by Abney; and the court should have overruled the contention that it was an unilateral contract.

[3] Appellant alleged that by reason of the facts set forth in his petition he had a lien on the Chadwick mill property, which he sought to foreclose. The court sustained an exception to that part of the petition, and that ruling is assigned as error. Counsel for appellant cite authorities in support of the proposition that, although he was not a party to the contract between the appellees, still, if the other appellees promised Davis to perform his part of the contract between Davis and appellant, the latter can maintain an action against them for failure to so do. But the correctness of that proposition does not show that appellant has any lien, either legal or equitable. None was created by the terms of the contract, and the facts alleged form no sufficient basis for an equitable lien. It may be conceded that, in the absence of a contract lien, a vendor has an equitable lien on the property sold to secure payment of the purchase money; but the petition does not allege that appellant sold to Davis, or any one else, the property upon which he sought to foreclose the alleged lien. Hence we hold that the trial court ruled correctly in sustaining the exception referred to.

[4] Appellees present a cross-assignment of error complaining of the action of the court in overruling a plea of privilege to be sued in the county of their residence, interposed by all the defendants except Davis. The defendant Davis was sued in the county of his residence, and the other defendants, being proper parties, were suable in that county also, under the statute which authorizes suit in any county in which one of the defendants resides, and therefore we overrule appellees' cross-assignment.

For the reasons given, the judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

#### INTERNATIONAL & G. N. RY. CO. v. OWENS. (No. 5347.)

(Court of Civil Appeals of Texas. Austin.  
April 15, 1914.)

#### 1. APPEAL AND ERROR (§ 757\*)—RECORD— QUESTIONS PRESENTED FOR REVIEW.

Where defendant's brief did not set out plaintiff's petition or even its substance, defendant's contention that its general demurrer was improperly overruled cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

#### 2. APPEAL AND ERROR (§ 837\*)—DEMURRER— EVIDENCE.

In determining on appeal the propriety of the overruling of defendant's general demurrer, the evidence cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

#### 3. APPEAL AND ERROR (§ 917\*)—RECORD— QUESTIONS PRESENTED.

Where the record shows no ruling on defendant's general demurrer, or that any was requested, it will be presumed on appeal that the demurrer was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.\*]

#### 4. APPEAL AND ERROR (§ 703\*)—RECORD— QUESTIONS PRESENTED FOR REVIEW.

Where the record showed that appellant requested only one instruction that was refused, appellant's assignment of error complaining of the refusal of several requested instructions cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2981; Dec. Dig. § 703.\*]

Appeal from Millam County Court; John Watson, Judge.

Action by Ose Owens against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chambers & Baskin, of Cameron, Doremus, Butler & Henderson, of Bryan, and Wilson, Dabney & King, of Houston, for appellant. Morrison & Lewis, of Cameron, for appellee.

KEY, C. J. In this case the plaintiff recovered a verdict and judgment against the defendant for the value of a mule which was killed on defendant's track in the town of Gause by a passing train on defendant's road, and the latter has appealed.

[1-3] The first assignment charges that the trial court committed error in overruling the defendant's general demurrer to the plaintiff's petition. The statement in appellant's brief in support of that assignment does not purport to contain even the substance of all that was alleged in the petition, but, in addition to stating that certain facts were alleged, states that certain facts were proved by the evidence. Of course, the testimony cannot be considered in determining the sufficiency of a pleading. Besides, the record does not show that the court made any ruling upon the general demurrer, or that it was requested so to do, and therefore that demurrer must be considered as waived.

The second and fourth assignments object to certain paragraphs of the court's charge, which objections we hold are without merit, and the assignments are overruled.

[4] The third, fifth, and sixth assignments charge that error was committed by the refusal of certain requested instructions. The record shows that appellant requested only one instruction that was refused, and no error is assigned upon the action of the court in refusing that instruction. Hence we hold

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the record does not sustain the assignments, and for that reason they are overruled.

No reason for doing otherwise has been made to appear, and therefore the judgment is affirmed.

Affirmed.

# JACKSON v. TAYLOR. (No. 7762.)

(Court of Civil Appeals of Texas. Ft. Worth. April 11, 1914.)

## 1. LANDLORD AND TENANT (§ 326\*)—FARM LEASES—CONSTRUCTION.

Where a farm lease on shares required the tenant to plant specified crops, and provided that, as soon as the crops were gathered, the land should revert to the possession of the landlord, the tenant is not, where the specified crop failed, entitled to the same share of a substitute crop; the lease expressly providing for the possession to revert to the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1367-1378; Dec. Dig. § 326.\*]

## 2. LANDLORD AND TENANT (§ 331\*)—FARM LEASES—EVIDENCE.

Where a lessee of a farm on shares claimed part of the hay raised after the failure of the crop required by the lease, evidence that landlords in that vicinity allowed their tenants to harvest hay grown after the usual crops had failed because of drought, just as if it had been the crop planted, is admissible on the question of whether the landlord agreed to allow the lessee to harvest such hay.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1360-1362, 1379-1387; Dec. Dig. § 331.\*]

## 3. TROVER AND CONVERSION (§ 54\*)—MEASURE OF DAMAGES.

Where a landlord converted hay belonging to the tenant, the measure of damages is the market value of the hay converted; hence the expense of hauling the hay to market would be immaterial.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 252, 255-257; Dec. Dig. § 54.\*]

## 4. LANDLORD AND TENANT (§ 331\*)—CROPPING CONTRACT—EVIDENCE.

Where a landlord converted hay belonging to his tenant, the measure of damages is the market value of the hay, and so evidence that the tenant had agreed to sell the hay at a fixed price is inadmissible, where the landlord had no notice of such contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1360-1362, 1379-1387; Dec. Dig. § 331.\*]

## 5. TROVER AND CONVERSION (§ 54\*)—DAMAGES—MEASURE.

Where a landlord converted hay belonging to her tenant, she cannot recover expenses incurred in baling the hay.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 252, 255-257; Dec. Dig. § 54.\*]

Appeal from Young County Court; E. W. Fry, Judge.

Action by Mary S. Taylor against G. W. Jackson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

C. W. Johnson, of Graham, and Theodore Mack, of Ft. Worth, for appellant. R. F. Arnold and Kay & Akin, both of Graham, for appellee.

CONNER, C. J. G. W. Jackson was a tenant of Mary S. Taylor for the year 1911, and this suit was instituted by the latter to recover some Colorado grass hay alleged to have been converted by Jackson. The plaintiff, at the time of the institution of the suit, sued out a sequestration writ which was levied upon the hay. The defendant having failed to replevy the hay, the plaintiff did so, and the same, 2,200 bales valued at 40 cents per bale, was delivered to her by the sheriff. The plaintiff claimed the hay by virtue of her ownership of the land under the terms of a written lease to the defendant. The defendant also claimed under the lease, and further specially pleaded an oral agreement with the plaintiff by the terms of which he (the defendant) was to cut and bale the hay free of cost to the plaintiff and to deliver to her one-fourth as rent. A trial before a jury resulted in a verdict and judgment for the appellee, and the defendant has appealed.

[1] The written lease between the parties provided that Jackson was to plant, work, and gather on the land rented to him 75 acres of cotton, 15 acres of corn, 5 acres of sorghum cane, and 10 acres of maize, and to deliver to Mrs. Taylor one-fourth of the cotton, one-third of the corn, and one-third of the wheat, oats, millet, and sorghum (also permitted) raised on the premises. The lease further stipulated that the crops should be planted, worked, and gathered in due season, and on failure or refusal to so do by the tenant the landlord might have it done and take the cost out of the tenant's part of the crops. It was further provided that "as soon as a crop is gathered, or could have been gathered by the use of proper industry, the land returns to the possession of the landlord for his disposal, for the next succeeding year, and at any time after the small grain has been taken off that the land may be used by the landlord, but not to the injury of the tenant or crops on the ungathered part of the premises."

The proof shows that Jackson properly plowed and planted some 15 acres of corn and some 75 to 80 acres of cotton and a number of acres in sorghum, but that there was an utter failure of from 25 to 30 acres of the cotton and some of the sorghum land because of a severe drought. Upon this part of the land, which had been cultivated and left level, Colorado grass sprang up and was allowed to grow, and later in the season was harvested and partly baled by Jackson; he tendering the plaintiff one-fourth thereof as rent. The defendant Jackson and his son both testified, as substantially alleged in his answer, that after the failure of the crops

he went to Mrs. Taylor and stated the situation to her and inquired whether she thought it best that he try to plant the land in maize or sorghum, or let it remain for the growth of Colorado grass, and that Mrs. Taylor stated that he might exercise his own judgment in the matter, which he did to their mutual profit. Mrs. Taylor, however, denied any such agreement.

The majority at least are of the opinion that the written lease did not confer upon the defendant a right to the Colorado grass in question, and that therefore there was no error in the charge of the court so instructing, as complained of in the fourth assignment, and in refusing special charges Nos. 2 and 3 of contrary import, as urged in assignments Nos. 8 and 9.

[2] We are of the opinion, however, that the court erred in excluding the testimony of G. W. Wiley, J. E. Parsons, and Robert McLaren, as urged in the second assignment, to the effect that it was the custom in the neighborhood of the rented premises during the year 1911 for the tenant to harvest Colorado grass grown upon lands upon which the usual crops had failed because of the drought and take three-fourths thereof, rendering to the landlord one-fourth. The testimony, as shown by the bill of exception taken to its exclusion, was offered "to corroborate the defendant Jackson in his claim of a verbal understanding with the plaintiff," and was objected to on the ground that it was immaterial. The conflict between the plaintiff and defendant on the issue of the subsequent agreement, upon which alone the case was submitted by the court, was sharp, and we think the evidence tendered admissible for the purpose offered as a circumstance rendering more probable the evidence of the defendant and his son in favor of the agreement. See *Kocher v. Mayberry*, 15 Tex. Civ. App. 342, 39 S. W. 604; *Paine v. Argyle Merc. Co.*, 133 S. W. 895; and the recent case by this court, No. 7827, *E. B. Carver et al. v. Power State Bank*, 164 S. W. 892, not yet officially reported. For the error of the court in the exclusion of the testimony, we think the judgment must be reversed, and the cause remanded for a new trial.

[3-5] In the event of a recovery by appellant, his measure of damage will be the market value of the hay converted by the plaintiff, less the part, of course, due her as rent, and hence the cost of hauling the same to market would be immaterial, as the court below ruled. So, too, the court properly rejected evidence that appellant had sold part of the hay baled by him at 50 cents per bale; there being no evidence that the appellee had notice of any such contract. If in fact appellant should show himself entitled to recover under the special agreement set up by him, the plaintiff would not be entitled to a deduction of the expenses incurred by her in

balancing that part of the sequestered hay that she did, as was instructed by the court, in the second paragraph of his charge. See *Rippy v. Less*, 55 Tex. Civ. App. 492, 118 S. W. 1084; *Tignor v. Toney*, 13 Tex. Civ. App. 521, 35 S. W. 881.

We find no error in other rulings of the court, or anything requiring further notice, but, for the error discussed, it is ordered that the judgment be reversed, and the cause remanded for another trial.

**GALVESTON, H. & S. A. RY. CO. v.  
FOETCHE.** (No. 5262.)

(Court of Civil Appeals of Texas. San Antonio.  
April 15, 1914. Rehearing Denied  
May 6, 1914.)

**CARRIERS (§ 134\*)—CARRIAGE OF GOODS—AC-  
TIONS—EVIDENCE—SUFFICIENCY.**

In an action against a railway company for injury to a shipment of cabbages on account of the improper icing of the car in which it was made, evidence held sufficient to sustain a verdict against the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.\*]

Appeal from Wharton County Court; J. R. Bowen, Judge.

Action by Otto Foetche against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, Proctor, Vandenberge & Crain, of Victoria, and W. L. Hall, of Wharton, for appellant. John A. Barclay and P. J. Alexander, both of Wharton, for appellee.

CARL, J. Appellee, Otto Foetche, sued the Galveston, Harrisburg & San Antonio Railway Company for \$305.25, alleging that he shipped over appellant's line a car load of cabbage from Kreigel, in Wharton county, to San Antonio, in Bexar county; the grounds of negligence upon which recovery was sought being unnecessary delay in shipment and improper and insufficient icing of the car in which such shipment was made. It was alleged that, on account of the insufficient icing of said car and delay in delivery, the cabbage became unsalable, and was a loss, except \$5 for which the car was sold. Appellee alleged that he paid \$25 for icing the car, and that the cabbage were worth \$280.25, thus making the \$305.25 sued for. Appellant answered by general demurrer, general denial, and specially denied any negligence on its part, and pleaded over on cross-action for \$91.20 for ice furnished in icing the car, less \$25 paid by appellee, and \$5 for which the cabbage were sold. The jury gave the plaintiff judgment for \$305, less \$40 paid for ice, and judgment was rendered in appellee's favor for \$265, from which judgment this appeal is taken.

The evidence shows that the car was loaded at Kreigel Station on the 22d and 23d of

August, 1912, and left that place about 4 o'clock p. m. of the last-named date, and reached San Antonio at 9:05 p. m. on August 24, 1912. It was shown by the plaintiff and his witnesses that the cabbage were sound when placed in the car; that sound cabbage could be hauled in a car for 30 hours, the time these were in route, without any ice; and that they would spoil in an improperly iced car much quicker than if no ice was used whatever.

Appellant showed that this car came to Wharton on August 17th loaded with peaches consigned to H. E. Moore & Son. It was there until August 21st, while the peaches were being sold out. Witnesses testified that the car was cold and in good condition during that time, and that on the day it arrived 1,500 pounds of ice were placed in the bunkers, on the 19th 1,500 pounds more, and on the 20th another 1,500 pounds, while on the 21st 2,000 pounds more were put in, when the car was carried to Kreigel, seven miles from Wharton. And further that in the afternoon of August 23d the car came back to Wharton loaded with cabbage, and a witness says he put 2,000 pounds of ice in the bunkers, and says the car appeared to be in good condition. The witness Brady, for appellant, said that he put 6,000 pounds of ice in the bunkers at Rosenberg at 11:50 p. m. August 23d. Voelcker, the agent for appellant at San Antonio, says the car came in at 9:05 p. m. the 24th, and was in bad condition. The next morning (Sunday) he put 8,200 pounds of ice in the car.

There seems to be no dispute that the car was not delayed in shipment. So the sole question is as to whether there is sufficient evidence upon which the jury could base the finding that the car was insufficiently iced, either at the time the cabbage were put in or in transit, and whether that was the proximate cause of the decay of the same. Some of the witnesses testified that, while the car was dripping from the bunkers when it came, it was not dripping so much later and before it left.

Is it a legitimate inference from this testimony that the car was not properly iced, and, if it was not, did that fact cause the decay of the cabbage? There is no contention that the goods were not spoiled when they reached San Antonio, about 30 hours after they left the shipping point, and the evidence is sufficient to show they were sound when placed in the car. It is also in evidence that cabbage improperly or insufficiently iced will ruin sooner than if no ice was put in, and that, if not iced at all, the shipment should have been made so as to leave the cabbage in good condition.

We think it a legitimate inference from the testimony, and that the jury was warranted in concluding, that appellant did not sufficiently ice the car at the beginning, and that

this fact caused the loss. Texas & P. Ry. Co. v. Copper, 38 Tex. Civ. App. 61, 84 S. W. 694. There being positive evidence that the cabbage were sound when placed in the car, and were ruined when they reached San Antonio, 30 hours later, coupled with the showing as to the manner of icing the car at and before the loading, would justify the conclusion that the negligence of the railway caused the injury. The assignments are all overruled, and the judgment is affirmed.

# BRIGHTMAN et al. v. BRIGHTMAN. (No. 4246.)

(Court of Civil Appeals of Texas. Austin.  
March 25, 1914. Motion to Affirm on  
Certificate Denied April 29, 1914.)

## APPEAL AND ERROR (§ 1127\*)—AFFIRMANCE— MOTION.

A motion to affirm on certificate must be denied, where the transcript accompanying the motion does not contain a copy of the judgment which the motion seeks to have affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4432-4440; Dec. Dig. § 1127.\*]

Appeal from Tom Green County Court; Oscar Frink, Judge.

Action between O. O. Brightman and others and O. F. Brightman, next friend, etc. There was a judgment for the latter, and the former appeal. On motion to affirm on certificate. Motion denied.

W. A. Anderson and Lee Upton, both of San Angelo, for the motion.

KEY, C. J. This is a motion to affirm on certificate, and it must be overruled because the transcript which accompanies the motion does not contain a copy of the judgment which the motion seeks to have affirmed. In *House v. Williams*, 40 Tex. 351, and *H. & T. C. Ry. Co. v. Greenwood*, 40 Tex. 362, it was held that in order to confer jurisdiction and authorize an affirmance on certificate by that court, it was necessary that the transcript which accompanied the motion to affirm should contain a copy of the judgment and appeal bond; and in *Supreme Council v. Anderson*, 36 Tex. Civ. App. 615, 83 S. W. 208, this court made the same ruling, and overruled a motion to affirm on certificate because the transcript did not contain a copy of the judgment. Following the cases cited, the motion asking for an affirmance on certificate is overruled.

Motion overruled.

# FT. WORTH & R. G. RY. CO. v. JONAS. (No. 5304.)

(Court of Civil Appeals of Texas. Austin.  
March 4, 1914. Rehearing De-  
nied April 29, 1914.)

## TRIAL (§ 260\*)—INSTRUCTIONS.

Where the charge given did not clearly and specifically present a defense, the denial of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

two special charges, either of which would have supplied the omission, is erroneous, though only one of them need have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from McCulloch County Court; Harvey Walker, Judge.

Action by J. M. Jonas against the Ft. Worth & Rio Grande Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Andrews, Ball & Streetman, of Houston, Harris & Harris, of Ballinger, and Wright, Wynn & Harris, of San Angelo, for appellant. Shropshire & House, of Brady, for appellee.

KEY, C. J. This is a suit for damages caused by fire, which resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

Overruling all others, we sustain the second and fourth assignments of error. One of the defenses relied upon was the contention that at the time in question the engine from which the sparks escaped which were alleged to have caused the fire was equipped with the most approved appliances in use to prevent the escape of fire, that the same were in good repair, and that the engine was being carefully and skillfully handled. The court instructed the jury that, if the defendant was not guilty of negligence on the occasion in question, to return a verdict for it, but did not apply that defense as specifically and clearly as appellant had the right to have done. Two charges were asked upon that subject, either of which would have supplied the omission in the court's charge, and the refusal to give those charges is made the subject-matter of the second and fourth assignments. It was not necessary to give both of the refused charges; but one of them should have been given. *Railway Co. v. Shlieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; *Railway Co. v. Johnson*, 98 Tex. 76, 81 S. W. 4; *Railway Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. 237.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### INTERNATIONAL & G. N. RY. CO. v. LEUSCHNER. (No. 5314.)

(Court of Civil Appeals of Texas. Austin. March 11, 1914. Rehearing Denied April 29, 1914.)

#### 1. RAILROADS (§ 411\*)—INJURIES TO STOCK—NEGLIGENCE.

Where an animal is killed on the track at a point where a railroad company is not required to fence its tracks, as within the depot grounds, the owner must show negligence by the company in order to recover therefor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

#### 2. RAILROADS (§ 425\*)—INJURIES TO STOCK—PROXIMATE CAUSE.

The railroad company's negligence must be the proximate cause of injury to stock on the track, to entitle the owner to recover therefor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1527-1533; Dec. Dig. § 425.\*]

#### 3. RAILROADS (§ 443\*)—INJURIES TO STOCK—ACTION—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in an action against a railroad company for injury to the stock on the track, held to show that the trainmen were not negligent in failing to blow the whistle or sound the bell or keep a lookout.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

#### 4. RAILROADS (§ 441\*)—INJURIES TO STOCK—BURDEN OF PROOF—NEGLIGENCE.

The burden is on the owner to show negligence by the trainmen resulting in injury to stock on the track, and not on the railroad to introduce evidence of exoneration.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Action by J. G. Leuschner against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Neff & Taylor, of Waco, for appellant. T. B. Bartlett and Prentice Oltorf, both of Marlin, for appellee.

RICE, J. Appellee's mule was killed by appellant's north-bound train on the early morning of September 27, 1912, at Otto, and this action is brought to recover damages therefor, alleging negligence on the part of appellant in the failure to blow the whistle or sound the bell at the time the mule was killed, notwithstanding the same was seen by its engineer in time to have prevented the injury. He also charged the failure on the part of appellant to fence its track at said point, and that the train was running at a high rate of speed when the animal was struck; that the engineer failed to keep a lookout, notwithstanding animals were in the habit of grazing at said point, which fact was alleged to have been known to appellant's operatives. Appellant answered by general exception, general denial, and specially that the place where the animal was killed was within the depot grounds, switch limits, switch tracks and yards, and at a public crossing in the town of Otto, where it could not fence its track without imperiling the lives of its employees, and at a place where it was not required to fence its right of way. A jury trial resulted in a verdict and judgment for appellee, from which this appeal is taken.

At the conclusion of the evidence appellant moved the court to peremptorily instruct the jury to return a verdict in its behalf, which was refused, and upon which error is assigned. The evidence shows that the ani-



mal was struck by the early morning train passing north through the town. There was no evidence in behalf of the plaintiff showing the circumstances under which the animal was struck; but, on the contrary, appellant's evidence showed that the animal was killed within the depot grounds at Otto, about midway of the switch limits, and at a point where the company was not required to fence its track. The fireman testified that: "We whistled for the road crossing about 500 or 600 yards south of the depot, and gave the station whistle about 300 or 400 yards from the depot and rung the bell. The mule suddenly stood in front of the train on the track. I halloosed to the engineer that there was a mule on the track, but we could not stop. We tried to stop; we turned on the air and whistled. We struck the mule on the crossing and knocked it off. When I first saw the mule he was coming on the track on the crossing; it was not possible to stop the train—we tried. The engineer sounded the whistle; I rung the bell from the time we whistled to the station. The headlight was burning; it was about half daylight and half dark. We were going between 25 and 30 miles an hour."

Garner, the engineer, testified that he remembered the occasion when the mule was killed; "that the mule suddenly appeared on the track and the fireman halloosed, 'Uncle Joe! There is a mule on the track.' I was very close to him before I saw him. I had begun to stop for the station; I tried to stop; could not scare him off. I blew the proper signal. I saw the mule first before the fireman. The fireman had been ringing the bell; I applied the emergency brake and whistled. When I saw the mule, we were not over 20 feet away."

There was no evidence showing or tending to show that they, or either of them, had ever seen animals there before, or knew that animals were in the habit of grazing at said point.

[1, 2] Where an animal is killed at a point where the company is not required to fence its track (as in the present case) it then devolves upon the owner to show negligence on the part of the company before he will be entitled to recover, and that such negligence was the proximate cause of the injury. See *I. & G. N. Ry. Co. v. Bandy*, 163 S. W. 341; *Ry. Co. v. Bennett*, 126 S. W. 607; *Ry. Co. v. Graham*, 155 S. W. 653; *Ry. Co. v. Bailey*, 150 S. W. 962; *Ry. Co. v. Conley*, 142 S. W. 36; *Ry. Co. v. Anson*, 101 Tex. 198, 105 S. W. 989; *Ry. Co. v. Matthews Bros.*, 158 S. W. 1048.

[3, 4] In the instant case, appellee has failed to meet this burden; but, on the contrary, the company has completely exonerated itself from blame by showing, as it has done, that it was not negligent in the respects charged, which it was not required to

do under the circumstances. It is said in 2 Wharton on Evidence, § 1268, that "the defendant is not called on to bring evidence of exoneration until the plaintiff has made a prima facie case."

We think the court erred in refusing to instruct a verdict in behalf of appellant, as requested, on the ground that the evidence wholly failed to show liability on its part; and, since the case appears to have been fully developed, it becomes our duty to render such judgment as the trial court should have done, for which reason we reverse the judgment of the court below, and here render the same in favor of appellant.

Reversed and rendered.

# ELIAS v. MISSOURI, K. & T. RY. CO. OF TEXAS et al. (No. 5,316.)

(Court of Civil Appeals of Texas. Austin. March 11, 1914. Rehearing Denied April 29, 1914.)

## 1. CARRIERS (§ 94\*)—CARRIAGE OF GOODS—ACTIONS—BURDEN OF PROOF.

In an action against a railroad company for converting a car load of cotton seed, plaintiff was entitled to recover, where he showed a delivery to the railroad company, unless it appeared that the shipment had been delivered to the consignee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

## 2. EVIDENCE (§ 354\*)—PRIVATE WRITINGS—BOOKS AND ACCOUNTS.

Where plaintiff, a ginner, produced all of the written slips and accounts kept by him and his clerk at his gin and constituting all the bookkeeping necessary in his business, and showed that such bookkeeping was regularly kept, and the entries regularly made, the court erred in admitting only such of the documents as were made by plaintiff, excluding those made by the clerk.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.\*]

## 3. CARRIERS (§ 94\*)—CARRIAGE OF GOODS—ACTIONS—EVIDENCE.

In an action against a railroad company for converting a shipment of 63,478 pounds of cotton seed, evidence that plaintiff, a ginner, had purchased 65,000 pounds in excess of the amount shipped out and sold, excluding the shipment involved, was admissible to support his claim that such shipment was delivered to the railroad company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

Appeal from Bastrop County Court; J. B. Price, Judge.

Action by A. M. Elias against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

S. L. Staples, of Smithville, and N. A. Rector, of Austin, for appellant. Orgain & Maynard and Page & Jones, all of Bastrop, for appellees.

KEY, C. J. The following is conceded to be a correct statement of the nature and re-

suit of this suit, contained in appellant's brief: "This suit was instituted in the county court of Bastrop county by appellant against the Missouri, Kansas & Texas Railway Company of Texas, and the Smithville Oilmill Company, a private corporation, located in Smithville, Bastrop county, Tex. The petition alleged that appellant, who resided at Primm, a station on the line of the defendant railway company, in Fayette county, on or about the 22d day of October, 1911, loaded one of defendant's freight cars with 63,478 pounds of cotton seed, which was of the value of \$533.50, to be transported by the defendant railway company from Primm, in Fayette county, to Smithville, in Bastrop county, and to be delivered by it to the defendant the Smithville Oilmill Company, to which latter company the plaintiff had already sold said seed for said sum of \$533.50, to be paid to appellant upon the delivery of said seed in the yard of said oilmill company, and after the same had been weighed. The petition further alleged that there was no agent or depot building at the town of Primm, but that for a number of years the railway company, when any freight of cotton, cotton seed, wood, or any kind of freight was to be shipped from said station to any other point, would leave empty cars at said station to be loaded by its freight patrons, who, in turn, would notify the station agent at Smithville that said cars had been loaded for shipment, and thereupon the trainmen of said railway company would stop at said station and take said car on its passing train to the point designated; and that this custom had existed for a number of years, and had been adopted by the railway company for its own convenience and that of its customers; that, when said car mentioned was loaded with cotton seed, the agent at Smithville was notified of that fact, and that its destination was the Smithville Oilmill Company at Smithville, Tex.; that, in pursuance of said notice, on or about said October 22d, one of defendant's trains, in passing Primm station, hitched on to said car of cotton seed, and hauled the same away from said Primm station, and carelessly and negligently refused and failed to deliver the same to said Smithville Oilmill Company, or destroyed or converted the same to its own use, and was therefore liable to plaintiff for the value of said cotton seed. And, in the alternative, the petition alleged that, if the defendant railway company did, in fact, deliver said car of cotton seed to the defendant the Smithville Oilmill Company, then that the defendant Smithville Oilmill Company had converted said cotton seed to its own use, and has refused to pay to appellant the value of said cotton seed, the sum of \$533.50; that both defendants have refused to pay plaintiff said sum of money, to plaintiff's damage the value of said cotton seed. The defendant railway company answered by demurrer and special exceptions (which were

not presented), and also by general denial. The defendant oilmill company answered by general demurrer (which was not presented) and by general denial. The case was tried before the court without a jury, and judgment rendered that plaintiff take nothing by his suit, and that defendants recover all costs by them respectively incurred. Appellant filed his motion for new trial, which was overruled, to which he excepted, and gave notice of appeal to this court, and presents this cause for reversal upon the following assignments of error, which errors were called to the court's attention in his motion for a new trial."

To that statement counsel for appellee railway company merely add that no request was made of the court to file conclusions of fact and law; and we add that none were filed.

#### Opinion.

[1] Under the first and second assignments of error appellant contends that the judgment of the court is contrary to, and not supported by, the testimony, and we sustain that contention. We do not care to discuss the evidence in detail, and deem it sufficient to say that it shows with reasonable certainty that the car load of cotton seed referred to was delivered to and received by the railway company; and, such being the case, appellant was entitled to a judgment against the railway company, unless it was made to appear that that defendant had delivered the cotton seed in question to its codefendant, the oilmill company. In any event, upon the testimony contained in the record, the plaintiff was entitled to judgment against one of the defendants, and the trial court should have determined which of the two was liable, and rendered judgment accordingly.

[2, 3] We also sustain the third assignment, and hold that the court committed error when it sustained the objection urged against the testimony referred to in that assignment. The excluded testimony comprised all of the written slips, statements, and accounts kept by the plaintiff and his clerk at his gin; and, according to the bill of exception, they would have shown the entire amount of seed purchased during that season, and they constituted, in effect, all the bookkeeping that was done, and all that was necessary to be done, in the conduct of the plaintiff's business as a ginner. In other words, the bill shows that the papers referred to comprised the plaintiff's entire bookkeeping relative to purchasing, selling, and handling cotton seed for that season, and plaintiff offered to show that the bookkeeping referred to was regularly and duly kept by himself and his clerk, and that all the entries were regularly and duly made by them. The trial court ruled that the plaintiff might introduce such of the documents referred to as were made or entered by him, but excluded those made and entered by

his clerk. We think all the testimony was admissible. McKelvey on Evid. 302, and notes. According to the bill of exception, if the excluded testimony had been admitted, it would have shown that the total amount of cotton seed purchased by the plaintiff was about 65,000 pounds in excess of the amount he had shipped out and sold, excluding the car load involved in this suit, and that fact would have tended strongly to support his claim against the railway company.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

# SOUTH TEXAS MORTGAGE CO. v. COE. (No. 5273.)

(Court of Civil Appeals of Texas. Austin.  
March 11, 1914. Rehearing Denied April 29, 1914.)

## 1. CONTRACTS (§ 94\*)—RESCISSION FOR FRAUD. Fraud is ground for rescinding a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.\*]

## 2. CONTRACTS (§ 94\*)—RESCISSION—FRAUD.

A verbal promise to do something in the future, which is a material inducement to the execution of a contract, and is relied upon by the promisee, is fraud, authorizing the rescission of the contract, if the promisor had no intention of fulfilling the promise when it was made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.\*]

## 3. EVIDENCE (§ 434\*)—RESCISSION—FRAUD.

Fraudulent representations need not be embodied in the contract in order to be ground for rescission, notwithstanding that oral evidence is not admissible to vary the terms of a writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.\*]

## 4. EVIDENCE (§ 441\*)—PAROL EVIDENCE VARYING CONTRACT—EXCEPTIONS TO RULE.

It is presumed that a written contract embodied the whole contract, and previous statements or representations of the parties cannot be brought into the contract by parol evidence, except where the contract consisted of distinct parts, only part of which was reduced to writing, or something was omitted by fraud, accident, or mistake, in which cases parol evidence is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

## 5. VENDOR AND PURCHASER (§ 214\*)—LIABILITY OF ASSIGNEE.

The assignee of a land contract is not responsible for the promise of the vendor to the purchaser, unless it contracted to become so.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 442-448; Dec. Dig. § 214.\*]

## 6. CONTRACTS (§ 174\*)—"EXCEPTION."

An exception is intended to take out of the contract that which would have been included in it but for the exception.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 765; Dec. Dig. § 174.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 8, p. 7656.]

## 7. VENDOR AND PURCHASER (§ 50\*)—CONSTRUCTION OF CONTRACT—DUTIES OF VENDOR.

A provision of a land contract that the vendor will not be responsible for any statements made regarding its property, except as stated in its printed literature or letters signed by its officers, left its liability for representations not contained in the contract the same as if the provision had not been inserted, so that it would not be bound to open and macadamize a certain street, though its printed advertisement stated that it would do so.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 81; Dec. Dig. § 50.\*]

Appeal from District Court, Bell County; John D. Robinson, Judge.

Suit by M. Coe against the South Texas Mortgage Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Lockett and A. M. John, both of Houston, and M. E. Monteith, of Belton, for appellant. Jno. B. Daniel, of Temple, for appellee.

## Findings of Fact.

JENKINS, J. The Western Land Corporation was incorporated in 1907, with an authorized capital of \$100,000, which was later increased to \$500,000. In January, 1911, \$377,000 of its capital stock had been paid up. The South Texas Mortgage Company was incorporated January, 1911, with an authorized capital of \$300,000, of which \$285,000 was paid up. Some, though not all, of the incorporators of the South Texas Mortgage Company had been associated with the Western Land Corporation. Prior to May, 1910, the Western Land Corporation had purchased a tract of land adjoining the city of Temple, and had laid the same off as an addition to Temple, known as the Laurel Heights addition. It entered into an agreement with appellee to sell to him certain lots in said addition, which agreement was evidenced by the following instruments:

### "Agreement for Purchase of Lots in Laurel Heights, Temple, Texas.

"I hereby agree to purchase from the Western Land Corporation, subject to conditions on back hereof, lot No. 10, block No. 8, price \$440.00, lot No. 11, block No. 8, price \$340.00, as shown on their plat of Laurel Heights, an addition to the city of Temple, Texas, and agree to pay therefor the total sum of \$780 as follows: \$50.00 in cash with this application, and \$20.00 on the 7th day of each succeeding month until the contract has been paid in full. The conditions on back of this application are hereby made a part of this contract. Name, M. Coe. Street. City of Gatesville, County Coryell, State of Texas.

"Date, May 7, 1910.

"I hereby certify that the purchaser signed this application.

"Salesman, E. J. Terral.

"No. 23."

**Back of contract:****"Conditions.**

"(1) The Western Land Corporation agrees to charge me no interest on deferred payments under this contract.

"(2) In consideration of the waiver of all interest on the installment payments as mentioned above, I hereby agree to make all payments when due, and, should I fail to pay any installment for a period of thirty days after due (except in case of illness as provided in contract), I hereby agree to forfeit all previous payments to the Western Land Corporation as rental charges for the possession of the property from the date of my contract.

"(3) The Western Land Corporation will pay all taxes on this property until my contract is completed.

"(4) In case of my death before the completion of the installment payments under this contract, and satisfactory proofs of my death having been furnished to the company by my heirs, the Western Land Corporation will deliver to my legal heirs a warranty deed and abstract of title, without further payments on their part, provided my contract is in force at the time of my death, and all payments then due have been paid. I hereby certify that I am not seriously ill on the date of this application.

"(5) Should the lots selected by me be sold when this agreement reaches the office of the Western Land Corporation, I agree to select other lots, or to allow some one to select other lots for me, and allow this payment to apply thereon.

"(6) The Western Land Corporation will not be responsible for any statements made regarding its properties, except as stated in its printed literature or in letters signed by its officers.

"(7) Our salesmen are only authorized to collect the first payment on each lot, and all further payments must be made directly to the office of the company, except at the risk of the purchaser."

The Western Land Corporation executed and delivered to appellee its contract for deed, which reads as follows:

**"Contract for Deed.**

"Know all men by these presents: That the Western Land Corporation, a corporation created and existing under the laws of the state of Texas, with its principal offices and place of business in the city of Houston, county of Harris, in said state.

"For and in consideration of the sum of \$50, to them in hand paid by M. Coe, of Gatesville, Texas, the receipt whereof is hereby acknowledged, and the agreement on his part to pay a further sum of \$20 on the 7th day of each succeeding month until a total sum of \$780 has been paid, the Western Land Corporation agrees that, upon the payment

of the said sum of \$780 in the manner and at the time above stated, they will execute and deliver to the said M. Coe a good and sufficient warranty deed and abstract of title to lot No. 10, block No. 8, size 50x140 feet, lot No. 11, block No. 8, size 50x140 feet in Laurel Heights, an addition to the city of Temple, Texas, as shown by the map thereof, which is recorded in the office of the county clerk of Bell county, in the state of Texas.

"The purchaser above named is entitled to the following benefits under this contract according to the conditions named herein:

"(1) Should the above-named purchaser die before the installment payments herein mentioned are completed, the Western Land Corporation will, upon the receipt of satisfactory proof of death, deliver to the legal heirs of the purchaser, without further payments, a warranty deed and abstract of title, provided that at the time of purchaser's death said purchaser is then the owner of this property, and all payments due up to that time shall have been paid. Should purchaser be seriously ill at time of signing application for purchase, this clause shall not be binding upon this company.

"(2) The Western Land Corporation agrees to pay all state and county taxes on this property until the installment payments are completed.

"(3) The Western Land Corporation agrees to carry this contract in full force for thirty days after payment is due, and in case of illness will carry this contract for six months on certificate from practicing physician and the payment of a fee of 50 cents per month on each lot.

"(4) The Western Land Corporation will not charge any interest on the deferred payments under this contract.

"(5) In accordance with agreement signed on the 7th day of May, 1910, by the purchaser above named, which agreement is made a part hereof, the said purchaser agrees, in consideration of the waiver of all interest charges on the deferred payments, that he will make all installment payments when due, and, should default be made in the payment of any installment for a period of thirty days after due, except in case of illness, as stated in clause 3, then all previous payments shall be forfeited to the Western Land Corporation as rental charges for the possession of above-named property from date of this contract, and this contract for deed shall be null and void thenceforth. The above-named purchaser shall in that event be likewise relieved from all responsibility under this contract.

"In witness whereof, the said the Western Land Corporation has caused these presents to be signed by its president, and its corporate seal to be affixed and attested by its secretary, this the 12th day of May, A. D. 1910.

C. S. Woods, President. [Seal.]

"J. F. Minton, Secretary. [Seal.]

"[Seal of the Western Land Corporation.]"

Subsequent to the execution of said contract the South Texas Mortgage Company purchased from the Western Land Corporation the land comprising said Laurel Heights addition, and assumed all of its written contracts in relation thereto. Subsequent to such purchase appellee filed suit against appellant, alleging, among other things, that, as an inducement for him to enter into the contract with the Western Land Corporation for the purchase of said lots, it promised that it would, at the earliest possible moment, and at its own cost and expense, open Sixth street of the city of Temple from its then terminus, and would macadamize same to and through said addition. Prior to the sale to appellee, the Western Land Corporation had advertised in a Temple paper that it would open and macadamize Sixth street, as alleged by appellee. Appellee had read this advertisement, and relied on said promise. The opening of said street and macadamizing same would have materially enhanced the value of the lots contracted for by appellee, and, but for the representation that the same would be opened and macadamized in a reasonable time, appellee would not have entered into the contract to purchase said lots.

There is a tract of land between the terminus of Sixth street and Laurel Heights addition, which neither the Western Land Corporation nor the appellant have ever owned. Sixth street has never been opened through said tract of land, and no part of Sixth street in Laurel Heights addition has been macadamized.

The jury found that the Western Land Corporation never at any time intended to comply with its promise to open and grade Sixth street, and the evidence is sufficient to sustain this finding. The Southern Mortgage Company knew, at the time it took over Laurel Heights, that the Western Land Corporation had advertised that it would open and macadamize Sixth street.

Appellee complied with his contract until he had paid the sum of \$370 on said contract, when he refused to make any further payments, unless appellant would open and grade Sixth street, and, upon its failure to do so, elected to treat said contract as forfeited, and filed this suit to rescind said contract and recover the money so paid by him, with legal interest thereon. Judgment was rendered in accordance with said prayer.

There were other allegations as to failure to grade streets and put down cement sidewalks, upon which the evidence is not so strong in appellee's favor. Also an allegation as to said Laurel Heights being incumbered with mortgages, which under the evidence we deem immaterial.

#### Opinion.

[1-3] Fraud is ground for the rescission of a contract. *Robinson v. Dickey*, 86 S. W. 500; 6 Cyc. 286. A verbal promise to do

something in the future, which is a material inducement to the contract, and which is relied upon by the promisee, that the promisor had no intention of fulfilling at the time he made the same, is fraud in law, and is sufficient grounds for the rescission of the contract. *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *Touchstone v. Staggs*, 39 S. W. 189; *Hodsden v. Hodsden*, 69 Minn. 486, 72 N. W. 562; *Read v. Chambers*, 45 S. W. 742. Fraudulent representations or promises, in order to furnish grounds for rescission, need not be embodied in the contract. *Ranger v. Hearne*, 41 Tex. 260; *Henderson v. Railway Co.*, 17 Tex. 576, 67 Am. Dec. 675; *Davis v. Driscoll*, 22 Tex. Civ. App. 15, 16, 54 S. W. 44.

[4] This does not contravene the rule that oral evidence is not admissible to vary the terms of a written instrument. When a contract has been reduced to writing, it is presumed that it embodies the entire contract between the parties, and no previous statements, representations, or promises of the parties thereto will be permitted to be read therein by oral testimony as a part of the contract. *Wooters v. Railway Co.*, 54 Tex. 294; *Davis v. Driscoll*, *supra*. The only exceptions to this rule are where the contract was in separate and distinct parts, and only a part thereof was reduced to writing (*Rubrecht v. Powers*, 1 Tex. Civ. App. 285, 21 S. W. 320), or where something which was intended to be inserted in the written contract was omitted by fraud, accident, or mistake (*Bruner Bros. v. Strong*, 61 Tex. 557). With the exceptions above stated, fraudulent representations or promises not embodied in a written contract, though they may be sufficient to furnish grounds for a rescission of the same, do not become a part thereof.

[5] This distinction is important in the instant case. This suit is not against the Western Land Corporation, which made the alleged fraudulent promise, but against the assignee of that corporation. The appellant is not responsible for the promises of the Western Land Corporation, unless it contracted to become so. It contracted to become responsible for the *written* contracts of the Western Land Corporation, but none other.

This brings us to the crucial point in this case, viz.: Was the agreement on the part of the Western Land Corporation to open and macadamize Sixth street a part of its *written* contract with appellee? Sixth street is not mentioned in either of the two instruments hereinbefore set out, and which together constitute the contract with appellee. The sixth clause of appellee's agreement to purchase reads as follows: "The Western Land Corporation will not be responsible for any statements made regarding its properties, except as stated in its printed literature or letters signed by its officers." The fifth paragraph of the agreement to sell makes the agreement to purchase a part thereof. The

printed advertisement of the Western Land Corporation contained the statement that it would open up and macadamize Sixth street. It is the contention of appellee that said sixth clause of his agreement to purchase had the effect to read into and make a part of the written contract all of the material representations and promises made by the Western Land Corporation in its printed advertisements as fully as if the same had been specially set forth in such written contract. In other words, that the Western Land Corporation, in effect, promised *in writing* in said contract that it would be responsible for all statements regarding its properties made in its printed advertisements, and that being "responsible" for promises so made meant that it would fulfill such promises. If this contention is correct, the judgment of the trial court should be affirmed, if no other error appears of record; but, if not, the judgment should be reversed.

As we have seen, if the sixth clause, above set out, was omitted from the contract, the promise of the Western Land Corporation made in its printed literature, though fraudulent, and therefore grounds for rescission as against said corporation, would not have constituted a part of the written contract, and oral evidence would not have been admissible to incorporate them in and make them a part of the written contract. What was in the minds of the parties in inserting the sixth clause? What was its purpose? Had this sixth clause been omitted, the Western Land Corporation would have been responsible for all fraudulent statements made by it or its agents acting within the apparent scope of their authority. The Western Land Corporation had the right to contract with appellee that it would not be responsible for any such statements, in which event such prior statements, whether printed or oral, made by itself or its agents, would have been no defense to the enforcement of the written contract, nor would they have furnished any grounds for its rescission. This assumes, of course, that appellee willingly and knowingly contracted to waive his right to set up such previous statements in avoidance of the contract. Leaving off the exception in said clause, this is just what appellee contracted to do. Without such exception, the clause reads: "The Western Land Corporation will not be responsible for any statements made regarding its properties."

[8] It is not the office of an exception to create a contract, but to take out of a contract that which, but for such exception, would have been included in it. *Austin v. Willis*, 90 Ala. 421, 8 South. 95; *Railway Co.*

*v. Robeson*, 27 N. C. 393; *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 548. "An exception exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or an enactment something which would otherwise be a part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse." *Friedman Co. v. Assurance Co.*, 133 Mich. 212, 94 N. W. 761.

[7] The exception in the sixth clause is, as to the matter therein referred to, as though said sixth clause had not been written in the contract. If it had not been written in the contract, the promises contained in the printed literature, but not embodied in the written contract, would not have been a part of the written contract. We think the evident purpose of said sixth clause was to relieve the Western Land Corporation against any alleged verbal representations, but to leave its legal responsibility just as it was without said clause. The opposite theory is plausible at first blush; but we do not think it is sound.

For the reason that we do not think that the promise to open and macadamize Sixth street was a part of the written contract, we reverse the judgment of the trial court and here render judgment for appellant.

We here take occasion to commend the attorneys for appellant for fairly stating every fact appearing in the record against their assignments of error and propositions thereunder, as required by rule 31 for the Courts of Civil Appeals. While this rule is not often flagrantly violated, it is not always complied with as fully as it should be.

Reversed and rendered.

#### SOUTH TEXAS MORTGAGE CO. v. ERWIN. (No. 5339.)

(Court of Civil Appeals of Texas. Austin. March 11, 1914.)

Appeal from District Court, Bell County; John D. Robinson, Judge.

Action between the South Texas Mortgage Company and J. R. Erwin. From a judgment in favor of Erwin, the Company appeals. Reversed and rendered.

M. E. Monteith, of Belton, and A. M. John and J. W. Lockett, both of Houston, for appellant. John B. Daniel, of Temple, for appellee.

JENKINS, J. This is a companion case to No. 5273, *South Texas Mortgage Company v. Coe*, 166 S. W. 419, this day decided by this court. For the reasons stated in said opinion, the judgment of the trial court in this case is reversed, and judgment is here rendered for appellant.

Reversed and rendered.

**EDWARDS v. OLD SETTLERS' ASS'N.**  
(No. 5318.)

(Court of Civil Appeals of Texas. Austin.  
March 25, 1914. Rehearing Denied  
April 29, 1914.)

**1. FRAUDS, STATUTE OF (§ 149\*)—INTEREST IN LAND—LEASE.**

In a lessee's action to enjoin interference with its exclusive and quiet enjoyment of the premises, allegations of payment to the lessor according to contract, delivery of possession, and permanent and valuable improvements were all that was necessary to take the verbal lease out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 359; Dec. Dig. § 149.\*]

**2. MONOPOLIES (§ 12\*)—CONSPIRACIES AGAINST TRADE—AGREEMENT IN LEASE.**

A lessor's agreement that he would not allow any cold drink stands, shows, exhibitions, dance halls, or platforms on the land he owned within 400 yards of the leased land, or allow any use of such contiguous land antagonistic to the lessee's purpose and welfare, did not violate Rev. St. 1911, arts. 7796-7809, defining and prohibiting trusts, monopolies, and conspiracies against trade.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 10; Dec. Dig. § 12.\*]

**3. ASSOCIATIONS (§ 15\*)—LEASEHOLD PROPERTY—RIGHTS OF MEMBERS.**

A lease to an unincorporated association which could not own a leasehold estate would not, for that reason, fail for want of a grantee, as the title would vest in its members.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 19-25; Dec. Dig. § 15.\*]

**4. FRAUDS, STATUTE OF (§ 129\*)—VERBAL LEASE—IMPROVEMENTS.**

Under the rule that, to take a verbal lease out of the statute of frauds, the improvements relied upon by the lessee must have been made during the lifetime of the lessor, improvements by an unincorporated association under a verbal lease made February, 1911, by beginning of work on a dam and a tabernacle, and on a spring, within a few months, and before lessor died, were sufficient, even though no part of such improvements was completed during the lifetime of the lessor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

**5. FRAUDS, STATUTE OF (§ 144\*)—VERBAL LEASE—RATIFICATION.**

Where a landowner made a verbal lease and died before the lessee made the agreed improvements required to take the contract out of the statute of frauds, his widow, by permitting permanent and valuable improvements to be completed, and accepting the fixed annual rent for two years, and selling other land subject to such lease, thereby ratified such verbal lease, and made it binding upon herself.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 351; Dec. Dig. § 144.\*]

**6. FRAUDS, STATUTE OF (§ 125\*)—EFFECT—CONTRACT.**

A contract is not unlawful because not in compliance with the statute of frauds, as the statute presupposes its legality, the enforcement of which is only suspended until the provisions of the statute are satisfied.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 275-277½; Dec. Dig. § 125.\*]

**7. FRAUDS, STATUTE OF (§ 152\*)—CONTRACT—PLEADING—DEFENSE.**

The statute of frauds must be pleaded when relied upon to defeat a contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 363-366, 371, 372; Dec. Dig. § 152.\*]

**8. ASSOCIATIONS (§ 24\*)—INCORPORATION OF ASSOCIATION—PROPERTY.**

While the incorporation of a voluntary association does not of itself constitute the corporation the owner of the association's property, yet, when such property is paid for with money derived from the sale of stock in, and is held in trust for, the contemplated corporation, delivery of possession to it when formed vests it with at least the equitable title to the property.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 45; Dec. Dig. § 24.\*]

**9. FRAUDS, STATUTE OF (§ 158\*)—ORAL LEASE—PART PERFORMANCE—SUFFICIENCY.**

Where an oral lease was made under which the lessee went into possession and made valuable improvements, the fact that it was agreed that the lease should be reduced to writing does not conclusively show that the improvements were made on the faith of the promised written lease, and not on the strength of the oral one.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. § 158.\*]

**10. EVIDENCE (§ 165\*)—PAROL EVIDENCE—CONTRACT.**

When the terms of an agreement are reduced to writing and signed by the parties, the writing is merely the evidence by which the contract can be proved, and, in the absence of fraud, accident, or mistake, is the best evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 548-555; Dec. Dig. § 165.\*]

**11. EVIDENCE (§ 121\*)—ADMISSIBILITY—RES GESTÆ.**

In a lessee's action for an injunction, statements of the lessor as to leasing the premises and delivering possession in so far as *res gestæ* as to delivery of possession were admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.\*]

**12. EVIDENCE (§ 229\*)—HEARSAY—DECLARATIONS AGAINST INTEREST.**

In such case the lessor's declarations against interest were admissible against defendant, who claimed under him with full notice that plaintiff was in possession claiming under a lease.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 822-834; Dec. Dig. § 229.\*]

**13. WITNESSES (§ 163\*)—DECLARATIONS OF DECEDENT.**

Such declarations were not objectionable as the declarations of a deceased party, where the suit was not against the heirs or executors of the lessor, and where neither of the witnesses were parties thereto.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 670; Dec. Dig. § 163.\*]

**14. EVIDENCE (§ 157\*)—BEST AND SECONDARY EVIDENCE—CONTRACT.**

A promise to execute a written lease, which lease was drawn and delivered to the lessor, who promised to sign it, but who did not do so, was not the best evidence of the terms of a previous verbal lease, followed by delivery of possession, payment of rent, and permanent improvements.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460-470; Dec. Dig. § 157.\*]

**15. WITNESSES (§ 255\*)—CONTRACT—MEMORANDUM TO REFRESH MEMORY.**

In such case it was permissible for the draftsman to use it as a memorandum to refresh his memory.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

**16. FRAUDS, STATUTE OF (§ 129\*)—VERBAL LEASE—IMPROVEMENTS.**

In considering improvements which would take a verbal lease with delivery of possession out of the statute, a dam for the construction of which the lessee had agreed to pay a part, and which, though not on the land leased, created a lake thereon, used for irrigation purposes, and a valuable and permanent improvement, was properly included.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 803, 806-808, 811, 814, 818-820, 822, 825, 826; Dec. Dig. § 129.\*]

Appeal from District Court, Williamson County; C. A. Wilcox, Judge.

Action for injunction by the Old Settlers' Association against W. W. Edwards. Judgment for plaintiff, and defendant appeals. Affirmed.

Lightfoot, Brady & Robertson, of Austin, for appellant. John D. Hudson, Richard Critz, Sansom & Metcalfe, and Wilcox & Graves, all of Georgetown, for appellee.

**Findings of Fact.**

JENKINS, J. We adopt the following findings of fact made by the trial judge herein:

"I find that the plaintiff is a corporation duly incorporated under and by virtue of the laws of the state of Texas, and that the defendant resides in Williamson county, Tex.

"I find further that about the 3d day of February, 1911, one G. W. Glasscock, now deceased, made and entered into a verbal contract with F. W. Carothers and W. K. Makemson, and also with the Old Settlers' Association of Williamson county, Tex., then unincorporated, by the terms of which contract the said G. W. Glasscock agreed to and did lease to the said Carothers and Makemson, and to the Old Settlers' Association, unincorporated, the following described tract of land:

"Lying and being situated in Williamson county, Tex., beginning at the north bank of the San Gabriel river, at a stake from which a water elm bears S. 60 E. 18 feet; thence N. 30 W. with the general line of a fence 525 feet to corner; thence S. 61 W. with a fence line 220 feet; thence S. 54 W. with fence line 1,217 feet; thence S. 37½ W. 233 feet to a fence; thence S. 32 E. with a fence line 360 feet to a stake; thence S. 55½ W. with fence line to a point 13 feet S. of the N. line of the street in North Georgetown; thence S. 400 feet to a stake; thence S. 35 feet to a large rock in the south edge of the north San Gabriel river; thence down said south edge of said North San Gabriel river to its junction with the South San Gabriel river; thence with the south bank of the

San Gabriel river to a point opposite the mouth of Glasscock's old millrace; thence across said stream at a right angle to a point on the north bank of said stream; thence up the north bank of said stream to the place of beginning; and containing 33 acres of land, more or less, and being what is known as the Old Settlers' Grounds near the city of Georgetown, in Williamson county, Tex., and that in addition to said lease that said lease included a 'right of way from the north end of the causeway just north of the above-described premises, across said river, said right of way leading from the north end of said causeway along the north bank of said river so as to lead into the above-described 33-acre tract of leased land.

"I find that by the terms of said lease it was agreed about said above-named date that the said Glasscock should receive annual rental for the said premises of \$150 per year, due and payable on the 1st day of January, at the close of each year, and that the said Glasscock reserved the right to gather all pecans for his own use on said premises, and further that he reserved the right to get sand and gravel on said premises, and fill all excavations where such sand and gravel is taken, and water for irrigation, domestic, and stock purposes; and I find, further, that the said Glasscock owned the surrounding lands contiguous to said tract, afterwards sold to the defendant herein, and that he agreed as a part of the consideration for said lease, that he would not allow any cold drink stands, shows, exhibitions, dance halls, or platforms on the land he owned within 400 yards of the above-leased land, or allow the use of said contiguous land within 400 yards of said premises for any purpose or pursuit that would come into competition with or antagonize the purpose and welfare of the said Old Settlers' Association.

"I also find that it was agreed by and between the said G. W. Glasscock and the said Carothers and Makemson and the said Old Settlers' Association, then unincorporated, that the said Old Settlers' Association should thereafter be incorporated under and by virtue of the laws of the state of Texas, and that said lease above named was made for the use and benefit of said Old Settlers' Association, then unincorporated, and that the agreement or contract between the said Glasscock and the said Carothers and Makemson and the said Old Settlers' Association, unincorporated, was that said Old Settlers' Association should thereafter be incorporated, and that said lease was made for the use and benefit of said Old Settlers' Association, unincorporated, at that time, and that, when said Old Settlers' Association should be incorporated, that said corporation should be the owner of said lease, and should be subrogated to all the rights and equities then owned or held by the said Carothers

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and Makemson and the said Old Settlers' Association, unincorporated, and each and all of them, that said lease was to begin on the 3d day of February, 1911, and was to continue for and during a period of 15 years from said date; and it was also agreed that said lease was to carry with it the right of exclusive possession, use, and control in the plaintiff herein and the Old Settlers' Association, unincorporated, and also the right of exclusive use and control during all of said lease, subject to the foregoing exceptions.

"I further find that it was agreed, as a part of the consideration for the making of the said lease above named, that the said Old Settlers' Association should build a tabernacle, and in connection with Williamson county, build a dam or causeway across said river so as to make a lake of water within the boundaries of said leased land, and said causeway to also be used as a public roadway; and it was also agreed that certain improvements were to be made to the springs on said land, and such other improvements as should be necessary for the use and occupancy of said land by said Old Settlers' Association.

"I further find that, in pursuance of said agreement, the said G. W. Glasscock did deliver actual and open possession and control of said premises to said Old Settlers' Association of Williamson county, then unincorporated, and that, in pursuance of said agreement, the said Old Settlers' Association remained in such possession and control until it was duly and legally incorporated under the laws of this state on the 3d day of May, 1912, for the purpose of education, etc., and that upon its incorporation said actual, open, and exclusive possession of said premises vested and continued in said corporation, that said corporation was subrogated to all the rights, privileges, and equities theretofore owned or held by said Carothers and Makemson and the Old Settlers' Association of Williamson county, unincorporated, and that it has since said date been in open, exclusive possession of said premises under said lease.

"I further find that, after entering into said lease, the said G. W. Glasscock died, and that, in the partition and division of said estate of the said G. W. Glasscock, the above-named premises were awarded to and set apart to his widow, Mrs. Helen Glasscock, and that on or about the 5th day of August, 1911, the said Mrs. Helen Glasscock, the then owner of said premises, accepted the first year's lease money on said premises, to wit, \$150, and that on or about the 2d day of August, 1912, she accepted the second year's lease money, \$150, and I find that said money was paid to and accepted by the said Mrs. Helen Glasscock under and by virtue of said verbal or parol contract with the said G. W. Glasscock above named, and that the said Mrs. Helen Glasscock at all times while she

owned said land recognized said contract and said lease.

"I further find that, after above-named contract was made, subscription lists were circulated for stock of plaintiff, and that the said G. W. Glasscock assisted in the circulation of said lists, and solicited subscriptions for stock, and assisted in the raising of said stock subscriptions, and that several thousand dollars were raised on said stock subscriptions; and I further find that this plaintiff and its predecessor, the Old Settlers' Association, unincorporated, in consideration of said 15-year contract and lease, made valuable improvements on said land in the shape of a large tabernacle, of the value and cost of about \$1,500, that they paid out about \$900 in the building of said causeway, and several hundred dollars in other permanent improvements on said premises, aggregating about \$3,000. I further find that the said G. W. Glasscock assisted in letting the contract for said tabernacle and causeway, and that they were nearly completed at the time of his death, and were in all things built according to contract; and I further find that under the terms of said contract of lease said improvements were to be made as part of the consideration of said lease, and were and are to be the property of the said Glasscock, his heirs and assigns, at the end of said lease; and I further find that the said improvements were made in good faith, relying on said lease, and acting strictly within the terms thereof.

"I further find that said improvements were all paid for out of the proceeds of the sale of the stock of this plaintiff corporation, and that therefore they were all paid for by this plaintiff. I further find that they are valuable and permanent improvements, and were started and nearly completed during the lifetime of the said G. W. Glasscock, with his full knowledge, consent, and approval, and erected in good faith, acting under and by virtue of the terms of said lease. I further find that they were completed with the full knowledge and consent of the said Mrs. Helen Glasscock.

"I further find that all the aforesaid payments of lease money so made by the plaintiff and its predecessor, and the improvements so placed on said premises by this plaintiff and its predecessors, were paid for and placed thereon in good faith, acting under and relying on said verbal or oral lease above named.

"I further find that after the death of the said G. W. Glasscock, and after the making of said improvements and the payment of said lease money, as above set out, that the said Mrs. Helen Glasscock conveyed the above land and the land surrounding the same then owned by her to W. W. Edwards, the defendant herein, this plaintiff at that time being in full, actual, and notorious possession and control of said 33 acres of land, leased as aforesaid,

at the time of said conveyance; and I further find that the defendant Edwards bought said land with both actual and constructive knowledge of the lease rights of this plaintiff at the time of said conveyance, and long before he purchased or contracted to purchase said land as aforesaid, and that at the time he made said contract he was told by the said Mrs. Helen Glasscock about said lease, and it was expressly understood by him that he purchased said land subject to the rights of this plaintiff under said lease.

"I further find that the plaintiff herein, under the terms of said lease, is entitled to use all dead timber for the use of campers on said premises.

"I further find that at the time of the institution of this suit, and at the time of the trial of this cause, that the defendant was disputing the lease rights of this plaintiff, and was disturbing it in its rights of exclusive possession and control of said premises, and was turning stock therein, and had torn down some of its fences, gates, and other improvements; and I further find that the purposes of this corporation are not those of profit, but education, as above set out.

"I further find that temporary injunction has heretofore been issued in the terms as set out in the judgment herein, and that said temporary injunction was necessary for the proper preservation of plaintiff's rights."

There was a judgment for appellee, and the temporary injunction was made perpetual.

#### Opinion.

[1] The court did not err in overruling appellant's general demurrer. The appellee alleged substantially the facts found by the trial court as above set out. These facts are all that is necessary to take a verbal lease out of the statute of frauds, under the decisions of this state, viz.: Payment according to contract, delivery of possession, and permanent valuable improvements. *Wallis v. Turner*, 95 S. W. 63; *Lechenger v. Bank*, 96 S. W. 640; *Bradley v. Owsley*, 74 Tex. 71, 11 S. W. 1052; *Hutcheson v. Chandler*, 47 Tex. Civ. App. 124, 104 S. W. 434; *Dixon v. McNeese*, 152 S. W. 676; *Anderson v. Anderson*, 13 Tex. Civ. App. 527, 36 S. W. 817; *Wanhacaffe v. Pontoja*, 63 S. W. 663.

The allegations as to the delivery of possession by Glasscock to the Old Settlers' Association, unincorporated, and the delivery of possession by said association to the appellee, are not as specific as they might have been; but we think they are sufficient as against a general demurrer, especially in view of the fact that the evidence fully substantiates these allegations, and there is no pretense that appellant was surprised by such evidence, or suffered any injury by reason of the vagueness of such allegations.

The special exception set out in the second assignment of error is in effect a general exception to the petition in so far as it relates

to the statute of frauds, and the same was properly overruled.

[2] The third assignment of error is to the effect that the alleged contract was void as being contrary to chapter 1 of title 130, R. S. 1911, defining and prohibiting trusts, monopolies, and conspiracies against trade. We overrule this assignment upon the authority of *Nickels v. Prewitt*, 149 S. W. 1096, *Malakoff v. Riddlesperger*, 133 S. W. 519, and *Forrest Photo Co. v. Hutchinson*, 108 S. W. 768. The part of the petition to which this exception was directed is as follows: "He [the lessor] further agreed that he would not allow any cold drink stands on his land within 400 yards of said land so leased, for cold drink stands, shows, exhibitions, dance halls, or platforms, or for any purpose or pursuit that may come in competition with or antagonize the purpose and welfare of the said Old Settlers' Association, as hereinbefore and hereafter alleged."

[3] It is true, as contended by appellant, that the unincorporated association, as such, could not become the owner of a leasehold estate; but the grant would not, for that reason, fail for the want of a grantee, as the title, where the grant is made to an unincorporated association, vests in its members. *Smith v. Bank*, 43 Tex. Civ. App. 495, 95 S. W. 1116. But, under the terms of the verbal lease herein, the unincorporated association, or its members, held the lease in trust for the corporation which was thereafter to be formed, and which was formed. It has discharged that trust by delivering possession of the leased premises to the incorporated association, and neither it nor any of its members are objecting to the title of appellee.

[4] It is true, as a general rule, that the improvements relied upon must have been made during the lifetime of the grantor. *Ryan v. Wilson*, 56 Tex. 36; *Baldwin v. Riley*, 49 Tex. Civ. App. 557, 108 S. W. 1192; *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 991; *Hammond v. Hammond*, 49 Tex. Civ. App. 482, 108 S. W. 1025; *Newcomb v. Cox*, 27 Tex. Civ. App. 583, 66 S. W. 340. Giving this rule its full force, the improvements made during the lifetime of Judge Glasscock were sufficient. The dam for which appellee paid as its part \$900 and the tabernacle which cost \$1,410.18, and the work on the spring which cost \$180 were begun, and a great part of the work on them was done, before Judge Glasscock died. In this case the appellee, with the knowledge and consent of Judge Glasscock, had become legally liable for \$900 for work on the dam, and for the cost of constructing the tabernacle during his lifetime, and we think this is sufficient to meet the demand for improvements, even though no part of said improvements had been made during the lifetime of the grantor. The rule announced in the cases above cited is correct as applied to the facts of those cases; but every case where the statute of frauds is invoked must stand

upon its own equities. *Wells v. Davis*, 77 Tex. 639, 14 S. W. 237; *Altgelt v. Escalera*, supra; *Morris v. Gaines*, 82 Tex. 258, 17 S. W. 538; *Bone v. Cowan*, 87 Tex. Civ. App. 519, 84 S. W. 386.

[8-7] However, if no work had been done, and no legal liability therefor incurred, during the lifetime of Judge Glasscock, we think the judgment should nevertheless be affirmed. In such case Mrs. Glasscock would have taken the title held by her deceased husband, and might have repudiated the lease contract, as he might have done, prior to improvements being placed on the land, or legal liability therefor incurred; but she might also have ratified said contract and thereby make it binding upon her. This she did by permitting the work to be finished as specified in the contract, which added permanent and valuable improvements to her land, and by accepting the annual rent for two years. She is not denying the validity of the contract; but, if she was doing so, she would be estopped by her conduct. Appellant purchased the tract of land which includes the leased premises with full knowledge of all of the facts, and with the express understanding that he did so subject to the lease, and he is in no better position to deny the validity of the lease than Mrs. Glasscock would have been had she not sold the land.

A contract is not unlawful by reason of its not being in compliance with the statute of frauds. "The statute presupposes its legality, the enforcement of which is only suspended by the statute until its provisions are satisfied." *Bringhurst v. Texas Co.*, 39 Tex. Civ. App. 500, 87 S. W. 896. The statute of frauds must be pleaded when relied upon to defeat a contract. *Patton v. Rucker*, 29 Tex. 411; *Texas Brewing Co. v. Walters*, 43 S. W. 548; *Garner v. Stubblefield*, 5 Tex. 561. It cannot be effectually interposed by a party who is estopped from availing himself of its benefits. The maintenance of a parol contract required by the statute of frauds to be in writing rests upon the broad grounds of equitable estoppel. *Bringhurst v. Texas Co.*, supra, 39 Tex. Civ. App. 500, 87 S. W. 896; *Lechenger v. Bank*, 96 S. W. 640. The equities in this case are sufficient to estop appellant from asserting the invalidity of the contract.

[8] Appellant insists that the judgment should be reversed for the reason that there was no transfer from the Old Settlers' Association, unincorporated, nor from Carothers or Makemson, as trustees for said association, to the Old Settlers' Association, incorporated. There was delivery of possession, and this is all that was necessary. This is not a suit of trespass to try title, in which appellee could be defeated by showing a superior outstanding title in a third party, but a suit for the enforcement of a contract originally made for the benefit of appellee, which is resisted on the ground that it was not

in compliance with the statute of frauds. Neither the Old Settlers' Association, unincorporated, nor any of its members, nor Carothers or Makemson, are denying the title of appellee, and appellant does not connect himself with any title or equities that any of said parties might have by reason of their failure to make a written transfer to appellee. It is true that the incorporation of a voluntary association does not of itself constitute the incorporation the owner of the property owned by the unincorporated association (*McLeary v. Dawson*, 87 Tex. 537, 29 S. W. 1044; *Carothers v. Alexander*, 74 Tex. 319, 12 S. W. 4); but, when the property is paid for with money derived from the sale of stock in the corporation to be formed, and is held in trust for such contemplated incorporation, as in the instant case, delivery of possession to such incorporation when formed vests it with at least the equitable title to the property.

[9, 10] Appellant insists that the evidence shows that the improvements were not made under a verbal lease, but upon the faith of Judge Glasscock's promise to make a written lease. It is true that Judge Glasscock promised to execute a written lease, and that Col. Makemson reduced the same to writing and delivered it to Judge Glasscock, who promised to sign same, and doubtless intended but neglected to do so. But this does not contradict the testimony that he had made a verbal lease and delivered possession thereunder. "Where the parties meet and discuss the proposed transaction, and it is consummated while they are together, then, in the nature of things, an oral agreement precedes the writing; the latter being the best evidence of the former." *Bringhurst v. Texas Co.*, 39 Tex. Civ. App. 500, 87 S. W. 896. We are accustomed to speak of "written contracts"; but, accurately speaking, there is no such thing as a written contract. A contract is an agreement, a meeting of the minds of the parties, and, when the terms of the agreement are reduced to writing and signed by the parties, the writing is simply the evidence by which the contract can be proven. In the absence of fraud, accident, or mistake, it is made by law the best evidence. But, when parties have made a contract, the agreement to thereafter reduce the same to writing does not abrogate the oral contract made. Where there was a parol gift of land, and a promise to make a deed to the same, it was held, in *Wells v. Davis*, 77 Tex. 637, 14 S. W. 237, that improvements placed upon the land in reliance on such promise was sufficient to take the case out of the statute of frauds.

[11] Error is assigned upon permitting several witnesses to testify to the statements of Judge Glasscock as to leasing the property, and delivering possession thereof. Some of these declarations were *res gestæ* of the delivery of possession, and were admissible for that reason.

[12] They were not hearsay. They would have been admissible against Glasscock as admissions and declarations against his interest, and were admissible against appellant, who claimed under him with full notice that appellee was in possession, claiming under a lease from Glasscock. *Hancock v. Tram Co.*, 65 Tex. 233.

[13] They were not objectionable as the declaration of a deceased party. This was not a suit by or against the heirs, executors, or administrators of Glasscock, and neither of the witnesses were parties to this suit. *Wootters v. Hale*, 83 Tex. 564, 19 S. W. 134; *McBride v. Moore*, 37 S. W. 451.

[14, 15] There is no merit in the contention that the written contract was the best evidence of the terms of the lease. It was not signed. It was permissible for Col. Makemson, who drew the same, to use it as a memorandum to refresh his memory. It was afterwards introduced by appellant, and there was no material variance between it and Col. Makemson's testimony.

[16] Appellant insists that the evidence as to the dam should not have been admitted for the reason that it was not built on the leased premises. It is true that it is not within the boundaries of the land surveyed by Glasscock and described in the lease drawn up by Col. Makemson which Judge Glasscock promised to sign; but it was a part of the verbal agreement to lease that the association should pay a part of the cost of constructing said dam; the county of Williamson paying the remainder, and using the dam for a public road crossing. It was so stipulated in said written but unsigned lease. Judge Glasscock pointed out the place where the dam should be built. Though the dam was not on the land leased, it created a lake on said property, which the lessor was to be permitted to use for irrigation purposes, and said lake was a valuable and permanent improvement on said property. Such being the fact, it is immaterial that the dam itself was not on the leased premises.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

KEY, C. J., not sitting.

#### SAGERTON HARDWARE & FURNITURE CO. et al. v. GAMER CO. et al.† (No. 7859.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 21, 1914. On Rehearing, April 25, 1914.)

#### 1. BANKS AND BANKING (§ 171\*)—COLLECTION OF CHECKS—AGENCY OF COLLECTING BANK—INDEPENDENT CONTRACTOR.

Plaintiff company, which made daily deposits with defendant bank in the course of business, deposited a check with it, without inquiry or instructions as to the manner of collection, taking credit on its passbook, and

the bank made a debit charge on one of its general forms against plaintiff for a certain sum for collection charges on the check. *Held*, that the bank became an independent contractor for collecting the check, so that the banks selected by it for collecting the check was its agent for whose defalcations or failure to remit it was liable to plaintiff.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

#### 2. BANKS AND BANKING (§ 150\*)—OVERDRAFT—AGREEMENT.

An agreement by a bank to permit a depositor to make an overdraft on the bank was equivalent to a loan to the depositor, so as to place the depositor in the position of having a checking credit with the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 455-464½; Dec. Dig. § 150.\*]

On Rehearing.

#### 3. BANKS AND BANKING (§ 171\*)—COLLECTION—LIABILITY OF COLLECTING BANK.

The D. bank which received a check from another bank for collection, stipulated in accepting the check that all items not payable in the city, received for collection, were taken on condition that it should not be liable for the acts or omissions of any other banks or collector to whom the checks were transmitted, and, should the collecting party convert the proceeds, the amount for which credit had been given would be charged back. When it was advised by the bank actually making collection that the collecting bank had credited its account instead of remitting the money, the D. bank advised the bank from which it received the check of that fact, and also advised it that the item had been charged back to its account, credit having been given when the check was first received, and the original forwarding bank credited the D. bank with the item. *Held*, that upon rendering judgment against the original forwarding bank for failure of the collecting bank to remit, it was error to enter judgment over against the D. bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by the Gamer Company against Sagerton Hardware & Furniture Company, the Waggoner Bank & Trust Company, and others, in which the Waggoner Bank & Trust Company filed a cross-action against the City National Bank of Dallas. From a judgment for plaintiff against the Hardware Company, and for the City National Bank on the cross-action, plaintiff and defendant hardware company appeal. Reversed, and judgment rendered for plaintiff against the Waggoner Bank & Trust Company, and in favor of the Hardware Company, as against plaintiff, and judgment rendered in favor of the City National Bank of Dallas on the cross-action.

Theodore Mack, of Ft. Worth, for appellant Sagerton Hardware & Furniture Co. Capps, Cantey, Hanger & Short and David B. Trammell, all of Ft. Worth, for appellant Gamer Co. Wray & Mayer, of Ft. Worth, for appellee Waggoner Bank & Trust Co. Cockrell, Gray & McBride, of Dallas, for appellee City Nat. Bank.

SPEER, J. The Gamer Company, a corporation, sued the Waggoner Bank & Trust Company, the City National Bank of Dallas,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes  
†Writ of error pending in Supreme Court.

W. P. Caudle, and the Sagerton Hardware & Furniture Company to recover a balance of \$1,460 alleged to be due upon a certain check drawn by the Sagerton Hardware & Furniture Company in its favor. The suit was dismissed as to the defendant Caudle. The plaintiff had judgment against the defendant Sagerton Hardware & Furniture Company, but failed to recover against the other defendants. The defendant City National Bank of Dallas also had judgment of course on the cross-action by the Waggoner Bank & Trust Company against it. The plaintiff and defendant Sagerton Hardware & Furniture Company both appeal.

We adopt the findings of fact of the trial court as follows:

"I. The court finds that on the 16th day of September, 1907, the defendants C. D. Haley, W. H. Littlefield, and Edgar Littlefield, composing the firm of the Sagerton Hardware & Furniture Company, purchased of the plaintiff the Gamer Company, for W. P. Caudle, certain goods, wares, and merchandise consisting of pipes, tanks, appliances, and attachments for windmills, one gasoline engine, and appliances and attachments therefor, and other articles for the installing of a waterworks plant at Sagerton, Tex., by the said W. P. Caudle, aggregating \$2,500, upon a written contract or order for the same, and which goods were shipped out on the 8th day of October, 1907, and received at Sagerton on October 22, 1907, at which time the Sagerton Hardware & Furniture Company wrote plaintiff a letter which was as follows:

"Sagerton, Texas, Oct. 28, 1907.

"The Gamer Company, Fort Worth, Texas—Gentlemen: We herewith hand you statement and check to cover invoice of Oct. 8 outfit for Mr. Caudle.

Invoice .....	\$2,500 78
By cash Caudle with order.....	\$ 500 00
commission .....	370 00
" freight paid .....	184 90

	\$1,064 90
Check to balance.....	\$1,435 88

"We are returning the freight bill and credit memorandum and assuring you that we will try to land another soon, we are, Very respectfully, Sagerton Hdw. & Furn. Co.

"P. S. Send receipt as the balance due on Caudle outfit as we don't want him to get next. Yours, S. H. & F. Co.'

"That as stated in said letter the check of the Sagerton Hardware & Furniture Company for \$1,435.88 was inclosed therein being for the balance due for said goods as shown in the itemized statement set forth in the foregoing letter; the Sagerton Hardware & Furniture Company charging a commission of \$870 for the sale of said goods.

"II. The court finds that the order for the goods in question was signed by W. P. Caudle, and contained the following excerpt: 'In consideration of which I or we hereby

agree to pay you for the same at your office in Fort Worth, Tarrant County, Texas, as well as for all goods theretofore or hereafter bought or ordered from you, together with ten per cent. interest from maturity of bills and ten per cent. attorney's fees if placed in the hands of attorneys or judicial proceedings be used for collection.'

"III. The court finds that on September 28, 1907, the Sagerton Hardware & Furniture Company wrote the Gamer Company as follows:

"Sagerton, Texas, Sept. 28, 1907.

"The Gamer Company, Fort Worth, Texas—Gentlemen: Please ship out the outfit we bought for Mr. Caudle for waterworks here, at once and send the bill of lading to First Bank of Sagerton, Sagerton, Texas, to collect for us. Thanking you in advance for the favor and for all past favors, we are, Very respectfully, Sagerton Hdw. & Furn. Co.'

"IV. The court finds that for several months prior to the transaction in question the Gamer Company had been doing its banking business with the Waggoner Bank & Trust Company of Ft. Worth, Tex., was a reputable bank, and that the Waggoner Bank & Trust Company had as its correspondent through whom it made collections the City National Bank of Dallas, Tex., also a reputable banking institution.

"V. The court finds that there was no other bank at Sagerton, Tex., save and except the First Bank of Sagerton, Tex., a private bank.

"VI. The court finds that the Gamer Company deposited the check of the Sagerton Hardware & Furniture Company for \$1,435.88 with the Waggoner Bank & Trust Company, which check was made payable to the Gamer Company drawn on the First Bank of Sagerton, Tex., dated October 23, 1907, and signed by the Sagerton Hardware & Furniture Company, which deposit was made on October 25, 1907, the plaintiff indorsing the check, 'Pay to the order of the Waggoner Bank & Trust Company of Fort Worth, Texas,' the date of deposit being the date of receipt of said check. Signed: 'The Gamer Company.'

"VII. The court finds that the Gamer Company was making daily deposits with the Waggoner Bank & Trust Company and took credit for this check in its passbook, and that on the said October 25, 1907, the Waggoner Bank & Trust Company made a debit charge on one of its general forms for that purpose against the Gamer Company for \$3.60, which was to be the collection charges on the Sagerton Hardware & Furniture Company check, and that on November 4, 1907, the Waggoner Bank & Trust Company made a debit charge against the Gamer Company of \$1,460.88, the same being made up as shown by credit clip, of the check of the Sagerton Hardware & Furniture Company for \$1,435.88 and another check for \$25.00 drawn on the same bank; the

officers of the Waggoner Bank & Trust Company telling the plaintiff at the time it made this charge ticket that the payment of the check had been refused but that the check had not been returned to the Waggoner Bank & Trust Company yet.

"VIII. The court further finds that at the time said check for \$1,435.88 was deposited the Gamer Company made no inquiry as to how the Waggoner Bank & Trust Company was going to collect the check, and gave no instructions, the plaintiff simply indorsing the check and depositing in the usual course of business and receiving the credit on the books of the bank in the usual way, and that the Gamer Company had no knowledge of what way or agency was employed by the Waggoner Bank & Trust Company in making collections of checks deposited with them upon other banks.

"IX. The court finds that when Mr. Gamer, president of the Gamer Company, received notice that the \$1,435.88 check had been charged back against the account of the company he went to the Waggoner Bank & Trust Company, and was advised that the check had been sent for collection, but that the bank had notice that they could not pay right then, but that the bank would pay it, but that they did not know just when, referring to the Sagerton Bank, and that Mr. Gamer then insisted on getting back the check so that he could send some one to see about the matter; that said check was never at any time returned to the Gamer Company.

"X. The court further finds: That the Waggoner Bank & Trust Company forwarded the check to the City National Bank of Dallas, Tex., indorsing thereon: 'Pay to the order of any bank or banker (all prior indorsements guaranteed). Waggoner Bank & Trust Company'—such check being received by the City National Bank of Dallas, Tex., October 28, 1907, and that the said City National Bank of Dallas, Tex., indorsed the check, 'Pay to the order of any bank or banker, previous indorsements guaranteed. City National Bank of Dallas, Tex., Lynn P. Talley, Cashier,' and then immediately forwarded the check direct to the First Bank of Sagerton. That about November 1, 1907, not having received the money back on said check, E. S. Gillespie, then manager of the transit department of the City National Bank, telephoned the First Bank of Sagerton, and, not being able to talk direct, had to talk through Stamford, talking through the operator and asking about the letter containing said check, and which letter had several other items thereon, and was advised that the bank could not remit, and advising that the check in question had already been delivered to the depositor or canceled.

"XI. The court further finds that the City National Bank then notified the Waggoner Bank & Trust Company as follows: 'On the 26th we credited your account \$1,435.88, same being an item on Sagerton, Tex. Sagerton

advises us that the item has been paid, but that they cannot remit to cover same now, but will do so within the course of a few days. We are, therefore, charging your account with this amount and will be pleased to credit same to you upon receipt of remittance from Sagerton to cover.'

"XII. The court finds that the City National Bank of Dallas, Tex., and the Waggoner Bank & Trust Company made no other effort to get back the check for \$1,435.88 which had been forwarded for collection, and that on the 29th day of October, 1907, the First Bank of Sagerton stamped the said check, Paid, charging the check to the account of the Sagerton Hardware & Furniture Company, and delivered the canceled check to the said Sagerton Hardware & Furniture Company, and also credited the account of the City National Bank of Dallas, Tex., with this item.

"XIII. The court further finds that the city National Bank of Dallas, Tex., had not authorized the First Bank of Sagerton to credit its account with the amount of said check, but took no other steps to collect the amount of said check, or to recover the same after having been advised that the check had been so credited to its account and the instrument canceled and delivered to the Sagerton Hardware & Furniture Company.

"XIV. The court finds that the Sagerton Hardware & Furniture Company was engaged in the Hardware & Furniture business at Sagerton, Tex.; and that the members of said partnership were the said C. D. Haley, W. H. Littlefield, and E. B. Littlefield; and that in July, 1907, the said Sagerton Hardware & Furniture Company bought two car loads of furniture; and that in order to get a discount upon said goods the said Sagerton Hardware & Furniture Company requested R. E. Caudle, the cashier of the First Bank of Sagerton, for a loan in order to meet the bills maturing for said furniture October 1st; and that the said cashier replied that he was not in position at that time to grant that much money, but for them to go ahead and issue the checks for the furniture, and would permit them to overdraw for this purpose; and that they would thereafter see about arranging for a loan; and that the Sagerton Hardware & Furniture Company did draw checks for various amounts against their account between the 1st day of October and the 23d day of October, which checks accumulated in the First Bank of Sagerton, Tex.; and that on the 30th day of October, 1907, the First Bank of Sagerton charged to the Sagerton Hardware & Furniture Company these checks, among them the \$1,435.88 check sent to the Gamer Company, aggregating in all \$4,085.95, and which caused an overdraft of said account in the sum of \$1,514.06; and that on November 4, 1907, the Sagerton Hardware & Furniture Company executed their negotiable promissory note to the First Bank of Sagerton for \$1,500 due on demand for which they were credited upon their account.

That the checks which caused the overdraft were the checks issued by the Sagerton Hardware & Furniture Company in payment of the bills for furniture, and for which they had asked to be permitted to overdraw their account.

"XV. The court further finds that when the goods which had been shipped by plaintiff were delivered to W. P. Caudle on the 22d day of October, 1907, the said W. P. Caudle gave to the Sagerton Hardware & Furniture Company his check for \$1,805 in payment of the balance due upon said goods, and this check was on said date deposited by the Sagerton Hardware & Furniture Company with the First Bank of Sagerton, and credited to the account of the Sagerton Hardware & Furniture Company; that at the time said deposit was made the Sagerton Hardware & Furniture Company had the outstanding checks for furniture given prior to that date, and knew that it did not have enough money in the bank to pay the same, and that when the check for \$1,435.88 was forwarded to the Gamer Company that the money was not in the bank to pay this check and the other checks which had been previously drawn against their account; that the checks for the furniture which had been issued prior to October 23, 1907, upon reaching the First Bank of Sagerton had been placed by the cashier in a drawer until he marked the same, Paid, and charged them to the account of the Sagerton Hardware & Furniture Company on October 29, 1907.

"XVI. That after the Sagerton Hardware & Furniture Company executed the note for \$1,500, the said note was sold before maturity by the First Bank of Sagerton to the First National Bank of Emma, Tex., and was renewed about the 1st day of January, 1908, and thereafter paid by the Sagerton Hardware & Furniture Company.

"XVII. The court finds that the First Bank of Sagerton was doing business through the Farmers' & Merchants' National Bank of Abilene, Tex., and that about October 15, 1907, its account with the said bank at Abilene was overdrawn somewhere in the neighborhood of \$38,000 or \$40,000, and that the First Bank of Sagerton had most of this money out in cotton, and as the cotton came in and as other money came in, the First Bank of Sagerton was using all of these funds to reduce its overdraft upon the Farmers' & Merchants' National Bank of Abilene; that checks had been accumulating in the First Bank of Sagerton from various banks which had sent the same in for collection, and in order to clear the First Bank of Sagerton of said checks, and which checks possibly aggregated \$25,000 or \$30,000 the said First Bank of Sagerton credited the banks which had sent in said checks for collection, including those of the Sagerton Hardware & Furniture Company given out for furniture and the check of the Gamer Company in question, this action being taken

about the 20th day of October, 1907; that during this time the First Bank of Sagerton was paying checks which were presented over the counter for collection; that if the check of \$1,435.88 of the Gamer Company had been presented at the window of the bank up until about the 10th of November, 1907, the First Bank of Sagerton would have had the cash on hand, and did have the cash on hand, to have paid the same over the counter.

"XVIII. The court further finds that between the 20th and 25th of October the First National Bank of Ft. Worth, Tex., sent a bunch of checks, aggregating between \$2,000 and \$3,000 to the First National Bank of Rule, Tex., for collection, and that Morris Manning, the cashier of the First National Bank of Rule, Tex., presented said checks in person at the window of the First Bank of Sagerton, and received the cash on the same.

"XIX. The court further finds: That on November 16, 1907, the Gamer Company wrote to the Sagerton Hardware & Furniture Company, advising them that it had not received their money upon the check in question, and that under date of November 18, 1907, the Sagerton Hardware & Furniture Company replied as follows:

"Sagerton, Texas, Nov. 18, 1907.

"The Gamer Company, Fort Worth, Texas—Gentlemen: In reply to yours of the 16th inst. will say that I have just been to the bank to ask about this matter. They had charged the check to our acct. and returned same to us canceled and paid, and the Pres. told me that they had made settlement with the Sweetwater exchange from Sweetwater, and told me too, that he was going to Sweetwater to-day to see that it was done. I hope that you will have your money by the time this reaches you. Very respectfully yours, Sagerton Hardware & Furn. Co., per W. H. Littlefield.' That after the receipt of the letter in question the Sagerton Hardware & Furniture Company made no effort to secure from the First Bank of Sagerton the money called for by the check of \$1,435.88, and that the said amount of \$1,435.88 was never paid to the Gamer Company.

"XX. The court further finds that at the time the check in question was forwarded to the First Bank of Sagerton for collection the American Express Company had an office and an agent at Sagerton, and that there was also a bank at Rule, Tex., located nine miles from Sagerton on the Orient Railway, and that there were three banks at Haskell, 18 miles east from Sagerton by dirt road, and that there were three banks at Stamford, located 15 miles from Sagerton by railroad, and also at Hamlin, located 11 miles from Sagerton by railroad; that during the early part of the year 1907, collection had also been made from the Sagerton Bank by C. H. Burden; such collections having been sent to Mr. Burden by the First National Bank of Stamford.

"XXI. The court further finds that the First Bank of Sagerton went into bankruptcy about the 4th or 5th day of December, 1907, and that said bankruptcy estate thereafter paid 42½ per cent. on the claims of the creditors of said bank.

"XXII. The court finds that the Sagerton Hardware & Furniture Company continued to deposit with the First Bank of Sagerton up until the bank went into bankruptcy, and made one deposition December 9, 1907, of \$91 after the receiver appointed by the bankruptcy court had taken charge of the bank.

"XXIII. The court finds that after the First Bank of Sagerton had gone into bankruptcy, the City National Bank of Dallas, Tex., made claim in said bankruptcy estate for the amount of said check of \$1,435.88, such action being taken with the consent and agreement of all parties, both plaintiff and defendants, to said suit, and that from said bankruptcy estate the amounts were paid on said claim by the trustee in bankruptcy as follows:

August 3, 1908.....	\$ 43 82
February 25, 1909.....	438 26
September 1, 1909.....	58 40
June 15, 1910.....	73 04
January 2, 1913.....	4 89

Aggregating ..... \$618 41

—and for which amount the claim on account of said check should be credited, leaving a balance due of principal and interest aggregating \$1,136.10.

"XXIV. The court finds that when the Sagerton Hardware & Furniture Company received the check from W. P. Caudle for the sum of \$1,805, the said Sagerton Hardware & Furniture Company deposited said check with the First Bank of Sagerton to their account, knowing that their account with said bank was already overdrawn to the amount of checks for furniture theretofore given, and that there would not be a sufficient balance remaining to said account to pay said check of \$1,435.88 drawn in favor of the Gamer Company.

"XXV. The court further finds that after the Waggoner Bank & Trust Company was advised by the City National Bank of Dallas, Tex., that it had not received the remittance of \$1,435.88 covering the check forwarded to the First Bank of Sagerton for collection, and that the check had been canceled and delivered to the Sagerton Hardware & Furniture Company, said Waggoner Bank & Trust Company made no further effort to secure possession of said check nor for the money called for by said check, and did not attempt to return said check to the plaintiff, nor the money called for by the same, and that it charged up the account of the Gamer Company with the amount of said check and the additional charge of \$3.60 for the collection of the same, and did not at any time or in any way pay to the Gamer Company the amount of said check."

[1] Under the facts as found the Waggoner Bank & Trust Company became an independent contractor for the purpose of collecting the check in question, and the agents selected by it for the accomplishment of this purpose became its agents for whose defalcations it is in law responsible. State Natl. Bank of F. W. v. Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016. Now, the findings show that the First Bank of Sagerton, Tex., which was called upon by the City National Bank of Dallas, Tex., the agent of the Waggoner Bank & Trust Company, to make the collection of this check, did so in the usual and customary manner, evidently in the way contemplated by the parties the same should be done, but failed to remit the collection to its correspondent, the City National Bank of Dallas, Tex. Under these circumstances, the proceeds having been lost through the failure of the Sagerton Bank, the Waggoner Bank & Trust Company became liable to the Gamer Company, and the City National Bank in turn became liable to it for the amount of the loss.

[2] While it is true that the Sagerton Hardware & Furniture Company's account was overdrawn at the time the check in controversy was presented for payment, the findings yet show that an arrangement had been made by it with the Sagerton Bank for an overdraft. This was equivalent to a loan, and the company, therefore, had at the time a credit with the bank against which it was authorized to check. When the check, therefore, was presented and paid by the Sagerton Bank, the collection was complete, and there remained nothing to be done but to transmit the proceeds to the City National Bank of Dallas. The question of negligence then becomes an immaterial issue in the case, and need not be considered. The Waggoner Bank & Trust Company is liable at all events because its agent had collected the proceeds of the check and failed to account for it. Smith Roofing & Contracting Co. v. Mitchell, 117 Ga. 772, 45 S. E. 47, 91 Am. St. Rep. 217. If our conclusion that the facts stated show an actual collection of the check be correct, it of course follows that judgment should also be rendered in favor of appellant, the Sagerton Hardware & Furniture Company, for it has already once paid the debt. The judgment of the district court is therefore reversed, and judgment here rendered in favor of appellant the Gamer Company against the Waggoner Bank & Trust Company for the balance due on said check, to wit, \$1,136.10, together with interest thereon at the rate of 6 per cent. per annum from March 24, 1913, together with all costs, that the Waggoner Bank & Trust Company have judgment for a similar amount and costs over against the City National Bank of Dallas, and that the appellant the Gamer Company take nothing as against the appellee Sagerton Hardware & Furniture Company, and



that the Sagerton Hardware & Furniture Company recover all its costs against the Gamer Company.

Reversed and rendered.

#### On Rehearing.

[3] We were in error in rendering judgment over against the City National Bank of Dallas in favor of the Waggoner Bank & Trust Company on its cross-plea, inasmuch as the terms of the agreement upon which the City National Bank accepted the checks for collection precluded recovery. In accepting the checks for collection it was stipulated by the City National Bank as follows: "All items not payable in Dallas received by this bank for credit or collection are taken upon the express condition that this bank is not to be held liable for the acts or omissions of any other banks or collectors to whom they may be hereafter transmitted, or for loss in transmission, the liability of this bank being hereby limited to its own acts and should the collecting party convert the proceeds or remit the checks or drafts which are thereafter dishonored, the amount for which credit has been given will be charged back. We will use our discretion as to sending direct or through intermediary banks for collecting, acting as agent only and assuming no responsibility beyond carefulness in selecting such agents." It seems to be undisputed in the evidence that as soon as the City National Bank was informed that the collecting bank had credited its account instead of remitting the money, it advised the Waggoner Bank & Trust Company of that fact, and also advised it that its account was being charged with that amount, and the Waggoner Bank & Trust Company credited the City National Bank with the item. Under these circumstances the Waggoner Bank & Trust Company was not entitled to judgment over against the City National Bank of Dallas, and our former judgment in this respect is set aside and judgment rendered in favor of the City National Bank of Dallas upon such cross-plea.

The motion for a rehearing by the Waggoner Bank & Trust Company is overruled.

#### TEXAS BITULITHIC CO. et al. v. ABILENE ST. RY. CO. (No. 7888.)†

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 21, 1914. On Rehearing, April 25, 1914.)

#### 1. STREET RAILROADS (§ 37\*)—PAVING—DUTY OF STREET RAILWAY.

Where the charter of a street railway company required it, at its own cost, to pave that portion of the street it occupied in the same manner as the city might pave the remainder, the railway company has the right to reasonable notice of a contemplated improvement, and to either pave the street itself, or itself to contract for the paving.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105, 123; Dec. Dig. § 37.\*]

#### 2. STREET RAILROADS (§ 37\*)—PAVING—RECOVERY OF COST—PETITION.

The petition, in an action by a municipality to recover from a street railway the cost of paving that portion of the street occupied by the railway, should disclose the width of the pavement and the length of the street, so that the court can determine the amount to which the city is entitled, and whether that amount is within its jurisdiction.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105, 123; Dec. Dig. § 37.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 486\*)—PUBLIC IMPROVEMENTS—STREETS—NOTICES—"ABUTTING."

The provision of Rev. St. 1911, art. 1013, which is a part of that chapter providing for the improvement of streets, including the portion occupied by street railways, that no assessments for an improvement shall be made against any abutting property until a full and fair hearing shall have first been given to the owners does not apply to the property of a street railway company, the term "abutting" not even in its larger sense including such property, although a further provision of the article that the governing body of any city making improvements shall by ordinance adopt rules and regulations providing for hearings to property owners and giving notice does apply to street railroads (citing Words and Phrases, vol. 1, pp. 50, 51).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084-1090, 1161; Dec. Dig. § 486.\*]

#### 4. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW.

A paving assessment against the property of a street railway company, made under Rev. St. 1911, art. 1013, where the company was given no notice or opportunity for hearing on the amount of the assessment and the benefits, is void, because working a deprivation of property without due process of law contrary to Const. art. 1, § 19, and federal Const. amend. 14, for, despite Const. art. 1, § 17, reserving to the Legislature power to regulate and control corporations, a paving assessment against the property of a corporation is void where it exceeds the benefits, or the corporation is not given a hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\*]

#### 5. COURTS (§ 91\*)—PRECEDENCE—CONTROLLING PRECEDENCE.

Where the decisions of the Supreme Court are conflicting, the Court of Civil Appeals is bound by the last one.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.\*]

Conner, C. J., dissenting on rehearing.

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by the City of Abilene, joined by the Texas Bitulithic Company, against the Abilene Street Railway Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Dabney & Townsend, of Dallas, Harry Tom King, of Galveston, and H. N. Hickman, of Abilene, for appellants. J. M. Wagstaff and S. P. Hardwicke, both of Abilene, for appellee.

CONNER, C. J. The city of Abilene, joined by the Texas Bitulithic Company, filed

its petition in the district court to enforce the payment of the costs of paving certain streets specified in the petition between the rails of the appellee street railway company and for 24 inches on each side thereof. As alleged, the city of Abilene by its governing board duly ordered the pavement of the streets and complied with the requirements of chapter 11, tit. 22, in terms conferring authority upon cities accepting the benefits thereof to make street improvements and levy assessments such as now resisted. The petition further alleged that the street railway company was incorporated under the laws of the state of Texas, and as assignee was operating under a charter theretofore granted by the city to one John H. Morrow, in which it was provided that, in event the city of Abilene should pave any street on which the railway should be constructed, "then the said John H. Morrow, associates or assigns, shall at their own expense and without cost to the city of Abilene, Texas, pave that portion of the street occupied by said railway company with the same material and in the same manner as the city of Abilene paved said street, or part of street, on each side of said railway; the part occupied by said railway being herein defined to be the space between each end of the ties used by said street railway company." There are numerous other allegations not deemed necessary to recite. The trial court sustained a general demurrer to the petition, and the plaintiffs, having declined to amend, dismissed the suit.

[1, 2] The petition seems founded upon two grounds for recovery. The first arises out of the terms of section 5 of the Morrow Charter, which we have quoted in part, and on this phase of the petition at least we think it is subject to the general demurrer urged. It is true that, by the acceptance of the charter with such provisions, the railway company agreed to do certain things; but the city's right of recovery, if any, is upon the contract, or for damages because of its breach. It therefore becomes important on this branch of the case to consider the scope of the contract. It is in substance that the street railway shall, at its own cost, pave that portion of the street "occupied" between the ends of the ties "with the same material and in the same manner as the city of Abilene paves said street." The railway company did not agree that the city, as is alleged was done, might itself, or by contractor, do the work, and that the street railway company would thereupon pay the city or contractor the cost of the paving, as fixed by it or him. Under its contract the railway company had the right to reasonable notice of the contemplated improvement, and then to either itself pave the part of the street occupied by it, or to itself secure contract therefor on the most favorable terms. No opportunity to so do is alleged. It is

doubtless true that under the section of the charter under consideration the city, in the exercise of its police powers, might pave or secure the pavement of that part of the street occupied by the railway in event the railway company, after due notice and request, should refuse to comply with its charter contract; but in that event the right of the city to recover the costs of paving would be by the way of damages for a breach of the contract, and no such cause of action is asserted. Moreover, the petition entirely fails to disclose the distance between the ends of the ties, or the length of the paving, or to give any other data from which a court could determine the amount of the recovery on this ground to which the city was entitled. It should at all events be made to appear that the amount was within the jurisdiction of the court in which the suit was filed.

There yet remains for consideration, however, the larger asserted right of recovery by virtue of the terms of chapter 11, tit. 22, of the Revised Statutes, before referred to. This right is resisted in behalf of appellee on the theory that chapter 11, tit. 22, of the Revised Statutes is void and unconstitutional, in that neither the legislative act, nor the ordinance, nor other proceeding set forth in the petition of the city of Abilene make any provision for or allege any notice to appellee of a hearing, before making an assessment against it, at which it would have an opportunity to be heard concerning the benefits of the proposed improvement in the enhanced value of its property, and because said acts, ordinances, and proceedings as set forth in the petition show no provision for limiting or restricting the amount which might be assessed against the railway company to the amount of the benefits received by it because of said improvements. It is insisted that, without such provision, an enforcement of the assessment declared upon amounts to the taking of the property of the street railway company without due process of law, in violation of section 19, art. 1, of the Constitution of this state, reading: "No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land"—and in violation of the fourteenth amendment to the Constitution of the United States, reading, so far as applicable, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The question thus presented is an important one, and has engaged our thoughtful consideration.

Article 1006 of the chapter referred to provides that such cities "shall have power to

improve any street, avenue, alley, highway, public place or square, or any portion thereof, within their limits, by filling, grading, raising, paving or repaving the same in a permanent manner," etc. Article 1008 of the chapter confers upon the governing body of the city the power to order the improvement of any highway therein or part thereof, and "to select the materials and methods for such improvement, and to contract for the construction of such improvements in the name of the city, and to provide for the payment of the costs of such improvement out of any available funds of the city, or as herein provided." The next article, 1009, provides that: "The cost of making such improvements may be wholly paid by the city, or partly by the city and partly by the owners of property abutting thereon: Provided, that in no event shall more than three-fourths of the cost of any improvement, except sidewalks and curbs, be assessed against such property owners or their property; but the whole cost of construction of sidewalks and curbs in front of any property may be assessed against the owner thereof or his property." The next article, 1010, declares that: "Subject to the terms hereof, the governing body of any city shall have power to assess against the owner of any railroad or street railway occupying any highway ordered to be improved, the whole cost of the improvement between or under the rails and tracks of said railroad or street railroad and two feet on the outside thereof, and shall have power, by ordinance, to levy special tax upon said railroad, or street railroad, and its roadbed, ties, rails, fixtures, rights and franchises, which tax shall constitute a lien thereon superior to any other lien or claim, except state, county and municipal taxes and which may be enforced, either by sale of said property in the manner provided by law in the collection of ad valorem taxes by the city, or by suit against the owner in any court having jurisdiction. The ordinance levying said tax shall prescribe when same shall become due and delinquent, and the method or methods of enforcing the same." Save as may be implied from what we hereinafter state, the petition sufficiently shows, as against a general demurrer at least, a full compliance on the part of the city of Abilene with the articles cited.

[3] The provisions of the chapter referring to the subject of a hearing and notice before assessments for the cost of street improvements is found in article 1013, which reads as follows:

"No assessment of any part of the costs of such improvement shall be made against any property abutting thereon or its owner, until a full and fair hearing shall first have been given to the owners of such property, preceded by a reasonable notice thereof given to said owners, their agents or attorneys. Such notice shall be by advertisement inserted at

least three times in some newspaper published in the city, town or village, where such tax is sought to be levied, if there be such a paper there; if not, the nearest to said city, town or village, of general circulation in the county in which said city is located, the first publication to be made at least ten days before the date of the hearing. The governing body may provide for additional notice cumulative of notice by advertisement. Said hearing shall be before the governing body of such cities, at which hearing such owners shall have the right to contest the said assessment and personal liability, and the regularity of the proceedings with reference to the improvement, and the benefits of said improvement to their property, and any other matter with reference thereto. But no assessment shall be made against any owner of abutting property or his property in any event in excess of the actual benefit to such owner, in the enhanced value of his property, by means of such improvement, as ascertained at such hearing.

"The governing body of any city making improvements under the terms hereof shall, by ordinance, adopt rules and regulations providing for such hearings to property owners, and for giving reasonable notice hereof."

The petition alleges full compliance with the chapter, and hence evidently with the requirements of the article just quoted. The article, however, is apparently for the benefit of abutting owners upon streets, and has no direct reference, if any, to a railway company occupying the street. In an enlarged sense, it might possibly be said, as provided in the Code of Iowa (see 1 Words and Phrases, tit. "Abutting," p. 51), that a street railway company is an abutting owner within the meaning of article 1013 of our statutes just quoted; but appellants seem to concede that such meaning is not to be given to such terms in the article, and it has been expressly held that a city charter authorizing the assessment of lands "abutting" on a street for improvements does not apply to a railroad right of way which lies wholly within the street. *Indianapolis, etc., Ry. Co. v. Capital Par. & Constr. Co.*, 24 Ind. App. 114, 54 N. E. 1078. It was also held, in *So. Park Com. v. C. & Q. Ry. Co.*, 107 Ill. 105, that an act authorizing assessment for the improvement of public streets upon "contiguous property abutting" upon such streets cannot be construed to include and authorize the assessment of right of occupancy, franchises, property, and interest of a railroad corporation in a street which had been improved. Moreover, it may be said, and perhaps should be said to avoid a declaration that the chapter is wholly invalid, that the last paragraph of article 1013, in requiring cities of the class mentioned to adopt by ordinances, "rules and regulations providing" for reasonable "notice" and "hearing" to property owners, sufficiently provides for notice to and

hearings of the owners of a street railway. But appellants expressly admit in their brief "that there are no provisions made in the ordinances of the city of Abilene for a notice to, or hearing of, a street railway company, nor was any such hearing given," and that, if "under the facts a street railway company holding a franchise from the city under a grant by ordinance permitting it to occupy its street for its private profit, is under the statutes and laws of Texas, entitled to a notice and hearing as to benefits in the enhanced value of its property before assessment, the assessment in this case is admittedly void." So that in our determination we shall treat the plaintiffs' petition as the parties and the court below treated it, viz.: As founded upon the assumption that it is wholly unnecessary for either the ordinances of the city of Abilene or the act of the Legislature to make provision for notice to or a hearing of a street railway corporation occupying a portion of the street ordered improved, and upon which an assessment as provided in the statute is made.

That such notice to and opportunity for hearing of the owner of land abutting upon a street is a vital requirement has been settled by our Supreme Court in the case of *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, relied upon by the court below, and which follows the decision of the Supreme Court of the United States in the case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; and we have concluded that there is no just ground for a distinction in respect to the right to notice and opportunity for hearing between the street railway company occupying the street and an owner of abutting lands, and hence that on the main question presented the judgment of the court below was also correct.

While our Constitution (section 17, art. 1) expressly reserves to the Legislature the power to regulate and control corporations incorporated under the general laws of the state, and while there are many authorities in such cases to the effect that the determination of the benefits to accrue to and the extent of an assessment to be made upon a railway company occupying a street ordered paved by a city in the exercise of its police powers is wholly a matter of legislative discretion, it was nevertheless distinctly held, in the case of *Hutcheson v. Storrie*, already cited, that no such assessment could be made in excess of the benefits to be conferred, and that a charter which did not afford an abutting landowner an opportunity to be heard upon questions of interest to him relating to the improvement was void. It cannot be disputed that a corporation is entitled to an equal protection of its property with the citizen within the meaning of our constitutional provisions. The right asserted in appellants'

petition is in its nature an absolute one. If, in the exercise of the power reserved by the section of the Constitution referred to, the Legislature or city acting under its authority may arbitrarily assess the cost of an improvement of a part of the street, it can as well so assess against a railway company occupying a street the entire cost of its pavement, without right on its part of having voice in the matter of contract, persons, material, or other thing of importance involved in making the improvement, and regardless of any question of benefit or injury to the railway company. This, if we have properly interpreted the case of *Hutcheson v. Storrie*, cannot be done in this state. Thence the plaintiffs' petition at least was fatally defective under the admissions made, and subject to the general demurrer.

[5] Before finally concluding this opinion, however, we should perhaps notice the case of *Storrie v. Houston City Street Railway Co.*, 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716, so earnestly relied upon in behalf of appellants in aid of their petition. This decision was also by our Supreme Court, and the opinion was written by the same eminent judge who wrote the opinion in *Hutcheson v. Storrie*. It is perhaps inferable from the face of the two opinions that the same provisions of the city's charter were involved in both cases, and yet in the case last cited the liability of the street railway company for the costs of paving certain streets between the rails of the railway and six inches on each side thereof was expressly upheld, without indicating that a notice to or hearing of the company was necessary. It may be said that the question decided in *Hutcheson v. Storrie* was not presented in *Storrie v. Houston City Street Ry. Co.*; but the question was, it seems to us, necessarily involved, and the cases, therefore, are in principle apparently in conflict. The *Hutcheson* Case makes no reference to the case against the street railway company, and we have felt some difficulty in disposing of the two opinions. But an examination of the opinions shows that the opinion in *Storrie v. Railway Company* was rendered a year earlier than the opinion in *Hutcheson v. Storrie*, and is apparently in harmony with the decision in *Adams v. Fisher*, 75 Tex. 637, 6 S. W. 772, which is expressly repudiated in the later case; the court indicating its pleasure in following the contrary rule announced in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, also decided several months after the decision in *Storrie v. Ry. Co.*, and therefore evidently not available when our Supreme Court decided the first case. So that, on the whole, we conclude, as already indicated, that in so far as the cases conflict we must give controlling effect to the latest expression of our Supreme Court in *Hutcheson v. Storrie*.

It is accordingly further concluded that the court did not err in sustaining the general de-

murrer to appellants' petition, and that the judgment should be affirmed.

On Rehearing.

PER CURIAM. Rehearing denied.

CONNER, C. J. (dissenting). The majority are of the opinion that the motion for rehearing should be overruled; but I find myself unable to agree to such course. In the beginning it was with much hesitation that I came to the view expressed in our original opinion, and after a reconsideration, aided as we have been by the able and painstaking effort of appellants' counsel, my original doubts have not only increased, but I have become convinced that we erred in the conclusion announced on the main question in the case. Time and opportunity admit of but a brief presentation of my present view; but, as it now appears to me, we erred in giving controlling effect to the case of *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, and in not giving proper application of section 17 of our Bill of Rights, which provides, among other things, that: "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

No such provision of our Constitution or law has application to a private owner of lots abutting on a street occupied by a street railway which the governing body of the city has determined to improve, and a distinction between the two classes of property should be made. As to the private owner, as held in *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, and as expressly provided in the chapter relating to the subject (R. S. c. 11, tit. 22), notice and opportunity for a hearing to determine the extent of the benefits to the owner must be extended. But neither that decision nor the statute is in terms made applicable to the owner of a street railway. The failure of the statute to so provide seems especially significant in view of the conceded fact that it was enacted after the decision in *Hutcheson v. Storrie* in order to conform therewith. It is hardly to be supposed that in so legislating the case of *Storrie v. Houston City Street Ry. Co.*, 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716, in apparent conflict with *Hutcheson v. Storrie*, was wholly overlooked by our legislators. It also is not to be assumed that the decision in *Storrie v. Houston City Street Ry. Co.* was overlooked by the careful, able judge who wrote both opinions. Hence I now think the case of *Hutcheson v. Storrie* should be limited to the facts of that particular case (which was that of an abutting owner), as has been done in the case upon which it was founded. See *French v. Barber Asphalt Co.*, 181 U. S.

324, 21 Sup. Ct. 625, 45 L. Ed. 879, loc. cit. p. 890.

But, as to the Abilene Street Railway Company, I think the case of *Storrie v. Houston City Street Ry. Co.* should be applied to the facts alleged in this case. It is alleged that the special tax assessment now resisted was levied in strict accordance with chapter 11, tit. 22, of the Revised Statutes. The railway company is a public service corporation that exists and exercises its rights and privileges by virtue of the law alone. It accepted its franchises from the city of Abilene, and has continuously since then exercised its privileges with full knowledge that our Constitution expressly provided that it, and all like corporations, was subject to the control of the Legislature, thus, in effect, agreeing in advance to the imposition of such additional burdens as the Legislature might thereafter in its discretion impose. The Legislature in fact has declared a fixed rule, not unreasonable on its face, by which the special assessment under consideration was made; the Legislature in effect determining the question of benefits. The power to so do is very generally upheld by the authorities. See *French v. Barber Asphalt Co.*, hereinbefore mentioned, and the numerous cases therein cited. Moreover, it does not appear, either by the petition in this case or from any answer, that the assessment under consideration is unreasonable, or that in the proceeding leading up thereto there was any irregularity, inequality, or other thing of which just complaint can be made. If there was, the statute itself provides the remedy. See chapter 11, art. 1015. So that I see no reason, either beneficial or available, for other or further notice of the assessment than was afforded by the enactment and publication of the legislative act and of the ordinance for the improvement. See *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Parsons v. Dist. of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943. In brief, under the section of the Constitution quoted, I think special assessments as alleged in this case may be made, and that the law so authorizing as now written in no wise conflicts with the "due process" clauses of our state and federal Constitutions. On the contrary, these laws seem but to impose upon street railway companies using for profit public streets of a city, a just proportion of the burden necessarily incurred in improving and safeguarding such streets for the benefit of all. I conclude that the court erred in sustaining appellee's general demurrer, and that the motion for rehearing should be granted, and that the cause should be remanded for a trial upon the merits. See the following cases, which are thought to support the foregoing conclusions: *Storrie v. Houston City Street Ry. Co.*, 92 Tex. 129, 46 S. W. 796,

44 L. R. A. 716; Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 899; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874; Fairhaven Street Ry. Co. v. City of New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. Ed. 237; Eldredge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490; West Chicago Street Ry. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; C., B. & Q. Ry. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Const. of Texas, art. 1, § 17; Revised Statutes 1911, c. 11, arts. 1006 to 1017, inclusive.

In accordance with the conclusion of the majority, however, it is ordered that the motion for rehearing be overruled.

### SWITZER LUMBER CO. v. CLEMENTS et al. (No. 7919.)

(Court of Civil Appeals of Texas. Ft. Worth. April 4, 1914.)

#### PARTNERSHIP (§ 173\*)—LIABILITY FOR FIRM DEBTS—NOTE SIGNED BY ONE PARTNER.

Where one, who had a claim against a partnership for goods sold to the firm, agreed to accept in full settlement thereof a note signed by only one of the partners, the other partner is not liable on the note, notwithstanding the fact that it was given in settlement of a firm debt.

[Ed. Note.—For other cases, see Partnership, Const. Dig. §§ 304, 305; Dec. Dig. § 173.\*]

Appeal from Jones County Court; Joe C. Randel, Judge.

Action by the Switzer Lumber Company against B. E. and M. T. Clements. From a judgment against the defendant M. T. Clements and in favor of the defendant B. E. Clements, plaintiff appeals. Affirmed.

S. J. T. Smith, of Anson, for appellant. C. C. Ferrell, of Anson, for appellee.

**DUNKLIN, J.** The Switzer Lumber Company instituted this suit against the defendants B. E. and M. T. Clements, to recover of them the amount of a promissory note for the principal sum of \$350, dated January 1, 1912, together with interest thereon payable to plaintiff.

It was alleged in the petition that the consideration for the note was lumber and other building materials sold to the defendants, who at the time were partners doing business as contractors under the firm name of B. E. Clements & Son; that the note was executed while defendants were doing business as such partners; that the note was executed by M. T. Clements alone, but that, by reason of the fact that the debt for which the note was given was a partnership obligation of the firm, B. E. Clements also became liable upon said note equally with M. T. Clements, who executed it. Plaintiff's petition also contained a prayer for general relief.

In the answer filed by the defendants, B. E. Clements alleged that the account for which

the note was given accrued more than two years next preceding the filing of the suit; that he neither signed the note nor authorized any one to sign the same for him; and that therefore plaintiff's cause of action as against him was barred by the statute of limitations of two years.

Judgment was rendered in favor of the plaintiff against M. T. Clements, but in favor of B. E. Clements as against the cause of action asserted against him. From the judgment denying a recovery against B. E. Clements, plaintiff has appealed.

The suit was tried by the county judge without the aid of a jury, and the following findings and conclusions were filed:

#### "Conclusion of Fact.

"I find: That on various dates, from November, 1910, to March, 1911, B. E. Clements & Son, then a firm composed of B. E. and M. T. Clements, the defendants herein, purchased from Switzer Lumber Company, plaintiff, lumber and other building material, and, according to the terms of purchase, defendants agreed to pay for each item within 30 days from the sale of the same; the dates of the respective sales and the price of each item being shown by plaintiff's verified account herein filed. That during the year 1912 plaintiff, acting by its collector and adjutor, J. W. Davis, had a settlement with M. T. Clements, whereby plaintiff accepted from him the note sued on in this case and two other notes of similar amount, each as payment in full of said indebtedness against B. E. Clements & Son. That, if Davis was not authorized to make the settlement and accept the notes, his action therein was subsequently ratified by plaintiff. That B. E. Clements never signed the notes nor any other writing nor authorized any one to sign any writing obligating him to pay said debt.

#### "Conclusion of Law.

"The verified account is barred by the statute of limitations, and, plaintiff having accepted the notes of M. T. Clements in full settlement of the debt, plaintiff is not entitled to recover against B. E. Clements."

The following is the only assignment of error presented:

"The court erred in rendering judgment in favor of defendant B. E. Clements, 'because the undisputed evidence in this case shows that B. E. and M. T. Clements were the individual members of the firm of B. E. Clements & Son; that they were a partnership at the time the lumber was sold for which the note sued upon was given, and that said lumber was bought by and used for said partnership, and that the notes were executed by one member of said firm to settle a firm obligation or account; that M. T. Clements promised and agreed that his copartner B. E. Clements would join him in the execution of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the note sued upon, but that said B. E. Clements refused to do so, notwithstanding his liability for same; and that said partnership existed at the time of the execution of the note so sued upon."

Thus it will be seen that the only contention presented by the assignment is that as B. E. Clements was originally liable for the building material sold to the firm, and for which the note was afterwards given, he was, by reason of those facts, also liable upon the note executed by M. T. Clements. Of course if B. E. Clements became liable upon the note, his plea of limitation could not be sustained. But by the assignment the finding of the trial judge that the account for material and for which the note was given is barred by the statute of limitation is not assailed. Nor does appellant by the assignment challenge the correctness of the finding that plaintiff's representative, J. W. Davis, "had a settlement with M. T. Clements whereby plaintiff accepted from him the note sued on in this case and two other notes of similar amount, each as payment in full of said indebtedness against B. E. Clements & Son"; and further "that B. E. Clements never signed the note, nor any other writing, nor authorized any one to sign any writing obligating him to pay said debt." If, as found by the court, plaintiff agreed to accept the note of M. T. Clements alone in full satisfaction of the account against the firm, then B. E. Clements was released from further liability, even though it should be held that, in the absence of such an agreement, the note executed by M. T. Clements would also be the obligation of his partner, B. E. Clements. For this reason the assignment is overruled, and the judgment is affirmed.

Affirmed.

# CISCO OIL MILL v. VAN GEEM. (No. 7915.)

(Court of Civil Appeals of Texas. Ft. Worth.  
April 4, 1914.)

## 1. TRIAL (§ 356\*)—VERDICT—FAILURE TO ANSWER INTERROGATORIES OR MAKE FINDINGS.

Where, in a negligence case, special issues of negligence, contributory negligence, and assumption of risk were submitted, the failure of the jury to find upon the issues of contributory negligence and assumption of risk was in direct violation of Rev. St. 1911, art. 1988, providing that the verdict shall comprehend the whole issue or all the issues submitted to the jury, and no final judgment could be rendered; article 1985, providing that upon appeal or writ of error an issue not requested shall be deemed as found by the court in such manner as to support the verdict, being inapplicable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849-854; Dec. Dig. § 356.\*]

## 2. APPEAL AND ERROR (§ 719\*)—ASSIGNMENT OF ERRORS—NECESSITY—FUNDAMENTAL ERROR.

Error in rendering judgment in a negligence case upon a verdict which failed to find upon special issues of contributory negligence and

assumption of risk submitted being fundamental, an assignment of errors was unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

## 3. COURTS (§ 170\*)—PLEADING—JURISDICTION—PLEA TO JURISDICTION—AMOUNT IN CONTROVERSY—ALLEGATIONS—TIME TO PLEAD.

The allegations of the petition as to the amount in controversy determine the jurisdiction of the court, unless the defendant specially plead and show by evidence that such amount so alleged was for the fraudulent purpose of giving the court jurisdiction, and the time to file such a plea is prior to the beginning of the trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.\*]

## 4. EVIDENCE (§ 14\*)—JUDICIAL NOTICE.

The court, in a negligence case, could not take judicial notice that plaintiff, a young man, had such a life expectancy that if \$10 per month be allowed for the remainder of his life for permanently diminished capacity to labor the amount so claimed would give an aggregate of more than \$1,000.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 19; Dec. Dig. § 14.\*]

## 5. DAMAGES (§ 153\*)—AMOUNT OF DAMAGES—ALLEGATIONS IN PLEADINGS.

A petition in a personal injury action was subject to special exception for failure to itemize the amount of damages claimed so as to show the amount claimed for loss of time, doctor's bills, drug bills, etc.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 422-425; Dec. Dig. § 153.\*]

## 6. MASTER AND SERVANT (§ 217\*)—RISKS ASSUMED BY SERVANT—DEFECTIVE OR DANGEROUS PLACE TO WORK.

Where an employé of a gin company knew that a ginhouse was so constructed as to cause excessive vibrations of the machinery and gins while in operation, and also knew of the risk incident to such condition, he assumed any risk of injury due to such condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

## 7. TRIAL (§ 350\*)—SUBMISSION OF ISSUES.

In an action for an injury to an employé of a gin company, caused by an alleged defective lever, where the court submitted the issue of defendant's negligence in furnishing the gin stand with the defective lever, it was improper to submit, as independent grounds of recovery, defendant's failure to warn of the defect, that the employé's work had been negligently changed with the assurance that the machinery would be looked after and repaired, and that defendant failed to employ an experienced mechanic to keep such machinery in repair, since such issues were included in the main issue first submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

## 8. MASTER AND SERVANT (§ 217\*)—RISKS ASSUMED BY SERVANT—DEFECTIVE APPLIANCES.

If it was the duty of an employé of a gin company to inspect the machinery and to repair any defects before operating it, he assumed the risk of any defect and could not recover for an injury caused by any such defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from Eastland County Court; E. A. Hill, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Chas. M. Van Geem against the Cisco Oil Mill. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cunningham & Oliver, of Abilene, for appellant. Earl Conner, of Eastland, for appellee.

**DUNKLIN, J.** This is the second appeal in this case; the decision upon the former appeal being reported in 152 S. W. 1108. Chas. Van Geem, plaintiff in the case, sustained an injury to his hand as the result of that member coming in contact with the saws of a gin operated by the Cisco Oil Mill, and he instituted this suit against the company for damages resulting from that injury. Upon the former trial a judgment was rendered in favor of the defendant. Upon the last trial the plaintiff recovered and the defendant has appealed.

According to plaintiff's testimony given upon the trial, at the time of his injury he was engaged in cleaning out one of the gin stands after the ginning for the day had terminated. In order to do this, he signaled the engineer to start the machinery. When that was done, he raised the breast of one of the gin stands, and started to place a block thereunder to hold it up, when the lever with which the gin was provided for raising the breast, and which was in a defective condition, broke, and knocked his hand against the saws, thus causing his injury. In his petition he alleged that the house in which the gin stands and machinery were installed was constructed in such a manner as to cause excessive vibrations of the machinery and gins while in operation; that the gin and lever with which he was working at the time of his injury were out of repair and in a defective condition; that the portion of the building where he was working was improperly lighted; that by reason of his inexperience in the operation of gins he was ignorant of the dangers of that service; and that defendant failed to warn him of such dangers. He alleged that defendant was guilty of negligence which was the proximate cause of his injury in constructing the building in the manner indicated, in furnishing the gin in the condition mentioned, and without sufficient lights, and in failing to warn him of the dangers of the service he was performing at the time of his injury.

[1] There was a jury trial upon special issues submitted, which, briefly stated, were negligence of the defendant alleged to be the proximate cause of plaintiff's injury, contributory negligence of the plaintiff, and assumption of risk of the injury by plaintiff. The jury rendered a verdict showing a finding of negligence on the part of the defendant which was the proximate cause of the injury, but the verdict omits any finding upon the other two issues of contributory negligence and assumed risk. There was evidence intro-

duced upon the trial sufficient to sustain both the defenses pleaded by appellant of contributory negligence and assumed risk. In its brief in this court appellant has assigned error to the rendition of the judgment in the absence of a finding by the jury upon the two issues last mentioned, and we are of the opinion that this assignment must be sustained. Following are articles of Revised Civil Statutes 1911:

Article 1985: "The special verdict must find the facts established by the evidence, and not the evidence by which they are established; and it shall be the duty of the court, when it submits a case to the jury upon special issues, to submit all the issues made by the pleading. But the failure to submit any issue shall not be deemed a ground for reversal of the judgment, upon appeal or a writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding."

Article 1988: "The verdict shall comprehend the whole issue or all the issues submitted to the jury."

Article 1994: "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."

The provision in article 1985, supra, that, "upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding," does not apply in the present case, for the issues of contributory negligence and assumed risk were submitted by the court, and there was evidence sufficient to sustain those defenses, as noted already. The failure of the jury to find upon those two issues was in direct violation of article 1988, and hence no final judgment could be rendered in the cause. See *Ablowich v. Greenville Natl. Bank*, 95 Tex. 429, 67 S. W. 79, 881; *T. & P. Ry. Co. v. Watson*, 13 Tex. Civ. App. 555, 36 S. W. 290, and cases there cited; *Stephenson v. Chappell*, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482.

[2] The assignment now under discussion was not filed in the trial court, but is submitted in appellant's brief in the form of a proposition under two other assignments, to which perhaps it is not germane, and appellee has objected to a consideration of the same for that reason. However, we are of the opinion that the error is fundamental and that appellant was not required to file the assignment thereto in the trial court. See Rules 23 and 24, 142 S. W. xii. The re-



versal of the judgment for the error noted above renders it unnecessary to discuss the numerous objections made by appellee to a consideration of the various assignments contained in appellant's brief.

[3, 4] For the guidance of the trial court upon another trial we deem it expedient to discuss in a general way some of the questions raised by numerous assignments of error. Two of those assignments relate to the question of jurisdiction of the court to determine the case. The amount claimed in plaintiff's petition was expressly limited to the sum of \$1,000. After the trial began and apparently after the evidence had been concluded, appellant filed what is designated as a plea to the jurisdiction, alleging in substance that in his petition plaintiff had restricted his recovery to the sum of \$1,000 for the fraudulent purpose of giving the trial court jurisdiction of said cause, and that it had been developed by the evidence heard that the amount in controversy was in excess of \$1,000. Upon the plea to the jurisdiction the court instructed the jury that if they should believe from a preponderance of the evidence that "the plaintiff brought this suit for a less amount than has been established to be due the plaintiff, and that in the bringing of this suit [by] the plaintiff the same was done as a fraud upon the jurisdiction of this court and was knowingly done for the purpose of maintaining this suit in this court, when in truth and in fact this court had not jurisdiction of the amount in controversy, if you so find, you will find for the defendant on the plea of [to] the jurisdiction of this court." The allegations contained in the petition would determine the jurisdiction of the court, unless the defendant should specially plead and show by evidence that the fixing of the amount of damages claimed at \$1,000 only was done for the fraudulent purpose of giving the court jurisdiction. The proper time to file such a plea to the jurisdiction is prior to the beginning of the trial, and the allegations contained in the appellant's plea that the evidence heard had already shown the amount in controversy to be in excess of the jurisdiction of the court had no place in such plea. Nor was it proper for the court in the charge to hinge the strength of the plea upon the amount of damages which had been established by proof, rather than upon the good faith of the plaintiff in the allegations contained in his petition. The charge given was further erroneous in that it left for the determination of the jury what amount in controversy would be beyond the jurisdiction of the court. In answer to the contention made by other assignments that the petition showed on its face a cause of action over which the trial court had no jurisdiction, we desire to say that no facts are alleged in plaintiff's petition which show the amount in controversy to be more than the

amount for which judgment was sought, as appeared in *Pecos & N. T. Ry. Co. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294. The only argument presented to support a conclusion to the contrary is that in the absence of any allegation to that effect the court should take judicial cognizance that plaintiff, a young man, had such a life expectancy that if \$10 per month be allowed for the remainder of his life for permanently diminished capacity to labor resulting from his injury, as alleged in his petition, the amount so claimed would be such a sum as when added to other damages claimed and itemized in the petition would give an aggregate of more than \$1,000. We know no law which would warrant us in assuming judicial knowledge of such facts.

[5] In view of the reversal it is unnecessary to discuss the assignment of error to the failure of the jury to render any finding upon the plea to the jurisdiction further than to say that upon another trial as a matter of course with a proper plea to the jurisdiction and evidence to sustain the same, there should be a finding thereon. We are of the opinion further that the special exception addressed to plaintiff's petition for its failure to itemize the damages claimed in the aggregate so as to show the amount claimed for loss of time, doctor's bills, drug bills, etc., should have been sustained. *Randall v. Rosenthal*, 31 S. W. 822.

[6, 7] Among the issues of negligence submitted by the court for the determination of the jury as a proximate cause of plaintiff's injury were the improper construction and maintenance of the ginhouse resulting in vibrations thereof, and the insufficiency of the lighting of the same. The evidence shows conclusively that these conditions were known to the plaintiff before he was injured, and that he also knew of the risk ordinarily incident to that condition. If his injury was due to those conditions alone, it was but an ordinary risk of defendant's negligence, if any, in maintaining the ginhouse under those conditions, and he assumed it. The entire strength of plaintiff's case rests upon the one issue of the alleged negligence of the defendant in furnishing to plaintiff for operation a gin stand with a defective lever without warning him of such defect, which, according to the allegations of the petition, broke, and the breaking of which caused plaintiff's hand to be knocked into the saw and thereby to sustain injury. The negligent failure of the defendant to warn plaintiff of the defect, if any, in the lever, and of the risk incident to an effort to operate the gin by using the same, could not properly be submitted as an independent ground of recovery if the alleged negligence in furnishing a gin stand with such a lever was also submitted as a separate and independent ground of recovery. For in determining the issue last named, it would be the duty of the jury to

take into consideration all the surrounding circumstances, including the ignorance of the defendant, if any, of such defect, and the failure of the defendant, if any, to warn the plaintiff of such defect. It was also improper to submit as separate and distinct grounds for recovery, as was done by the trial court, that plaintiff's work had been negligently changed by the defendant with the assurance that the machinery would be looked after and repaired, that defendant negligently failed to warn plaintiff of the danger of operating the gin with the alleged insufficient lights, and that the defendant had negligently failed to employ an experienced machinist to keep the machinery in repair; since those issues were necessarily included in the one issue of alleged negligence in furnishing the gin stand with the defective lever. The foregoing observations have been made without reference to the defenses of contributory negligence and assumed risk and with no intention of being understood as in any manner precluding either of those defenses if they should be sustained upon another trial.

[8] In view of some other assignments, we deem it proper to further state that if it was one of the duties of plaintiff's employment to examine the gin for the purpose of discovering such defects as that of the defective lever which broke and to repair the same himself, or to report the same to his superiors to be repaired, and if in the proper discharge of that duty he must necessarily have discovered such defect before he attempted to operate the gin on the occasion of his injury, then he assumed the risk of operating the gin in that condition and cannot recover. See *Allen v. Ry.*, 14 Tex. Civ. App. 344, 37 S. W. 171; *Bonnet v. Railway Co.*, 89 Tex. 72, 33 S. W. 334; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65, 65 S. W. 693; *Railway Co. v. Spellman*, 34 S. W. 298; *Green v. Cross*, 79 Tex. 130, 15 S. W. 220.

The issues submitted are somewhat in the nature of a general charge and are not as clear and as specific as they might be made and should be upon another trial, although it is not necessary to determine whether or not the form in which they were submitted would be reversible error. See R. S. arts. 1984 and 1985; also, article 1984a enacted by the Legislature at its regular session in 1913, as shown by Acts of that Legislature, p. 113.

For the reasons noted, the judgment is reversed and the cause remanded.

**JONES v. CITY NAT. BANK.** (No. 7895.)  
(Court of Civil Appeals of Texas. Ft. Worth.  
March 14, 1914.)

**1. TROVER AND CONVERSION (§ 10\*)—WHAT CONSTITUTES—RIGHTS OF CREDITOR.**

Though a debtor agreed to apply the proceeds of a sale of property to the discharge of a debt, his creditor, who had no lien, is guilty of

a conversion by seizing the property, without the debtor's consent, and selling it to discharge his debt; such conversion rendering the creditor liable, although reasonable care was used in disposing of the property.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 84-94; Dec. Dig. § 10.\*]

**2. TROVER AND CONVERSION (§ 22\*)—RIGHT TO RECOVER.**

In a suit for the conversion of property, the proceeds of which plaintiff had agreed to apply to the debt due defendant, plaintiff's right to recover is not dependent upon whether he would have continued to apply the proceeds to the discharge of his debt.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 152-162, 167-169; Dec. Dig. § 22.\*]

**3. TROVER AND CONVERSION (§ 10\*)—ACTIONS—RIGHT OF RECOVERY.**

Where a debtor claimed that a creditor seized his property without his consent, and did not use reasonable care in its disposition, and the creditor claimed that the debtor consented to its taking possession and disposing of the property, the debtor is entitled to recover at all events if the creditor did not exercise reasonable care in disposing of the property.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 84-94; Dec. Dig. § 10.\*]

Appeal from Wise County Court; E. M. Allison, Judge.

Action by P. L. Jones against the City National Bank. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McMurray & Gettys and Spencer & Shults, all of Decatur, for appellant. R. E. Carswell, of Decatur, for appellee.

SPEER, J. P. L. Jones instituted this suit in the county court of Wise county against the City National Bank of Decatur to recover damages for the conversion of 454 boxes of apples, alleging the market value thereof to be \$908. A credit was admitted in favor of the bank, and judgment was prayed for \$690.50. The defendant answered generally and specially that it had furnished to plaintiff the sum of \$725 to protect a bill of lading for the car of apples, and that plaintiff had agreed to market the apples and deposit the proceeds in defendant bank until this amount was repaid, but that he had breached said agreement, and had voluntarily consented that defendant might take possession of the apples and dispose of them to the best advantage, applying the proceeds to the payment of his indebtedness. The bank further pleaded that it had disposed of said apples to the best advantage and applied the proceeds to the plaintiff's indebtedness, but that there was still lacking the sum of \$200, which one J. D. Taylor, as surety for plaintiff, had paid. There was a jury trial resulting in a verdict for the defendant, and the plaintiff has appealed.

The assignment complaining of the introductory statement of the nature of the case

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the court's charge is overruled. The statement is a very fair presentation of the issues raised by the pleadings. It is true that portion relating to the defendant's plea is more voluminous than that relating to the plaintiff's petition, but not unnecessarily so, since the defendant's pleadings were themselves somewhat voluminous presenting several issues.

As to the substance of the case, the court charged as follows:

"(1) If the plaintiff, after getting possession of said apples, failed or refused to proceed with reasonable care, dispatch, and diligence to sell the same and deposit the proceeds in defendant bank, and the defendant bank, through its employes and agents, got possession of said apples and sold the same and applied the proceeds to the satisfaction of the said draft, I charge you it would not be liable to plaintiff, unless you find from the evidence that it failed to use reasonable care in the handling and sale of said apples, and that plaintiff was damaged thereby.

"(2) If you should find from the evidence that the plaintiff, after getting possession of the apples, proceeded with reasonable care and dispatch to sell said apples and deposit the proceeds as received with defendant bank, and that he would have continued to do so until said apples were disposed of, if he had not been prevented by action of defendant, and if you believe that, while he was so disposing of said apples in carrying out his contract with defendant, the bank, through its agents or employes, took possession of said apples, without the consent of plaintiff, and against his will, and sold and disposed of the same and applied the proceeds to the payment of said draft, then defendant would be liable to plaintiff for any damages or loss he may have sustained by said action of the bank under the evidence in this case, and the measure of such damages would be the difference, if any, between the fair cash market value of the apples taken by it and sold at the time of such taking and the sum of \$848.91, the amount realized by the bank on said apples and credited to plaintiff.

"(3) In no event will you find for the plaintiff, unless you find upon the preponderance of the evidence that the apples were taken by the defendant from the possession of the plaintiff, without his consent and against his will."

[1] As presented to the jury appellant was unduly restricted in his right to recover. The gist of his action is that appellee wrongfully seized his apples and converted them to its own use to his damage. If these facts are established, appellant would be entitled to recover, irrespective of the fact that he was indebted to appellee, and irrespective of the fact that, after seizing the apples, appellee used reasonable care in han-

dling them. It is not the law that a creditor, without a lien, and without the consent of the owner, may seize a debtor's property and sell the same for the purpose of discharging his debt. *Cont. St. Bank of Beckville v. Trabue*, 150 S. W. 209; *Baldwin v. Davidson*, 143 S. W. 717. The implication of the charge very clearly is, and the jury doubtless understood, that appellee would not be liable to appellant for a wrongful seizure of the apples, provided it used reasonable care in disposing of them after such seizure.

[2] Appellant's criticism of the second section of the charge quoted is also well taken. It was error to make his right to recover dependent on whether the jury should think "that he would have continued" to sell the apples and deposit the proceeds as received with reasonable care and dispatch.

[3] The third paragraph of the charge quoted is further erroneous in that it denied appellant a right to recover in the event the apples were taken with his consent; but yet the appellee failed to exercise the proper care in disposing of them as it pleaded it had done. In the event of such a finding, that is, that the apples were taken with the consent of appellant, and that they were not carefully handled and disposed of, the appellant would be entitled to recover such damages as he could show.

For the errors contained in the charge, the judgment is reversed, and the cause remanded.

**McKINNEY v. THEDFORD et al.**  
(No. 7884.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 14, 1914.)

**1. BROKERS (§ 88\*)—EMPLOYMENT AND AUTHORITY—EVIDENCE OF AGENCY—SUFFICIENCY.**

Evidence, in an action for commissions for effecting an exchange of land, held sufficient to go to the jury on the issue of plaintiffs' authority from defendant to make the exchange.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

**2. BROKERS (§ 86\*)—ACTIONS FOR COMPENSATION—EVIDENCE—SUFFICIENCY.**

Evidence, in an action for commissions for effecting an exchange of land, held not to show conclusively that the purchaser bought defendant's land solely upon his own information after negotiating with defendant, and was not influenced by any efforts made by the plaintiffs to bring about the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

**3. BROKERS (§ 53\*)—COMPENSATION—SUFFICIENCY OF SERVICES.**

Where a broker was the procuring cause of a sale, it is immaterial to his right to a commission that he did not personally conduct the negotiations, was not present when the bargain was closed, or that the principal at the time did not know that the purchaser was found by the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.\*]

#### 4. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

An instruction as to a broker's right to a commission, where he did not personally conduct the negotiations, was not present when the bargain was closed, and where his principal did not at the time know that he found the purchaser, was not inapplicable to the facts, where plaintiff did not personally negotiate the exchange and was not present when it was made.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 5. TRIAL (§ 194\*)—INSTRUCTIONS.

An instruction, in an action for commissions, that, "where a broker was the procuring cause of a sale, \* \* \* it is immaterial \* \* \* that he did not personally conduct the negotiations, \* \* \*" was not objectionable as being upon the weight of the evidence; it being a mere abstract proposition of law, not applying directly to any issue, and the question whether plaintiffs were the procuring cause having been submitted as a disputed issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 6. TRIAL (§ 194\*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

An instruction that, in an action on implied contract, it is only necessary for the plaintiff to show that he performed acts as the broker of the seller, and that the latter adopted his acts and accepted his agency, was not objectionable as upon the weight of evidence, being merely an abstract legal proposition not applicable directly to any issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 7. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

An instruction that plaintiffs could recover if they procured a buyer themselves or through their agent R. was not objectionable on the ground that R. was agent of the buyer, and that an agent cannot delegate his authority without his principal's consent and cannot represent both parties, where the evidence showed that R. represented the buyer only, and the brokers on both sides represented their respective principals in the negotiations.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 8. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

An instruction that plaintiffs, suing for commissions, were not partners of R., who represented the other party, and that they may recover, though R. got all of the commission from the other party, was not objectionable, because an agent who receives a secret commission from the other party cannot recover, where the evidence showed that the brokers on both sides represented their respective principals only.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 9. TRIAL (§ 260\*)—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

There was no error in refusing an instruction that a broker is not entitled to a commission where the purchaser bought on his own information after negotiating with the owner, without being influenced by the broker, though the broker made efforts to sell to such purchaser, where the court instructed that the brokers must have been the efficient and procuring cause of the sale, as the instruction given embodied substantially the same defense.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 10. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

There was no error in refusing an instruction that, even though a broker brings the parties together, he is not entitled to a commission, in the absence of a contract of agency, where the same defense was substantially presented in the court's main charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 11. TRIAL (§ 252\*)—INSTRUCTIONS.

There was no error in refusing an instruction, in an action for brokers' commissions, that any agreement between plaintiffs and the buyer's agent relative to the exchange would not bind defendant without his consent, where there was no evidence of any such agreement to which it could apply.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

#### 12. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

Evidence, in an action by brokers for commissions for effecting an exchange of real estate, held sufficient to support a verdict for the plaintiffs.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 88.\*]

Appeal from Young County Court; E. W. Fry, Judge.

Action by G. C. Thedford and another against J. G. McKinney. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. C. Counts, of Olney, for appellant. Arnold & Arnold, of Graham, for appellees.

DUNKLIN, J. J. G. McKinney has appealed from a judgment in favor of G. C. Thedford and R. H. Chancellor for the sum of \$125, as commissions earned for sale by plaintiffs, as real estate brokers and agents for McKinney, of land belonging to him; the sale being by way of an exchange of defendant's land for other property. The suit was not upon quantum meruit, but upon an alleged contract of defendant to pay 2½ per cent. commission on a valuation of the property at \$5,000.

The evidence shows that McKinney exchanged his land for a tract of land in the state of Missouri owned by one Tull, who, in the negotiations for the exchange, was represented by another broker named W. G. Reddin; that prior to the exchange defendant went to Missouri and inspected Tull's land, and after inspection, and while in Missouri, agreed with Tull to make the exchange, the agreement of Tull being conditioned upon a subsequent inspection of defendant's land.

[1] Appellant insists that a peremptory instruction should have been given in his favor as requested by him. The assignment of error complaining of the refusal of such an instruction is based upon two grounds: First, the lack of evidence to show that plaintiffs were authorized by the defendant to make the exchange; and, second, the lack of evidence to show that they performed any service under the alleged contract. By a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proposition submitted under the assignment, the scope of the assignment is limited to the first ground stated, namely, that there was no evidence to show any contract by the defendant with plaintiffs authorizing them to sell the land. In view of the testimony of plaintiff Thedford that defendant listed the land for sale with plaintiffs, who were engaged as real estate brokers, and that he informed defendant in answer to the latter's inquiry that a charge would be made of 2½ per cent. commission on a valuation of the property at \$5,000, and the further testimony of the witness Reddin in effect that, after defendant agreed with Tull for an exchange of properties, defendant told witness that he would pay plaintiffs a commission, this assignment must be overruled.

[2] By the third and fourth assignments it is insisted that the court erred in the first and second paragraphs of the charge given to the jury. The assignments present several grounds of objection to those instructions, but they are limited by the proposition submitted under those assignments to the single criticism that the evidence showed conclusively that the purchaser bought defendant's land solely upon his own information after negotiating with defendant, and was not influenced by any efforts made by the plaintiffs to bring about the sale. The evidence shows that Tull lived in Missouri, and that plaintiffs had no communication with him whatsoever, but according to Thedford's testimony he (Thedford) first told Reddin of plaintiffs' property, and later used considerable persuasion to induce defendant to make the exchange, consisting of recommendations of the Missouri land, all of which occurred before defendant went to Missouri to inspect the land. In view of this testimony and Reddin's testimony already noted in effect that while in Missouri, and after the exchange had been agreed on between defendant and Tull, defendant told Reddin that he expected to pay plaintiffs a commission, these two assignments must be overruled.

[3-5] One paragraph of the court's charge reads as follows: "Where a broker was the procuring cause of a sale of real estate, it is immaterial to his right to a commission that he did not personally conduct the negotiations, was not present when the bargain was closed, or that the principal at the time did not know that the purchaser was found by the broker." This instruction is criticized as being inapplicable to any of the facts in the case, upon the weight of the evidence strongly implying that plaintiffs were the procuring cause of the sale, and calculated to lead the jury to believe that plaintiffs could recover, in the absence of any contract of employment by the defendant and without performing any service for him. We do not think the instruction subject to any of the criticisms made. We think it presents a

sound proposition of law, and, in view of the fact that plaintiffs did not personally negotiate with Tull for the sale of defendant's land and were not present when the agreement of exchange was made in Missouri, the instruction cannot be said to be inapplicable to any of the facts in the case. Nor do we think that the instruction is upon the weight of the evidence; the same being an abstract proposition of law, and not applying directly and specifically to any issue in the case. The instruction was one of several abstract statements of law which in the charge preceded the instructions to guide the jury in determining whether or not a verdict should be rendered in favor of the plaintiffs, and in which the questions whether or not plaintiffs were employed by defendant to act as his agents in the sale of the land, as alleged in plaintiffs' petition, and whether or not their efforts were the procuring cause of the exchange that was made with Tull, were submitted as disputed issues of fact.

[6] Another one of the abstract statements of law contained in the charge reads as follows: "In an action on an implied contract, it is only necessary for the plaintiff to show that he performed acts as the agent and broker of the seller; the latter adopted his acts and accepted his agency." Criticisms are presented to this instruction as follows: That it authorized a recovery without proof of any contract of employment of plaintiffs, and that it strongly implies that defendant did adopt the acts of plaintiffs and did accept their agency, and that therefore it was upon the weight of the evidence. This assignment is overruled for the same reasons given for overruling the last preceding assignment.

[7] Error has been assigned to this instruction: "An agent may be created by an express or an implied agreement, and when by an implied agreement the acts and conduct of the parties must be looked to in determining if there is an agency, and, if one party accepts the work and benefits arising from the efforts of a second party in a land deal, he makes the second party his agent by an implied contract. Therefore if you find from the preponderance of the evidence before you that there was either an express or an implied contract between the parties for the sale of the land in question, and that Thedford and Chancellor acted either as the direct or implied agents of McKinney and procured for him a buyer for his land, either through themselves or their agent Reddin, then you will find for the plaintiff in the sum of \$125, but, if you do not so find, then you will find for the defendant." In the assignment many criticisms are addressed to this instruction, but, as in other assignments already noted, it is limited by the following proposition, which is the only proposition submitted under the assignment: "An agent cannot delegate the authority given him by his principal without the principal's consent, and an agent can-

not act for both vendor and vendee without the consent of both." Following this proposition is a quotation from the testimony of the witness Reddin as follows: "I made a trade for Brother McKinney through Brother Thedford. I had no interest in the commission down here. The Missouri man paid me. He was agent for Tull. I represent both men's interests. Upton called me to McKinney and brought me and McKinney together. Thedford knew nothing of the contract between Tull and McKinney until I told him."

The testimony of Reddin was uncontroverted that he represented Tull only; that he so told McKinney on different occasions before the trade was closed; and that he had no interest whatever in the commissions claimed by plaintiffs. The negotiations between plaintiffs and Reddin were simply negotiations between two agents representing two principals, in which both agents were trying to effect a sale of the respective properties of their principals, and there is nothing in the testimony nor in the charge which does violence to the rule of law stated in the proposition.

[8] Another instruction was given by the court reading: "You will find that Chancellor and Thedford are not partners of the witness Reddin, and that it makes no difference to their right for a commission that he got all of the commission out of the party in Missouri." The proposition submitted under an assignment to this instruction reads: "An agent cannot obtain a commission from his principal for buying, where, unknown to such principal, he has received a commission from the seller."

In view of what we have said in the discussion of the last preceding assignment, the assignment now under discussion must be overruled.

[9] Complaint is made of the refusal of the following instruction requested by appellant: "A real estate broker is not entitled to commission on a sale of land, where the purchaser bought solely upon his own information after negotiating with the owners and was not influenced by the broker, even though the broker himself, or through another, had made efforts to sell the land to such purchaser."

The court gave another special instruction requested by defendant reading as follows: "Unless you find from the evidence that plaintiffs Thedford and Chancellor, as the agents of the defendant, were the efficient and procuring cause of the sale or trade of defendant's land, as alleged by plaintiffs, then you will find for the defendant." The instruction so given presented substantially the same defense as was covered by the instruction which was refused. Appellant was not entitled to two instructions upon the same issue, and, when one was given, he is in no position to complain of the refusal of the

other, even though it was more favorable to him.

[10] It is insisted that the court erred in refusing another requested instruction in effect that, even though an agent brings parties together to make a trade, he is not entitled to a commission in the absence of a contract of agency. There was no error in refusing that instruction because the same defense was substantially presented in the court's main charge.

[11, 12] Error has been assigned to the refusal of another instruction requested by the appellant that any agreement between plaintiffs and the witness Reddin, relative to the exchange of the two properties, would not be binding upon the defendant unless such agreement for exchange was made with defendant's knowledge and consent, or was afterwards ratified by him prior to the consummation of the trade. We do not think that this instruction was applicable to any of the evidence in the case. There was no testimony of any agreement between plaintiffs and Reddin further than that each did make an effort to induce his principal to make the trade that was afterwards made. We are of the opinion further that the evidence was sufficient to support the verdict, and that the trial court committed no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

TEXAS & P. RY. CO. v. TOMLINSON.  
(No. 7922.)

(Court of Civil Appeals of Texas. Ft. Worth.  
April 11, 1914.)

**1. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—BURDEN OF PROOF OF INJURY TO STOCK.**

Where a shipper of live stock, required by the contract to accompany it, was not afforded an opportunity to do so, the rule that the burden of proof rested on him to show which of the connecting carriers inflicted the injury to the stock complained of did not apply.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

**2. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—BURDEN OF PROOF OF INJURY TO STOCK.**

Where a carrier of live stock contracted to transport it to designated stockyards, and there deliver it to the consignee, but proceeded without any special request therefor to take the stock to the stockyards by a belt line railway, the belt line railway was but an agency of the carrier to perform the contract, and, the shipper suing for injuries to the stock, did not have the burden of proving which carrier inflicted the injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

Appeal from Stephens County Court; N. N. Rosenquest, Judge.

Action by J. E. Tomlinson against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 157 S. W. 278.

Earl Conner, of Eastland, for appellant. Alexander, Power & Ridgway, of Ft. Worth, for appellee.

CONNER, C. J. Appellee recovered a judgment for the sum of \$150 as damages to a car load of cattle shipped by him over the line of the appellant railway company from Cisco to Ft. Worth, Tex. The cattle by the shipping contract were consigned to the Daggett-Keene Commission Company at North Ft. Worth, where it was alleged that appellant accepted the shipment for delivery. The contract was in writing and by the terms thereof appellee was to accompany the shipment and care for his cattle en route, but the proof shows that after arrival of the train in the west yards of appellant company about 4 o'clock a. m. on the morning of January 17, 1912, in the city of Ft. Worth, the caboose was detached therefrom, and appellee requested to leave it. He did so, ate his breakfast in the city, and then took a street car for the stockyards in North Ft. Worth, where he arrived at about 6 a. m. and found several car loads of other cattle that had been transported by the same train as his own, but his car of cattle, as shown by the proof, did not arrive, and were not delivered to the consignees until about 9:30 or 10 o'clock of the same day.

We find no error in the court's charge, as complained of in the first assignment, nor in its action in refusing special instructions Nos. 1 and 2, as complained of in the second and third assignments. The material questions presented are dependent upon whether the evidence supports the charge of negligence on appellant's part. It appears that the cattle were properly transported from Cisco to the west yards of the railway company in Ft. Worth, where they arrived, as before stated, about 4 o'clock a. m. in good condition. There was evidence, however, tending to show that at the time of their delivery to the consignees in North Ft. Worth, they were damaged in an amount equal to the verdict.

[1] Appellant's principal insistence is that it has not been made to appear that the appellant, instead of the Ft. Worth Belt Railway Line, an alleged connecting carrier, inflicted the injury to the cattle. While, as stated, appellee agreed to accompany his cattle, yet he was afforded no opportunity to do so between the west yards of appellant and the point of delivery, and therefore the rule that the burden of proof rested upon the plaintiff to show which of the connecting carriers inflicted the damage has no application.

[2] Moreover, it was shown that the consignees' place of business was in North Ft. Worth; that the appellant company, without special request therefor, proceeded to take the cattle from their west yards, and, further, the transportation on to the Belt Line Railway, which completed the transportation

and delivery. It seems evident from a consideration of the contract that it was contemplated that the transportation should be to the stockyards in North Ft. Worth, and that the Belt Line Railway was but an agency of appellants to complete what it had undertaken originally to do. Defendant's special instruction No. 4, placing the burden upon the plaintiff to show which road inflicted the injury, was therefore properly refused.

The evidence undoubtedly tends to show an unexplained delay of some three or four hours after arrival of the cattle in Ft. Worth, and that such delay after transportation as already stated, had a tendency to cause the damage shown, so that the court committed no error in submitting the issue, nor in overruling the motion for new trial on the ground of the insufficiency of the evidence. Nor do we think the court committed error in admitting proof that it was the custom of cattle shippers over the Texas & Pacific Railway to do as plaintiff did do in the present case, viz., under the circumstances stated, to leave the train and go by other conveyance to North Ft. Worth, where cattle shipped for sale on the market were uniformly delivered. This evidence, together with appellant's course hereinbefore adverted to in forwarding the transportation without further request or tender of cattle at any other place, tended to show the construction the parties themselves placed upon the shipping contract, viz., that it was originally contemplated that the transportation should be from Cisco to the stock yards at North Ft. Worth, and there delivered to the consignee.

No other question seems to require a discussion, and it is ordered that all assignments of error be overruled, and the judgment affirmed.

#### COPE v. PITZER. (No. 7870.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 28, 1914. Rehearing Denied April 4, 1914.)

#### 1. APPEAL AND ERROR (§ 731\*)—ASSIGNMENT OF ERRORS—FORM—GENERALITY.

An assignment of error that one finding by the trial court was in conflict with two other findings, which does not point out in what respect the findings conflict, is too general to be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

#### 2. CORPORATIONS (§ 90\*)—ACTION ON SUBSCRIPTION—FINDINGS OF FACT—INCONSISTENT FINDINGS.

A finding that the agent of an insurance company in selling stock of the company did not misrepresent to the subscriber the past or existing status of the company, and that any misstatements made by him involved future contingencies, and were speculative and conjectural, is not inconsistent with findings that the agent represented that the note for his commission was all that the subscriber would have to pay for the stock, that the company would carry the note for the purchase price for the

stock as a loan which would eventually be paid out of the dividends, but that at the time of action the company had paid no dividends, and did not intend to for some time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.\*]

### 3. CORPORATIONS (§ 99\*)—STOCK SUBSCRIPTIONS—VALIDITY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 12, § 6, provides that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void. Rev. St. 1911, art. 4725, subd. "e," requires the articles of incorporation of a life insurance company to show the amount of its capital stock, all of which must be subscribed and fully paid up before the articles of incorporation are filed. Rev. St. 1911, art. 4733, provides that the laws relating to corporations in general shall govern life insurance companies in so far as they are pertinent and not in conflict with the statutes especially pertaining to such companies. Rev. St. 1911, art. 1146, provides that no corporation shall issue any stock except for money paid, labor done, or property actually received. *Held*, that these provisions did not prevent a life insurance company from contracting to sell an increase of its capital stock and take notes of the subscribers in payment for such stock where the stock was not issued by the company until the notes were fully paid, since the contracts did not constitute sales and actual issuance of the stock on credit within the meaning of the Constitution and statutes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

### 4. APPEAL AND ERROR (§ 934\*)—REVIEW—PRESUMPTIONS.

Where the trial court found that a life insurance company was ready to issue stock, forming a part of an increase of the capital stock of the company, to a subscriber upon his paying the note given for the purchase price thereof, it must be presumed, in aid of the judgment against the subscriber, that the company had complied, or was ready to comply, with the statutory requirements for increasing its capital stock.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

### 5. CORPORATIONS (§ 76\*)—SUBSCRIPTIONS FOR STOCK—VALIDITY.

A subscription contract for the purchase price of a portion of the capital stock of a corporation created by an increase in the amount of its authorized capital stock, where notes were given by the subscriber in payment for the stock, is, when not in violation of law, a valid and enforceable obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.\*]

### 6. CORPORATIONS (§ 80\*)—SUBSCRIPTIONS FOR STOCK—VALIDITY—MISREPRESENTATIONS.

Statements by an agent in taking subscriptions for the increased capital stock of a life insurance company, the purchase price of which was represented by notes, that the agent's commission was all the subscriber would be compelled to pay, for the company would carry his subscription as a loan which would eventually be paid out of the dividends from the stock, are mere puffing inducements or promises for future performance, and not fraudulent misrepresentations, especially where it does not appear that the company had no intention to refuse a compliance with such promises.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Action by S. A. Pitzer against J. E. Cope. Judgment for the plaintiff, and defendant appeals. Affirmed.

Howell Johnson and W. A. Hadden, both of Ft. Stockton, and Cunningham & Oliver, of Abilene, for appellant. Ben L. Cox, of Abilene, for appellee.

DUNKLIN, J. J. E. Cope, Felix S. Wilson, and Tom Cope each subscribed for 10 shares of capital stock of the face value of \$1,000 in the Wichita Southern Life Insurance Company, agreeing to pay therefor the sum of \$2,500, evidenced by two promissory notes, one for \$2,000, payable to the company, and one for \$500 payable to S. A. Pitzer, who solicited the subscriptions for and on behalf of the company under appointment by F. W. Griffin, its fiscal agent. The subscription contracts were in writing duly signed, and each an exact copy of the other. Three suits were instituted by Pitzer upon the notes executed to him, and from judgments in his favor the defendants have appealed, and the three appeals have been consolidated. The cases were tried by the court without the aid of a jury. No statements of facts appear in the records, the assignments of error being predicated upon findings of fact and conclusions of law filed by the trial judge. The facts so found by the trial judge in the case against J. E. Cope, together with the conclusions of law thereon, are as follows; the findings of fact in the other cases being identical with the exception that Tom Cope's and Felix S. Wilson's names appear as subscribers instead of J. E. Cope:

"I. On or about the 7th day of February, 1912, the Wichita Southern Life Insurance Company was a duly incorporated life insurance company under the laws of the state of Texas, doing business and having its principal office and place of business in Wichita Falls in Wichita county, Tex., and J. E. Cope, the defendant, was a resident citizen of Ft. Stockton in Pecos county, Tex.

"II. Prior to said date it was proposed by said corporation to increase its capital stock and surplus fund, as shown by the contract between said company and defendant, as hereinafter set out, and F. W. Griffin of Wichita Falls was engaged or employed by said company as its fiscal agent to dispose of said shares of capital stock represented by said increase, and said Griffin was duly authorized and empowered to solicit and obtain subscription contracts to said increase of said capital stock on blank forms for subscription approved by said company, one of which forms was used in taking said subscription of the defendant.

"III. Said F. W. Griffin employed plaintiff, S. A. Pitzer of Abilene, Tex., to assist him in taking subscriptions to the capital stock of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



said company, and the said company secured the subscriptions of defendant to 10 shares of said capital stock, the defendant entering into the following contract, to wit: 'No. shares, 10. Subscription Contract to Increase Capital Stock of Wichita Southern Life Insurance Company, Wichita Falls, Texas. Whereas, Wichita Southern Life Insurance Company is a life insurance company, successfully organized and incorporated under the laws of the state of Texas, and, whereas, it is proposed to increase the capital stock of said company in accordance with the provisions of the laws of the state of Texas, to an amount not exceeding, with that already subscribed, a total paid-up capital stock of \$300,000.00 and a paid-up surplus of \$300,000.00; and, whereas, said company has engaged F. W. Griffin as fiscal agent, to sell said increase in capital stock: Now, therefore, I, J. E. Cope of Ft. Stockton, Texas, hereby subscribe for ten shares of the said capital stock when so increased, of the par value of \$100.00 each, said stock to be fully paid up and nonassessable, and I agree to pay therefor \$250.00 per share as follows: \$50.00 per share to be paid to said F. W. Griffin in cash on date of subscription, to be appropriated by him for selling and distributing the stock hereby subscribed for; and \$200.00 per share to be paid at Wichita Falls, Texas, to the said company on January 1st, 1913, as evidenced by my promissory note of even date herewith, of which \$100.00 goes to the capital stock fund and \$100.00 to the surplus fund of the company; said company alone has the right to accept or reject this subscription contract. If accepted, amount of \$50.00 specified above as paid in cash to said F. W. Griffin on date hereof shall be considered duly earned and not to be refunded to me under any condition. If rejected, total payments made to date hereof, shall be refunded to me. No conditions or agreements other than those printed hereon shall be binding on any party hereto. It is expressly agreed that any payment becoming due on the stock subscribed for or on any note given therefor, must be paid within ten days after date due, and in the event of failure to so make such payment, then this subscription contract and any such note or notes shall thereupon become void, and all payments made thereon shall thereby at once be and become forfeited to said company, and it is hereby agreed that the amount so forfeited is and shall be the stipulated, liquidated damages, which said company will suffer by reason of such failure, however, the subscriber shall have the right to make arrangements satisfactory to said company for the extension of such note, without prejudice to the rights of said company or fiscal manager under this clause. Dated and signed at Ft. Stockton, Texas, this 19 day of Feb. 1912. J. E. Cope, Subscriber. Ranchman, Occupation. Witness: S. A. Pitzer, Agent.'

"IV. The defendant paid no cash in said contract, but executed and delivered to the said Pitzer, the defendant's certain promissory note for \$500.00, payable to the order of the said S. A. Pitzer at Abilene, Tex., six months after date, and being dated February 7, 1912, bearing 10 per cent. interest from date and providing for the 10 per cent. additional as attorney's fees under the usual conditions, the same being the note sued on in this clause. That the defendant at the time also executed his note for \$2,000 to cover the amount of \$100 a share to go to the capital stock fund, and \$100 a share to go to the surplus fund of the company as provided in said contract; said note being payable to F. W. Griffin at Wichita Falls, Tex., and being due January 1, 1913, bearing interest at the rate of ——— per cent. from date, and being dated February 7, 1912. At the time of the delivery of said contract and notes to the said Pitzer by defendant, the said Pitzer delivered to the defendant a receipt, which is as follows, viz.: 'No. Feby. 19, 1912. Received of J. E. Cope of Fort Stockton, Texas, the sum of five hundred dollars, as part payment for 10 shares of the capital stock of Wichita Southern Life Insurance Company of Wichita Falls, Texas, as set forth in said subscription contract numbered as this receipt and bearing even date herewith. Should said subscription contract be not accepted by said company, the amount paid as per this receipt will be refunded. It is expressly agreed that any payment becoming due under the said subscription contract, or on any note given for the stock thereby subscribed for must be paid within ten days after date due, and in the event of failure to so make any such payment, then the said subscription contract and the said note or notes shall thereupon become void and all payments thereon shall thereby at once be and become forfeited to said company and it is hereby expressly agreed that the amount so forfeited is and shall be the stipulated liquidated damages which said company will suffer by reason of such failure. Not valid unless countersigned by S. A. Pitzer, Salesman. F. W. Griffin, Fiscal Manager. ———, Secretary.' This receipt is countersigned by 'S. A. Pitzer, Salesman,' across its face. The cash payment of \$500 mentioned in said receipt was represented by the note for \$500 sued on in this cause. That the proceeds of the note were to be divided between the said Griffin and plaintiff, and plaintiff having paid to said Griffin said Griffin's portion of same, Pitzer became the owner and holder of said note.

"V. The said company delivered no stock to the defendant on the execution of said contract and notes, and no stock has been delivered to defendant thereon, and said company has not agreed to deliver any stock thereon until said note for \$2,000 is paid in full, and demands payment of said note as a prerequisite to issuing said 10 shares of

stock, or any part thereof, to defendant, but said company stands ready to deliver to the defendant said 10 shares of stock on payment of said note for \$2,000.00.

"VI. Said note for \$2,000 and said contract executed by defendant were accepted by said company, and are now held by F. W. Griffin, fiscal agent for said company, in his office in Wichita Falls. No part of said note for \$2,000 has been paid, and on the 2d day of December, 1912, said company, acting by and through its assistant manager, or fiscal manager, F. W. Griffin, and over his signature wrote the defendant a letter, in substance, as follows, viz.: 'Your note dated February 7, 1912, for \$2,000.00 with \$144.00 accrued interest, making a total of \$2,144.00 will be due January 1, 1913, and we would like very much to receive your check for this amount on that date. If it is your purpose to make some other arrangements in regard to the payment of this note, kindly take it up with us at once in order that we may have time to consider the matter before the note is due.' During the correspondence between the company and the defendant about the payment of this note, which correspondence was conducted principally, if not entirely by the fiscal agent Griffin, the company offered to extend the time of payment of same on payment of all interest accrued, and to accrue to the date of maturity of the renewal note and expressed a willingness to make other extensions in future, provided all interest on same was paid to maturity, and satisfactory arrangements could be made with the company at the time of the renewals. No renewal of said note for \$2,000 has ever been executed by defendant. The company does at times accept renewal notes and extend the time of payment of notes given as subscriptions to its capital stock.

"VII. Said Pitzer, in order to induce defendant to sign said contract and notes, represented to the defendant at the time of their execution that said note for \$500, given by defendant to said Pitzer, was all that the defendant would have to pay on said notes; that said life insurance company was in a prosperous condition; that it had a large amount of money on hand which it was loaning out, and in making loans it always gave its stockholders the preference, and in case defendant could not pay said note for \$2,000 at maturity the company would carry it as a loan; that the company then had on hand a surplus out of which it would soon declare a dividend to its stockholders, and if defendant would subscribe then he would participate in this dividend; that the profits and income of the company were such that the dividends earned by the stock which defendant subscribed for would be sufficient to pay the interest on said \$2,000 note, and would in time pay the principal thereof. The defendant was a stockman, and had little knowledge of the organization and manage-

ment of corporations, and knew nothing at all about the affairs of the Wichita Southern Life Insurance Company except what Pitzer told him, and never participated in any stockholders' meeting of the company in any way. That he relied upon and believed the statements of Pitzer, and would not have purchased said shares of stock had not such representations been made by said Pitzer. Said Pitzer was a comparative stranger to defendant at the time of said subscription, they having known each other only about two weeks.

"VIIa. I further find that at the time said representations were made said life insurance company was in a prosperous condition, and had money to loan and was loaning large sums of money to stockholders and others. The portion of its surplus represented by selling its capital stock above par was held by said company, and was not distributed in dividends, but only the portion of the surplus or undivided profits, derived from its sales of insurance interest on loans and other sources was distributed in dividends to the stockholders. At the time said representations were made said company had sufficient surplus, or undivided profits subject to such distribution, to pay a small dividend to its stockholders, but no dividend was declared, and company has never paid a dividend on its capital stock, and does not contemplate doing so until the end of the year 1913. Said company never contracts directly to carry stock subscription notes and apply the dividends on the stock they represent to the payment of, or as credits on said notes.

"VIII. I find that the defendant executed the note described in plaintiff's petition, and delivered the same to S. A. Pitzer on the date of said note, that said note was in writing, and by its terms payable at Abilene, Taylor county, Tex., and that said note was past due and unpaid to the extent of the judgment rendered herein.

"IX. I find that the \$50 per share cash payment recited in said subscription contract referred to the \$500 note which was given by the subscriber to Pitzer, which \$500 note Pitzer accepted from the subscriber in lieu of cash as a private agreement between the said Pitzer and said subscriber, and I find that Pitzer then became the owner of said \$500 note, and that he paid said F. W. Griffin \$100 out of said note, and one Charley Graham, who acted with him in securing said subscription, \$125 out of same.

"X. I find that defendant subscriber fully understood at the time he executed said \$500 note that said note represented so much cash, the duly earned compensation of said F. W. Griffin as provided in said contract, and understood that same was not to be refunded to him under any condition, save and except the rejection of his subscription contract by the company.

"XI. I find that said Pitzer did not mis-

represent to the subscriber the present or past or existing status or condition of said company in order to induce the execution of said note and contract; that if he made any misstatements which induced the execution and delivery of the notes and contract, same involved future contingencies, and were speculative and conjectural.

"From which facts I find the following conclusions of law, to wit:

"I. The Wichita Southern Life Insurance Company could lawfully contract for the sale of its capital stock through an agent, and agree to deliver the same to the subscriber on a future date, when fully paid for in cash upon delivery thereof, at least the par value thereof, and that the contract entered into by defendant subscriber for such purchase of stock was a valid and binding obligation.

"II. The defendant subscriber, having signed the \$500 note with due knowledge of the law and with a full understanding of what it was for, is now estopped from claiming that it is without consideration, or constitutes a part of an ultra vires contract.

"III. The promises and inducements held out by the said Pitzer to defendant subscriber to get him to sign said contract and notes, in effect, attempted to vary the terms of said written contract, and were not binding either on said company, or on Griffin or on Pitzer; that they were mere puffing inducements and promises for future performance, and were not as a matter of law fraudulent.

"IV. Plaintiff is entitled to judgment against defendant for the amount due on said note according to its terms.

"V. I conclude that defendant's plea in abatement is not well taken."

The representations made by Pitzer to the subscribers in order to induce them to enter into the contracts and execute the notes, as shown in paragraph VII of the court's findings of fact, were alleged in appellants' answers, coupled with allegations that the same were untrue, and appellants each sought to avoid liability by reason of such misrepresentations.

[1, 2] By the first assignment of error the contention is made that the findings shown in the eleventh paragraph of the facts found, in effect, that Pitzer did not misrepresent to the subscribers the present or past condition of the company; that if he made any misrepresentations which induced the execution and delivery of the notes and contracts, same involved future contingencies only—is contrary to the facts found in paragraphs VII and VIIa. In what respects the supposed conflicts consist is not pointed out in the assignment, which for that reason is too general to merit consideration. Aside from that suggestion, however, we fail to discover any inconsistencies in those findings.

[3] The principal defenses urged to the recoveries sought are that the subscription contracts were in violation of article 12, sec-

tion 6, of our state Constitution, and Revised Statutes, 1911, art. 4725, subdivision "e," 4727, 4733, 1146, and 1147.

Article 12, § 6 of the Constitution reads: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Article 4725 of the statutes prescribes what shall be shown in articles of incorporation of a life, health, or accident insurance company, and subdivision "e" of that article reads as follows: "The amount of its capital stock, not less than \$100,000.00 all of which capital stock must be subscribed and fully paid up and in the hands of the corporators before said articles of incorporation are filed, such capital stock to be divided into shares of one hundred dollars each."

Article 4727 provides for the amendment of charters of insurance companies.

Article 4733 provides that the laws relating to and governing corporations in general shall govern life insurance companies also in so far as the same are pertinent and not in conflict with the statutes pertaining specially to life, health, or accident insurance companies.

Articles 1145, 1146, and 1147 pertain to corporations in general. By article 1145, it is provided that, in order for a corporation already formed to increase its capital stock, the same showing shall be made relative to the amount of stock subscribed and the amount of payments on such subscriptions as is required to obtain the original charter.

Article 1146 reads: "No corporation, domestic or foreign, doing business in this state, shall issue any stock whatever, except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the company. Any corporation which violates the provisions of this article shall, on proof thereof in any court of competent jurisdiction, forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from or by virtue of the laws of this state."

By article 1147 it is made the duty of the Attorney General of the state to institute judicial proceedings for the cancellation of any stocks or bonds issued by a corporation in violation of the provisions of article 1146.

The decision in *McCarthy v. Texas Loan & Guaranty Co.*, 142 S. W. 96, by the Court of Civil Appeals for the Eighth District, and in which case a writ of error was denied by our Supreme Court, is the authority relied upon most strongly by appellants to support their contention that their contracts with the insurance company were in contravention of the article of the Constitution and of the statutes above noted, and therefore void.

It will be noted that the inhibition prescribed by the Constitution and statutes is against the issuance of stock without the payment therefor in money, labor, or property, and that by article 4725, subdivision "e" of the statutes, it is provided that, before the issuance of the charter for a life insurance company, the stock must be fully paid up and in the hands of corporators, and by other articles of the statutes the same requirements necessary for the formation of a corporation apply also to an amendment of its charter after it has been first organized. The case of *McCarthy v. Texas Loan & Guaranty Co.*, supra, was a suit by a subscriber for stock against a corporation to enforce the issuance to him of the stock for which he had subscribed, or in the alternative, for damages for breach of the contract to issue such stock. According to the terms of that contract, the subscriber was not obligated to pay all cash for his stock when it should be issued, but was entitled to receive the same upon payment of less than 10 per cent. of the contract price in cash and the execution of his notes for the balance. In that case it was held that the contract was violative of the provisions of the Constitution above noted. Likewise in *Mason v. First Natl. Bank of Paint Rock*, 156 S. W. 366, also cited by appellants, it was held that a promissory note given for the entire consideration of capital stock already issued to the maker of the note was in violation of the Constitution, and no recovery could be had thereon. Also in *S. A. Irri Co. v. Deutschmann*, 102 Tex. 201, 105 S. W. 486, 114 S. W. 1174, our Supreme Court used the following language: "The contract which Deutschmann sets up, by which he was not to pay for the stock any money *at the time* of its issue (*italics ours*) is plainly and unquestionably in violation of the Constitution of the state, and, being in violation of the Constitution, that agreement, in so far as it provided that Deutschmann should have all the time that he might find necessary in which to pay for his stock, was void." Other authorities are cited by appellants in line with the decisions noted.

[4] The facts in the case at bar differ from those in the cases noted, in that, as shown by the subscription contracts themselves, the insurance company did not agree to deliver any stock until the purchase price therefor was fully paid, and the purchase price was more than double the face value of the stock. And as recited in the fifth paragraph of the court's findings, none of the stock has been delivered to appellants, but the company stands ready to deliver the same upon the payment of the notes executed by the subscribers in favor of the company. If the company is ready to do this, then in aid of the judgment, it must be presumed that, if it has not already done so, it is now ready

to comply with the statutory requirements necessary to properly amend its charter; nothing to a contrary effect appearing in the findings.

As the act prohibited by the Constitution and the statutes is the issuance of stock by a life insurance company without full payment of the consideration therefor, and as no stock has been issued to appellants, and as the company has not obligated itself to issue, and does not intend to issue, the same except upon payment by the subscribers of more than the face value of the stock, the authorities relied on by appellants are not applicable in this case.

[5] It is well settled that a subscription contract such as those in controversy, when not in violation of law, is a valid and binding obligation which can be enforced in court. *Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134; 10 Cyc. 394.

[6] While the Insurance Company obligated itself to issue stock to the subscribers in the future upon the payment of the consideration therefor, those contracts did not constitute sales and actual issuance of stock on credit within the meaning of the Constitution and statutes, as appellants insist by different assignments of error. We are of the opinion, further, that the trial judge was correct in his finding that any misstatements by Pitzer which induced appellants to execute the contracts and notes were mere puffing inducements and promises for future performance involving speculative and conjectural future contingencies which were not binding upon the company for that reason, and for the further reason that they were at variance with the written contracts, especially in view of the further fact that there is no finding by the trial judge that at the time of the execution of the contracts and notes, the insurance company had no intention to refuse a compliance with such promises. 10 Cyc. 391; 2 Thompson on Corporations, § 1311.

Appellants insist that the court erred in his second conclusion of law in holding that appellants are estopped from claiming that the notes were a part of an ultra vires contract. We agree with appellants in the contention that they would not be estopped to claim that the executions of the notes in controversy were procured by fraudulent misrepresentations of fact, but we construe the conclusion as meaning simply that, as appellants had failed to establish their pleas of fraudulent misrepresentations inducing them to execute the notes, the insurance company was entitled to recover, and that the conclusion that appellants were estopped from questioning the validity of the contracts was used in that sense only.

The judgments are affirmed.

**HOUSTON & T. C. R. CO. v. EAVES et al.**  
(No. 7100.)(Court of Civil Appeals of Texas. Dallas.  
April 11, 1914. Rehearing Denied  
May 2, 1914.)**RAILROADS (§ 259\*) — INJURIES TO PROPERTY—PERSONS LIABLE—LICENSEE.**

One who leased a portion of a right of way of a railroad company and assumed all loss and damage caused by the negligence of the company is not thereby required to pay to the company the amount of damages recovered from it by one who owned a house situated on the right of way, but who was not holding under the lessee or in privity with him, and of which house the company had never put the lessee in possession, for the negligent burning of the house.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 802-816; Dec. Dig. § 259.\*]

Appeal from Limestone County Court; A. M. Brackmon, Judge.

Action by J. C. Eaves against the Houston & Texas Central Railroad Company, in which one Allen was made a defendant by said railroad company. From a judgment in favor of the plaintiff and of the defendant Allen against the said company, the company appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and C. S. Bradley, of Groesbeck, for appellant. Bradley & Herring and W. T. Jackson, all of Groesbeck, for appellees.

**RAINEY, C. J.** Appellee J. C. Eaves sued the appellant to recover damages sustained from the loss of a certain cotton seed house, and other property situated on the right of way of appellant, caused from a fire negligently set out on the right of way by appellant's servants.

Defendant answered by general denial, and specially that plaintiff was holding the premises under lease from one Allen, which was then in force, of which plaintiff was assignee, and by the terms of said lease it was agreed that Allen was to assume all loss and damages caused by the negligence of said railroad company to said property, and the said Allen was vouched in by appellant, and judgment was asked over against Allen in the event it had to pay for the destruction of said property.

Allen pleaded a general denial and interposed other defenses.

A trial was had without a jury, and judgment rendered against the railroad company in favor of plaintiff, and also in favor of Allen.

There is no error presented that requires a reversal of this cause. The evidence shows: That appellant's servants were negligent in setting fire to the grass on the right of way when a strong wind was blowing, and in not watching and preventing the fire from burning plaintiff's house.

(2) That Eaves was in no way liable for the destruction of the house. He was not

holding under Allen nor in privity with the contract between appellant and appellee Allen.

(3) Allen is not liable to appellant on the contract between them. The contract by its terms leased the right of way to Allen, and Allen assumed all risk of appellant's negligence for loss by fire to the property on the right of way leased by Allen. The house of Eaves that was burned was situated on one end of the right of way, and was then and there owned by another when Allen entered into the contract of lease, and he was never in possession of said house. The appellant had never put him in possession of said house, and therefore he was not responsible, under the contract to said appellant, for the burning of the house.

The judgment is affirmed.

**ALDERETE v. MOORE et al.** (No. 328.)  
(Court of Civil Appeals of Texas. El Paso.  
April 16, 1914.)**APPEAL AND ERROR (§ 773\*)—BRIEFS—FAILURE TO FILE—EFFECT.**

The judgment will be affirmed if appellant files no brief; there being no fundamental error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Appeal from El Paso County Court; J. M. Deaver, Special Judge.

Action by Victor C. Moore and another against Isaac Alderete. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. L. Vowell, of El Paso, for appellant. J. M. Harris and T. A. Falvey, both of El Paso, for appellees.

**HIGGINS, J.** This was a suit to recover a balance alleged to be due by Alderete to the law firm of Moore & Moore, for professional services rendered, resulting in a verdict and judgment in favor of appellees.

There is no brief on file in appellant's behalf, and, since there is no fundamental error, the judgment will be affirmed. Because of such failure to file brief, the various assignments of error are not entitled to consideration and are not considered, but, in passing, it may be said that we have examined the entire record, and apparently none of the assignments are well taken, and, had they been presented by proper brief, the same would have been overruled.

Affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS**  
**v. COOK.** (No. 7874.)(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 28, 1914. Rehearing Denied  
April 4, 1914.)**1. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—INSTRUCTIONS—ASSUMING FACTS.**

A charge, in an action for injuries caused by the failure of a railroad company to warn its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

depot after the arrival of plaintiff by train, the first paragraph of which stated abstractly the duty of the company under Rev. St. 1911, art. 6591, to keep its station lighted and warm for not less than one hour after the departure of all passenger trains, and the second paragraph of which applied the law by instructing the jury that if they found that plaintiff was a passenger, etc., they should find for her, is not erroneous as assuming that the plaintiff was a passenger during the time of which she complained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

**2. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—TERMINATION OF RELATIONSHIP.**

By the common law, the relation of carrier and passenger does not terminate until after the passenger has alighted and has a reasonable time and opportunity to leave the depot, the question of what is a reasonable time and opportunity being one of fact, dependent on the circumstances of the particular case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

**3. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—TERMINATION OF RELATIONSHIP.**

Rev. St. 1911, art. 6591, requiring railroads to keep their passenger depots open, lighted, and heated for one hour after the departure of passenger trains, fixes the reasonable time within which a passenger may remain in the station, without losing his right to protection as such, at not less than one hour.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

**4. CARRIERS (§ 333\*)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

One who remains in a railroad station for the full hour during which Rev. St. 1911, art. 6591, requires it to be warmed and lighted, after he has reasonable time and opportunity to leave, and thereby submits himself to danger or discomfort, cannot recover for the consequences because his own negligence contributed to the result.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

**5. CARRIERS (§ 346\*)—INJURIES TO PASSENGERS—ACTIONS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

In an action for injuries caused by the failure of a railroad company to keep its depot lighted and warmed for one hour after the departure of a passenger train, as required by Rev. St. 1911, art. 6591, evidence held sufficient to warrant the jury in finding that the plaintiff was not negligent in remaining in the depot during the full hour.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. § 346.\*]

**6. CARRIERS (§ 321\*)—INJURY TO PASSENGERS—INSTRUCTION—DUTY OF CARRIER.**

In such an action a special charge that the railroad company owed the plaintiff no duty to take her to the hotel, or to provide her lodging from the time of the arrival of the train until the hour at which she left the depot, might have misled the jury, since the company did owe her a duty for at least a part of the time to keep the depot warm.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

**7. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—PERSONAL INJURIES—IMPAIRMENT OF HEALTH.**

Where the evidence showed that plaintiff, a woman 54 years old, who prior to that time

had been in good health and able to plow, hoe, and gather her crops to support herself and children, was seized with chills and fever as a result of sitting in a cold railroad depot after her arrival on one of defendant's trains, and that such symptoms had continued more or less ever since, resulting in an inability to work, and the question of the permanent injury was submitted to the jury without objection, a verdict for \$2,875 will not be set aside as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 872-885, 896; Dec. Dig. § 132.\*]

**Appeal from District Court, Clay County; P. A. Martin, Judge.**

Action by Mrs. A. P. Cook against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for the plaintiff, and defendant appeals. Affirmed.

Garnett & Garnett, of Gainesville, for appellant. Taylor & Humphrey, and Wantland & Parrish, all of Henrietta, for appellee.

CONNER, C. J. This suit was instituted by Mrs. A. P. Cook to recover of appellant damages for alleged injuries sustained by her on the ground that appellant had failed to maintain lights and fire in its station at Henrietta for one hour after the departure of its 3 o'clock a. m. train November 7, 1912. Appellant answered: First, by a general denial; second, that appellee ceased to be a passenger upon reaching and safely alighting from the train at Henrietta, and hence that appellant owed her no further duty; third, that opportunity was afforded the appellee upon the occasion in question of leaving the depot by means of a cab which met said train, but that she did not avail herself of this opportunity, and made no effort to secure other accommodations for the balance of the night, and that her injuries, if any, were brought about by such failure on her part; and, fourth, that appellee's ill health, if any, was not the result of remaining in appellant's depot from 3 a. m. until 6:30 a. m., but was due to overwork, nervous breakdown, and conditions over which appellant had no control, and to which its action did not contribute. A trial before a jury upon the issues indicated resulted in a verdict and judgment in appellee's favor for the sum of \$2,875.

[1] The first and second paragraphs of the court's charge are criticised as being on the weight of the evidence in assuming that appellee was a passenger during the time of which she complains, but these criticisms must be overruled we think. The first paragraph merely states in an abstract way the duty of the railway company, as declared by the article of the statutes hereinafter quoted, to keep its passenger station lighted, warmed, and open for all passengers entitled to go therein for a time not less than one hour before the arrival and after the departure of all trains carrying passengers. The second paragraph then proceeds to apply the law by instructing the jury that if they found that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellee was a passenger, etc., they should find for the plaintiff, thus distinctly submitting to the jury in an affirmative form the issue of whether appellee was a passenger at the time in controversy, in view of which the merely possible inference that appellant has drawn from the charge was evidently without appreciable force. The further criticism of the charge that in the third paragraph the court assumes that plaintiff was injured must be answered in the same way. The charge as a whole clearly leaves the issue for the determination of the jury.

The vital question on the issue of appellant's liability is raised by the fourth assignment complaining of the refusal of the following special charge: "Gentlemen of the jury, the evidence in this case shows that after the plaintiff reached Henrietta at 3 a. m., November 7, 1912, and disembarked from defendant's train that she ceased to be a passenger of defendant, and that it owed her no further duty. You will, therefore, return your verdict for defendant." The contention is that under the undisputed evidence the plaintiff at the time of her injury, if any, had ceased to be a passenger, and hence that as to her the defendant was not bound to furnish light or warmth.

Revised Statutes, 1911, article 6591, reads: "Every railroad company doing business in this state shall keep its depots or passenger houses in this state lighted and warmed, and open to the ingress and egress of all passengers who are entitled to go therein for a time not less than one hour before the arrival and after the departure of all trains carrying passengers on such railroad; and every such railroad company, for each failure or refusal to comply with the provisions of this article, shall forfeit and pay to the state of Texas the sum of fifty dollars, which may be sued for and recovered in the name of the state in any court of competent jurisdiction, and shall be liable to the party injured for all damages by reason of such failure."

[2] Even in the absence of a statute by the common law the relation of carrier and passenger does not terminate until after the passenger has alighted and had reasonable time and opportunity to leave the depot or alighting place, the question of what is reasonable time and opportunity being one of fact dependent on the circumstances of the particular case. See *Tex. & Pac. Ry. Co. v. Dick*, 63 S. W. 895; *Ormond v. Hays*, 60 Tex. 180; 4 *Elliott on Railroads* (2d Ed.) § 1592, and cases cited in notes.

[3] An analysis of the article of the statute quoted, however, indicates the legislative purpose to arbitrarily fix not less than one hour as the reasonable time within which a departing passenger may acquaint himself with his surroundings and deliberate upon ways and means for his further progress. The statute is imperative in form, and the right of the state in the exercise of its regulatory and police power to so prescribe is not

questioned. Indeed, appellant on the trial in effect so assumed by requesting the following special charge, which the court gave, viz.: "I charge you that defendant was required under the law to keep its depot warmed and lighted for one hour after the departure of its 3 a. m. train upon the occasion in question. Now, if you find from the evidence that a reasonable time within which plaintiff should have left defendant's depot did not exceed one hour after the departure of said train, then I charge you that you cannot allow plaintiff damage for any injury sustained by her, if any, by remaining in said depot for a longer time than one hour after the departure of defendant's train."

[4, 5] Of course the statute is not to be construed so as to impose a liability in favor of a departing passenger who remains in the depot for the full hour without cause or reason after he has had time and opportunity to leave. Should he do so, and thus voluntarily subject himself to danger, discomfort, or harmful conditions, he will be required to bear the burden of the consequences, on the familiar ground that his own negligence contributed to the result. So the question of whether, within the prescribed hour at least, appellant was liable for its failure to perform the duty of keeping its depot lighted and warm must depend upon the issue of appellee's own contributory negligence. This issue was fully submitted both in the court's charge and in special charge given at appellant's request, and we cannot say that the evidence is insufficient to support the jury's verdict thereon in appellee's favor. There is evidence tending to show that appellee was about 54 years old, frail in body, thinly clad, accompanied by a small grandchild, and nearly blind. There was other evidence to the further effect that she was unacquainted with the location of the town or hotels, some half a mile away; that there was no cab that met the train; that she lived and worked in rural communities and was timid and unresourceful, as the jury may have inferred from her appearance and manner of testifying. This evidence, we think, sufficiently sustains the jury's verdict that appellee was not guilty of negligence in remaining in appellant's depot for an hour at least after her arrival at Henrietta. Hence for that time appellant owed appellee the duty of keeping its depot open, lighted, and warm, and is liable under the statute for the proximate results of its failure to discharge such duty. In this connection we should perhaps state that we have not found it necessary to consider appellant's duty beyond the hour, inasmuch as the court submitted the case on the statute and the evidence tends to show that appellee's injuries were caused within less than an hour after her entry in the depot.

[6] We find nothing in the case requiring special charge No. 1, to the effect that appellant was under no duty to take appellee to a hotel or to provide her lodging from 3

to 6:30 a. m. when she departed. Indeed, the charge might have been misleading, for if appellee was without negligence, appellant did owe the duty of furnishing a warm depot for at least part of the time specified. Other special charges refused were, so far as proper, included in charges given.

[7] It is also insisted that the verdict and judgment is excessive, but as to this also we have concluded that it is our duty to rule against appellant. If appellee's evidence is to be credited, and the jury evidently did credit it, she was, prior to the occurrence in question, in good health and able to plow, hoe, and gather her crops, as had been her habit of life in supporting herself and children; that the night was cold, as was also the depot when she entered it; that it remained cold, and that within less than an hour after her entry she, as a result, was seized with a severe chill or "rigor," followed by fever; that such symptoms had continued more or less of the time since, causing suffering and an inability to labor, etc. The court even submitted the issue of permanent injury, and we find no specific complaint that the evidence did not warrant the submission. So that, on the whole, we feel, as stated, unable to say that the verdict and judgment is excessive. See *Citizens' Ry. Co. v. Griffin*, 49 Tex. Civ. App. 569, 109 S. W. 999, and cases therein cited.

Questions presented by assignments not noticed are sufficiently disposed of, we think, by what we have already said. It is, accordingly, ordered that all assignments of error are overruled, and the judgment affirmed.

#### MASON v. WARD. (No. 7903.)

(Court of Civil Appeals of Texas. Ft. Worth. March 28, 1914.)

##### 1. LANDLORD AND TENANT (§ 330\*)—RENTING ON SHARES—PURCHASERS FROM TENANT—LIABILITY TO LANDLORD.

If the lease from B. to A. provided B. should receive as rent, not one-fourth of the cotton raised, but one-fourth of the proceeds of the cotton, neither B. nor M., who, during the life of the lease, bought the land, has any claim against W. because of his buying the cotton of A.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1394-1399; Dec. Dig. § 330.\*]

##### 2. LANDLORD AND TENANT (§ 330\*)—RENTING ON SHARES—PURCHASERS FROM TENANT—LIABILITY TO LANDLORD.

If the lease from B. to A. provided that B. should receive as rent one-fourth of the cotton raised, then title to such part of the cotton raised and gathered vested in B., making W. liable to B. because of buying B.'s share of A., unless A. had an unrevoked agency from B. to sell his share.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1394-1399; Dec. Dig. § 330.\*]

##### 3. PRINCIPAL AND AGENT (§ 8\*)—CREATION OF RELATION.

If the lease of B. to A. provided B. was to receive as rent one-fourth of the cotton raised,

so that title to one-fourth of the cotton raised and gathered vested in B., then an agreement by B. or M., successor in title to the land, with A., to sell the landlord's part of the cotton, would be merely an appointment of A. to do so as agent of the landlord.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 16, 18; Dec. Dig. § 8.\*]

##### 4. PRINCIPAL AND AGENT (§ 83\*)—REVOCA-TION OF AGENCY.

Agency of a tenant to sell the landlord's share of the cotton raised, not inuring to the financial benefit of the agent, can be revoked.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 54; Dec. Dig. § 33.\*]

##### 5. PRINCIPAL AND AGENT (§ 193\*)—REVOCA-TION—PEREMPTORY INSTRUCTION.

There being testimony of a revocation of an agency, which revocation, if made, would make defendant liable to plaintiff, it was error to instruct peremptorily for defendant.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 721½-726; Dec. Dig. § 193.\*]

Appeal from Taylor County Court; J. W. Moffett, Special Judge.

Action by J. C. Mason against J. K. Ward. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Cunningham & Sewell, of Abilene, for appellant. Scarborough & Hickman, of Abilene, for appellee.

DUNKLIN, J. W. M. Brown leased a farm to Sam Ashby for the year 1912. During the life of the lease Brown sold the land to J. C. Mason. Ashby sold J. K. Ward 15 bales of the cotton raised by him on the farm. Mason, claiming that one-fourth of said cotton was due him under the lease contract, sued Ward to recover the value of the same, which he alleged to be \$287.55.

Two contentions were urged by Ward in defense of the plaintiff's demand. One was that, under the lease contract from Brown, Ashby was authorized to sell the cotton and to pay over to Brown one-fourth of the proceeds, and that Mason, in buying the land, took it subject to this contract. The other contention was that, after Mason purchased the land, he expressly authorized Ashby to sell the cotton with the understanding that one-fourth of the proceeds would be paid to Mason as rents.

In obedience to a peremptory instruction from the trial judge, a verdict was returned in favor of the defendant Ward, from which judgment Mason has appealed.

[1-5] If, by the terms of the lease contract between Brown and Ashby, it was agreed that Brown should receive as rents one-fourth of the proceeds of the cotton instead of one-fourth of the cotton itself, then neither Brown nor Mason could assert any claim against Ward for buying the cotton. If the lease contract provided that Brown was to receive one-fourth of the cotton as rent, then the title to one-fourth of the cotton raised and gathered was vested in Brown. If such was the contract, an agreement by Brown or



Mason for Ashby to sell the landlord's part of the cotton would be merely an appointment of Ashby to do so as the agent of the landlord, and there is nothing in the testimony which would indicate that the landlord would not have the right to revoke such agency, as it does not appear that such agency in any manner inured to the financial benefit of Ashby. Ashby was the only witness who testified to the terms of his lease from Brown, and, according to some of his testimony, it seems that Brown was to receive one-fourth of the cotton grown as rentals, and that Ashby was appointed agent of Brown to sell the latter's interest in the cotton. According to testimony of Mason, after he purchased the land Ashby recognized the right in Mason to receive one-fourth of the cotton grown on the land. Mason admitted that, prior to the sale by Ashby of the 15 bales to Ward, Ashby sold some 23 other bales and placed one-fourth of the proceeds thereof to Mason's credit in bank, and that Mason accepted the same. His action in so doing tended to show authority from Mason to Ashby to sell the 15 bales to Ward. Of course, if Ashby had the consent of Mason to make the sale to Ward, he would have no right to recover of Ward. But Mason testified further that before the sale to Ward he expressly notified Ashby not to sell any more of the rent cotton, but to turn over the same to Mason's agent. Such being the evidence, the trial court committed error in peremptorily instructing a verdict in favor of Ward, and for this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

CONNER, C. J., not sitting.

**SPIRES v. McELROY et al.** (No. 7906.)  
(Court of Civil Appeals of Texas. Ft. Worth.  
March 28, 1914.)

**1. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR.**

In an action to recover a commission due a real estate broker, where defendant admitted a telephone conversation with the broker, the admission of evidence of the broker's version of the conversation and his ex parte statement that he was talking to defendant, if erroneous, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**2. BROKERS (§ 88\*)—COMPENSATION—ACTIONS.**

A broker who had effected an exchange of land for defendant, was induced by his false representation that he was not pleased with the land but would take it if the broker would accept half of his commission, to waive the same. *Held* that in an action for the remaining half of the commission the charge need not submit whether it was a fraudulent misrepresentation and whether the broker relied upon it, the action not being one for damages for fraudulent misrepresentations but for a sum due on a contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

**3. TRIAL (§ 192\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

In an action for an amount due on a contract, where it was liquidated and the parties agreed as to the sum, the charge could assume that any recovery should be for the sum agreed upon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

Appeal from Taylor County Court; E. M. Ourshiner, Judge.

Action by W. R. McElroy against G. O. Spires and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

Eugene De Bogory, of Abilene, for appellant. Scarborough & Hickman, of Abilene, for appellee McElroy.

**SPEER, J.** This suit was instituted by W. R. McElroy against G. A. McElroy and G. C. Spires to recover the sum of \$300 alleged to be due by Spires to defendant McElroy, and by indorsement and guaranty from defendant McElroy to plaintiff, for a balance due on commissions earned by W. R. McElroy in a certain real estate sale or exchange effected by him for defendant Spires.

It was alleged, and the facts tended to show, that defendant G. A. McElroy as agent for defendant Spires effected an exchange of his lands whereby the defendant Spires became indebted to him in the agreed sum of \$600. That after said exchange had been effected and the commissions earned, the defendant Spires falsely and fraudulently informed McElroy that he was not altogether pleased with the lands offered him in exchange for his, but that he would nevertheless close the trade and accept the same if he, McElroy, would agree to cut his commissions in half and accept the sum of \$300, and that, relying on such representations, and in ignorance of the fact that the trade had in fact been consummated, McElroy accepted the proposition and received the \$300. This suit is to recover the balance of the \$600 commission. There was a jury trial, resulting in a verdict and judgment for the plaintiff against both defendants, and Spires has appealed.

[1] The first, second, and third assignments of error complain of the court's ruling in admitting testimony as to a telephone conversation between G. A. McElroy and appellant, and as to McElroy's ex parte statement that he was talking to Spires; the objections being that such statements were made out of the presence of appellant. But these assignments are overruled, because it is undisputed that such conversation did occur; appellant himself testifying to it. No possible harm, therefore, could have resulted to appellant.

[2, 3] The main issue in the case was thus submitted to the jury: "Now, if you believe and find from the evidence that at the time

said Spires had said conversation over the telephone with said G. A. McElroy, in which conversation said McElroy agreed to reduce his commission to the sum of \$300, he, the said Spires, had already closed said land deal as alleged in plaintiff's petition, then you will return your verdict in favor of the plaintiff for the amount sued for; but, on the contrary, if you believe and find from the evidence that at the time said Spires had said conversation over the telephone he, Spires, had not closed said land deal, you will return your verdict for the defendant." Under this assignment the abstract propositions are announced that parties to a contract may vary the same upon sufficient consideration at their pleasure, that such variance of a contract after it is entered into is no ground for relief, provided all parties acquiesce in the same, and that it was a question for the jury whether or not the representations by appellant were fraudulently made, or, if made, were relied on by G. A. McElroy. There is no contention in the case that a new contract upon sufficient consideration was made in lieu of the original contract of employment between appellant and the agent, McElroy. The facts alleged and established by the verdict of the jury show there was no consideration for G. A. McElroy's agreement to release \$300 of his commissions which had already been earned. The action is not therefore in the nature of damages for fraud, but is essentially one to recover a balance due on contract. This conclusion also disposes of the fifth and last assignment, to the effect that the court erred in assuming that the amount of appellee's recovery, in the event of a recovery by him, would be the sum of \$300. Under the undisputed facts as submitted in both briefs, there remained that sum of the original commissions unpaid, and the sole question of the case was the one submitted to the jury, that is, whether or not at the time McElroy agreed to remit that sum appellant's trade had in fact been closed and the commissions earned.

There is no error in the judgment, and it is affirmed.

CONNER, C. J., not sitting.

BEATON et al. v. FUSSELL. (No. 5247.)  
(Court of Civil Appeals of Texas. San Antonio.  
April 15, 1914. Rehearing Denied May 6, 1914.)

1. FRAUDS, STATUTE OF (§ 110\*)—SPECIFIC PERFORMANCE (§ 29\*)—DESCRIPTION OF LAND SOLD—CERTAINTY.

A contract by which the vendor agreed to sell his place, consisting of four lots in a certain town, it appearing that he owned only one place in that town which did consist of four lots, describes the property sold with sufficient certainty to comply with the statute of frauds

and to entitle the purchaser to specific performance, since it refers to an existing fact which can be easily ascertained.

[Ed. Note.—For other cases, see *Frauds*, Statute of Cent. Dig. §§ 225-236; Dec. Dig. § 110;\* *Specific Performance*, Cent. Dig. §§ 69-82; Dec. Dig. § 29.\*]

2. DEEDS (§ 90\*)—CONSTRUCTION AGAINST GRANTOR.

A deed will be construed against the grantor and in favor of the grantee.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.\*]

3. EVIDENCE (§ 460\*)—PAROL EVIDENCE—IDENTIFYING SUBJECT-MATTER OF WRITTEN CONTRACT.

Where a vendor contracted to sell his place in a certain town, parol evidence was admissible to show that he owned but one place in that town, and also to show of what particular property that place consisted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.\*]

4. SPECIFIC PERFORMANCE (§ 110\*)—TENDER OF PAYMENT—SUFFICIENCY.

The cash payment called for by a contract for the sale of land need not be actually paid into court when payment is tendered by the pleadings in a suit for specific performance, since the court can decree performance upon the payment of the money and the passing of the title only when it is paid.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 354; Dec. Dig. § 110.\*]

5. SPECIFIC PERFORMANCE (§ 106\*)—PROCEEDINGS—PARTIES PLAINTIFF—WIFE OF PURCHASER.

The wife of a purchaser of land is not a necessary party plaintiff in a suit for the specific performance of a contract which did not require the deed to be made to her, or the vendor's lien notes to be signed by her, notwithstanding the fact that the vendor, at the purchaser's request, had executed a deed conveying the property to the purchaser's wife, which was rejected because it was a special, and not a general, warranty deed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 342-351; Dec. Dig. § 106.\*]

Appeal from District Court, Kimble County; Clarence Martin, Judge.

Action by J. W. Fussell against G. W. Beaton and another. Judgment for the plaintiff, and defendants appeal. Affirmed.

M. Fulton, of Mason, for appellants. Horace E. Wilson, of Junction, for appellee.

CARL, J. Appellee, J. W. Fussell, sued G. W. Beaton to enforce specific performance of a contract, whereby it is alleged appellant agreed to convey four lots in the town of London, Kimble county, and all improvements thereon, to appellee, in consideration of \$200 cash, and the balance to be represented by two vendor's lien notes, each for \$225, bearing 8 per cent. interest, and due respectively July 7, 1914, and July 7, 1915. The contract describes the property as: "My place in London, Kimble county, Texas, consisting of four lots in the town of London, county of Kimble, state of Texas, with real-

dence and all improvements thereon." The contract further provided that Beaton would give "a good and sufficient warranty deed to same." The petition further alleges that the four lots referred to are lots 3, 4, 5, and 6, in block 5, in said town of London.

It was further alleged that, subsequent to the making of said contract, defendant G. W. Beaton fraudulently conveyed said lots to C. D. Hensley, with full knowledge of the contract, for the purpose of evading the same. Hensley was made a party defendant, and prayer was that the deed made him be canceled and held for naught.

The defendants filed a joint answer, and the cause was tried before the court, judgment being in favor of plaintiff for the lots and title thereto upon his paying the \$200 cash payment and executing the two vendor's lien notes within ten days from the date of the judgment, same to fall due July 7, 1914, and July 7, 1915, and canceling the Hensley deed.

[1] The first assignment complains of the action of the court in overruling an exception to the petition, for the reason that the contract sued on was not sufficient under the statute of frauds, and also as to the introduction of such contract in evidence, over objection, that it was not sufficient, for want of proper description of the lots, to form the basis of an action for specific performance. The court found that Beaton owned only one place in the town of London, Kimble county, and that same consisted of four lots, viz.: Nos. 3, 4, 5, and 6, in block 5.

That is sufficiently certain which can be made certain from facts furnished. And that which puts a party upon inquiry is notice, if that inquiry becomes a duty. *Wise-man et al. v. Watters et al.*, 142 S. W. 135; *Wethered v. Boon*, 17 Tex. 143; *Hines v. Perry*, 25 Tex. 443; *Taylor v. Townsend*, 61 Tex. 144; *Skov v. Coffin*, 137 S. W. 450. Since Beaton owned but the one place in London, and it consisted of four lots, the contract could refer to nothing but that place. The question is whether there is a sufficient basis for identification; and not that the utmost certainty should exist. *Watson v. Baker*, 71 Tex. 747, 9 S. W. 867; *Fulton v. Robinson*, 55 Tex. 404; *Penn v. Lumber Company*, 35 Tex. Civ. App. 181, 79 S. W. 844. Certainty to a common intent is all that is required, where the contract furnishes the means by which the land can be identified with reasonable certainty. In *Porter v. Memphis Land & Commission Co.*, 159 S. W. 498, it was held that "263 acres of land 1½ miles northeast of Memphis, Tex.," where the contract referred to an incumbrance of about \$8,140 which is upon the land, makes a recitation of a fact which can be made certain. Quoting with approval from the Kentucky Supreme Court (*Campbell v. Preece*, 133 Ky. 572, 118 S. W. 374), it is said: "It is never good to refer to a future

event, as that could not have been certain" at the time the contract "was made. But a general reference to an existing or past event is good, for that which has transpired is changeless. \* \* \* 'The place where I live' identifies one place only, and is susceptible of being shown definitely and unerringly." This contract states that it is "my place in the town of London, Kimble county, Texas, consisting of four lots, etc., and all improvements." He owned but one place; so this contract points unerringly to the only possible subject of the contract. The Kentucky case, *supra*, says: "If it had stated, 'the land where Joseph Preece now lives,' or the land 'where Joseph Preece lived in 1899,' it would not be questioned that the description would have been sufficient." And this could not possibly be any more certain than the reference to Beaton's place, when he owned only one, corresponding in every particular to the one referred to in the contract.

In *Rosen v. Phelps*, 160 S. W. 105, cited by appellant, the contract was to convey "a certain 3,000 acres of land in Bosque county, Texas," without designating the owner, any particular locality, landmark, natural object, or other thing that fixes location, and makes no reference to any other writing by which the land may be identified, and *Penn v. Texas Yellow Pine Lumber Co.*, 35 Tex. Civ. App. 181, 79 S. W. 842, is cited.

"It is the duty of the court to so construe the deed of trust as to give effect to the intention of the parties, if that intention can be legally ascertained. *Faulk v. Dashiell*, 62 Tex. 646 [5 Am. Rep. 542]. The language of the deed of trust under which the plaintiff in error claims title is not of such a character that the court can say that the description of the land cannot be made certain by extrinsic evidence." *Pierson v. Sawyer Bros.*, 93 Tex. 163, 53 S. W. 1012, citing *Wilson v. Smith*, 50 Tex. 365; *Smith v. Westfall*, 76 Tex. 509, 13 S. W. 540; *Herman v. Likins*, 90 Tex. 448, 39 S. W. 282. In these cases the court held that extrinsic evidence could be introduced to identify the land.

In the case of *Taffinder v. Merrill*, 95 Tex. 100, 65 S. W. 177, 93 Am. St. Rep. 314, the Supreme Court held that property described as "two town lots in the town and county of Hamilton" was sufficient. It was shown by oral testimony that the location and identity of the two lots in Hamilton which had belonged to Taffinder and wife were well known at the time of the proceedings and since. See, also, *Gallup et al. v. Flood et al.*, 46 Tex. Civ. App. 644, 103 S. W. 427.

[2] A deed will be construed against the one making it and more in favor of the grantee, so as to make it effective, and, applying that rule to the present case, we have the contract calling for "my place in the town of London, Kimble county, Texas, consisting of four lots." By reference to the deed records, this property could readily be identified

by information furnished in the contract itself; and we are not going to assume that Beaton had more than one place. The benefit of doubt, if there is any, would be against his ownership of any other "place."

[3] It was proper to show by parol that Beaton owned but one place in that town, and of what that consisted. This assignment is overruled.

[4] Complaint is made that the \$200 cash payment was not paid into court, in compliance with the tender made in the pleadings. Judge Simkins says: "If it be money that is tendered, a simple offer to pay it is a sufficient tender in equity without bringing the money into court (Ball v. Belden, 126 S. W. 21; Fordtran v. Dunovant [54 Tex. Civ. App. 564] 118 S. W. 768; Nabours v. McCord, 82 S. W. 157), because a court of equity can decree performance on payment of money, and not permit the title to pass until then." Simkins on Equity, p. 700 (last edition). This will dispose of the second assignment adversely to appellant.

[5] The third assignment is also overruled, wherein complaint is made that the court erred in not sustaining defendant's exception to plaintiff's petition for want of proper and necessary parties plaintiff. The petition charges that the plaintiff and defendant entered into the contract, which is signed by them both and in which it is provided the land shall be sold and conveyed to Dr. J. W. Fussell. Hensley knew all about this contract, because he represented Beaton in the deal and prepared the contract. This paper did not stipulate that Mrs. Fussell was to sign the notes, nor that the deed should be made to her. Consequently the petition was not subject to the criticism made against it, and Mrs. Fussell was not a necessary party plaintiff. Suppose she had attempted to bring the suit on this contract? It was not made for her benefit, and her name was not mentioned in it. The petition does not state that the property was to be conveyed to Mrs. Willie A. Fussell, as contended, but merely recites that the deed which appellant Beaton and his wife did prepare and tender was a special warranty deed made to her at the request of plaintiff. This deed was declined on account of the special warranty feature. But that formed no part of the contract sued upon. The fact that Fussell asked that the deed be made to his wife did not lessen his obligation or liability under the contract, and Beaton could not have been compelled to make a deed to her. So the court very properly overruled the exception, and also the objection to the contract, when offered in evidence.

In view of what we have said, it is unnecessary to write upon the fourth and fifth assignments further than to say that they are overruled.

The judgment is affirmed.

## HENSON v. BAXTER et al. (No. 7902.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 21, 1914.)

### 1. APPEAL AND ERROR (§ 1032\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if questions to witnesses, in an action by lessors against a lessee for failure to cultivate in a proper manner, as he had agreed—was the land properly cultivated? was it neglected? how much cotton would have been produced on the land planted in cotton if it had been properly cultivated?—were improper, as calling for conclusions on a mixed question of law and fact, still, under Court of Civil Appeals rule 62a (149 S. W. x), putting on appellant the burden of showing that error in the course of the trial was such a denial of rights as was calculated to and probably did cause an improper judgment, allowing the questions, and admitting the answers, that in the opinions of the witnesses the farm was not properly cultivated, but was neglected, and, if properly cultivated, would have produced more cotton than it did, is not ground for reversal; the witnesses testifying to the facts on which their opinions were predicated, from which their conclusions necessarily followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

### 2. LANDLORD AND TENANT (§ 136\*)—ACTION FOR IMPROPER CULTIVATION—EVIDENCE.

Proof of the amount of cotton raised on the land during the year following that for which it was leased is properly admitted, in an action by lessors against the lessee for failure to properly cultivate, as agreed; it being shown that the conditions for producing such a crop were as favorable during the first year as during the second.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 487-489; Dec. Dig. § 136.\*]

### 3. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

Defendant's requested instruction, in an action by lessors against the lessee for failure to cultivate in a proper manner, as he had agreed, that no damages could be allowed for the part of the crop that died after it came up is erroneous in eliminating the issue of it having died of defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

### 4. TRIAL (§ 260\*)—INSTRUCTIONS—REPETITION.

A requested instruction substantially covered by the court's charge need not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

### 5. LANDLORD AND TENANT (§ 150\*)—INJURY TO REVERSION—LIABILITY OF TENANT.

A lessee having removed portions of a windmill on the premises to prevent one of his employes using it, and an effort of some one to use it in that condition causing it to break, the lessee is liable to the lessors for the cost of repairing it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.\*]

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Action by J. H. Baxter and others against P. R. Henson. Judgment for plaintiffs, and defendant appeals. Affirmed.

Scarborough & Hickman, of Abilene, for appellant. Cunningham & Oliver, of Abilene, for appellees.

DUNKLIN, J. J. H. Baxter and others, plaintiffs in the trial court, leased a farm to P. R. Henson, defendant, for the year 1911. In this suit plaintiffs sought damages for the alleged failure of defendant to cultivate the farm in a proper manner, as he had agreed to do, and for negligently injuring a windmill situated on the farm. From a judgment against him, the defendant has appealed.

[1] Plaintiff introduced several witnesses who were experienced farmers, and who had observed the manner in which the farm had been cultivated, and propounded to them substantially the following questions, to be answered according to the opinions of the witnesses, respectively: Was the farm properly cultivated? Was it neglected? How much cotton would have been produced on the 140 acres planted in cotton if the land had been properly cultivated? In response to those questions, the witnesses stated in effect that in their opinions the farm was not properly cultivated; that it was neglected; and that, if the land planted in cotton had been properly cultivated, it would have produced more cotton than was raised thereon by Henson. To each of those questions and the answers thereto, defendant objected, upon the ground that the questions called for the conclusions of the witnesses upon a mixed issue of law and fact, which was the specific issue submitted to the jury, and the determination of which was exclusively the province of the jury.

The decision of our Supreme Court in *H. & T. C. Ry. v. Roberts*, 101 Tex. 418, 108 S. W. 808, is the leading authority cited in support of the assignment of error now under discussion. That was a suit for damages for negligent delay in a shipment of cattle, and upon the trial a witness who was an experienced shipper was permitted, over appellant's objection, to give his opinion as to "what is a reasonable time within which to transport a train of cattle from Llano to Fairfax when they are transported with ordinary care and diligence?" It was held that the question called for a conclusion of the witness upon a mixed question of law and fact, and therefore was improper. The decision was upon a certified question by the Court of Civil Appeals, and in the certificate from the latter court the following occurs: "The question was properly raised by an assignment of error, was material, and from the record it possibly influenced the verdict of the jury."

Reverting to the present case, we are inclined to the opinion that the questions shown above were designed to elicit the opinions of the witnesses upon the issue whether or not the land was cultivated in a good farmerlike manner, and that they were so understood by

the witnesses in responding thereto. But it is unnecessary to determine that question, for we are of the opinion that, even though it should be held that the questions and answers come within the rule announced in *Ry. v. Roberts*, still the error in admitting them would not require a reversal of the judgment in view of rule 62a (149 S. W. x). As shown in the case last cited, it was stated in the certificate to the Supreme Court that the testimony there admitted "possibly influenced the verdict of the jury." That decision was rendered before the adoption of rule 62a, and under the old rule as established by a long line of decisions to the effect that an error would be presumed to be harmful in the absence of a showing to the contrary by the party in whose favor it was committed. Under rule 62a the burden is upon appellant to show that an error complained of was such a denial of the rights of appellant as was calculated to cause and probably did cause the rendition of an improper judgment in the case.

The witnesses in the present case all testified to the facts upon which their opinions, admitted over appellant's objections, were predicated, and, from those facts so detailed, the conclusions given necessarily follow that the cotton was not cultivated in a workmanlike manner. Those facts were chiefly that appellant permitted weeds to grow between the rows of cotton almost as high as the cotton, and that the crop grown upon the land was considerably inferior to cotton grown the same year on adjoining land of practically the same quality.

[2] Nor do we think that there was error, as urged by the second assignment, in permitting proof of the amount of cotton grown on the same land during the year 1912, as other testimony was introduced which tended to show that the conditions for producing such a crop during the year 1911 were practically as favorable as those prevailing during the year 1912, if not more so.

By one proposition submitted under this assignment it is insisted that evidence of amount of rents realized in 1912 was improper, for the reason that there was no proof that the prices of cotton during that year were the same as during the previous year. A sufficient answer to this is that the testimony set out in the bill of exceptions made the basis of the assignment was confined to the amount of cotton raised during the year 1912, and contained no reference to the prices realized therefrom.

[3, 4] Complaint is made of the refusal of appellant's requested instruction, in effect, that no damages could be allowed for that portion of the crop that died after it came up. The instruction was erroneous in eliminating the issue whether or not such loss of the cotton was due to negligence of appellant. Furthermore, the defense there suggested was substantially covered by the court's charge.

[8] It is insisted, further, that the court erred in refusing another requested instruction which was a summary instruction to allow no damages for injury to the windmill on the farm. This assignment must be overruled for, according to appellant's own testimony, he removed certain portions of the mill to prevent one of his employes from using it, and an effort of some one to use it in that condition caused the mill to break, and, according to the testimony of one of appellees, it cost some \$18.50 to repair such breakage.

The judgment is affirmed.

### AMICABLE LIFE INS. CO. v. KENNER et al. (No. 5269.)

(Court of Civil Appeals of Texas. San Antonio.  
April 22, 1914.)

#### 1. APPEAL AND ERROR (§ 569\*)—STATEMENT OF FACTS—PARTIES SIGNING.

It was not necessary for certain defendants to sign the statement of facts, where their interest was not affected by the appeal, and appellant does not complain of the judgment as to them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.\*]

#### 2. CORPORATIONS (§ 82\*)—REPRESENTATION BY AGENT.

Where defendant's agent received money for it on a stock subscription, defendant was liable for the money in its agent's hands, and hence was liable for its return, if the contract under which the money was paid required its return in certain contingencies, which happened.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

#### 3. CORPORATIONS (§ 76\*)—STOCK—SUBSCRIPTION CONTRACTS—REPUTATION.

Where notes given for corporate stock were attached to and made a part of the subscription contract, the rejection of the notes, together with the failure to deliver the shares to the person contracting for them, justified him in concluding that the subscription contract had been rejected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.\*]

#### 4. PRINCIPAL AND AGENT (§ 169\*)—AUTHORITY OF AGENT—ESTOPPEL TO DENY.

One who authorized another to make contracts as agent for the sale of corporate stock cannot deny the agent's authority to make the particular contract made, where it ratified the form of the contract, and sought to recover on it in a cross-action, when sued to recover payments made under it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. § 169.\*]

#### 5. CORPORATIONS (§ 88\*)—STOCK—SUBSCRIPTION CONTRACTS.

Where a stock subscription contract provided that \$5 a share should be paid in cash to the corporation's agents as compensation for their services in procuring the contracts, the corporation could not object that the agents accepted a less sum from the purchaser, except that, in case of the rejection of the contract, it was bound to return the sum accepted

by the agents under the provision of the contract requiring the return of the amount paid in case the contract was rejected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 837-364, 425-428; Dec. Dig. § 88.\*]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by E. B. Kenner against the Amicable Life Insurance Company and others, in which defendant named filed a cross-action. From a judgment for plaintiff against the defendant named and another, it appeals. Affirmed.

Spell & Sanford and W. W. Naman, all of Waco, for appellant. Stewarts and J. E. Quaid, all of Galveston, for appellees.

FLY, C. J. E. B. Kenner sued appellant H. M. Baine & Co. and L. C. Gibbs to recover the sum of \$250, an amount alleged to have been paid to Gibbs and Baine & Co. on certain shares of stock in the corporation. A receipt for the sum of \$500 was copied into the petition, in which it is recited: "Received of Dr. E. B. Kenner, of Galveston, the sum of \$500.00 as part payment for 100 shares of the capital stock of Amicable Insurance Company of Waco, Texas, as set forth in his subscription contract numbered same as this receipt and bearing even date herewith. Should said subscription contract be not accepted by said company, the amount paid as per this receipt will be returned, together with note settlement as per back of receipt." The receipt was signed "H. M. Baine & Company, Fiscal Managers, by M. M. Leach, Secretary," and countersigned by "L. C. Gibbs, Salesman." Appellant interposed a plea of privilege, which was overruled, and then answered that the money was not paid to nor received by appellant, but, if paid at all, was paid to H. M. Baine and L. C. Gibbs, and that only \$250 was paid to them by Kenner, and that neither Baine nor Gibbs were acting for appellant in receiving the money. Kenner dismissed as to Baine & Co., and their plea of privilege was sustained as to the cross-action of appellant, and judgment was rendered in favor of Kenner against appellant and Gibbs for \$250.

[1] Kenner and appellant agreed to the statement of facts, and it was approved by the trial judge. It was not signed by H. M. Baine & Co. or L. C. Gibbs, and Kenner seeks to strike out the statement of facts because not signed by those parties. There is no complaint made by appellant of the judgment as to Gibbs and Baine & Co., and this appeal can in no manner affect their interest, and therefore there was no necessity for them to sign the statement of facts.

It was provided in the subscription contract that \$5 of the \$27.50 a share agreed to be "paid to H. M. Baine & Co., fiscal manag-

ers, in cash on date of this subscription, to be appropriated by them as compensation for selling and distributing the stock hereby subscribed for, and \$22.50 per share to be paid at Waco, Texas. \* \* \* It was also provided in the subscription contract: "Said company alone has the right to accept or reject this subscription contract. If accepted, the amount of \$5.00, specified above as paid in cash to H. M. Baine & Co., on date hereof, shall be considered as duly earned by them, and not to be refunded to me under any conditions. If rejected, total payment made on date hereon shall be returned to me." The contract was negotiated with L. C. Gibbs, was signed by E. B. Kenner, and \$250 was paid by Kenner to Gibbs for Baine & Co. H. M. Baine & Co. which was the style under which H. M. Baine was doing business, was the fiscal agent of appellant, and had the authority to receive the \$5 per share and to solicit and receive subscription contracts. L. C. Gibbs was the agent for Baine, and was recognized as such by appellant.

[2] Baine was acting for appellant in receiving the money from Kenner, no matter what was to be done with the money when collected. Appellant could not evade its responsibility for the money on the ground that it never came into its hands. When it was placed in Baine's hands, and when it was contracted that, under certain circumstances, it should be returned, it was contracted that appellant should return the money.

The testimony showed that the words making all of the three notes given by Kenner to Gibbs payable on March 12, 1912, were interlined by Gibbs without the knowledge or consent of Kenner. Appellant admits that Gibbs was its agent in making the contract, in which Gibbs took three notes payable to him, instead of to appellant.

[3] The notes were attached to and made a part of the contract, and the rejection of the notes was a rejection of the contract. The rejection of the notes, taken with the failure to send the shares to Kenner, was amply sufficient to justify the latter in acting upon the conclusion that the contract had been rejected.

[4, 5] All the changes made in the contract by Gibbs were ratified by appellant, and it seeks in a cross-action to recover against Kenner on that contract. It cannot be heard to deny the authority of Gibbs to make the contract. The object of the provision in the contract that \$5 a share should be paid in cash to its agents and was to be their property was to secure the agents their pay in cash. If they saw proper to take a less sum in cash, it did not concern appellant, except that it became liable, in case of rejection of the contract, for the return of a less sum of money. It is singularly inconsistent to contend in one breath that the contract was invalid because it was not the printed form,

and in the next insist that it had accepted the contract, and that Kenner should be compelled to comply with its terms.

The judgment is affirmed.

# ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. FARRIS. (No. 7133.)

(Court of Civil Appeals of Texas. Dallas.

April 18, 1914. Rehearing Denied

May 9, 1914.)

## 1. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS—"JERK"—"LURCH."

Where plaintiff testified that after the train had come to a stop, and he had arisen to alight, it was either backed up or jerked in some way, and that he was thrown against a seat and injured, the use in a charge on negligence of the terms "suddenly moved, lurched, and jerked," used by the petition, was not erroneous, as any jerk is a sudden movement, and the word "lurch," though it has specific reference to side-wise movements, is commonly used with reference to any sudden movement, and the jury, in view of the common knowledge of the movement of trains, could not have been misled by the charge, although plaintiff did not testify in the precise language of the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*

For other definitions, see Words and Phrases, vol. 4, p. 3811.]

## 2. APPEAL AND ERROR (§ 1064\*)—REVIEW—HARMLESS ERROR.

Where a charge submitting to the jury the question of a railroad company's negligence in suddenly moving its train, which had stopped to allow passengers to alight, could not have misled the jury, its inexact use of language was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by Charles F. Farris against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, of Dallas, and Scott & Ross, of Waco, for appellant. T. H. Jackson, Walter Collins, and B. Y. Cummings, all of Hillsboro, for appellee.

RASBURY, J. Appellee sued appellant for damages for personal injuries alleged to have resulted from the negligent operation of appellant's train. There was a trial by jury resulting in a verdict for appellee for \$1,500. Upon the verdict similar judgment was entered, from which this appeal is taken. Appellee's injury was what the physicians who testified termed a moderate hernia, and the evidence supports the claim that it resulted from appellant's negligence, and supports as well the amount of the verdict. In fact no attack is made upon those features of the case.

[1] It is urged, however, that the court erred in refusing appellant's special charge

directing the jury to return verdict for appellant, because the evidence failed to show that appellant caused its train "to suddenly jerk and lurch," as alleged by appellee, and that the case should be reversed because the court submitted that issue in the general charge. The precise point is that while appellee alleged that after the train reached Corsicana and halted, and after he had arisen to disembark therefrom, appellant caused same "to be suddenly moved," and caused same "to suddenly lurch and jerk," and thereby caused the plaintiff to be thrown with great force and violence onto and against the back of one of the seats in said coach and injured as alleged, etc., the evidence, as matter of fact, failed to support the allegation that the train "suddenly" moved, jerked, or lurched, notwithstanding which the court adopted the language of appellee's petition and directed the jury to find for appellee if appellant "suddenly" moved the train and caused the same "to suddenly lurch and jerk," if such acts were negligent, etc. Appellee's petition did allege the acts of negligence just stated. His evidence in support of the negligent act so alleged, which was adopted by the jury, is in substance that as the train stopped he arose to disembark from the train, placing one hand on the back of a car seat, reaching with his other hand for his "grip," and as he did so "the train either backed up or jerked some way and threw me against the corner of the seat." And again, on cross-examination, he said that, as he reached for his grip, "the train either backed up or started up, I could not tell definitely which." Such is the evidence, and, while the evidence does not show that appellee used either the word "suddenly" or "lurched" in his testimony, we nevertheless conclude that the use of these terms in the court's charge does not constitute reversible error. The substance of the court's charge is that the train suddenly moved, lurched, and jerked, while the substance of the evidence is that the train jerked some way forward or backward and threw appellee against the wall. We can see no possible harm in the use of the words "suddenly moved and lurched," instead of the word "jerked," as used by appellee in testifying, since, obviously, there could not be a jerk of the train without a movement thereof, and it can hardly be intelligently maintained that the use of the word contributed one way or the other to the result. Nor could there be a jerk of the train that was not sudden, since to jerk a thing is to give it a short, sudden thrust, push, or to strike it with a short quick motion. So it is with the use of the word "lurch," which, to the ordinary mind, has reference to a sudden movement, although it has specific reference to sidewise movements. We are convinced, however, that the jury in determining the issuable

facts in the case were not misled by the use of the terms complained of. We can hardly conceive that ordinarily intelligent men, such as the jury trying the case are presumed to have been, having, as they must have had, common knowledge relating to train jerks, resulting from backward and forward movement, dealt in any niceties concerning its specific meaning as applied to the court's charge.

[2] Aside from what we have said, and conceding technical error in the charge, it is not reversible under the rule now in force, which forbids reversal upon such matters, unless it shall appear that the error amounted to such denial of appellant's rights as was reasonably calculated to and probably did cause the rendition of an improper judgment.

The judgment is affirmed.

### GALVESTON, H. & S. A. RY. CO. v. PENNINGTON et al. (No. 5252.)

(Court of Civil Appeals of Texas, San Antonio, April 15, 1914. Rehearing Denied May 6, 1914.)

#### 1. PLEADING (§ 182\*)—DENIAL—STATUTE.

Under Rev. St. 1911, art. 1829, as amended by Acts 33d Leg. c. 127, providing that any fact pleaded by the defense which is not denied by the plaintiff shall be taken as confessed, it is unnecessary for plaintiff to traverse allegations in the answer which are the mere converse of those in the petition; the purpose of the statute being merely to simplify trials by rendering it unnecessary to introduce evidence to prove immaterial issues conceded under the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 387, 388; Dec. Dig. § 182.\*]

#### 2. RAILROADS (§ 344\*)—CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Untraversed allegations in the answer, in an action for wrongful death at a crossing, that the headlight of the train which struck deceased's wagon was reflected from the ground and buildings, but that he did not stop, look, and listen, do not show him to have been guilty of contributory negligence, where it did not appear that those reflections could have been distinguished from the reflections from other engines on sidings, for, unless there was something to put deceased on guard, his failure to stop, look, and listen would not be contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

#### 3. PLEADING (§ 412\*)—WAIVER OF OBJECTIONS—WANT OF REPLY.

Where defendant proceeded to trial as if issue had been properly joined upon all allegations in the answer, the objection that the defense pleaded was admitted because uncontroverted, was waived, and could not be raised after an adverse verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.\*]

#### 4. RAILROADS (§ 350\*)—CROSSING INJURIES—JURY QUESTION.

In an action for wrongful death of one run down at a railroad crossing, the question of his contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**5. RAILROADS (§ 346\*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In an action for wrongful death of one run down at a crossing, the burden of establishing deceased's contributory negligence is upon the railroad company, and does not shift upon its establishing a prima facie case; but the company is entitled to have the jury consider all the evidence on that issue, whether introduced by it or plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1117-1123; Dec. Dig. § 346.\*]

**6. EVIDENCE (§ 157\*)—BEST EVIDENCE—ADMISSIBILITY.**

In an action for wrongful death, a witness who had sufficient acquaintance with deceased to estimate his earning capacity may testify as to his estimates, where they were not based upon any books, and it did not appear that deceased kept any books showing his earnings.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460-470; Dec. Dig. § 157.\*]

**7. DEATH (§ 99\*)—ACTIONS—EXCESSIVE DAMAGES.**

An award of \$20,000 damages for the wrongful death of a husband and father, 29 years old, who enjoyed good health, was kind and considerate, and at times earned as much as \$60 a week, less expenses, in hauling freight, was not excessive; it appearing that he devoted his earnings to the upkeep of his family, consisting of his wife, who was 29 years old, and four children, ranging in age from 1 to 8 years.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

**8. PARTIES (§ 75\*)—OBJECTIONS—TIME FOR MAKING.**

In an action by a widow for the wrongful death of her husband, an objection that she was not entitled to sue for any damages sustained by his parents should be raised upon the filing of the petition, showing that the suit was also on behalf of the parents; it not appearing that they were under any disability whatsoever.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\*]

**9. CONSTITUTIONAL LAW (§ 43\*)—DEATH (§ 9\*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY WITHOUT.**

As Rev. St. 1911, art. 4699, authorizing any one of the parties entitled to bring an action for wrongful death for the benefit of all, is part of the act providing for actions for wrongful death, and gives not only the widow and children of one wrongfully killed but his surviving parents a right of action, the surviving parents cannot complain that to permit the widow to maintain the action for their benefit, without making them parties, will deprive them of their rights without their day in court, contrary to the constitutional inhibition against deprivation of property without due process, for the right to sue for wrongful death is inseparable from the remedy, and a party cannot accept one and attack the other.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 41; Dec. Dig. § 43; *Death*, Cent. Dig. § 11; Dec. Dig. § 9.\*]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Action by Mrs. Ola Pennington and others against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston. Claude Lawrence, of Uvalde, and W. B.

Teagarden, of San Antonio, for appellant. Winbourn Pearce, of Temple, A. L. Curtis, of Belton, and Martin & Martin, of Uvalde, for appellees.

MOURSUND, J. Mrs. Ola Pennington, for herself, her four minor children, and the parents of her deceased husband, J. L. Pennington, sued appellant for damages, alleged to have resulted to them by reason of the death of said J. L. Pennington, who was killed on May 14, 1913, by one of appellant's trains, on a road crossing near Uvalde, while crossing same with his wagons and teams. It was alleged that said crossing is situated about 300 yards west of defendant's passenger depot at Sansom, which is called "Uvalde," and within the yard limits of the company where it maintains its main track and four other tracks; that the road crossing the tracks at said place is a public road extending from Uvalde to Rock Springs, and is frequently traveled by the public at all times of the day and night; that the crossing is dangerous, in that, approaching the same from either direction, the view of the track and of an approaching train is obstructed, so that it is difficult to see the approach of a train in entering upon said crossing; that the defendant, in the exercise of ordinary care, would and should have maintained a flagman at and near said crossing to warn persons about to enter said crossing of the approach of trains, but the defendant carelessly and negligently failed and refused to maintain a flagman at such crossing, and adopted no means for the protection of persons passing over said crossing. It was further alleged that on or about May 14, 1913, defendant had carelessly and negligently placed its cars for a long distance in either direction from said crossing on one of its tracks passing over said crossing, and lying north of its main track, and also on other tracks lying south of its main line track, and had negligently and carelessly stopped and placed some of said cars, especially those lying upon the track north of the main line track upon said public road and crossing, so that the same was blocked, and room was barely left between said cars for the passage of one wagon, and so that a person, approaching from the north, and going towards Uvalde, could not see the approach of a train from either direction, and especially could not see the approach of a train from the west; that at said time J. L. Pennington was engaged in hauling freight between Rock Springs and Uvalde, and at that particular time was traveling said road with several wagons attached together, drawn by several teams, and was riding the horse on the left-hand side nearest to the front wagon, and was going towards Uvalde; that about dusk he approached said crossing, and, his view being obstructed, as aforesaid, he could not see the approach of the train, and in the exercise of ordinary care, failing to

see or hear the approach of any train, he drove between the cars of defendant which were placed upon the side track lying north of its main line track, and as he entered upon said main line track was struck by a delayed fast passenger train of the defendant, which was approaching from the west, and sustained serious injuries from which he shortly thereafter died; that defendant, its agents and employes in charge of said train carelessly and negligently ran said train over said public crossing, while the view of the approaching train was obstructed, at an excessive rate of speed, and carelessly and negligently failed to give any warning or signal by ringing the bell or blowing the whistle, or otherwise, of the approach of said train, and had carelessly and negligently cut the steam off, so that the train was running noiselessly onto and upon said crossing; that the negligence of the defendant as alleged was the proximate cause of the injury and death of Pennington. It was further alleged that Pennington sustained his injuries without any fault or negligence on his part. The remaining allegations related to the age, occupation, character, and earnings of the deceased.

The defendant, on September 30, 1913, filed its answer, consisting of a general denial and a special denial, sufficient, under the provisions of chapter 127, Acts of the 33d Legislature (Reg. Sess.), to put in issue each allegation of the petition, and then pleaded that the train was operated in the usual and customary manner, and at the usual rate of speed; that the crossing was neither a dangerous nor much used one, especially after 6 o'clock p. m.; that, when the train was about 500 to 800 yards west of said crossing, the engineer sounded the whistle for the station, and for the crossing and semaphore board, and the bell was also sounded for the crossing, and each of said warnings could readily have been heard by deceased by the exercise of ordinary care; that the engine had a brilliant headlight, which could have been seen from the crossing a distance of more than a mile, and at the time deceased approached the crossing the light from said headlight was reflected from the ground at the crossing and buildings and cars near the crossing, and was plainly to be seen, and, if he did not see this, he could have done so by the exercise of slight care; that the train was making the usual and customary noises of a large and heavy passenger train, which could have been heard for several hundred yards before it reached the crossing by listening with ordinary care, which precaution deceased did not take, or, if he listened, failed to heed what he heard and took the chances of getting across ahead of the train; that the view of the main line track to the westward was not obstructed by cars or other objects, except partially, and for a comparatively short distance near the

crossing, and from his position as he approached the track, and at the proper times and places to look before going on the track, deceased could have, without difficulty, seen the train in ample time to have avoided it, in fact the train was in view of deceased's position for 100 feet or more as he drove to the crossing, and he must have seen same, or by the exercise of slight diligence could have seen it, in ample time before driving on the crossing, but he negligently failed to do so, or else did not heed what he saw; that, if the view of the track was obstructed, then deceased could have readily heard the train and the signals and alarms given by it, and, if the rattle of the wagon and harness or anything else interfered with his hearing, could, with little inconvenience, have stopped, before going upon the crossing, at a place where he could see the track to the westward, and by so doing and looking and listening he could, without difficulty, and by the exercise of ordinary care, have both heard and seen the train and avoided the accident, all of which, under such circumstances, a person of ordinary care would have done, and which deceased failed to do, and, if he looked and listened, he failed to heed what he saw; that as a matter of fact deceased was riding one animal of six or eight hitched to two or more wagons, and the rattling of wagons and harness made much noise, which interfered with his hearing to some extent, and he deliberately and negligently drove upon the crossing directly in front of the train, without stopping to look and listen, and without looking or listening for an approaching train, and without exercising ordinary care and caution in any respect, when, by the exercise of any of these precautions or any other precautions such as a person of ordinary care would have exercised, he could have discovered the train in ample time to have avoided it; that in each of said matters deceased was guilty of negligence which caused or contributed to his death.

No replication was filed by plaintiffs. The trial resulted in a verdict and judgment against appellant for \$20,000, as follows: Mrs. Pennington \$8,000; each child \$3,000; the parents nothing.

[1, 2] By the first assignment of error complaint is made because the court refused to give a peremptory instruction to find for defendant. The first proposition asserts that the charge should have been given because of the failure of plaintiff to deny the allegations relied upon to show contributory negligence. An examination of the pleadings discloses that almost all of the facts alleged by appellant as its basis for claiming that Pennington was guilty of contributory negligence were directly controverted in the petition, and issue was fully joined thereon. The allegation with respect to the headlight being reflected from the ground at the crossing and buildings and cars near the crossing, and that it was plain-

ly to be seen, is a new matter not contradicted in the petition. Issue was joined as to whether the train was visible by a person approaching the crossing, and as to whether it made a great noise, and whether the signals were given. The failure to stop, look, and listen cannot be said to show contributory negligence when disconnected from the allegations which are in issue. It was admitted that the train was delayed, and there was nothing to particularly put Pennington on guard, unless it was the reflection from the headlight. We do not think failure to see or be warned by the reflection, there being no allegation that it was the only headlight casting a reflection upon the crossing, or facts showing that Pennington could not in the exercise of ordinary care have taken it for the reflection of a headlight from an engine attached to some of the many cars alleged to have been on the tracks at and near the crossing, can be said to show negligence as a matter of law. We conclude that the facts not in issue considered alone fail to show contributory negligence as a matter of law, and that, had the ruling of the court been invoked upon the pleadings, and he had decided against appellant, we would not reverse such decision. Article 1829, as amended by chapter 127, Acts 33d Leg. (Reg. Sess.), provides: "Any fact so pleaded by the defense that is not denied by the plaintiff shall be taken as confessed." This, of course, only applies to facts not already in issue by virtue of plaintiff's allegations. To allege in affirmative language the converse of what plaintiff has alleged does not constitute new matter which must in turn be controverted. If the new facts standing alone do not show contributory negligence, the pleader could only take advantage thereof by objecting to evidence controverting same, and by having the court instruct the jury that such facts were admitted, should the same be material with respect to any issues submitted to the jury. The purpose of the Legislature in passing said law was to simplify trials by reducing the number of issues to be decided, thus shortening the trial, and obviating the necessity of calling witnesses to prove undisputed facts.

[3] In this case appellant in no manner sought to avail itself of any rights with respect to the facts stated in its answer which were not controverted until it filed a motion for a new trial. True, it asked for a peremptory instruction on the ground "that plaintiffs have wholly failed to show defendant liable for the death of J. L. Pennington under the law"; but thereby the court was not apprised of any contention that appellant claimed a judgment upon the pleadings. Nor in filing exceptions to the charge was the court informed that appellant contended the issue should not be submitted. Evidence had been introduced as if issue was joined on all the facts alleged. In view of all this appellee

contends that appellant waived its right to take advantage of plaintiff's failure to file any denial of the additional facts alleged by appellant. The general rule as announced in 31 Cyc. p. 733, is as follows: "Failure to file any pleading which is necessary to form an issue, including a complaint, answer, or reply, or otherwise failing to join issue properly or at all upon any or all of the allegations appearing in the pleadings, is deemed waived by voluntarily proceeding to trial as though issue was properly joined. Likewise, where the parties have voluntarily tried the case as if certain matters were in issue, neither will be permitted afterward to object that such matters were not properly put in issue by the pleadings." Appellant relies upon the Kentucky cases of *Railway v. Paynter's Adm'r*, 82 S. W. 412, and *Railway v. Hibbitt*, 129 S. W. 320. The Kentucky statute provides "that every material allegation of a pleading must, for the purposes of the action, be taken as true unless specifically traversed." In one of the Kentucky cases, *Gore v. Railway Co.*, 32 S. W. 754, some weight is given to a statute providing that judgments shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him. That statute appears to exclude the idea generally recognized that certain defects of pleading may be cured by verdict. We see no reason for adopting the Kentucky rule, and believe the general rule announced in Cyc. conduces to a fair trial, and will prevent litigants from taking up the time of the courts with experimental trials, relying upon saving themselves, if things go wrong, by urging that they should have had judgment upon the pleadings. Therefore we hold that, if defendant was entitled to a judgment upon the pleadings, it waived its right thereto, and we give such holding as an additional reason for deciding that appellant's first proposition is without merit.

[4] By the second proposition it is contended that the undisputed facts, both including and excluding those in the answer not traversed, show that Pennington's death was due solely to his own negligence or at least to his contributory negligence. In deference to the verdict of the jury, the evidence being conflicting, we conclude that appellant was guilty of negligence proximately causing Pennington's death in not giving the statutory signals for the crossing, and in placing its cars so as to obstruct the view of its main line track, so that a person approaching the crossing as Pennington did could not see the approach of a train coming from the west. We conclude, further, that Pennington was not guilty of negligence proximately contributing to cause his death. We will not attempt to rehearse the evidence upon which these conclusions are based. At the time Pennington was killed three freight trains were waiting at Sansom for the passenger to pass, and at

least two engines faced the crossing. The engines made much noise, while the passenger train had cut off steam and rolled along down grade with slight noise. Pennington drove very slowly, and it cannot be said, as a matter of law, that had he stopped he would have heard the passenger train.

[8] The fifth, sixth, and seventh assignments relate to charges given and refused on the question of burden of proof upon the issue of contributory negligence. Complaint is made because the court gave plaintiff's special charge No. 1, which placed the burden of proof upon defendant upon the issue of contributory negligence, but instructed the jury that upon said issue they should take into consideration all the evidence offered in the case, whether by plaintiff or defendant. Appellant excepted to the charge on the ground that under the facts of this case the burden should have been placed upon plaintiff to show that Pennington was not guilty of contributory negligence, or at least that special charge No. 3, offered by appellant, should have been given, as follows: "You are further charged that in this case, if, upon consideration of all the facts in evidence tending to explain the happening of the accident to J. L. Pennington, and showing his relationship thereto, you are of the opinion that it indicates that he was guilty of contributory negligence, then the burden would be upon the plaintiff to overcome by a preponderance of the evidence this condition, and to establish by a preponderance of all the evidence that Pennington was not guilty of any act or omission amounting to negligence that either caused or contributed to his death; and, if the plaintiffs have failed to sustain such proof, then they cannot recover in this case, and your verdict will be for the railroad company."

The contentions announced in the propositions under assignments 5, 6, and 7, all relating to this matter, may be briefly stated as follows: (1) That the testimony necessary to show the circumstances under which Pennington came to his death, and his relation to the happening of the accident, amply show *prima facie* that he was guilty of contributory negligence, and that this was still more manifest by the facts alleged by appellant, and not denied by appellee, for which reasons the burden should have been placed upon plaintiff. (2) If the court cannot say, as a matter of law, that a *prima facie* case of contributory negligence has or has not been made out by all the testimony necessary to show the cause of Pennington's death, and his relation thereto, then the court, upon request, should direct the jury to determine whether or not a *prima facie* case of contributory negligence has thus been established, and, if so, the burden is on the plaintiff to overcome this, looking to all the testimony for the final solution of the issue. In sup-

port of its contentions, appellant cites the case of *Railway v. Reed*, 88 Tex. 447, 31 S. W. 1058; but the doctrine there announced, and followed in many cases, has no application here, because the charge given in this case was carefully worded so as not to leave any chance for the jury to be misled into believing that it could only consider the testimony introduced by defendant upon the issue whether Pennington was guilty of contributory negligence. This line of cases has no bearing upon the questions presented in appellant's propositions. The contentions made by appellant have been urged in many cases in this state, and, while the existence of exceptions to the general rule that the burden of proving contributory negligence shall be placed upon the defendant in the charge of the court has been recognized in many cases (but generally held not applicable in such cases), we think it is now settled that no such exceptions exist as are contended for by appellant. *H. & T. C. Ry. v. Harris*, 103 Tex. 422, 128 S. W. 897; *Railway v. Anglin*, 99 Tex. 349, 89 S. W. 966, 2 L. R. A. (N. S.) 386. See, also, note to *Oklahoma City v. Reed*, 17 Okl. 518, 87 Pac. 645, 33 L. R. A. (N. S.) 1188, for a very interesting and thorough discussion of this question; also *Chamberlayne on Mod. Law of Ev. c. XI*. The assignments are overruled.

[8] By the ninth assignment complaint is made of the admission of the testimony of the witness Young, which was the only testimony upon the very important question as to the earning capacity of the deceased. Young testified that he and Pennington were partners in the freighting business when Pennington first went into such business, but for some time prior to Pennington's death the witness had no interest in the business; that Pennington could carry from Uvalde to Rock Springs about 10,000 pounds as an average load, and received 60 cents per 100 for carrying same. He also testified as follows: "He made a trip a week; he hauled freight from here to Rock Springs; he freighted from here to Rock Springs all the time; he also hauled freight from Rock Springs back this way. The last month or two he hauled wool he had parts of loads from Rock Springs here all the time. The last month or such matter he had a full load every trip I think; that is, about 10,000 pounds." Upon cross-examination, permitted for the purpose of testing "the personal knowledge" of the witness, it developed that he did not know whether Pennington kept any books showing his earnings, but that the witness, being in the grain business, had a set of books from which he could tell what Pennington had hauled for the grain store, but that he also hauled for other people. The witness did not testify how much deceased hauled for the grain store. Objections were then urged by appellant to the testimony, and a motion made to strike same from the record. As the witness

did not undertake to state what was shown by his books, and as his books, if produced, could not have shown what amount of freight was hauled by deceased in all, or what deceased's earnings were, we may leave out of consideration the fact that the witness had books showing what deceased had hauled for him. Such statement did not indicate the existence of better evidence than he was able to give as to the entire earnings of Pennington, which was the only fact important to be determined. After the objection was overruled, the witness proceeded to state, without further objection, that the expense of making each trip was about \$10; that the average freight rate was 60 cents per 100 pounds; that Pennington could make a trip in 6 days, and for a long time made a trip once a week; that a man can always haul a full load from Uvalde to Rock Springs; and that for the last month Pennington freighted he had a load both ways. On cross-examination he testified that Pennington had been freighting for about 6 or 8 months, that he had nine or ten animals and three wagons which he trailed together, hitching the teams to the leading wagon; that deceased owned three of the horses, while witness owned the remaining horses and two of the wagons, which he permitted deceased to use free of charge, but had the right to take them at any time. The question is whether, under the circumstances, error was committed in not excluding the testimony. It must be admitted that Young could only estimate Pennington's earnings. He testified to facts which showed that he was qualified to make such estimate, and stated the facts upon which he based such estimates as he made. He was never asked to make a final estimate for any given period, nor whether the conditions of the roads and weather affected the earnings; but we take it that no sensible jury would fail to make the allowances which the witness would have been bound to have made if asked the questions relating thereto. His testimony did not disclose or even indicate that better evidence could be obtained. He did not know whether Pennington kept any books. Appellant did not ask that witnesses be called to testify on the issue whether better evidence could be procured, and it is highly improbable that such was the fact. As it was not shown that primary evidence could be obtained, there was no error in admitting the testimony of Young. *Chamberlayne on Mod. Law of Ev.* § 479; *Greenleaf on Ev.* § 84; *M., K. & T. Ry. v. Millam*, 20 Tex. Civ. App. 688, 50 S. W. 417; *Lewis v. San Antonio*, 7 Tex. 313. In the case of *Railway v. Brown*, 16 Tex. Civ. App. 105, 40 S. W. 608, the court held that, even though books were kept, a witness could estimate a physician's income if he did so independently of the knowledge he obtained from the books; but, as it is not shown in this case that books were kept, we are not called upon to pass upon the correctness of

that opinion. The other objections to this testimony are also without merit, and the assignment is overruled.

There is no merit in the tenth assignment, which complains of the charge of the court, and the same is overruled.

[7] The eleventh assignment, complaining of the verdict being excessive, is overruled. Deceased was 29 years old, a strong man, in good health, had always engaged in useful pursuits, and supported his family in a proper manner. His wife was 29 years old, and his four children's ages ranged from 1 to 8 years. The testimony relating to his earnings has been hereinbefore stated. All of his net earnings were devoted to the upkeep of his family. He was a kind husband and a man of good habits. *T. & N. O. Ry. Co. v. Walker*, 125 S. W. 103.

[8] The twelfth assignment reads as follows: "The court erred in refusing to stop the trial upon defendant's motion and suggestion until the father and mother of deceased could be made parties to the suit, when at the trial it was shown that they were living and laboring under no disabilities that would prevent them from suing for themselves in the action. They were necessary parties, and it was error to proceed with them." The plaintiff sued for the benefit of Pennington's parents, and no exception was urged by appellant on account of failure to make them parties to the suit. Mrs. Pennington testified that the parents were alive and in good mental and physical condition, laboring under no disabilities. Pennington's father was present and testified. Appellant filed the motion described in the assignment, and contends that under the state and federal Constitutions the parents must be accorded their day in court, and that courts cannot lawfully proceed to pass judgment upon their rights, if necessary parties, until jurisdiction is obtained over them by process, and that the Legislature has no power to deprive persons of such right, and judgments rendered in disobedience of such rule are void as to such persons, citing article 1, § 19, of our state Constitution and the fifth amendment to the federal Constitution. If appellant wished to object to the bringing of the suit by Mrs. Pennington for the benefit of her husband's parents, the objection should have been made before going into trial. There was no allegation that such parties for whom she was suing were laboring under any disabilities, and the presumption obtained that they were fully capable of representing themselves, and appellant should not have waited until the evidence disclosed that fact, but should have raised the question at once. However, we do not care to rest the overruling of the assignment of error upon that ground, and will consider the objection upon its merits.

[9] Article 4699 of our Statutes (1911), which authorizes suits of this character to

be brought "by all of the parties entitled thereto, or by any one or more of them for the benefit of all," has been in existence for many years, yet we find no case in which the constitutionality thereof has been heretofore questioned. This statute has often been considered by our courts, and it is settled that a suit brought as this one was is a compliance with the statute. The parents need not be made parties to the suit, if it is brought for their benefit, as well as the benefit of the widow and children. *S. A. & A. P. Ry. v. Williams*, 158 S. W. 1171; *Railway v. Mertink*, 101 Tex. 165, 105 S. W. 485. In the case of *De Garbis v. Railway Company*, 90 S. W. 670, Justice Neill said: "However fraudulently one of the parties plaintiff may act towards another for whose benefit the right of action is given, if such fraud is unknown, not participated in, nor connived at by the defendant, he is not called upon to protect the rights of the party whom a co-plaintiff, or the one who has brought suit for his benefit, would defraud. In no event can a party to a lawsuit be expected to go into the camp of his adversary and assist him in making out a case against himself." The statute falls to provide for notice to the other parties by plaintiff, and the remedy given the parents is indeed the mere shadow, if they have no opportunity to prove what benefits they received from their son. The widow, even if cognizant of such benefits, would hardly make proof thereof and thus provide another distributee to share in the pecuniary benefits awarded largely upon a consideration of her husband's earning capacity. The statute, therefore, is subject to criticism for not providing for some kind of legal notice to be served on those not bringing the suit, provided their whereabouts is known. But the question is whether such statute violates the due process of law provisions of our Constitution and the federal Constitution. The statute gives a remedy for a wrong for which the common law has failed to make provision, and prescribes the method in which the remedy may be invoked. We cannot separate the method from the remedy, and say that the remedy becomes a right which cannot be restricted by the method provided for invoking the same. The beneficiaries of the law must accept it as it stands, and cannot be heard to say they will reject part and accept part. If the remedy as provided is not as fair and just as it might be, or even if, in exceptional cases, it works out so as to amount to no remedy at all, still it is what the law gives, and the beneficiaries must be satisfied therewith. It is not an analogous case to those in which laws are passed which injuriously affect vested rights. The statute is not subject to the objections made, and the assignment of error is overruled.

The judgment is affirmed.

**COMANCHE COUNTY et al. v. BURKS et al.**  
(No. 7,865.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 21, 1914. Rehearing Denied  
March 4, 1914.)

**1. COUNTIES (§§ 1, 47\*)—ACTS OF COMMISSIONERS' COURT—LIABILITY.**

A county is by Rev. St. 1911, art. 1365, a body corporate and politic, and acts by the commissioners' court, and the acts of the court, made in good faith within the scope or apparent scope of its authority, are the acts of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 1, 55; Dec. Dig. §§ 1, 47.\*]

**2. COUNTIES (§ 141\*)—ACTS OF COMMISSIONERS' COURT—LIABILITY.**

Where a county in its corporate capacity commits a wrong in relation to property in which others are interested, the county, like any other corporation or like an individual, may be held liable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 209; Dec. Dig. § 141.\*]

**3. COUNTIES (§ 195\*)—ACTS OF COMMISSIONERS' COURT—LIABILITY.**

A county which has, through the commissioners' court, wrongfully diverted and appropriated the proceeds of a sale of school lands of the county is liable for the misappropriation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 307; Dec. Dig. § 195.\*]

**4. OFFICERS (§ 114\*)—JUDICIAL OR QUASI JUDICIAL CAPACITY—LIABILITY.**

Officers to whom is committed the power of acting in a judicial or quasi judicial capacity are not personally liable for an honest, though mistaken, exercise of their powers.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192; Dec. Dig. § 114.\*]

**5. COUNTIES (§ 155\*)—SCHOOL LANDS—PROCEEDS—INVESTMENTS—VALIDITY.**

Under Const. art. 7, § 6, providing that lands granted to the several counties, and the proceeds of sales thereof, shall be held by the county as a trust for the public schools, and that the proceeds shall be invested in bonds of the United States, or state, or counties, and that the counties shall be responsible for all investments, the commissioners' court of a county, in investing the proceeds on a sale of county school lands, acts in a judicial or quasi judicial capacity, and the county is responsible for investments made.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 223-225; Dec. Dig. § 155.\*]

**6. COUNTIES (§ 183\*)—SCHOOL LANDS—PROCEEDS—INVESTMENTS—VALIDITY.**

The proceeds of a sale of school land of a county, required by Const. art. 7, § 6, to be invested in a specified class of bonds, may not be diverted to the general purposes of the county, and bonds issued by the county therefor, and bonds so issued are invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.\*]

**7. COUNTIES (§ 155\*)—SCHOOL LANDS—PROCEEDS—LIABILITY.**

Under Const. art. 7, § 6, making a county responsible for all investments of the proceeds of a sale of its school lands, a county is responsible for proceeds, regardless of the form or the legality of an investment attempted to be made by the commissioners' court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 223-225; Dec. Dig. § 155.\*]

**8. COUNTIES (§ 196\*)—SCHOOL LANDS—DIVERSION OF PROCEEDS—PARTIES ENTITLED TO SUE.**

In the absence of any statute on the subject, an action by the treasurer and superintendent of schools of a county, and officers of independent school districts of the county, and citizens in their individual right, against the county and the commissioners' court, to ascertain the amount of proceeds of school lands which had been diverted, and to compel the commissioners' court to make a levy to the amount of the diversion, and thereby enforce the trust imposed on the county, is maintainable, though some of the plaintiffs are not entitled to sue.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**9. LIMITATION OF ACTIONS (§ 11\*)—LIMITATIONS IN FAVOR OF COUNTY.**

The duty of a county to make proper investments of the proceeds of a sale of its school lands, as required by Const. art. 7, § 6, is of a public nature and pertains to governmental affairs, within the rule that limitations are not available in such cases.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.\*]

**10. LIMITATION OF ACTIONS (§ 102\*)—ENFORCEMENT—LIMITATIONS.**

An action against a county to enforce the trust imposed on it by Const. art. 7, § 6, providing that county school lands and the proceeds of a sale thereof shall be held by the county in trust for the public schools of the county, is not barred by limitations, though the county wrongfully diverted the proceeds, but did not repudiate the trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. § 102.\*]

**11. COUNTIES (§ 213\*)—ACTIONS—PRESENTATION OF CLAIM FOR ALLOWANCE—NECESSITY.**

Rev. St. 1911, art. 1366, providing that no county shall be sued unless the claim relied on shall have been presented to the commissioners' court for allowance, and the court shall have neglected to allow the same, does not apply to an action to enforce the trust imposed on a county to hold county school lands and the proceeds on a sale thereof in trust for the benefit of the schools of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 342, 343; Dec. Dig. § 213.\*]

**12. COUNTIES (§ 213\*)—ACTIONS—PRESENTATION OF CLAIMS—MINUTES OF COMMISSIONERS' COURT.**

Where the demand sued on was presented to the commissioners' court, but it refused to grant relief, the mere failure of the clerk to enter the proceedings on his minutes did not prevent an action against the county on the demand, though Rev. St. 1911, art. 1366, provides that no county shall be sued, unless the claim shall have been presented to the commissioners' court, and it shall have refused to allow the same, and though it was the duty of the clerk to enter the proceedings on his minutes.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 342, 343; Dec. Dig. § 213.\*]

**13. COUNTIES (§ 161\*)—COUNTY FUNDS—INTEREST.**

A county diverting the proceeds of the sale of its school lands is properly chargeable with interest on the misappropriated fund,

whether the statute fixing the legal rate of interest is applicable or not.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.\*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Action by Jokkie W. Burks, Treasurer of Comanche County, and others, against Comanche County and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

M. L. Harris, of Comanche, and Wilkinson & Baugh, of Brownwood, for appellants. Goodson & Goodson, of Comanche, for appellees.

CONNOR, C. J. This suit was instituted against Comanche county and the members of its commissioners' court by Jokkie W. Burks, treasurer of Comanche county, joined by the superintendent of its public schools and by the officers and boards of trustees of several independent school districts of the county, and by a number of persons in their individual right as citizens.

The plaintiffs alleged in substance that, in accordance with the Constitution and laws of the state, there had been set aside to Comanche county, as a part of its permanent school fund, four leagues of land, which it was the duty of the commissioners' court to sell and invest the proceeds thereof as collected in interest-bearing securities, as provided in the Constitution, for the benefit of the public free schools of the county; that, under the terms of the Constitution, the principal from the sale of such lands constituted the permanent fund, and the interest derived therefrom constituted the available fund. It is further alleged that prior to November 28, 1891, the commissioners' court sold the land so granted to Comanche county, but instead of investing the proceeds of the sale in securities, as provided by the Constitution, from time to time had diverted portions thereof and appropriated the same to the general purposes of the county, at the same time issuing what was termed "bonds of Comanche county" for the several sums so appropriated bearing 6 per cent. interest; that from one to ten of such bonds, inclusive, had been so issued stipulating for the payment by Comanche county to the permanent school fund of the county the several sums so appropriated, with interest thereon at the rate of 6 per cent. per annum. It was further alleged that a further diversion of the funds to the amount of \$237.25 had been made by the action of the commissioners' court in appropriating that amount for other unauthorized purposes. It was further alleged that an auditor had been appointed to state the account against Comanche county, who had reported that the total amount of said unauthorized appropriation was \$12,346.52, and that the interest accrued thereon to June 2, 1913, at the rate of 6 per cent. per annum, amounted to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sum of \$11,649.68. There are further allegations of the petition to the effect that, within the limit allowed by the Constitution and laws, the commissioners' court could add to its tax levy a sum sufficient to realize, during a series of years, a sum necessary to restore the unauthorized appropriations, and the prayer was for a decree fixing the amount of the permanent school fund which had been so diverted with interest, and for a mandamus compelling the commissioners' court to make the required levy.

The trial was before the court without a jury. He has filed conclusions of fact which we adopt, and upon which he entered judgment fixing the total amount of permanent and available school fund due by Comanche county at \$20,695.59, with interest thereon from the date of the judgment at 4 per cent. per annum, from which judgment this appeal has been prosecuted.

[1] It is first insisted that the court erred in overruling appellant's general demurrer. The contentions are that the petition on its face shows an unlawful and an unauthorized appropriation of the county's permanent school fund on the part of the commissioners' court, and that the county cannot be made responsible for the wrongs of its officers. It has been frequently held that in certain cases a county cannot be held liable in damages for the wrongs or negligence of its officers. *Helgel v. Wichita County*, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63. But this rule of nonliability is not of universal application. See *McQuillan on Municipal Cor.* vol. 6, § 2605, citing numerous cases where the rule has been limited. And we are of the opinion that the principle invoked has no application in this case. Counties, by the express terms of our statute (R. S. 1911, art. 1365), are bodies corporate and politic and act by and through the commissioners' court, composed of the county judge and of the commissioners from the several commissioners' precincts provided by the law. The acts of the commissioners' court, therefore, in good faith performed within the scope, or apparent scope, of the powers committed to it under the Constitution and laws, are the acts of the county and not of the individual members composing the court.

[2] And where counties in their corporate capacities, as contradistinguished from their individual officers, commit a wrong in relation to property in which others are interested, the county, like any other corporation or individual, may be held liable. Thus in *Watkins v. Walker County*, 18 Tex. 586, 70 Am. Dec. 298, Walker county was held liable at the suit of the owner of certain lands in damages for timber taken from the land by an overseer of roads to repair a highway. In the course of the opinion it was said: "The duty of providing highways for the use of the public has been confided to the counties. The overseers of roads are the legally

constituted agents of the counties from which they receive the appointment, and, what they do in the proper and necessary exercise of the authority conferred upon them, the county, in its corporate capacity, is responsible for." The principle announced in the case just cited was affirmed in the later case of *Hamilton County v. Garrett*, 62 Tex. 602. In *Baker v. Panola County*, 30 Tex. 87, our Supreme Court affirmed the right of Baker to recover from the county taxes illegally assessed against him and paid under protest. And in *Boaz v. Ferrell*, 152 S. W. 201, this court held to the effect that Jones county was liable for certain state taxes wrongfully deposited with its county treasurer by a tax collector.

[3] So here, if Comanche county has wrongfully diverted and appropriated funds of which the plaintiffs were the beneficiaries and as to which they have the right to herein complain, as we shall later have occasion to affirm, then we think Comanche county, rather than the several members of its commissioners' court, as is insisted, must be held liable. As further illustrating this conclusion, we cite the case of *Gaines v. Newbrough*, County Judge, 12 Tex. Civ. App. 466, 34 S. W. 1048, by this court, in which it was held that a county judge, commissioners' court, and sheriff were not personally liable in a suit for damages for false imprisonment by virtue of the execution of a writ by the sheriff, regular on its face, but which the members of the commissioners' court, in a mistaken exercise of a judicial act in fining the plaintiff for contempt, had ordered to be issued. So also in *Wright v. Jones*, 14 Tex. Civ. App. 423, 38 S. W. 249, also by this court, and in which writ of error was denied, it was held that members of a county commissioners' court were not liable in a civil action to one whose property had been wrongfully taken by the tax collector in pursuance of an order of the commissioners' court to collect a tax levied by them in a district which had erroneously been determined to be within their jurisdiction.

[4] The principle of the cases last noted may be said to be dependent upon the very generally recognized rule that officers, to whom have been committed the power of acting in a judicial or quasi judicial capacity, cannot be held liable for an honest, though mistaken, exercise of their powers. The further pertinent inquiries, therefore, arise as to whether the members of the commissioners' court, in diverting the funds, as alleged, were in the exercise of a judicial function, and whether Comanche county may be held liable as herein sought.

[5] Section 6, art. 7, of the Constitution, so far as applicable, provides: "All lands heretofore or hereafter granted to the several counties of this state for educational purposes, are of right the property of said counties respectively, to which they were granted,



and title thereto is vested in said counties; and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands, in whole or in part, in manner to be provided by the commissioners' court of the county. \* \* \* Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law; and the county shall be responsible for all investments; the interest thereon and other revenue except the principal, shall be available fund." A reading of this section of the Constitution makes it manifest, it seems to us, that the commissioners' court of the county, in making an investment of the proceeds therein specified, must act in a judicial or quasi judicial capacity. The county for which they act holds the proceeds as an express trust, and the investment thereof in the securities named in the Constitution or otherwise, as may be prescribed by law, necessarily involves an exercise of judgment and discretion. The counties also, by the express terms of the Constitution, are "responsible for all investments." As alleged, and as shown in the court's findings, the commissioners' court from time to time appropriated to the general uses of Comanche county specified sums of the proceeds which had arisen from the sale of the county school lands.

[6] Therefor, as also alleged and shown in the court's findings, the commissioners' court issued in a formal way what was termed "bonds of Comanche county," bearing 6 per cent. interest. While the bonds so issued are doubtless invalid, as such, for want of any authority for their issuance, yet there is nothing in the record that indicates that the county judge and commissioners so issuing said obligations acted corruptly or in bad faith, and it seems more than probable that, in construing their authority to invest the proceeds "in bonds of the United States, the state of Texas, or counties in said state," said court mistakenly concluded that the investment could be made in "bonds of Comanche county," as well as of other counties. Of course if the bonds so issued could be upheld as authorized under the terms of the Constitution and by many legislative acts, then Comanche county would concededly be responsible, not only for the several sums so invested, but also for the interest at the rate therein specified.

[7] But, regardless of the form or the legality of the investment attempted, it is undoubtedly true by the terms of the Constitution that Comanche county is "responsible for the investment."

[8] It is insisted, however, with much apparent force that the plaintiffs in this suit

were not authorized to maintain the action; the contention being in substance that the state alone could do so. Again, referring to the section of the Constitution quoted, it will be seen that the sovereign power of the state, as represented by the delegates of the people in convention duly assembled, expressly declared that the lands granted to counties for educational purposes "are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties," and that "said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein." If there is any other provision of our Constitution, or any legislative act which confers a like right or similar duty upon any other officer or department of the state, we have failed to find it; and the explicit declarations quoted leave no room for the contention, it seems to us, that any other body, corporate or politic, in the autonomy of this state has either title to county school land, or can be held as trustees of the proceeds thereof.

In the recent case of *Dubose v. Woods*, 162 S. W. 3, by the Court of Civil Appeals for the Fourth District, it was held that resident citizens of Dunn county, who were qualified voters and owners of real and personal property therein, had sufficient interest to apply for mandamus to compel the commissioners' court of that county to perform its duty in dividing the county in commissioners', justice, and voting precincts.

In *Dillon's Municipal Corporations* (4th Ed.) vol. 2, § 909, it is said that: "In respect of property held by municipal corporations in trust or clothed with public duties, equity has always asserted its jurisdiction to see that the trusts were observed and its public duties in respect of such property discharged." And that while in England, and perhaps also in some of our states, a bill seeking the enforcement of such a trust must be filed by the Attorney General in behalf of the beneficiaries, it is said further (in section 914) that in this country "the right of the property holders or taxable inhabitants to resort to equity to restrain municipal corporations and the officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of corporate property, or levying or collecting void and illegal taxes and assessments upon real property"—has, without the aid of statute provision to that effect, been affirmed or recognized in numerous cases in many of the states. It is said to be the prevailing and almost universal doctrine on the subject; this rule of right being expressly affirmed in *Crampton v. Zabriskie*, 101 U. S. 801, 25 L. Ed. 1070. The rule so stated, of course, would not apply in cases where the Legislature had prescribed a different method of

procedure, but appellants have cited us to no law which devolves upon any public officer of this state the duty of instituting a suit to enforce a trust of the character under consideration, and we have found no such law. So that, irrespective of the contention in behalf of appellee that this suit is in effect a suit by the state, we think the plaintiffs, or at least some of them, were entitled to maintain this action to enforce the trust undoubtedly devolved upon Comanche county by the terms of the Constitution. The plaintiffs comprehend, not only citizens of the county in their individual capacity, but also trustees of the independent school districts who are the beneficiaries of the fund, and the county treasurer and county superintendent, upon whom are imposed by law duties as to the proper distribution of the available fund arising from the interest from the permanent fund. It seems immaterial to us whether all of the plaintiffs were entitled to maintain the suit or not. It is to be remembered no individual recovery is sought, no judgment as such against the county is contemplated, but the action is purely one in equity seeking the issuance of a mandamus to require the county to fulfill its trust and restore the trust fund.

[9] But it is said that the action is barred under both the two and four years' statute of limitations. We think, however, there is nothing in this contention. In a very important sense the duty of Comanche county to make proper investment of the proceeds of its school lands was of a public nature and such as pertains to governmental affairs. In such cases it is very generally held that limitation or laches is not available. See *Delta County v. Blackburn*, 100 Tex. 51, 93 S. W. 419.

[10] Moreover, in the matter of the trust under consideration, we see no reason why the county should not be held to the same rules of law that are applicable to other trustees, and it is familiar doctrine that limitation will not run in favor of a trustee until after repudiation of a trust and notice thereof has been brought home to the beneficiaries. In the case before us it affirmatively appears from the court's findings that Comanche county never repudiated the trust herein involved. On the contrary, at the time of the several appropriations referred to, it issued specific obligations, or what at the time evidently was thought to be such, for the repayment of the sums, taken together with interest as stipulated. No act of repudiation of any kind or character is pretended.

[11] It is further insisted that the claim herein declared upon was never presented to the commissioners' court for allowance, and that therefore the action cannot be maintained. Our statute on the subject (article 1366) reads: "No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the county com-

missioners' court for allowance, and such court shall have neglected or refused to audit and allow the same, or any part thereof." Compliance with this statute has many times been held to be necessary in order to maintain a suit against the county. But we are of the opinion that the statute has no proper application here. The suit is not by the plaintiffs, or any one of them, for the recovery of a debt or damages, but is one wherein the plaintiffs present to the court a prayer for the discharge of a duty imposed by the Constitution and laws of the state in behalf of the public free school fund.

[12] Besides, the court finds that the complaint made in the plaintiffs' petition was in fact presented to the commissioners' court of Comanche county, and that, while the members expressed the conviction that the restoration sought should be made, the court refused to comply with the request of the petitioners on the ground that they doubted their authority to do so, in the absence of a decree of a court of competent jurisdiction so decreeing. It is insisted, however, that this action is not evidenced by any order of the commissioners' court entered upon its minutes. Nothing, however, in the article quoted directs the entry of presentation and refusal to be entered upon the minutes or declares a penalty for failure to do so, and we think it would be extremely technical to now deny the relief sought in this case merely because the clerk of the commissioners' court failed to enter the proceedings upon his minutes, though doubtless it was his duty to do so.

Several other questions are specifically presented which have been incidentally disposed of by what we have already stated, and we will therefore discuss but one further assignment.

[13] The judgment fixes the total amount of the permanent school fund of Comanche county that had been unlawfully converted as alleged at \$12,583.77, to which the court added interest thereon from a date named in the judgment to the date of the trial at the rate of 4 per cent. per annum; the total interest so allowed amounting to \$3,111.82. It is earnestly insisted that interest was not allowable; the theory of the contention being that the interest in its nature is but damages which are not recoverable because of the rule hereinbefore discussed of nonliability of a county for the wrongs or negligence of its officers. We feel that this contention must also be overruled. It is true that it may be well doubted whether our statute, fixing the legal rate of interest at 6 per cent. per annum, has application, but we think the court's action in imposing interest should, under the circumstances, be upheld on general principles. Thus in *Lewin on Trusts*, vol. 1, p. 338, it is said: "It may be stated as a general rule that, if a trustee be guilty of any unreasonable delay in investing the fund or transferring it to the hand destined to receive it, he will be answerable to the cestui

que trust for interest during the period of his laches; and a trustee has been decreed to pay interest even where it was not prayed by the bill, and, in a suit establishing laches, will be decreed to pay personally the cost up to the hearing of a suit arising out of the laches."

It is further stated in Perry on Trusts, vol. 1 (4th Ed.) § 468: "It is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest that trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay, they will be charged with interest at the rate of 4 per cent.; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of 5 per cent.; and, in certain special cases of misconduct, the court will order annual or semiannual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name, or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate, in the absence of special agreements."

Appellees have made no complaint of the action of the court in fixing the interest allowed at the rate of 4 per cent. rather than at the legal rate prescribed under our statute, and, in view of the authorities cited, we certainly think, as before indicated, that appellants have no cause of complaint in this respect.

We conclude on the whole that the court's findings of fact should be approved, and the judgment affirmed.

#### MARIS v. ADAMS. (No. 567.)

(Court of Civil Appeals of Texas. Amarillo. March 14, 1914. On Motion for Rehearing, April 11, 1914. Rehearing Denied April 25, 1914.)

#### 1. WILLS (§ 114\*)—REQUISITES AND VALIDITY—EXECUTION—ATTESTATION.

Papers alleged to constitute a testamentary disposition, which were not attested as required

by Rev. St. 1911, art. 7857, providing that every will shall, except when otherwise provided, be attested and subscribed in the testator's presence by two or more credible witnesses over 14 years of age, were insufficient as a formal will under that article.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 277-279; Dec. Dig. § 114.\*]

#### 2. WILLS (§ 132\*)—REQUISITES AND VALIDITY—HOLOGRAPHIC WILLS—HANDWRITING OF TESTATOR.

An envelope on which was written the word "Notes" and B.'s name, a paper inclosed asking B. and A. to accept this, and a note also inclosed, written on a printed form, payable to A. and B., and both signed by V., in whose handwriting all was written, except the printed portion of the note, did not constitute a valid holographic will, because not "wholly written by the testator," as required by Rev. St. 1911, art. 7858.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 341; Dec. Dig. § 132.\*]

#### 3. WILLS (§ 132\*)—REQUISITES AND VALIDITY—HOLOGRAPHIC WILLS—HANDWRITING OF TESTATOR.

Where a printed form is used in writing a will, so that it consists partly of the printing and partly of the clauses written by the testator, no part of it can be admitted to probate as his holographic will under Rev. St. 1911, art. 7858, dispensing with the necessity of attestation "where the will is wholly written by the testator."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 341; Dec. Dig. § 132.\*]

#### 4. WILLS (§ 134\*)—CONSTRUCTION—CONSTRUING WRITINGS TOGETHER.

If parol evidence was admissible to show that a writing asking B. and A. to accept this, and a note to them, both signed by V., were found together in a sealed envelope, and if the note was properly incorporated into the writing by reference, then all three were to be considered and construed together in determining whether they could be probated as a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 345; Dec. Dig. § 134.\*]

#### 5. GIFTS (§ 32\*)—INTER VIVOS—DELIVERY—NECESSITY.

Where V. executed a note to A. and B., which, with a paper asking them to accept it, was placed in an envelope and sealed, and the same was found in V.'s house after his death, there was no gift inter vivos, because of the absence of a delivery by V. during his lifetime.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 63, 64; Dec. Dig. § 32.\*]

#### 6. WILLS (§ 87\*)—REQUISITES AND VALIDITY—NATURE AND ESSENTIALS—TESTAMENTARY INTENT.

A paper asking B. and A. to accept this, and a note payable to them "15 after date," both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and B.'s name, did not show an intent to make a testamentary disposition, the criterion of which is whether by intentment it takes effect at the maker's death, vesting no earlier interest in the beneficiary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208, 207; Dec. Dig. § 87.\*]

#### 7. WILLS (§ 464\*)—CONSTRUCTION—LANGUAGE OF INSTRUMENT—PARTICULAR WORDS.

In construing an alleged will consisting of a writing asking B. and A. to "please except this," and a note to them, both signed by V., and inclosed in a sealed envelope, the word "except" will be treated as meaning "accept"; a liberal

allowance being made for V.'s awkwardness in the use of words.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 983; Dec. Dig. § 484.\*]

**8. BILLS AND NOTES (§ 348\*)—BONA FIDE PURCHASERS—TIME OF TAKING.**

A note payable to the order of B. and A., "Fifteen after date," could not be revoked by the maker on the ground that it was a testamentary gift, if delivered and transferred within a reasonable time to a bona fide holder before demand.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 870-871½; Dec. Dig. § 348.\*]

**9. EVIDENCE (§ 450\*)—PAROL EVIDENCE—AIDING CONSTRUCTION—AMBIGUITY.**

There was no ambiguity about a writing asking B. and A. to accept this, and a note to them, both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and B.'s name, the intention evidenced being to make a gift rather than a will, and it was improper to admit parol evidence to vary, contradict, or add to their expressed terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.\*]

**10. WILLS (§ 488\*) — CONSTRUCTION — EVIDENCE TO AID CONSTRUCTION—AMBIGUITY.**

If an alleged will consisting of a writing asking B. and A. to accept "this," and a note to them, both signed by V., and inclosed in a sealed envelope, indorsed "Notes," was ambiguous on account of the use of the words "Notes" and "this," it was a patent ambiguity, which could not be explained by parol evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.\*]

**11. WILLS (§ 293\*)—REQUISITES AND VALIDITY—NATURE AND ESSENTIALS—EVIDENCE AS TO CHARACTER OF INSTRUMENT.**

Whenever a person deceased has executed a paper which does not upon its face clearly evidence a testamentary character, the courts cannot transform it into a will by the aid of parol evidence, in violation of Rev. St. 1911, art. 7857, declaring that every will, except as otherwise provided, shall be in writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

**12. WILLS (§ 293\*) — CONSTRUCTION — EVIDENCE TO AID CONSTRUCTION.**

Under Rev. St. 1911, art. 7857, providing that all wills, except as otherwise provided, shall be in writing, parol evidence as to the testator's intent is not admissible, except to explain a latent ambiguity, which can never arise as to the question of testamentary intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

**13. WILLS (§ 477\*)—REQUISITES AND VALIDITY—FORM AND CONTENTS—REFERENCE TO OTHER WRITINGS.**

A note which was found with a letter asking the payees to accept "this," in a sealed envelope, indorsed "Notes," was not incorporated into the letter by reference, so as to constitute a will, as the reference was too indefinite and ambiguous, and required parol evidence to explain it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 998; Dec. Dig. § 477.\*]

**14. WILLS (§ 477\*)—REQUISITES AND VALIDITY—FORM AND CONTENTS—REFERENCE TO OTHER WRITINGS.**

In order to incorporate a separate instrument into a will by reference, it must be in existence at the time of the execution of the will,

which fact must appear upon its face, and the instrument intended must be described in clear and definite terms.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. § 477.\*]

**15. WILLS (§ 297\*)—PROBATE—EVIDENCE—ADMISSIBILITY.**

Declarations of the testator made before or after the date of the will, and relating to its execution, but not a part of the res gestæ, are not admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 690-696; Dec. Dig. § 297.\*]

**16. WILLS (§ 297\*)—PROBATE—EVIDENCE—ADMISSIBILITY.**

Declarations of a testator at the time of executing a will that he "already had Adams and Henry fixed" were not admissible to establish the execution of a prior will, nor to identify a note claimed to have been found with a letter asking the payees to accept "this," in a sealed envelope, indorsed "Notes," as one of the notes referred to on the envelope.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 690-696; Dec. Dig. § 297.\*]

**17. WILLS (§ 293\*) — CONSTRUCTION — EVIDENCE TO AID CONSTRUCTION.**

The rule that parol evidence is admissible to show the situation of the testator or the surrounding circumstances at the time of executing the will applies only after the court has decided that the instrument or instruments under consideration were executed with a testamentary intent, and therefore constitute a will, since to permit such evidence to determine the nature and character of the instrument would open the door for fraud, encourage perjury, and allow an instrument clearly not a will upon its face to be converted into a will by the evidence of outside or interested parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

**On Motion for Rehearing.**

**18. APPEAL AND ERROR (§ 1091\*)—REVIEW—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.**

Where a case was appealed from the county court to the district court, and on appeal from the district court the proceedings in the county court were not made part of the record, every presumption must be indulged in favor of the correctness of the judgment of the district court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4302-4311, 4331; Dec. Dig. § 1091.\*]

**19. WILLS (§ 272\*)—PROBATE—PLEADINGS—IN GENERAL.**

Where the replication of the proponent of certain papers as a will asked that a subsequent will be admitted to probate in connection with proponent's alleged will, the pleadings were sufficient to authorize the admission of the subsequent will to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 627; Dec. Dig. § 272.\*]

**20. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—NECESSITY—FUNDAMENTAL ERROR.**

A want of evidence or an insufficiency of evidence to sustain the judgment is not such a fundamental error as to require consideration without a proper assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

**21. WILLS (§ 179\*)—REQUISITES AND VALIDITY—REVOCATION—SUBSEQUENT WILL.**

If a will leaving a certain sum to G. and the rest to testator's heirs was executed after the execution of an alleged will, consisting of a

letter and a note to B. and A., both signed by testator, it had the effect of revoking such alleged will, if any there was, though it was claimed that such was not testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457; Dec. Dig. § 179.\*]

Hendricks, J., dissenting in part.

Appeal from District Court, Moore County; D. B. Hill, Judge.

Application by F. Y. Adams for the probate of certain papers as the will of E. Vanlaw, deceased, opposed by C. H. Maris. From a judgment admitting such papers to probate, the contestant appeals. Reversed and rendered in part, and affirmed in part.

Madden, Trulove & Kimbrough, of Amarillo, and Moore, Harrington & Powell, of Dalhart, for appellant. Tatum & Tatum, of Dalhart, and W. Boyce, of Amarillo, for appellee.

HALL, J. On August 10, 1912, appellee, Adams, filed in the county court of Moore county his application to probate as the last will and testament of E. Vanlaw three papers as follows: (1) An envelope on which was written horizontally the words "Henry Boyce," and across the end the word "Notes." (2) A sheet of paper apparently torn from a small writing tablet, and on which was written the words: "Henry, please except this you and F. Y. Adams for the kindness shown me. E. Vanlaw." (3) A promissory note prepared on a printed blank, a copy of which (the script part being in italics) is as follows: "\$14000, Dumas Texas, July the 3, 1911, Fifteen after date after date, for value received, I, we or either of us promise to pay to the order of F. Y. Adams & Henry Boyce Fourteen Thousand Dollars Dollars, with ——— percent per annum thereon from ——— until paid, interest payable annually, and if not paid to bear the same rate of interest and if default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection then an additional amount of ten percent on the principal and interest of this note shall be added to the same as collection fees. The makers and endorsers of this note hereby severally waive demand of payment, notice of nonpayment, protest and notice of protest and hereby consent that time of payment may be extended from time to time without notice hereof. *E. Vanlaw.*" Notice of application having been given, C. H. Maris, a half-brother of the deceased, appeared and contested. Upon a hearing in the county court these papers were, on May 21, 1913, admitted to probate and ordered recorded as the proven will of said deceased. Maris appealed from this judgment to the district court. Where, upon another trial before a jury, judgment was entered upon the findings of the jury admitting such instruments to probate, and establishing a subsequent instru-

ment dated July 15, 1911, known as the "Geary will," and which is as follows: "Know all men by these presents that E. Vanlaw has wld John Geary Seven Thousand Dollars at My Death the Rest of my property to my bodley airs, written by F. Y. Adams." J. H. Boyce was appointed administrator, etc.

In appellee's brief is set out in part some of the evidence, which we reproduce in substance: E. Vanlaw, the deceased, was at the time of his death about 72 years of age. It appears that he left home when a boy; his nearest relatives being his half-brothers and sisters, with whom he seems to have had little acquaintance. Prior to his settlement in Moore county he seems to have traveled a great deal, and is described by the witnesses as being somewhat peculiar and eccentric. He is said to have been a miser, and frequently did not have enough to eat or sufficient clothes to protect him. In 1905 he abandoned his occupation as a veterinary surgeon and purchased five sections of land in Moore county, stocked it with cattle, and lived there until he was carried to Dalhart for medical treatment about a month before he died. He lived alone most of the time, but during a part of the time had a hired man on his place. For a number of years he had relied largely on the advice of Henry Boyce in the conduct of his business, consulting him frequently, and often referring to him in his conversations. He seems to have had very little to do with his relatives. John Geary attended to the handling and delivery of his cattle, and he usually called on F. Y. Adams for assistance and advice in the details of his daily business affairs. He had been suffering from an incurable malady for many years, and was a regular drinker; his death, being ascribed to alcoholic poisoning of the brain. During the spring of 1911 he grew weaker, and his health was apparently failing. One of the witnesses testified that during this time he heard the testator say he did not think he would live very long; that it might have been a good thing to have given his property to orphan children, but "Henry, I expect, deserves it more than anybody else." On July 5, 1911 (if the date of the writing is correct), the deceased sent Hammitt, his hired man, for F. Y. Adams, and had him write what is referred to as the Geary will, which is witnessed by Hammitt and Adams, whereby he bequeathed to John Geary \$7,000, stating at this time, so Hammitt and Adams testify, that he already had Adams and Henry "fixed." He died on October 21, 1911. From September 20th to October 21st he was not rational except at intervals. One J. H. Lamb went to the Vanlaw house some time during the month of August, 1912, and in the upper room of the building found in a small box the sealed envelope on which was written "Henry

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Boyce" and the word "Notes," and advised Henry Boyce of this fact. Boyce visited the place and testified that he found the envelope offered in evidence in the box as described by Lamb; that he opened it and exhibited the contents to the parties who were with him at the time, such contents being the note and other writing offered in evidence for probate. The jury found that the writing on the envelope and that portion inclosed, except the printed portions of the note, were all written by E. Vanlaw; that thereby Vanlaw intended to make a gift to Henry Boyce and F. Y. Adams, effective upon his death; that he was at such time capable of knowing and understanding the nature of the act, and that the note was in existence at the time the words, "Henry, please except this you and F. Y. Adams for the kindness shown me," were written; that the note was what was referred to by the word "this" used in said writing; and that it was not the intention of Vanlaw to revoke this gift by the execution of the Geary will.

[1-3] The three papers, viz., the letter, the envelope, and the \$14,000 note, were not attested, as required by R. S. art. 7857, and clearly cannot be considered a formally written will when measured by that article, even though the *animus testandi* was apparent, nor can they be probated as a holographic will, because the note, being partly printed, is not within the requirement of R. S. art. 7858, that it shall be "wholly written by the testator." A will cannot be holographic if any part of it is not in the handwriting of the testator. *Philbricks' Heirs v. Spangler*, 15 La. Ann. 46; *Estate of Knox*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798. Hence, if a printed form has been used, so that the paper consists partly of such printing and partly of clauses written by the testator, no part of it can be admitted to probate as his holographic will. *Williams' Heirs v. Hardy*, 15 La. Ann. 286; *In re Rands' Estate*, 61 Cal. 468, 44 Am. Rep. 555. In the case last cited the testator had procured a blank form for a will, in which the formal parts, such as directions with reference to his burial, payment of funeral expenses, and expenses of last sickness, etc., were printed. The opinion of the court quotes the California Civil Code as follows: "An holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form and may be made in or out of this state, and need not be witnessed" (Civ. Code, § 1277)—and proceeds: "The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The Legislature has seen fit to prescribe forms requisite to an holographic will, and these forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate,

omitting the printed portions. We are not at liberty to so hold. We should thereby in effect change the statute and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an holographic will. The instrument in its entirety is before us. It was not entirely written by the hand of the deceased." It has been held in several instances that a will written upon a letter head in which part of the date line was printed and the remainder written was void as a holographic will. This holding is based upon the statute that a holographic will must be dated by the testator. *In re Billings' Estate*, 64 Cal. 427, 1 Pac. 701; *Succession of Robertson*, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672. The requirement as to dating is not found in the statutes of this state; but the authorities are numerous and seem to be without discord that a holographic will not entirely written by the testator cannot be probated. *Estate of Martin*, 58 Cal. 532; *Gregory v. Oates*, 92 Ky. 532, 18 S. W. 231; *In re Plumel*, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100.

[4, 5] If we are to consider the parol testimony admitted by the court showing that the letter and \$14,000 note were found by Lamb and Boyce in the sealed envelope, and if we hold that the note was by proper reference incorporated in the letter (which question we will discuss later), then, according to appellant's contention, these three papers must be considered and construed together, and we think this would be correct. *Grigsby's Legatees v. Willis' Estate*, 25 Tex. Civ. App. 1, 59 S. W. 576; *Alliday v. Cage*, 148 S. W. 838. If taken collectively, they do not constitute a holographic will. *In re Noyes*, 40 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145, 20 Ann. Cas. 366; R. S. 1911, art. 7858; 40 Cyc. 996 and 1129. According to the record, these papers were never delivered to Boyce and Adams by Vanlaw prior to his death, and for this reason there was no gift *inter vivos*. *Chevallier v. Wilson*, 1 Tex. 161.

[6-8] Taking the instruments, either separately or as a whole, do they show a testamentary intent? "The great criterion of a testamentary disposition is that by intentment it takes effect at the death of the maker, vesting no earlier interest in the beneficiary." *Grigsby's Legatees v. Willis' Estate*, supra. We make a liberal allowance to the awkwardness of testator in the use of words and construe "except" used in the letter as meaning "accept." Then the letter would be: "Henry, please accept this, you & F. Y. Adams, for the kindness shown me. E. Vanlaw." There is clearly not a word of testamentary import, such as "I give," "I bequeath," "I will," "I desire," and the like in it; but, on the contrary, the words "please except" might imply a possible refusal on the part of donees and rather indicate the tender of a gift *inter vivos*. Neither is the find-

ing of the jury, sustained by the face of the note. It is a plain promissory note, in its legal effect, payable on demand; but the words "Fifteen after," whether it be taken to mean fifteen days, months, or any other period of time, cannot be reconciled with the contention that it was intended to be made payable after the death of the maker. There is no stipulation that it is to be paid by his executor or out of his estate after death, and in short it contains nothing to distinguish it in character from the flood of negotiable instruments daily filling the channels of commerce. If it had been delivered, it would not have been revocable at the will of Vanlaw, because it was payable to the order of Boyce and Adams and could have passed within a reasonable time into the hands of a bona fide holder before demand. *Paine v. C. V. R. R. Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, 30 L. Ed. 195; *Wood's Byles, Bills*, § 333; *Nott v. State National Bank*, 51 La. Ann. 871, 25 South. 475. "Courts have not infrequently accorded great weight to the fact that the maker retained possession of the paper, and have permitted that fact to give to the instrument the revocable character which the language implied failed to supply (*Schouler, Wills*, § 268, p. 276); but it is difficult to determine from the authorities just what weight should be given to this fact, or whether it is proper to allow it to control in any cause" (*Grigsby's Legatees v. Willis' Estate*, supra).

Aside from the fact that Vanlaw failed to deliver the \$14,000 note to Boyce and Adams before his death, we find nothing in the record tending to show an ambulatory character—an inspection of the note and letter themselves does not disclose such nature. Even if we are to consider the papers in the light of the surrounding circumstances, they tend to show an intention to make a gift *inter vivos* rather than a posthumous disposition of any property. The finding of the jury as to the testamentary intent must be sustained, if at all, by parol evidence. Upon the admissibility of parol evidence for this purpose there is an irreconcilable conflict in the decisions of other states. Nor is there perfect harmony in the decisions of our own state upon the point. It is said, in *Ferguson v. Ferguson*, 27 Tex. 339: "In discussing the form and manner of making a will, the correct doctrine by which the courts are governed in passing upon instruments of a doubtful or uncertain character is thus aptly and forcibly expressed in *Williams on Executors*: 'The true principle to be deduced from the authorities appears to be that, if there is proof, either in the paper itself, or from clear evidence dehors, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will, secondly, if death was the event that was to give effect to it, then, whatever may be its form, it may be admitted to probate as tes-

tamentary; and there seems to be this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character, that the first will be entitled to probate, unless they are proved not to have been written *animo testandi*, whilst in the latter the *animus* must be proved by the party claiming under them.' 1 *Williams on Ex'rs*, 87. There is always a presumption, it is said, against an imperfect testamentary paper, and when it is doubtful in which way such paper should operate, it is for the jury to decide on the facts of execution and delivery, and to draw the just inferences from the declarations of the maker. \* \* \* It cannot be insisted for a moment that the paper under discussion in this case is a perfect testamentary instrument. It is evidently very inartificially drawn, whether intended as a deed or a will; but the maker himself calls it a deed, and its phraseology and manner of execution is much more analogous to instruments of that character than to wills. It is executed under seal, which is unnecessary in a will. Subsequent to its execution it was duly acknowledged by the maker as his deed before the clerk of the county court, and placed upon record as such, which was unnecessary and very unusual with wills, but appropriate, if not essential, if it was intended as a deed. The operative word 'give,' which is the only one used in the instrument, is appropriate to either a deed or a will; but, standing alone, it would seem to indicate a direct and immediate gift rather than a testamentary bequest. The *habendum* clause, which is twice used, would be altogether out of place in a will, and the reservation of a life estate to the maker is wholly inconsistent with the idea that the instrument was intended as a will. That the beneficiaries should not take or hold possession of the property until after the death of the maker is as consistent with the supposition that he intended to make a deed of gift *in fee* after the termination of a life estate reserved to himself as that the instrument was intended to be of a testamentary character. On the other hand, those clauses of the instrument embracing property to be subsequently acquired by the maker, while they might be embraced in a will, are inoperative and void in a deed, and may be fairly referred to as tending in some degree to repel the conclusion to be drawn from other parts of it that it was not executed or intended to operate as a testamentary instrument. The legitimate conclusion, therefore, to be deduced from the face of the paper leaves it a matter of doubt whether it was intended to operate as a deed or will, and in such cases the fact of its delivery and the intention and purpose of its execution should be submitted as questions of fact to the jury, to be guided in their determination of them, however, by the construction given to the terms of the instrument by the court, together with such extrinsic testimony as may be furnished by the

parties to aid in their elucidation." In that case the instrument contained this recital: "This deed, however, is not to deprive myself of the use of any or all of said property so long as I live, and after my death they [the grantor's son and daughter] will take full possession of the whole," etc.

In *Rogers v. Kennard*, 54 Tex. 80, the court had under consideration a writing from the testatrix, addressed to her daughter, purporting to be made in consideration of "many kind and valuable services," and closing with this language: "But it is understood, further, that the lands, etc., given and conveyed to my daughter Polly by this deed, and which is an equal share with the children herein mentioned, are given and conveyed subject to the reservations and conditions: The said lands are hers for life, subject to none of her present debts or liabilities, or the use, debts, or liabilities of no future or past husband, and at her death to be divided between the six children specified in this will, share and share alike, and to be given and divided between no other person or persons." Citing the *Ferguson Case*, supra, *Bonner, A. J.*, said: "Was the purported deed from Tabitha Melton to Polly Rogers and others, under which the plaintiffs claim, a deed or a will? In a proper case, where there is such ambiguity connected with an instrument as to forbid that the court, as a question of law, should construe and declare its legal effect to be either a deed or a will, this issue should be submitted to the jury as a question of fact. The instrument under consideration was recited in its commencement to have been an indenture, further on it is called a deed, and near the end it is styled a will. In its general form it was a deed." The only remaining case which we have been able to find bearing upon the question under discussion, and tending to sustain the judgment, is *Hannig v. Hannig*, 24 S. W. 695, in which the Court of Civil Appeals of the Third District used this language: "The question now to be considered is as to the effect to be given to these instruments, whether as a deed or a will. Appellant insists that there was no ambiguity in the instruments, but that they are clearly deeds, and the court should not have allowed the jury to construe them. We do not think the court erred as stated. The fact that the conveyance was not to take effect until after the death of the donor, together with extrinsic testimony, made it doubtful whether he intended it to operate as a deed or a will. In such case it was proper to submit the question to the jury. \* \* \* To show that an instrument is intended to operate as a will, much stress is laid upon the fact that it is not intended to take effect until after the death of the donor. In *Carlton v. Cameron*, 54 Tex. 77 [38 Am. Rep. 620], it is said that, although the instrument had the form of a deed, and was placed upon record, it was nevertheless testamentary in character, and

inoperative as a deed, if the intention of the maker appears to have been that it should take effect only on his death.' The court concluded that, as the judgment of the lower court was upon the ground that such was the intention, it was correct, and should stand."

These cases take no note of the statute of wills, and the decisions announced were evidently without any reference to the statute requiring wills to be in writing, and do not touch that question or discuss it from the standpoint in which we find it discussed by *Stayton, Chief Justice, in Heldenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29. It has lately been held by the Court of Civil Appeals in *Johnson v. Avery*, 148 S. W. 1156, that only in case of ambiguity can parol evidence be introduced upon the question of testamentary intent. To the same effect are the cases: *Naugher v. Patterson*, 9 Tex. Civ. App. 168, 23 S. W. 582; *Stanley v. Samples*, 2 Posey Unrep. Cas. 126. As said in *Noble v. Fickes*, 230 Ill. 604, 82 N. E. 953, 13 L. R. A. (N. S.) 1207, 12 Ann. Cas. 282: "It is a well-established rule that parol evidence is inadmissible to add to, alter, vary, or contradict the terms of a valid written contract or other instrument of a solemn and conclusive nature. \* \* \* The rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally. Such evidence is not receivable to show the intention of the testator except to enable the court, where the question arises, to give the language such an interpretation as, from the circumstances in which he was placed, it is reasonable to presume the testator intended it should receive, or, as it is sometimes expressed, to put the court in the testator's place. 1 Redf. Wills (4th Ed.) p. 496. Under the lax rules that formerly prevailed in England, especially in the Ecclesiastical Court, where wills of personal property were probated, cases may be found where resort to extrinsic parol evidence was allowed for the purpose of establishing testamentary intent, where there was no ambiguity on the face of the instrument, and the instrument afforded no evidence that it was only to take effect upon the death of the maker; and there are some decisions in this country to be found in the earlier reports where instruments in the form of a deed of gift had been admitted to probate out of regard to the giver's testamentary purpose, which was disclosed by extrinsic parol evidence. Some of these cases may be found collected in the note above cited from *Schouler on Wills*. This question is very ably discussed by *Chancellor Kent in Mann v. Mann*, 1 Johns. Ch. [N. Y.] 231, where the earlier cases are carefully reviewed, and the rule of law deduced, as follows: 'It is a well-settled rule that seems not to stand in need of much proof or illustration, for it runs through all the books



from *Cheyneys Case*, 5 Coke, 68, down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, words of a will in order to explain the intention of the testator, except in two specific cases: (1) Where there is a latent ambiguity arising de hors the will as to the person or subject meant to be described; and (2) to rebut a resulting trust. All of the cases profess to go upon one or the other of these grounds.' See 1 Redf. Wills (4th Ed.) p. 561. In *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458, the question arose as to the admissibility of parol evidence to show the testamentary intention in the making of a deed which was unambiguous on its face. That court, in a well-considered and exhaustive opinion, held that such evidence was not admissible, and expressed its conclusion as follows: 'We have had difficulty in finding a case in which the exact point before us is raised; but it seems manifest that the same rule that forbids the contradiction of an established will should forbid the contradiction of the same instrument as a means of establishing it as a will when its terms plainly show it to be a deed conveying a present interest. It is only when the writing is of doubtful import that interpretation by the aid of extrinsic evidence becomes necessary, and in such case interpretation—not contradiction—is permissible. We are reluctantly driven to the conclusion that we cannot give effect to the deceased's manifest desire, a desire so well established and so apparently well grounded and just as to merit our approbation; but we fear that the trite saying that "hard cases make bad law" would be applicable should we sustain the complainant's contention. To do so would be to override established rules and principles essential to the protection of the rights of heirs.' There are very strong reasons why this rule should be applied in this state. Our statute requires wills to be in writing. If an ambiguous deed which, on its face, purports to convey a present interest can be converted into a will by proving an animus testandi in the maker by parol evidence, the effect is, not only to change the legal character of the instrument, but to ingraft upon it one of the essentials of a will by parol in the face of our statute which requires all wills to be in writing."

[9] There is no ambiguity upon the face of the three papers under discussion as to the testamentary intent, and they evidence merely a gift from Vanlaw to Boyce and Adams—void, of course, because not delivered prior to the death of Vanlaw—and the trial court should not have admitted oral evidence to vary, contradict, or add to their expressed meaning. In *re Kennedy*, 159 Mich. 548, 124 N. W. 516, 28 L. R. A. (N. S.) 417, 134 Am. St. Rep. 743, 18 Ann. Cas. 892.

[10-12] If, on the other hand, there is an ambiguity existing by reason of the word "Notes" on the envelope and the word "this"

in the letter, then it is patent, and is not such an ambiguity as may be explained by parol, and the attempted disposition is void and must fail. *Linnay v. Wood*, 66 Tex. 22, 17 S. W. 244; *Crumbley v. Busse*, 11 Tex. Civ. App. 319, 32 S. W. 441; *Giddgins v. Day*, 84 Tex. 605, 19 S. W. 682; *Norris v. Hunt*, 51 Tex. 609; *Cammack v. Prather*, 74 S. W. 855; *Douthit v. Robinson*, 55 Tex. 74; *Pfeiffer v. Lindsay*, 66 Tex. 123, 1 S. W. 265; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327, 35 S. W. 316; *Myers v. Maverick*, 27 S. W. 952; *Curdy v. Stafford*, 27 S. W. 824; *Stipe v. Shirley*, 27 Tex. Civ. App. 97, 64 S. W. 1014. In *Stevens v. Haile*, 162 S. W. 1025, the Court of Civil Appeals construed an instrument contended upon the one hand to be a deed and upon the other a will, and, in discussing this clause of the instrument, viz., "the delivery hereof not to occur until my death," declared the same to be ambiguous because the word "hereof" may have referred to the property described in the instrument itself, and used this language: "Counsel for appellant contend that, considering the entire instrument, the language referred to is not ambiguous; but we cannot sustain that contention. The word 'hereof' is defined by the Century Dictionary as meaning 'of or concerning this,' and the word 'this' is defined as 'a demonstrative adjective used to point out with particularity a person or thing present in place or thought.' When the word 'hereof' was written, the deed, and not the property, was present in place; but the property, and not the deed, may have been present in thought, and therefore the use of that word in that connection renders it uncertain whether it was intended to refer to the deed or the property conveyed." Appellee contends in the instant case that the word "Notes" supplements the ambiguous word "this," and that the letter should be read "accept this note." In *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159, it appears from the report of the case that a testator requested his executors "to sell and dispose of the following described land," but left out the description, and the court, speaking through Graves, J., said: "It is certain that it was not competent to resort to parol evidence to supply the absent matter. The case was not one for interpretation or construction, because there was nothing on which the power could be exercised, and, as there was no subject-matter to be construed or interpreted, there was no call for extrinsic facts to aid the office of interpretation or construction. The provision is a complete blank, and in regard to the property the will is dumb. There is nothing whatever on the face of the instrument to denote what real estate the testator had in view nor anything to incline the attention one way rather than another in search of it." Whatever the rule may heretofore have been in this state or in other jurisdictions, we think it is now settled in

Texas that, whenever the deceased has executed a paper which does not, upon its face, clearly evidence its testamentary character, it is not within the province of the courts to transform it by the aid of parol evidence into a will in contravention of a statute declaring that "every last will and testament, except where otherwise provided by law, shall be in writing," etc. And we think here is the chief infirmity in the appellee's case.

In construing the statute relating to wills in this state, Stayton, C. J., in *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29, has definitely set the question at rest by interposing the statute as a bar to the admission of oral proof, except to explain a latent ambiguity, and as we understand the meaning of the term a latent ambiguity can never arise as to the question of testamentary intent. He says: "The statute provides that 'every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator, or by some person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in the presence of the testator.' R. S. 1879, art. 4859; R. S. 1911, art. 7857. This statute applies to wills whereby either real or personal property is disposed of, and the purpose of it is to require every testator to leave evidence *in writing*, attested as the statute requires, of the testamentary disposition made of his estate, except in those cases in which nuncupative wills are permitted, in order that the *highest evidence of testamentary intention* might be furnished, and fraud and perjury prevented; and it matters not whether the bequest or devise be directly to the legatee or devisee or to a trustee who may be required to hold and administer it for a time for the benefit of the real beneficiary. In either case the will on its face, or by reference to some paper existing when the will is, executed, and so referred to and identified as to become a part of it, must declare, not only what the bequest or devise shall be, but also who shall take it directly or beneficially through a trustee. If, after a will is executed, the testator desires to change parts of it or to add to it, this may be done by a codicil which must, however, be executed with the same formalities made necessary by the statute to the validity of testamentary papers. In the paper before us the beneficiaries are not in any manner pointed out, nor can it be claimed that this was done by any paper referred to and so identified as to make it a part of the will. The memorandum made by the person named in the will as trustee amounts to no more than would the oral declaration of the testator to the trustee, and the last paragraph in it, whether written by the testator or by the trustee at his dictation, suggests a

doubt as to whether the preceding parts of the memorandum correctly expressed the wish of the testator as expressed orally by him to the person named in the will as trustee. The evidence introduced was offered for the purpose of showing *what the intention of the testator was* as to the disposition of the residuum of his estate, and not for the purpose of enabling the court to carry out an intention clearly expressed in the will, but which might be applied to more than one person or thing on account of a latent ambiguity; and, when offered for such a purpose, we know of no rule of evidence which justifies the admission of such testimony. To admit it and give effect to it would make a will, whatever the testimony of one or more witnesses may swear was intended by the testator, when the statute requires such intention to be manifested by a writing executed with the formalities prescribed. Parol testimony is admissible often to enable a court to give effect to an intention expressed in a will; but it is unnecessary in this case to enumerate the purposes for which such evidence may be received, for such evidence is never admissible for the purpose of showing a testator's intention by proof of his oral declarations of intent, either as to the persons who shall take his estate, or as to what particular part of his estate any one person was intended to receive. The existence of such a statute as that in force in this state ought to be deemed a sufficient answer to a proposition that such evidence as was admitted in this case ought to be admitted for the purpose of showing who the testator intended should be the recipients of his bounty, for there are no parts of a testamentary paper more important elements in its validity than those which name the beneficiaries and declare what part of the testator's estate each shall receive. While the language of the statute prescribing the requisites to a will is affirmative, it as fully denies testamentary effect to parol declarations as would it if it expressly declared that no testamentary disposition of property should be made in manner other than that prescribed. The reasons on which the requirements of the statute are based have been too often stated to require repetition, are founded on sound public policy, and require the rejection of such evidence as was received in this case. Whart. Ev. 992-994; Abbott, Tr. Ev. 84; Wig. Wills, 10-13; 1 Redf. Wills, 496-508; 1 Jarm. Wills, 409-413; Schouler, Wills, 567-569."

Inspection of the authorities cited by Judge Stayton in support of the rule announced by him will throw some light upon the issue in this case. The section from Abbott's Trial Evidence cited follows the discussion by that author of the general subject, "Extrinsic Evidence Affecting Wills," and section 81 announces the doctrine that the statute of wills, by requiring testamentary acts to be expres-

ed and authenticated in writing, precludes us from treating oral declarations as a testamentary act, or even as any part of such an act; that every disposition which the testator makes must be embodied in a writing that conforms to the statute; that extrinsic evidence cannot establish a provision shown to have been omitted by mistake, nor even supply any essential or vital part left blank in a provision the frame of which was inserted by the testator. It is further announced in this section that a will may be construed in connection with another writing to which it refers; but it cannot, even by expressing an intention to do so, make an unattested instrument a part of itself so as to effect a testamentary disposition without compliance with the statutory formalities. Section 83 states the reasons for the liberal admission of extrinsic evidence; but section 84, specifically referred to by Judge Stayton, is, in so far as it relates to the facts of this case, as follows: "Reasons for its strict execution: On the other hand, it is to be considered that the rules allowing parol evidence in aid of the interpretation of contracts are not fully applicable to wills, for they rest on several reasons that are foreign to these instruments: (1) A will is not a transaction between parties but a silent and private act, and the principle of good faith which may bind a contracting party by what passed in conversation does not justify disposing of the rights of heirs and next of kin by what may have been foreign from their ancestor. (2) Nor is a will a grant or effective act during the testator's life, but a revokable expression of intention, made frequently under circumstances likely to involve secrecy, if not fickleness and change, and the law does not bind a man by his expressions of intention, much less by his oral declarations that he has expressed certain intentions in a revokable writing. (3) It is a matter of common observation that testators are instinctively disposed to shroud their testamentary acts in secrecy and disguise their intentions, and to baffle with equivocations or misrepresentations the importunities of the expectant and the inquisitiveness of the curious. The law regards this concealment as a right of the testator, and even positive deceit by him, however questionable morally, is not a legal wrong, unless fraud is accomplished by it. Therefore the testator's representations as to what he has or has not done, much more those as to what he intends, fail to afford any substantial presumption as to the testamentary act. (4) Besides this absence of reasons for admitting extrinsic evidence so freely as in cases of contracts, the objections to hearsay evidence apply in the strongest manner in many cases, and the fact that the controversy in which such evidence is offered usually arises between those who stood in very unequal degrees of personal intimacy with the testator, and that his own

lips are sealed by death, render the resort to such evidence peculiarly liable to abuse, which it is the object of the statute to avoid by requiring every testamentary act to be expressed in a written and authenticated will."

As further bearing upon the effect of the statute relating to wills upon the admissibility of parol evidence to prove the testamentary intent, we quote from Grigsby's *Legatees v. Willis' Estate*, supra, as follows: "On the other hand, one who wishes to control the disposition of his estate after his death must adopt some lawful means for the accomplishment of his purpose. So, if a deed of gift devoid of testamentary words be found among the valuable papers of decedent, it cannot be given the effect of a will, even though it should be shown by parol that the maker believed and intended it as a will. To adopt such a rule would be dangerous because of the law requiring the delivery of deeds to render them effective. The maker of a deed is presumed to know that delivery is necessary to its validity, and so long as he retains possession is presumed not to have finally decided to execute it. If undelivered deeds found in the possession of the maker at death could be established as wills by resorting to parol proof of the maker's wishes, it would open the door to fraud and serve to defeat the purpose of the statutes requiring wills to be in writing, and prescribing certain safe modes of proof. *Stilwell v. Hubbard*, 20 Wend. [N. Y.] 46. For a similar reason parol evidence may not be resorted to for the purpose of ingrafting on a will the wishes of the testator not expressed in the writing, nor to change, modify, or eliminate any of its material provisions. 1 *Jarm. Wills*, p. 409. The rule governing the extent to which parol evidence may be resorted to in the construction and enforcement of such instruments is thus stated by Mr. Jarman: 'Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will, but may be used to rebut a resulting trust, or to remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift. *Jarm. Rules of Const.* rule 8; 1 *Redf. Wills*, 426, note.'"

[13, 14] In regard to the incorporation of the note by reference into the letter, it is our opinion (even if we are to consider the writing on the envelope as a part of the letter) that the reference is wholly insufficient. In the first place parol evidence was required to show that the note and letter produced in court were both inclosed in that identical envelope and found in the Vanlaw house. It will be seen that the note in no way refers to the letter. The word of reference or attempted identification on the envelope is "Notes," and in the letter it is "this." Then the complete reference is "this" "Notes." There is no attempt to specify the kind of notes, whether bank notes or promissory

notes, and, if the latter, there is no definite description or information, either in the letter or upon the envelope, as to their number (except that there is more than one), date, maturity, payor, payee, etc. In order to perfect and to conclude this ambiguous reference, appellee produced one note supplemented by parol evidence showing that it alone was found in the envelope with the letter. This evidence contradicts and varies the indorsement on the envelope that it contained "Notes." Under all the authorities we have found this reference is not sufficient to incorporate any note or notes. As was said in Bryan's Appeal, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 38, 1 Ann. Cas. 393: "First, the paper must be in existence at the time of the execution of the will, and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms.' In a California case upon this subject this language is used: 'But, before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt. \* \* \*'. In an important and well-considered English case, decided in 1902, the court uses this language upon this subject: 'But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained. \* \* \* The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document.' In the Goods of Smart [1902] L. R. P. D. 238." In the instant case the note is dated July 3d; the letter sought to be probated is not dated. In this condition of the record the jury must necessarily have presumed that the note was in existence before the letter was written. As we understand the rule this proof must appear from the face of the instrument itself. Quoting again from Bryan's Appeal, it is said: "Tested by the rules as thus laid down in the cases above cited and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett, 'in trust, however, for the purposes set forth in a sealed letter which will be found with this will.' There is not in the language quoted nor anywhere else in the will any clear, explicit, unambiguous reference to any specific document

as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed, and 'found with the will,' would each fully and accurately answer the reference, and, if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is 'so vague as to be incapable of being applied to any instrument in particular' as a document existing at the time of the execution of the will; 'the vice is that no particular paper is referred to.' Phelps v. Robbins, 40 Conn. 250-273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the cases of wills." In the instant case it is contended by appellants that the \$14,000 note appears not to have been written by Vanlaw, and hence the language, supra, that "any sealed letter, or any number of them, \* \* \* made by anybody at any time," and Judge Stayton's statement that the purpose of the statute was that fraud and perjury might be prevented, are peculiarly applicable, and illustrate very forcibly the reason of the rule uniformly announced with regard to incorporation by reference.

[15, 16] Again: "A reference so defective as the one here in question cannot be helped out by what is called parol evidence, for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document." To the same effect is the holding of Speer, J., in Allday v. Cage, 148 S. W. 838. The rule seems to be settled by the decisions of our own state that the declarations of the testator made before or after the date of the will, and relating to its execution, and not a part of the *res gestæ*, are not admissible. Kennedy v. Upshaw, 64 Tex. 411; Tynan v. Paschal, 27 Tex. 286, 84 Am. Dec. 619; Peet v. Com. & E. S. Ry. Co., 70 Tex. 522, 8 S. W. 203. Therefore the statements of Vanlaw at the time he executed the Geary will, to the effect that he "already had Adams and Henry fixed," were not admissible to establish the execution of a prior will, or to identify the note in question as one of the notes referred to on the envelope. In *Re Young's Estate*, 123 Cal. 337, 55 Pac. 1011, the Supreme Court of California construed a will wherein the testatrix provided that "two deeds" should be handed to her husband, and after his death they should go

to another. The court said: "An existing writing may by reference be incorporated into and made a part of a will; but, before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt. The identification of the paper must be had from a description given in the will itself; otherwise the will is not wholly in writing, as our law requires, but rests partly upon a writing and partly in parol. \* \* \* Applying these familiar principles of construction, it is apparent, not only that the deeds are not referred to with sufficient definiteness to insure certainty in their identification, but that there is even a patent ambiguity in the very language of the will which attempts a designation of them. There shall be handed to C. H. Young 'two deeds.' Any two deeds executed by any person conveying any kind of an estate in any land would fill the measure of this requirement, so that to the admissibility of parol evidence to aid this clause there are two objections, each equally insurmountable—the first, that the description of an extrinsic writing must be so definite as not to require such evidence; the second, that parol evidence is never admissible to explain a patent ambiguity; \* \* \* but, were these objections to the consideration of the parol evidence entirely removed, there are yet others equally fatal to the construction which the court in probate has put upon this clause of the will. There was no delivery of these deeds during the testatrix's lifetime. What validity they possess, then, comes from the will, and therefore if, by the act of the testatrix, title to these lands passed, we must find in the will both an intent to devise them and operative words to effect the intent. We are not here unmindful of the rule that permits reference to an extrinsic writing duly incorporated into a will for the purpose, not alone of determining the subject-matter of a devise, but even for determining the character of the estate conveyed. *Fesler v. Simpson*, 58 Ind. 83. But in the case just cited, and in all such cases, there must in the will itself be found a clear intent to devise and words legally sufficient to create a devise. If such words exist at all in this will, they are contained in this language: "To C. H. Young, my husband, \* \* \* shall be handet \* \* \* two deeds. After my husband deatts the two deeds shall go to Katarina Muhr." Assuming a proper identification of the two deeds, there is left in this language nothing of doubt or uncertainty. The directions are plain, explicit, and not to be misunderstood. The intention of the testatrix, then, was that two paper instruments, in form grant, bargain, and sale deeds of her lands in counties of Sonoma and Napa, duly signed and acknowledged by her and by her husband, should at the proper time in the administration of her estate be handed to

her husband, and after his death be handed to Katarina Muhr. What effect would a compliance with the terms of these directions have upon the title to the real estate? Unquestionably none. For this reason it is strenuously urged that, as the law favors the construction which avoids total or partial intestacy, \* \* \* and as it is not to be supposed that a testator in so solemn an instrument as a will would exact the doing of a vain and empty thing, it must be certain that this testatrix intended to devise some estate in these lands to the husband and cousin, and that the decree of distribution should do so accordingly. It is true that courts have always leaned to constructions which will avoid intestacy, and their swift willingness in this regard has passed into a rule of construction; but there are well-defined limits beyond which the courts have not gone, and beyond which they could not go without subverting all rules and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established and never departed from nor even criticised, is that the expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? but it is, what do his words mean? In *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 14, 16 L. R. A. 321, 34 Am. St. Rep. 64, it is well said: "The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will. \* \* \* The case thus presented is one where the expressed intent of the testatrix is plain, but where a full performance of the acts which she has directed will amount in law to nothing. The testatrix, it may be assumed, did not understand the legal effect which would follow a compliance with her will, or thought that the legal effect would be other than it is. But a court, for this reason, is not justified in speculating over what may have been in the testatrix's mind, and in substituting what it may have believed to have been her intent in place of the directions which she has actually employed. The inquiry of the court in construing the will comes to an end when the intent has been discovered from the language of the will. Its duty is then limited to giving effect to that intent so far as may be without doing violence to express law or the mandates of public policy. It is never at liberty to supply omissions or to wrest language from its plain import and give it such a meaning as it may be guessed the testatrix would have intended

if she had known that her own efforts to create a legal devise had resulted in failure. In *re Walkerly's Estate*, 108 Cal. 659, 41 Pac. 772, 49 Am. St. Rep. 97. Here, to repeat, there is no doubt as to the language and its meaning. The testatrix merely mistook the legal effect which would follow a compliance with her directions. While no form of expression is required to create a devise, and while considering that wills are frequently made by ignorant people in a great extremity of sickness, and under an impending fear of immediate death, and while, therefore, much liberty is and should be shown in construing the terms of such instruments, in every case some words must be employed from which, under the rules of law, an expressed intent to devise particular real estate must be found in the will itself; otherwise the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him, not such disposition as the testator made, but such disposition as the court thinks he would have made. This can never be permitted. We may well leave this branch of the case with the following quotation from Buller, J., in the case of *Dacre*, 1 Bos. & P. 251: 'I agree that a testator may express his intention by what words he pleases, and the court is so to expound his expressions that every word may stand, if possible. The court is to pronounce according to the apparent intent of the testator; but that intent must be found in the words of the will, and is not to be collected by conjecture dehors the will, or, as my Lord Chief Justice expressed himself, \* \* \* as the question has not been asked of the testator, it is but conjecture what would have been his answer.'

[17] During our investigation we frequently find language to this effect, used by the judges: "It is competent to admit parol evidence, as it is sometimes, though not very accurately, expressed to explain a will, by showing the situation of the testator in his relation to persons and things around him, or, as it is often expressed, by proof of the surrounding circumstances; in order that his will may be read in the light of the circumstances in which he was placed at the time of making it. \* \* \* As he may be supposed to have used language with reference to the situation in which he was placed to the state of his family, his property, and other circumstances relating to himself individually and to his affairs, the law admits extrinsic evidence of those facts and circumstances to enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts in the case. For this purpose very material facts that will enable the court to identify the persons or things mentioned in the instrument is admissible in order to place the court whose province it is to determine the meaning of the words

as near as may be in the situation of the testator when he used them in making his will." *Hunt v. White*, 24 Tex. 652; *Packard v. Miranda*, 146 S. W. 211; *Busby v. Lynn*, 87 Tex. 151; *Cleveland v. Cleveland*, 89 Tex. 450, 35 S. W. 145; *Peet v. Commerce, etc., Ry.*, 70 Tex. 528, 8 S. W. 208; *Clark v. Catron*, 23 Tex. Civ. App. 51, 56 S. W. 100; *Allday v. Cage*, 148 S. W. 838; *Winfree v. Winfree*, 139 S. W. 36. But it will be observed that in all such cases almost without an exception, either in this state or elsewhere, the language is used with reference to the construction of the instrument in so far as it seeks to determine the identity of the devisees and the property devised to each. In other words, the rule applies *after* the instrument has been determined to be a will, because, as said in *Hunt v. White*, 24 Tex. 652, "his intent must be ascertained from the meaning of the words in the instrument, and from those words alone;" and, further: "It is insisted that it can be in the exercise of the equitable powers of the court to grant relief in cases of accident and mistake, and that the court may reform the will so as to make it express the intention of the testator as deposed to by the witnesses; but it must be observed that the power of a court of chancery to grant relief in cases of mistake in written instruments does not go to the extent of adding to or changing the nature and legal import of the writing. That would be to contravene the rule, which obtains as well in courts of chancery as in courts of law, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. The case of wills does not constitute an exception \* \* \* of this rule." *Hunt v. White*, 24 Tex. 651. "In this way extrinsic evidence may aid in arriving at the intention of the testator by showing in what sense he employed the language he used in his will, and for this purpose, that is, to enable the court to understand the meaning of the words in the instrument, parol evidence is admissible, but never for the purpose of proving other language declaring his meaning than that which is contained in the instrument itself. That would be, in the language of a learned authority (2 Phil. Ed. 306) 'inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely: That the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added.'" A great many authorities have been cited in the brief of appellee announcing in substance the rules quoted from *White v. Hunt*. We have carefully reviewed such of these as were accessible to us and have arrived at the conclusion that these rules do not apply until after the court has decided that the instrument or instruments under consideration were executed with a

testamentary intent, and therefore constitute a will. We have not passed that milestone in this case. As said in the *Heidenheimer v. Bauman* Case, and others heretofore discussed and quoted from by us, to permit extrinsic parol evidence of declarations, facts, and circumstances to determine the nature and character of the instrument itself would be opening a door for fraud, and for the encouragement of perjury, and would permit an instrument clearly not a will upon its face, as in this case, to be converted into a will by the evidence of outside or interested parties.

There are a number of other questions submitted for our consideration in the briefs of appellants. Among these is that raised by the assignment relating to the Geary will, and the effect of that will as a revocation of the will under which appellees claim. Since we have construed the first three papers not to be a will, it is unnecessary for us to consider this assignment, nor do we think it incumbent upon us to consider any of the remaining assignments presented.

On account of the errors which we have discussed it is the judgment of this court that the judgment of the lower court be reversed and rendered in so far as it admits to probate the letter, envelope, and \$14,000 note; but, in so far as the judgment probates the Geary will, it is affirmed.

Reversed and rendered in part, and affirmed in part.

HENDRICKS, J., dissents in part, but concurs in the disposition made of the case.

#### On Motion for Rehearing.

HALL, J. Both parties have filed motions for rehearing. Appellant's motion raises no new question, and, after carefully considering the various grounds set up in connection with our former opinion, we think we have correctly decided the issues.

Appellant's motion insists that we should not have affirmed that part of the judgment admitting the Geary will to probate. The Geary will is as follows: "The state of Texas, county of Moore. July 5, 1911. Know all men by these presents that E. Vanlaw has willed John Geary Seven Thousand Dollars at My Death the Rest of my property to my bodley airs, written by F. Y. Adams. Witness by F. Y. Adams, Bob Hammett. [Signed] E. Vanlaw."

[18-20] The appellee's replication first alleged that the Geary will had been offered for probate in a separate proceeding and probate thereof refused by the district court of Moore county. In a separate paragraph it is further alleged that said will was not intended to revoke the former will, consisting of the promissory note, envelope, and letter set out in the original opinion, but declares that the Geary will was to provide a legacy for John Geary, and for a disposition of the

balance of his estate after the payment of the legacy, and prays "that, if said will was so executed, and it is the judgment of the court that the former judgment herein pleaded is not conclusive, then your applicant prays that the said will be admitted to probate as the will of E. Vanlaw, deceased, in connection with the probate of the instrument offered by your applicant, and that the court inquire into the manner of the execution of said instrument and the circumstances of its execution, and, if it be found that the same was intended by the said E. Vanlaw as his will, then the same be admitted to probate in connection with the probate of the instruments offered by your applicant, to the end that said two instruments may be construed together, and the intention of the said testator as expressed in said two instruments be ascertained." The proceedings in the county court are not made part of the record, and every presumption must be indulged in favor of the validity of the judgment of the district court. The brief of appellant in this case nowhere raises the question that the judgment of the district court in probating the Geary will is not supported by proper pleadings and evidence, and the only assignment bearing directly upon the question is appellant's forty-first assignment of error, as follows: "Said judgment is further erroneous upon its face for that it admits to probate the John Geary will, which, by its terms, revokes all prior testaments, documents, and at the same time admits to probate the envelope, promissory note, and other paper tendered as a whole and as the will of E. Vanlaw, and such note bears a prior date, so that judgment contradicts itself." It is clear that this assignment does not raise the question of the right of the court to probate the Geary will because of a dearth of pleading or evidence. We think the pleadings are sufficient, and a want of evidence or an insufficiency of evidence to sustain the judgment is not such fundamental error as to require a consideration without the matter having been brought to the attention of this court by proper assignment.

[21] *G. & S. A. Ry. v. Clark*, 21 Tex. Civ. App. 167, 51 S. W. 276; *Peevehouse v. Smith*, 152 S. W. 1196: Appellant has raised the question too late to entitle it to consideration. Even if the note, envelope, and letter could be held to be a will, we believe that the Geary will had the effect of revoking it, provided the Geary will was executed afterwards. *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113.

Appellee's motion for rehearing is also overruled.

HENDRICKS, J., dissents in part.

HUFF, C. J. (concurring). It is not my purpose to try to add anything to the opinion of Judge HALL, as I regard his conclusions

well supported by authorities and by cogent argument; but it may not be improper for me to express my view upon the interpretation of the instruments sought to be probated. In my judgment the language of the letter is not testamentary in character. I find nothing in the face of the instruments to indicate a testamentary purpose. Such purpose can only be inferred from the facts of the death of Vanlaw some four months thereafter, and that the letter and note were not delivered or presented for acceptance. To my mind it is clear from the instruments it was not a posthumous donation or gift. Nearly, if not all, the authorities are to the effect that parol testimony cannot be resorted to for the purpose of establishing such a character. In some of the cases cited there is an indorsement on the envelope or wrapper, such as "will," "codicil," and the like. In most of these cases some such expression as, "It is my wish or desire that you have," "wish to give you." These terms indicate a purpose to give in the future, and not a present purpose. The question in such cases then arises, is it the purpose to give in view of or after death? In such cases the instruments do not answer the question with certainty, and hence facts allunde the instruments are resorted to in order to determine the intent of the deceased as to when it shall be effective. There is no word indorsed on the envelope in this case indicating that a will is inclosed. Upon picking up the letter one would not expect upon reading the indorsement "Notes" to find a will. Upon opening and finding a note a will would not yet be suggested to the mind. In reading "accept this" suggests that the maker's purpose was to present for acceptance, and a present purpose is at once conveyed. It is not the language of a wish to give in the future; the doubt raised is that it was not actually presented for acceptance, and that some months thereafter the maker died. The doubt is not raised by the instrument itself but by aliunde facts. The posthumous intent so raised contradicts the clear and manifest meaning of the letter. The statute provides wills must be in writing. To be a will it must be a purpose to dispose of property after death. An instrument which does not do so is not a will. If it is clear from the instrument that such disposition is not made, that ends the inquiry. If the language is doubtful as to whether this is a testamentary purpose, inquiry may be prosecuted and other sources examined to find the true intent of the language used in the instrument. The inclosed note is payable fifteen after. This is payable on demand as we interpret it, and must be presented to the donor for payment, and is so indicated by the instruments themselves. That the note was not delivered is no more evidence of a testamentary intent than the presumption that its delivery was delayed, or that the maker had recanted his generous purpose. It was not

delivered for some reason, and, if the deceased could speak, he might give a very cogent reason for not presenting or delivering the note. I believe to give the statute of wills the construction contended for in order to probate these instruments as a will would open the door too wide for fraud and defeat a wise and just law which wisdom, from experience, has adopted.

If the rule is to prevail that the instruments should be read together and construed as one instrument, I then think under the statute it cannot be admitted to probate. It is not attested as required by law. It is not wholly written by the testator, but is partly printed. If the letter is alone to be treated as the will, it gives nothing; if the word "this" refers to the note, then the note becomes part of the will, and is only a general legacy, which is created by the terms of the will to be carved out of the estate, and is the amount named in the will to be given. It is therefore necessary that the note be read as part of the will in order to make it the gift of anything, and, in thus making it part of the will, the will is of no effect because of the statute which requires the testator to write all of the will. As I understand this case, the rules with reference to incorporation are really unnecessary in disposing of the questions at issue. Incorporation must refer to some instrument then in existence. The instruments in this case, to constitute a will, must be considered as one instrument, and contemporaneous documents, making a whole. To make it a devise of anything, they must be so considered, and when so considered there is no will under the statute.

**HENDRICKS, J. (dissenting in part).** The following instruments and whether the same meet the requirements of a holographic will, constitute the main issue in this record. I quote from appellant's brief:

"(1) An envelope on which is written horizontally the words 'Henry Boyce,' and across the end the word 'Notes.'

"(2) A sheet of paper apparently taken from a small writing tablet, and on which was written the words: 'Henry, please except this you & F. Y. Adams for the kindness shown me.'

"(3) A promissory note prepared on a printed blank, a copy of which, putting script parts in italic, is as follows:

"\$14,000 Dumas Texas, July the 3, 1911

"Fifteen after date after date, for value received, I, we or either of us promise to pay to the order of *F. Y. Adams & Henry Boyce* Fourteen Thousand Dollars dollars, with — percent interest per annum thereon from — until paid, interest payable annually, and if not paid to bear the same rate of interest and if default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection then an additional amount of ten percent on the



principal and interest of this note shall be added to the same as collection fees. The makers and endorsers of this note hereby severally waive demand of payment, notice of nonpayment, protest and notice of protest and hereby consent that time of payment may be extended from time to time without notice hereof.

*E. Venlow.*

"Due .....

"No. ....

"P. O. ...."

I agree with the majority of the court upon the disposition of the cause that the above instruments do not constitute a holographic will, upon one ground only (discussed later), dissenting, however, from the majority on the question of testamentary intent, and disagreeing, further, with Associate Justice HALL on the question of incorporation by reference of the note in the other instrument as an applicable principle destroying said instruments as a will. Upon the question of testamentary intent, candor actuates me in saying that it is with some hesitancy that, as applied to the foregoing instruments, I pronounce testamentary intention as being susceptible of judicial proof in order that said instruments may be declared a holographic will. The forcible presentation by the majority, and the elaborate opinion of Justice HALL, and the grounds of policy advanced upon which the proposition of invalidity is based on this question of posthumous intention, exhaustively cover that side of the controversy and that view of the question; however, I consider the great swing and tendency of the American and English decisions against the view therein advanced, and, whenever and wherever the question has been presented, has been under statutes defining wills, in substance the same as our statute, both in England and in America. I reproduce some of the cases cited by appellee, which I am inclined to think indicate the sweep of the law in the direction taken in this opinion, on the question of testamentary intent and applicable to all the documents propounded for probate.

In *Wareham v. Sellers*, 9 Gill & J. 98, by the Court of Appeals of Maryland, the following instrument was offered for probate by the proponent and denied by the trial court: "This will certify that I do assign, and gave all my personal property unto George Wareham—that is to say, one silver watch, one chest, one beaurough, and some carpenter's tools, besides two notes of hand, one \$200 and one of \$89, and \$18 book account. Signed by me in the presence of Thomas Sater. [Signed] Phillip Sellers." The contestant in that cause "admitted that no particular form of expression or execution was essential to constitute a will, yet that a testamentary disposition should appear upon its face, or it should seem to refer in some mode to the death of the maker"; the proponent contending that "the paper

contained intrinsic evidence that it was made as a will." The discussion and the issue of testamentary intent is obtainable from the briefs; the Court of Appeals merely reversing the decree of the orphans' court, ordering that court to "reinstatate the petitioner and receive the testimony offered by him and proceed to a hearing and trial of said cause, as to law and justice shall appertain."

The Supreme Court of North Carolina, in the case of *Outlaw v. Hurdle*, 46 N. C. 150, had under consideration the following instrument: "It is my wish and desire that my good friend and relative Dr. Joseph B. Outlaw, have all my property of every description. [Signed] David Outlaw." The Supreme Court of that state said: "It is a very grave question. Taking all the allegations of the propounder to be true, is the *script testamentary*? A disposition? In plain English, did the deceased mean to dispose of his property after his death by the force and effect of that very paper? We think he did. As it embraces all his property of every description, it is clear it was not intended as a gift *inter vivos*, \* \* \* and, as he most unquestionably intended that it should have some effect, it is manifest that his intention was to make a disposition of his property, to take effect after his death. by the force and effect of that paper. \* \* \* So that, besides the paper itself, we have the facts, as found by the jury, that the deceased did not treat this as a paper such as one would throw into the street, but he treated it as a valuable paper, put it carefully away among his bonds, in his \* \* \* trunk, and it was there found at his death. It is obvious, therefore, that he intended, by the force and effect of this paper, to dispose of his property after his death. He intended it to be his will."

The case of *Clarke v. Ransom*, 50 Cal. 599, involved the question of testamentary intent as applied to the following instrument: "Dear old Nance: I wish to give you my watch, two shawls, and also \$5,000.00. Your old friend, E. A. Gordon." The Supreme Court of California said: "On its face there is nothing to indicate that it was intended to be testamentary. The full name of the beneficiary is not mentioned, nor is there any reference to the anticipated death of Mrs. Gordon." This instrument, according to the opinion of the court, depended upon oral evidence as to the situation of the donor, relationship to the donee, and identification of the latter as a "valued" friend of the former, stating: "It is well settled in this country and in England, first, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, \* \* \* and, second, that if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention," etc. The Chief Justice of the Supreme Court of

California dissented from the opinion of the other four judges.

The case of *Tozer v. Jackson*, reported in 164 Pa. 373, 30 Atl. 400, embodied for probate the following instrument: "High, James Rogers, do give to John Jackson, Sr., my property known as Penargyl hotel, and the land adjoining Penargyl in Northampton county, P. A. [Signed] James Rogers." The Supreme Court of Pennsylvania said: "How could there be any more direct, emphatic, and positive expression of a purpose on the part of James Rogers to give the property described to John Jackson, Sr.? \* \* \* And no legitimate contention can arise upon that aspect of the subject."

In the course of a review of numerous decisions involving imperfect wills, some of which I have cited in this opinion, and following a review of the case of *Cocke v. Cocke*, 1 Prob. & Div. 241, which seems to be a leading English case on this subject, the Supreme Court of Pennsylvania further said: "Here the deceased, instead of destroying the paper, as he would necessarily have done if he did not intend it to become operative, preserves it, incloses it in an envelope, addresses the envelope to the person who is named as a donee, and places it in a conspicuous position where it would certainly be discovered, and then takes his life. It is impossible to conceive of a stronger purpose and intent." This court commented upon the form of the instrument attempting to convey real estate, which, on account of its form, could not possibly have that effect until after the death of James Rogers, as a circumstance indicating effect after death. The statute of wills of England, Victoria 1837, effective 1838, amending the old statute, was in effect when the case of *Cocke v. Cocke* was decided in 1865 by the Court of Probate and Divorce of England, the opinion rendered by Sir J. P. Wilde; also the case of *Robertson v. Smith & Lawrence*, L. R. 2, P. & D. 43, decided by the same court opinion rendered by Lord Penzance in 1870. The latter case involved this instrument: "I hereby make a free gift to Maria R. of sixty pounds and to John V. of fifty pounds, being the sum deposited by me," etc. And parol evidence of the surrounding conditions was admitted to show the intention to make a testamentary gift. The former case, *Cocke v. Cocke*, embraces for consideration this instrument: "I wish myn sister, Louisa Cocke, of 104 York Road, Lambeth, to have my Schering (Charing) Cross bank book for her own use. December 7, 1865." Sir J. P. Wilde said: "The only question raised with respect to it is whether it is meant to be testamentary. In order to form a proper judgment, it is very material to look at the words written and the acts done by the testatrix in the light in which a person of her imperfect condition would be likely to regard them, and not at-

tach anything like a technical meaning, of which she was ignorant, to the language she has used. The expression, 'I wish myn sister to have,' appears to me to imply, 'I wish her to have after my death,' because when she wrote these words she was dangerously ill. \* \* \* If she had merely wished to make her sister a present, she would not have taken the trouble to write anything at all, but would simply have handed over the bank book to her, etc. It is undoubted law that, whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigor and effect, it is testamentary." As stated, while the English decisions, except the last quoted from, are not accessible to us, but, from the annotations and other decisions appropriate on this subject, we infer that the cause of *Cocke v. Cocke* is considered a leading case. It is noted that the English judge in this instance, deducing the implication of a *causa mortis* intention of the donor, did so "because when she wrote these words she was dangerously ill and did not expect to live," etc., resorting to parol proof for that purpose. If the promissory note, though written wholly in the handwriting of Vanlaw, and found in his tobacco box, without any other explanatory features in connection with it, payable to Adams & Boyce, were as indicated, truly it would not be a will. However, we can infer these steps clearly from this record: That he executed the promissory note, partly printed and partly written, and the writing, "Henry, please except [accept] this, you and F. Y. Adams, for the kindness shown me." (I inserted the commas before "you" and after "Adams.") He placed the note and the other instrument in an envelope and sealed the same. Horizontally he wrote the name "Henry Boyce" on the envelope, and across the end of the envelope the word "Notes." That he placed the same in a receptacle in his home in Moore county. Conclusively the intention to give is manifest; the only question being whether in present or in futuro—now or after death. There is a principle of construction which seems never to have been denied; that is, the law favors the interpretation to avoid total or partial intestacy, and "the swift willingness in this regard has passed into a rule of construction." As seen from the foregoing authorities and others, some of the courts imply a testamentary intent and aid it with oral proof; some of the decisions indicate that, though the instrument is not indicative of testamentary intent, parol proof though is admissible for that purpose; some of the authorities suggest that, where the instrument is doubtful, susceptible of two interpretations—one of a present gift, as well as a gift after death, with parol proof aiding the construction of testamentary

intent, and not detracting from it—the instrument constitutes a will. We take it the contravailing theory is, as to the instruments directly involved, that there is nothing here to imply testamentary intent from the face of the instrument, and that there is everything implying a gift *inter vivos*; that the promissory note in connection with the other instrument signed by Vanlaw indicate a gift in *præsent*.

I deduce from the foregoing decisions, or at least some of them, that if, from the subject-matter, or from the form and manner in which the donor manifested his dispositive intention, if an implication of testamentary intent may be inferred, though it may also suggest an intent *inter vivos*, parol evidence is always admissible. In the Maryland case the man gave all his personal property, and the instrument indicated a present gift as well as after death; in the North Carolina case the donor gave all of the real and personal estate. The instruments were susceptible of a present as well as a testamentary gift. It is, however, unusual for a donor to give all his property in his lifetime. Lord Wilde, in the case of *Cocke v. Cocke*, commented on the unusual act of the donor giving a bank book during life. Something is said that the words "please accept" is suggestive of a present dispositive intention, and that the note indicates a present payment or gift. Without pursuing the subject too lengthily, in considering all the instruments, I believe the dispositive intention of a testamentary nature may be implied, considering the matter as a whole, that is, by the execution of said instruments by Vanlaw, placing the same in the envelope, and sealing the latter with his inscription and indorsement upon the back thereof, and taken in connection with the further fact that it is a demand note for the sum of \$14,000. It is unusual for a man to dispose during his lifetime of all his personal property, though he may use words indicating a gift in *præsent*; the same is applicable to the disposition of all of a man's real estate, though the language, literally construed, also indicates a present gift. It is unusual for a donor to give a bank book during life—the nature of the gift has a strange aspect—so I think it is a very rare occurrence, exceedingly so, for a man to make another a gift of a demand note; it contravenes common experience to say that one in making a gift, placing the power in the donee to compel the donor to pay the immediate obligation, intends it as a present gift. When Vanlaw wrote, "Please except this you and F. Y. Adams for the kindness shown me," of course he intended to say, "Please accept this, you and F. Y. Adams, as a gift, for the kindness shown me." Whether he intended them to accept the gift after death, or in *præsent*, we may say is doubtful by construction of the implied meaning of the instruments. The way I view it the incident of a gift by one to another

of an obligation practically payable on demand, in this case of \$14,000, with attorney's fees a part of the note, and necessarily paid out of the assets, if the donor had not the ready money to meet the obligation upon demand, excludes more the idea of a gift in *præsent*, and is more significant of the idea that the donor meant to give the amount of the note after death; and being of doubtful construction as to the intention of the donor when aided with parol proof as to the situation of the parties, if the instrument then further excludes a gift in *præsent*, to that extent it is testamentary and a will. When you resort to parol proof, the face of the note is practically two-thirds in amount the value of the donor's estate, excluding his debts, and that with this aid, and other incidents corroborative of the man's meaning, it clearly excludes the idea that Vanlaw intended to give Boyce and Adams an obligation during life which would practically absorb his estate, unless you infer it was the act of a lunatic.

In an instrument as to which, from the subject-matter and the nature of the gift, it could be implied that the gift is incompatible with the idea of a present assignment (though by another interpretation it may be compatible with a present gift), the doubtful meaning of the instrument may be aided by parol testimony to ascertain the real intention of the donor. Justice Stayton, in the case of *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 81 Am. St. Rep. 29, had no record similar to this under consideration in writing the opinion in that cause, and the real question decided, however eminent the judge, and the real record imaged in the judge's mind when deciding it, should be considered in attempting to apply the language of that judge to a different question. Justice Stayton did, however, say in that cause: "*Parol testimony is admissible often to enable the court to give effect to an intention expressed in a will; \* \* \** but it is never admissible for the purpose of showing a testator's intention by proof of his oral declarations of intent, either as to the persons who shall take his estate or as to what particular part of his estate any one person was intended to receive." Where clearly expressed, when testamentary intent is involved, which Justice Stayton did not have in view, you do not need parol proof; when doubtful it is necessary and always admissible in will cases.

I disagree, however, with appellee in the assertion that the cause of *Crain v. Crain*, 21 Tex. 790, decided by Chief Justice Hemphill, is of great value in determining this immediate question in his favor in this cause. In that case the plaintiffs claimed that certain deeds were unofficial wills in contravention of the statute of forced heirship. The defendant contended that they were deeds conveying the property in *præsent*. The condition of the pleadings and the attitude of the liti-

gants were such that, upon the jury's finding that they were instruments of a testamentary nature, in violation of the disinherison statute, and not conveyances of a present estate, the Supreme Court merely held, the formalities with reference to the execution of the instruments not having been contested, that the instruments were of a testamentary nature, and partially void and partially valid, conveying a one-fourth estate, instead of all of the property. The court, in saying that they were instruments of a testamentary nature, was not deciding that the deeds in that record, if they had been contested under the statute were wills in compliance with our statute of wills. I rather concede that some of the other Texas cases cited by appellee, where deeds were construed wills, tend to sustain his contention as to testamentary intent, for the reason that in some of those cases, while language was used to show that the possession of the estate was postponed to a time after the death of the donor, and the donor had the use of the property during life, however, the title to the property, according to the terminology of the instrument, really passed in present, at least so I view it; but evidence was permitted to be introduced to show that the title was also testamentary. The fact of sealing instruments in an envelope, and addressing the latter to the intended donee, and retaining such envelope and instrument therein inclosed in the possession of the donor, in some receptable, while it is proof of a fact in parol, is deemed by all the courts as a circumstance of significance, aiding the testamentary intent of the instrument in which the property is intended to be given.

This logically brings me to the point where, in according to my conception of the law, this instrument cannot be construed as a valid will under the statute. The doctrine of incorporation by reference I do not believe applicable to the instruments in this record. The Supreme Court of Pennsylvania, in the case of *Fosselman v. Elder*, 98 Pa. 159, had under consideration a sealed envelope, found among the papers of the deceased, on which was written the following words, addressed to the donee: "Dear Bella: This is for you to open." And when opened the following was found: "My wish is for you to draw this \$2000 for your own use should I die sudden." The envelope contained a certain note for \$2,000. That Supreme Court did not have under consideration the question of incorporation by reference; but it did have the natural sequence of the writings, and were of the opinion "that the inscription on the envelope should be read as the preface of and in connection with the paper inclosed therein, and that they altogether constitute a valid testamentary disposition of the accompanying note operating as a codicil to the will of the testatrix." The court also said: "The natural order of reading ought

to control, and that is, the name of the party addressed, first, and then what is written, or concerning him." The note in this record is not a specific legacy, but, if a valid will, would have to be construed a general legacy, chargeable upon the estate of Vanlaw. The "please accept" instrument is incomplete and practically meaningless without the general legacy. Appellee construes this instrument, if we understand his brief correctly, as a part of the transaction of the execution of the note. If the note were executed at the time the other paper was also executed, I mean contemporaneous in law, as a part of the will-making act, all the parts are necessarily construed together as ingredients of the testament. This, as I view it, is not incorporation by reference within the legal meaning of that doctrine under the authorities. This is making a will all at one sitting. If the donor had written, "Henry, you and Adams, please accept the following for the kindness shown me. B. Vanlaw"—then the following language on the same sheet of paper would have been, "To Henry Boyce I bequeath \$7000 and to F. Y. Adams, I bequeath the same amount;" and, if the latter language were printed, I am unable to conceive by what process of reasoning the instrument complied with the statute as a holographic will, whether the "following" was signed or unsigned. I admit that some of the authorities, from the facts, indicate that an unattested document made immediately previous to the writing of the will may be incorporated by reference into the will, but in any case accessible to the writer you are not required to go to the incorporated document to determine whether the instrument was a will, the incorporation of the document by reference means bringing it into the will; the will is already made in so far as the intent to give after death and the other formalities are concerned, and the antecedent memorandum is drawn in by reference. If A. were to write that he gave to B. "the property evidenced by a printed memorandum, made by me at the time of signing this instrument," and the printed memorandum was an instrument bequeathing a legacy of \$14,000 to B., and though the memorandum were signed, I am unable to conceive the transaction a will—it is partly written and partly printed.

Incorporation, of course, is a will-making act, performed at the same sitting of the making of the will; but making a will at the same sitting and writing it all at that time is not incorporation, and I so construe the transaction here—all acts construed together as will-making acts performed at the same time, and all necessary to be taken together as a valid will, but all when construed together is not such.

Neither do I think that the Geary will, under the jury's finding and the record here, referred to in the court's opinion on the motion for rehearing, on the proposition of

revocation, notwithstanding the residuary clause, revoked the Boyce-Adams instrument, if the latter were a will. I am convinced that the declaration made by Vanlaw at the time he executed the Geary will was clearly admissible for that purpose; it was res gestæ of a transaction of the making of that instrument. I am not holding that this testimony of his declaration, in substance that he had Boyce and Adams already fixed, was admissible to prove the testamentary intent entering into the Boyce-Adams instrument, but as a declaration to prove that the Geary will was not the only will of the testator; the declaration, having been made when the latter will was made, was competent.

The Supreme Court of Colorado said: "The two are to be taken together as forming one will, unless the circumstances under which the last will was made prohibits such a condition, or the conditions of the two wills are so repugnant and inconsistent that they may not stand together. In this connection we will say that the court erred in striking out the testimony concerning the conversation that took place at the time of the execution of the last will, and the testimony of the witness Hanington. The conversation was a part of the subject-matter, and was admissible for the purpose of determining the intention of the testator in relation to the will which was then in existence, and of the facts and circumstances attending the execution of the wills. 1 Underhill on Wills, p. 39." Whitney et al. v. Hanington, 36 Colo. 407, 85 Pac. 86. See, also, In re Venable's Estate, 127 N. C. 344, 37 S. E. 465, quoting section 407 (2d Ed.) Schouler on Wills; Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342; In re Pillsbury's Will, 50 Misc. Rep. 367, 99 N. Y. Supp. 68; Williams v. Miles, 68 Neb. 463, 44 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431.

I do not construe the residuary clause as a nullity, according to the contention of appellee, but think that the jury were entitled to consider Vanlaw's age, his unmarried state, the short intervening time between the making of the two instruments, and the testimony of the declaration indicated for the purpose of finding whether the last will revoked the former, which is always a question of intent. If not revoked, the two instruments are construed together—the last in the nature of a codicil.

I am also inclined to think that the court is in error in affirming the judgment of the lower court, admitting the Geary will to probate. I construe this record in its travel from the county court to this court as solely embodying, in so far as the question of probate is concerned, the Boyce-Adams will exclusively. The transcript from the county court to the district court excludes the idea that the Geary will was used for any other purpose in the county or district than one of

proof of revocation by the appellant, Maris, of the Boyce-Adams will. In the district court the proponent of the Boyce-Adams will, by supplemental pleading, averred that the Geary will, upon an appeal from the county court of Moore county to the district court of that county, had been denied probate by the latter court in a different proceeding between the appellant, Maris, and the beneficiary, John Geary; further stating that, if the court in this proceeding did not construe such former judgment as res judicata, said Geary will be admitted to probate with the Boyce-Adams instrument. There is no proof of the former judgment—simply an averment by the pleader—and in the condition of this record I am constrained to believe that the same pleader has not invoked the jurisdiction of the district court, and the same is not shown in order that the Geary will could be probated; and it could not be presumed, in the state of the record, that the district court was acting in an appellate capacity for the purpose of probating said will. I agree with the court that a correct judgment in this case is a rendition of the trial court's judgment as to the Vanlaw-Boyce-Adams instrument, but think that the judgment probating the Geary will by the district court of Moore county should be reversed and remanded, and respectfully dissent from the reasons and findings of the majority to the extent herein indicated.

### PECOS & N. T. RY. CO. v. HUSKEY. (No. 592.)

(Court of Civil Appeals of Texas. Amarillo.  
April 4, 1914. Rehearing Denied  
May 9, 1914.)

#### 1. RAILROADS (§ 95\*)—CROSSINGS—DUTY TO MAINTAIN.

The contention that where a railroad crosses a public highway it is not required to keep the approaches in repair if properly constructed, unless the approach constitutes a part of the track or crossing proper, is untenable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

#### 2. DAMAGES (§§ 143, 149\*)—ALLEGATIONS.

Under the general allegation of damages in a personal injury action by breaking plaintiff's arm, etc., plaintiff could recover for both mental and physical suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 410, 433; Dec. Dig. §§ 143, 149.\*]

#### 3. DAMAGES (§ 143\*)—PERSONAL INJURIES—ALLEGATIONS.

The petition alleged that while riding on horseback along a public highway, and while crossing defendant's railroad track at its intersection with the public road, and while upon defendant's right of way, plaintiff's horse stumbled over a hole in an iron culvert or metal pipe, which defendant had placed in and on said public road as a drain pipe, by reason whereof plaintiff was thrown to the ground, injuring his nose, shoulder, and arm, etc., and that defendant was negligent in placing said culvert across the road in the manner in which it was placed there, and in not keeping and maintaining the same, and in permitting it to become uncover-

ed and allowing a hole to be and remain therein so as to become dangerous to travelers. *Held*, that the petition was not objectionable as failing to state of what the damages consisted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 410, 433; Dec. Dig. § 143.\*]

**4. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—ALLEGATIONS OF PETITION—CAUSE OF INJURY.**

The petition was not objectionable as failing to state in what way plaintiff had sustained the damage alleged.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

Appeal from District Court, Floyd County; R. C. Joiner, Special Judge.

Action by Dallas Huskey against the Pecos & Northern Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Madden, Trulove & Kimbrough, of Amarillo, for appellant. T. F. Houghton, of Floydada, for appellee.

HALL, J. Appellee filed this suit by next friend, in the district court of Floyd county, to recover damages on account of personal injuries. He alleged that while riding on horseback along the public highway near Floydada, and while crossing defendant's track at its intersection with the public road, and while still upon defendant's right of way, his horse stepped in and stumbled over a hole in an iron culvert or metal pipe, which defendant had placed in and on said public road as a drain pipe; that by reason thereof plaintiff was thrown to the ground, injuring and bruising his nose, shoulder, spraining his left wrist, and breaking his left arm; that the defendant was negligent in placing said culvert across said road in the manner in which it was placed there, and in not keeping and maintaining the same, and in permitting it to become uncovered and allowing a hole to be and remain therein so as to become dangerous to travelers. There is a general allegation of damages in the sum of \$1,500. The record shows that the public road had been established and used many years prior to the building of the line of railway across the same, and that the culvert was part of the approach to the railway track, and constituted part of the crossing at that point. There was a trial before a jury, resulting in a verdict and judgment in favor of appellee, in the sum of \$400 and costs of suit.

[1] The appellant requested a peremptory instruction in its favor, which, being refused by the court, is made the basis of the first assignment of error. The first proposition urged under this assignment is that where a railway crosses a public highway, it is required to keep in repair the crossing proper, but is not required to so keep the approaches to such crossing if properly constructed in the beginning, unless the approach consti-

tutes a part of the track or crossing proper. In this sort of a case this question has been decided adversely to appellant's contention several times. In *St. L. & S. W. Ry. Co. of Texas v. Smith*, 49 Tex. Civ. App. 1, 107 S. W. 638, it is said that under R. S. 1911, art. 6485 (4426), requiring a railroad company building its road across an established highway to restore the highway to its former state, or to such state as not to unnecessarily impair its usefulness, and to keep the crossing in repair, the duty of the company to keep the crossing in repair is absolute; and Talbot, Justice, said: A "crossing within the meaning of the statute \* \* \* is not confined to that portion of the \* \* \* roadbed upon which" the rails and cross-ties "are laid but \* \* \* includes the approaches of public roads there-to on its right of way." *I. & G. N. R. R. Co. v. Butcher*, 81 S. W. 819; *G. C. & S. F. Ry. Co. v. Sandifer*, 29 Tex. Civ. App. 356, 69 S. W. 463.

[2] Appellant asked the following special charge: "If you should find in favor of the plaintiff in this case, in estimating the damages which you will allow him, you will take into consideration only the physical pain suffered by the plaintiff, Dallas Huskey, by reason of the injuries received by him at the time and place alleged in plaintiff's petition"—and the refusal of the court to give this charge is the basis for appellant's second assignment of error. The court did not err in refusing this charge, because under his general allegation of damages, appellee was entitled to recover for both mental and physical suffering. *T. & N. O. Ry. Co. v. Bingle*, 9 Tex. Civ. App. 322, 29 S. W. 674; *T. & P. Ry. Co. v. Curry*, 64 Tex. 85. Paragraph 5 of the general charge properly submitted this issue to the jury.

It is contended under the third assignment that the railway company, in maintaining a culvert on its right of way across a highway, is bound to use only ordinary care when the culvert is disconnected with its track across its property. What we have said in disposing of the first assignment also disposes of this contention.

[3, 4] The following special exception was urged to plaintiff's petition: "Said petition alleges in the ninth paragraph thereof that the plaintiff, Dallas Huskey, has been damaged in the sum of \$1,500, but fails to state of what said damages consist, and in what way plaintiff has sustained such damages, wherefore defendant prays judgment," etc. Plaintiff's petition specifically alleges the condition of the culvert and the manner in which the accident occurred, and contains a detailed statement of the nature and extent of his injuries. We think the allegations are sufficient.

The fourth assignment of error questions the sufficiency of the evidence to sustain the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

verdict and judgment. This assignment is without merit. There is sufficient evidence in the record, not only to sustain the finding of the jury, but to authorize a verdict for the amount rendered. The fourth and fifth assignments are therefore overruled.

Because there is no reversible error, the judgment is affirmed.

# **DRAUGHON'S PRACTICAL BUSINESS COLLEGE v. DORSETT.**

(No. 5275.)

(Court of Civil Appeals of Texas. San Antonio. May 6, 1914.)

## **1. APPEAL AND ERROR (§ 231\*)—BILL OF EXCEPTIONS—EVIDENCE.**

Error in admitting a letter in evidence will not be reviewed, where the bill of exceptions shows that no reason was given for objection to the introduction of the letter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299-1352; Dec. Dig. § 231.\*]

## **2. CONTRACTS (§ 280\*)—PERFORMANCE.**

Plaintiff, who was contesting for a prize offered for the greatest amount of money paid in for scholarships in defendant's business college, was entitled to credit for certain tables which defendant accepted as part payment for a scholarship procured by plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1249-1280; Dec. Dig. § 280.\*]

## **3. CONTRACTS (§ 305\*)—PERFORMANCE.**

Where defendant, who offered a prize to the person procuring the greatest amount paid in on scholarships in its business college, did not provide in its circular offer that all of the money for the scholarship should be collected after the contest began, and accepted the money paid in by a contestant knowing that a small part of it had been collected before the contest began, defendant cannot complain, as against such contestant, that the collection was made before the contest.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398-1400, 1463, 1464, 1467-1475; Dec. Dig. § 305.\*]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by Dulcie Dorsett against Draughon's Practical Business College. From a judgment for plaintiff, defendant appeals. Affirmed.

L. R. Patton, of Galveston, for appellant. Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellee.

FLY, C. J. Appellee sued appellant to recover the sum of \$281.14, which she alleged was due her by reason of the fact that she had gained the first prize, a diamond ring of the value of \$279, offered by appellant for the greatest amount of money paid in on scholarships obtained by her up to April 5, 1913, and a certain commission of \$2.14. The cause was tried by a jury and resulted in a verdict for \$150 in favor of appellee.

The evidence shows that appellant offered to give to any student or ex-student of its school, who obtained the most money for

scholarships and books and stationery, a diamond ring; that appellee paid in the largest sum, and was entitled to a diamond ring of the value of \$150, but appellant failed and refused to deliver it to her.

[1] The first assignment of error complains of the introduction in evidence of a certain letter written by appellant's manager to appellee. The bill of exception shows that no reason was given for objection to the introduction of the letter in evidence. Such a bill of exceptions will not form a basis for an assignment of error. This has been the uniform rule in Texas since *Cheatham v. Riddle*, 8 Tex. 162, was decided in 1852. No reference to the admission of the evidence was made in the motion for new trial.

[2] It was uncontroverted that appellee took in payment on a scholarship certain tables desired by appellant, and that appellant accepted the tables and credited them on the scholarship account of the maker of the tables. The facts show that the tables were accepted at an agreed price from appellee, and the court did not err in instructing the jury that their price should be credited as cash. Appellant got the benefit of the tables, and could not deprive appellee of a credit for them. Appellee swore that appellant agreed to accept the tables as cash, which was denied by appellant, but it accepted the tables and gave the maker of them a credit of \$18 on his scholarship.

[3] There was no provision in the circular that all the money for the scholarships should have been collected after the contest began, and appellant did not so construe it, for it accepted the money knowing that a small part of it had been collected by appellee just before the contest began. It may have been unjust to other contestants, but appellant has no cause of complaint.

The complaints of the charge, in the third, fourth, and fifth assignments of error, are not meritorious and are overruled.

The sixth and seventh assignments are overruled.

The judgment is affirmed.

# **McKENZIE v. IMPERIAL IRR. CO.** (No. 322.)

(Court of Civil Appeals of Texas. El Paso. April 2, 1914. Rehearing Denied May 7, 1914.)

## **1. EVIDENCE (§ 341\*) — RECORDS — COPIES OF ARTICLES OF INCORPORATION — ADMISSIBILITY.**

Articles of incorporation, under Rev. St. 1911, art. 5002, may be proved as authorized by article 3707, by a copy certified by the secretary of state, and article 3700, prescribing that, when recorded, instruments may be admitted in evidence without proof, has no application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1289-1292; Dec. Dig. § 341.\*]

## 2. EMINENT DOMAIN (§ 169\*) — IRRIGATION COMPANIES — PROCEEDINGS TO CONDEMN LAND.

The right of an irrigation corporation to condemn land under Rev. St. 1911, art. 5004, for a right of way is not dependent on the filing of a water appropriation under articles 4996, 4998, and in proceedings to condemn it is not error to exclude a certified copy of a water appropriation made by the corporation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. § 169.\*]

## 3. APPEAL AND ERROR (§ 1050\*)—ERRONEOUS ADMISSION OF EVIDENCE—HARMLESS ERROR.

Error in admitting evidence is not reversible, where it is apparent that it could not have had any effect on any issue in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

## 4. APPEAL AND ERROR (§ 215\*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

Under Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59, providing that objections to the charge shall be presented to the court before the charge is read to the jury, and all objections not so made shall be waived, any error in a charge is waived, where no objection was presented to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\*]

## 5. TRIAL (§ 406\*)—FUNDAMENTAL ERROR—OBJECTIONS—WAIVER.

A fundamental error may be waived, unless it is of such a nature as to render the judgment void.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 968; Dec. Dig. § 406.\*]

## 6. TRIAL (§ 192\*) — INSTRUCTIONS — ASSUMPTION OF FACT.

Where, in proceedings by an irrigation corporation to condemn land for a right of way, the indorsement of the county judge showed that the petition was presented to him on April 18, 1910, and commissioners appointed on that date made a report dated May 5th following, and the parol testimony showed that the petition was presented in the year 1910, the court properly assumed in its charge that the proceedings were instituted April 18, 1910, though the file mark of the clerk showed that the petition was filed April 19, 1909, for, under the evidence, the clerk's file mark was a clerical error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

## 7. EMINENT DOMAIN (§ 196\*)—RIGHT TO CONDEMN—FAILURE TO AGREE WITH OWNER—EVIDENCE.

The testimony of the agent of a corporation, seeking to condemn land for a right of way, that he had asked the owner what he would settle for, and that the owner asked such a price that it was impossible to agree to it, and that no agreement as to price was made, showed an effort by the company to reach an agreement, entitling it to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. § 196.\*]

Appeal from Pecos County Court; R. D. Wright, Special Judge.

Proceedings by the Imperial Irrigation Company against T. N. McKenzie to condemn land for a right of way. From a judgment awarding compensation, T. N. McKenzie appeals. Affirmed.

W. A. Hadden, of Ft. Stockton, and J. F. Woodson, of El Paso, for appellant. J. R. Hill and W. O. Jackson, both of Ft. Stockton, for appellee.

HIGGINS, J. This was a proceeding instituted by the appellee to condemn for right of way purposes certain real estate owned by the appellant. Commissioners were appointed by the county judge, and from their assessment of damages an appeal was taken to the county court, and from the award of damages there made this appeal is prosecuted.

Appellee is incorporated under the provisions of article 5002, Revised Statutes of 1911, providing for the incorporation of irrigation companies, and upon trial a copy of its articles of incorporation, certified to under the hand and seal of the secretary of state, was admitted in evidence.

[1] Error is assigned to the admission of this copy, upon the grounds that it had not been filed among the papers of the case three days before the commencement of the trial and notice of such filing given to appellee. The original articles of incorporation are on file and of record in the office of the secretary of state, and the articles of incorporation of a corporation incorporated under the provisions of article 5002 may be proven by properly certified copy from that department. Article 3707, R. S. Article 3700 has no application whatever.

[2] Upon the trial, appellee also offered in evidence a certified copy from the office of the county clerk of Pecos county of a water appropriation made by it. Error is also assigned to the admission of this copy, for the reason that it had not been filed among the papers of the cause and notice of its filing given, as required by article 3700.

Article 5004 grants to corporations formed for the purpose of irrigation, mining, milling, and construction of waterworks the right to acquire a right of way over private lands by condemnation, by causing the damages for any private property so appropriated to be assessed and paid for, as provided in cases of railroads. An irrigation company's right to condemn is in no wise dependent upon the filing of a water appropriation, under the provisions of articles 4996 and 4998. These two last-mentioned articles relate merely to the appropriation of water. The act of appropriation evidenced by the instrument objected to being entirely foreign to the right of condemnation, the error, if any, in its admission, was wholly harmless.

[3] The erroneous admission of evidence is not ground for reversal, where it is apparent that it could not have had any effect upon any issue involved.

[4] Upon the trial, the court gave the following charge upon the measure of damage: "And in estimating the damages, if any, to



the remainder of plaintiff's two sections of land, after eliminating the said right of way strip, the measure is the difference, if any, between the actual cash market value thereof immediately before and immediately after *the condemnation proceedings*; but, if you find from the evidence that the remaining portion had no market value, then the measure would be the difference between the cash intrinsic value for the purpose for which it is adapted immediately before and immediately after *the condemnation proceedings*."

No error was assigned in the lower court to this portion of the court's charge, but it is here contended that it requires a reversal, since it is fundamental in its nature, or at least an error apparent on the face of the record of such a character that this court is authorized to, and should, reverse without an assignment. Under the view which we take of the matter, it is immaterial whether the error was of this nature or not.

The cause was tried on August 22, 1913. Upon that date the provisions of chapter 59, Acts of 1913, Regular Session, p. 113, were effective. Thereby article 1971, Revised Statutes, was amended so as to read as follows: "Art. 1971. The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be submitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived."

No objection to the charge upon the measure of damage was presented to the lower court, and, by virtue of amended article 1971, it must be held that the error complained of was waived.

[5] It is an established rule of practice that fundamental error will be considered, though not assigned, in the lower court, but this is a mere rule of appellate practice, in no wise related to the question here considered. A fundamental error may be waived, unless it be of such a nature as to render the judgment absolutely void; for example, an error respecting jurisdiction over the subject-matter.

[6] Error is next and last assigned to the action of the court in peremptorily instructing the jury that the condemnation proceedings were instituted on April 18, 1910. Article 6506 provides that, if the parties cannot agree upon the damages, the company shall file its petition for condemnation with the county judge, who, upon the filing thereof, shall appoint commissioners to assess the damages. The petition in this case bears the following indorsement: "Filed April 19th, 1909, Frank Rooney, Co. Clk. Pecos Co., Texas, by Geo. C. Haseltine, Deputy."

The indorsement of the county judge shows that the petition was presented to him on April 18, 1910, and commissioners appointed upon that date. The report of the commissioners is dated May 5, 1910. The testimony of Judge W. C. Jackson, the attorney for appellees, discloses that he presented the petition to the county judge in the year 1910. Haseltine testified that he had no independent recollection of the filing by him of the petition. Judge Williams testified to an effort made by him, as the representative of the company, to reach an agreement with McKenzie respecting his damages in March, 1910. Appellant, McKenzie, in effect, testified that the condemnation proceedings were instituted after the filing of an injunction suit by him against appellee in the district court of Pecos county on March 4, 1910. Appellant urges that the file mark raises an issue as to whether condemnation proceedings were instituted in 1909 or 1910, and, since a prior failure to reach an agreement with reference to damage is essential to the right to condemn, the trial court erred in assuming and peremptorily instructing that the proceedings were instituted on April 18, 1910. The law seems to contemplate that all of the papers in the original proceedings before the commissioners should be filed direct with the county judge, rather than in the office of county clerk, making same a record of the judge's office, rather than of the county clerk. Articles 6506, 6507, 6508, 6522, and 6527. So it may be doubted whether the file mark had any probative force whatever, but, conceding to it the probative force ordinarily accorded an official certificate, still the evidence noted shows beyond question that the indorsement of the year 1909, instead of 1910, was a mere clerical error. No two reasonable minds could differ upon this subject; especially so in view of the fact that there is no evidence in this record, other than the certificate, in any wise tending to show that the proceedings were originally instituted in 1909, instead of 1910. In this state of the record, the trial court committed no error in assuming, as a fact, that the proceedings were instituted April 18, 1910, by presenting the petition to the county judge.

[7] As to the suggestion of appellant that an effort to reach an agreement respecting the damages is a prerequisite to the right to condemn, and that the evidence fails to show such an effort to have been made, it is necessary only to call attention to the testimony of Judge Williams, the agent of the company: "That in March, 1910, he asked appellant what he was willing to settle the matter for, and McKenzie asked such a price that it was impossible for him to agree to same; that it was impossible to do so; that they never came to any agreement." This testimony of Williams was undisputed, and

establishes that an effort to settle was made in March, 1910.

Associate Justice McKENZIE was disqualified, and did not sit in this case.

Affirmed.

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**CONSOLIDATED KANSAS CITY SMELTING & REFINING CO. et al. v. LOPEZ. (No. 327.)**

(Court of Civil Appeals of Texas. El Paso. April 16, 1914. On Rehearing, May 7, 1914.)

**1. MASTER AND SERVANT (§ 198\*)—LIABILITY FOR INJURIES — NEGLIGENCE OF FELLOW SERVANTS.**

An employé of a smelting and refining company, engaged in sweeping pieces of ore off a car track, and the motorman in charge of small ore cars used to haul ores from the roaster to the reverberatory, who had nothing to do with the other men, and was charged with no duties making him a vice principal, were fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.\*]

**2. MASTER AND SERVANT (§ 180\*)—LIABILITY FOR INJURIES — NEGLIGENCE OF FELLOW SERVANTS.**

An employé of a smelting and refining company operating ore cars to haul ores from the roaster to the reverberatory, engaged in sweeping pieces of ore from the car track, was not a railway employé; and hence the common-law rule as to nonliability for the negligence of a fellow servant applied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.\*]

Appeal from El Paso County Court; J. M. Deaver, Special Judge.

Action by Pascual Lopez against the Consolidated Kansas City Smelting & Refining Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded on rehearing.

Davis & Goggin, of El Paso, for appellants. C. L. Vowell, of El Paso, for appellee.

HARPER, C. J. Appellee brought this suit in the county court of El Paso county, Tex., against appellants to recover for personal injuries, which he alleges he received by reason of being struck by one of the defendants' motor cars without warning, no signal of the approach of said car having been given by the motorman in charge thereof.

Appellants answered by general denial, and specially: "That, if appellee was hurt, it was through no fault, wrong or negligence of these defendants or of any one, for whose acts they might be held liable."

[1] There are several assignments of error, but, since the record shows conclusively that the question raised by the second is decisive of appellee's right to recover in this action, it becomes unnecessary to pass upon the others, so this opinion will be confined to the error therein assigned. Said assignment charges that: "The court erred in en-

tering judgment for plaintiff, for the reason that the jury found that plaintiff was injured through the negligence of the motorman. Appellants say that said motorman was a fellow servant with the plaintiff, and that therefore defendants would not be liable to plaintiff on account of the injuries sustained through the negligence of said motorman in failing to keep a proper lookout, and to notify plaintiff of the approach of said train."

A. G. Gramly testified: "I was the motorman running the larry engine at the time the plaintiff was injured. My only duties were to operate the cars and motor, and I had nothing to do with the men. The cars that I was operating were small ore cars and motor, used to haul ores from the roaster up to the reverberatories. I had a helper, but he was not on the motor at the time. I had nothing to do with the other men."

W. H. Pierson testified: "I was the foreman over the plaintiff at the time of the accident. I sent him up on the trestle with Guerrera to sweep off the track. In taking up the ores from the roaster to the reverberatory, small pieces would fall off on the track, and it was to brush these off that I sent Lopez up for. I did not see the accident, and know nothing about it. Lopez was working under me at the time. I had full authority and control over him; had the right to hire and discharge him."

Plaintiff testified: "On the 22d day of January, 1913, I was employed and worked for the El Paso Smelting Works, or the defendants in this suit. Mr. W. H. Pierson was my foreman. I had been working at another place doing other things, but on that morning he sent me up there to work, to sweep off the tramway track."

All the testimony in the record is to the effect that the motorman in charge of the car was a fellow servant of plaintiff, and was charged with none of the duties which would constitute him a vice principal of the appellants, for whose acts and knowledge they would, in law, be held liable. *Williams v. Kirby Lumber Company*, 136 S. W. 1182; *Id.*, 159 S. W. 310; *Quinn v. Glenn Lumber Co.*, 118 S. W. 733.

[2] The appellee was not a railway employé; so the common law, and not the statute of fellow servants, would apply. *Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 80 S. W. 847.

For the reason that the pleadings and evidence show no liability upon the part of appellants for the injuries complained of, the cause is reversed and here rendered.

Reversed and rendered.

On Rehearing.

Upon the authority of *Ft. Worth & Denver City Ry. Co. v. Copeland*, 164 S. W. 857, cited by appellees in motion for rehearing,

the motion for rehearing is granted to the extent that the cause is remanded for another trial, with instructions that, if, upon another trial, the pleadings and evidence are the same as they were upon the last trial, the court will instruct a verdict for the defendant.

**BURLINGTON STATE BANK et al. v. MARLIN NAT. BANK et al. (No. 5313.)**

(Court of Civil Appeals of Texas. Austin.

April 1, 1914. Rehearing Denied April 29, 1914.)

**1. CHATTEL MORTGAGES (§ 87\*)—RECORD—PLACE—"SHALL THEN BE SITUATED."**

Under Rev. St. 1911, art. 5655, providing that every chattel mortgage not accompanied by an immediate delivery and an actual change of possession shall be void as against creditors of the mortgagor and subsequent purchasers, mortgages, or lienholders in good faith, unless the mortgage or a copy thereof is forthwith filed in the office of the county clerk of the county where the property shall then be situated, or, if the mortgagor resides in this state, then of the county in which he then resides, the term where the property "shall then be situated," means where the property is situated when the mortgage is executed, and not when it is recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 162-165; Dec. Dig. § 87.\*]

**2. CHATTEL MORTGAGES (§ 150\*)—RECORD—TIME—"FORTHWITH."**

Under such statute a filing of the mortgage seven days after its execution, when it might have been filed immediately without inconvenience, was not a filing "forthwith," which means immediately, at once, without inexcusable delay, and hence was void as to mortgages subsequent to its filing.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-252; Dec. Dig. § 150.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 2916-2925; vol. 8, p. 7665.]

**3. CHATTEL MORTGAGES (§ 153\*)—RECORD—EFFECT—"GOOD FAITH."**

Under such statute, the expression "good faith" is synonymous with conscience, and embraces those obligations which are imposed on one dealing with property by the circumstances surrounding it at the time, and a mortgage in "good faith" means a mortgage for a valuable consideration without notice, and not lacking in that caution or diligence which a man of ordinary prudence is accustomed to exercise in making purchases—quoting Words and Phrases, vol. 4, pp. 3117, 3121; vol. 8, p. 7672.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 255-262, 267, 268; Dec. Dig. § 153.\*]

**4. CHATTEL MORTGAGES (§ 48\*)—DESCRIPTION OF PROPERTY—CERTAINTY.**

A chattel mortgage of cotton described as 10 bales of cotton crop of 1910 then being picked, and to be ginned in F. county, owned by the mortgagor free from all liens, was not void for uncertainty, since it could be identified by showing what cotton the mortgagor was having picked when it was executed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93-95; Dec. Dig. § 48.\*]

**5. CHATTEL MORTGAGES (§ 117\*)—CONSTRUCTION—PROPERTY CONVEYED.**

A chattel mortgage of 10 bales of cotton of the crop of 1910 then being picked and to be ginned in a certain county would not convey any specific bales, but in equity would be suffi-

cient to convey an interest in the cotton described in the proportion of 10 bales to the entire amount then being picked by the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 202; Dec. Dig. § 117.\*]

**6. CHATTEL MORTGAGES (§ 138\*)—PRIORITY—EVIDENCE.**

Where a tenant on October 7th mortgaged 10 bales of cotton of the crop of 1910 then being picked in a certain county, a showing by the landlord that he purchased 12 bales of the tenant after October 13th did not support a judgment in favor of the mortgagee against the landlord for the excess over the landlord's lien, since all of the 10 bales mortgaged may have been picked before the landlord's purchase.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. § 138.\*]

**7. APPEAL AND ERROR (§ 901\*)—REVIEW—BURDEN OF PROOF.**

A party appealing from the judgment has the burden of showing that it is erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.\*]

**8. CHATTEL MORTGAGES (§ 49\*)—FORM AND CONTENTS—DESCRIPTION—CERTAINTY.**

A chattel mortgage mentioning seven horses and mules, but not describing them except by color, age, and height, and not stating that the mortgagor was the owner of the property, or where it was situated, was void for uncertainty as to two of the mortgagor's mules which had been covered by a previous mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 90-92; Dec. Dig. § 49.\*]

Appeal from District Court, Falls County; Prentice Oltorf, Judge.

Action between Batte & Baskin, Ben Johnson, Burlington State Bank, Tarver-Henslee Company, Marlin National Bank, and others. Judgment for Bates & Baskin against the Burlington State Bank and for Marlin National Bank against the Tarver-Henslee Company, and Burlington State Bank, Marlin National Bank, and Tarver-Henslee Company appeal. Affirmed as to other parties not appealing, and as to the remainder reversed and remanded.

W. A. Morrison, of Cameron, for appellants. Tom Connally, of Marlin, and Chambers & Baskin, of Cameron, for appellees.

**Findings of Fact.**

JENKINS, J. Ben Johnson was a tenant farmer, and prior to December, 1908, had lived in Milam county. Batte & Baskin were dealers in horses and mules, and lived in Cameron, Milam county. They were acquainted with Johnson, and had sold him mules prior to October 15, 1909, for which he had paid them. In December, 1908, Johnson moved to the farm of Tarver-Henslee Company in Falls county, and continued to reside there to the time of the trial of this case. On October 15, 1909, Johnson purchased two mules from Batte & Baskin in the town of Cameron, and executed a mortgage thereon to secure the purchase money in the sum of \$250. He immediately took the mules to his home in Falls county, where they re-

maintained to the time of the trial hereof, July 19, 1913. Batte & Baskin recorded their mortgage in Milam county October 22, 1909. They did not know that Johnson lived in Falls county at that time. On November 1, 1909, Johnson gave a mortgage on these same mules and other personal property to the Burlington State Bank. On January 3, 1910, Johnson gave a mortgage on these mules and other property to the Planters' National Bank, which prior to the trial hereof was transferred to the Burlington State Bank. On October 7, 1910, Johnson gave a mortgage to the Marlin National Bank upon cotton described as follows: "Ten bales of cotton crop of 1910 now being picked and to be ginned at High Banks in Falls County. \* \* \* Said property is owned by me in good faith and a perfect title, free from all liens whatsoever, and I agree to hold same in Falls county, Texas, where it is now located, free of all liens other than the one hereby granted, until the indebtedness hereinafter mentioned is paid in full." This mortgage was recorded in Falls county, October 13, 1910. The mortgage to the Burlington State Bank and also the mortgage to the Planters' National Bank each recited that the property therein described was free from all mortgages and other liens. Neither the Burlington State Bank nor the Planters' National Bank had any actual knowledge of the mortgage executed to Batte & Baskin at the time their mortgages were taken. By agreement of all parties hereto, the property mortgaged by Johnson was taken possession of and sold by the Burlington State Bank, and the proceeds held subject to disposition by final judgment herein. The trial court held that the mortgage of Batte & Baskin was superior to the mortgages given to the Burlington State Bank and to the Planters' National Bank, and consequently gave judgment against the Burlington State Bank for the amount of Batte & Baskin's debt, the evidence showing that the mules had been sold for more than enough to pay said debt.

Tarver-Henslee Company, subsequent to October 13, 1910, purchased from Johnson 12 bales of cotton of the value of \$60 each. Johnson was a tenant on the farm of Tarver-Henslee Company during the year 1910, and they advanced him money to enable him to pick his cotton, and the court allowed this amount by virtue of their landlord's lien, and gave judgment in favor of the Marlin National Bank against Tarver-Henslee Company for the balance, \$370.15. From this judgment the Marlin National Bank and Tarver-Henslee Company have appealed.

#### Opinion.

[1] The judgment in favor of Batte & Baskin involves the construction of article 5655, R. S. 1911, which, so far as applicable to this case, reads as follows: "Every chattel mort-

gage, deed of trust, or other instrument of writing, intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making same, and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then, of the county of which he shall at that time be a resident."

[2] It is the contention of appellees Batte & Baskin that the words "filed in the office of the county clerk of the county where the property was then situated," means where the property is situated at the time the mortgage is executed. Appellant Burlington Bank contends that it means where the property is situated at the time the mortgage is recorded. We agree with appellees Batte & Baskin as to this matter. It will be observed that with reference to recording a mortgage in the county where the mortgagor resides, the language is "of which he shall at that time be a resident." We think this aids in the construction of the statute; that the language, "shall at that time be a resident," evidently means at the time of the execution of the mortgage, and that likewise the time referred to with reference to the situation of the property means the time when the mortgage is executed. Such being the case, had Batte & Baskin complied with the statute, there can be no question but that they would have a prior lien as against the mortgages subsequently executed. But they did not comply with the statute. The statute required that such mortgage should be "forthwith deposited with and filed in the office of the county clerk," etc. The mortgage was not filed until seven days after its execution. The office of Batte & Baskin was in sight of the courthouse of Milam county, and no reason is shown why they might not, without inconvenience, have filed the mortgage immediately after its execution. "Forthwith," means immediately, at once, without inexcusable delay. They did not file the mortgage forthwith. *Hackney v. Schow*, 21 Tex. Civ. App. 613, 53 S. W. 713.

[3] The statute declares that the failure to record the mortgage "forthwith" shall render the same "absolutely void" as against certain parties mentioned. This language leaves no room for construction; as to such parties the mortgage must be held to be void, and therefore of no force whatever. If an instrument is void, it is as if it had never existed. In fact, a void instrument never

had any legal existence. Such being the case, it remains to be considered whether or not the Burlington State Bank, and the Planters' National Bank come within the definition of the parties mentioned in the statute, as to whom such mortgage is void. The parties mentioned are "subsequent purchasers and mortgagees or lienholders in good faith." Both of the banks mentioned were "subsequent mortgagees and lienholders." If they were such "in good faith" within the meaning of that term as used in the statute, then the Batte & Baskin mortgage must be held to be absolutely void as to them. It has been held that a mortgage not recorded forthwith is good against a subsequent mortgagee when the same was taken after the record of the first mortgage in the proper county. These decisions can be upheld only upon the ground that the subsequent mortgagee was not a mortgagee in good faith.

"Good faith consists in an honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

"Good faith, in general, means without notice, as well as for a valuable consideration."

"A want of that caution and diligence which an ordinary man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith."

Words and Phrases, p. 3117.

"A mortgage in good faith means the same thing as a mortgage for a valuable consideration without notice."

"No one can become a purchaser or a bona fide incumbrancer of property in good faith if he have notice of a pre-existing mortgage, although such mortgage may not be verified or recorded in accordance with the statute."

"The expression 'good faith,' as used in the statute providing that a chattel mortgage shall cease to be valid against the creditors of the person making the same or mortgagees in good faith after the expiration of one year from following the same unless an affidavit of renewal is filed, is synonymous with 'conscience.' It embraces those obligations which are imposed upon one in dealing with property by the circumstances surrounding it at the time."

Words and Phrases, p. 3119.

It may well be held that where a mortgage is recorded in the proper county, though it be not recorded "forthwith," a subsequent mortgagee is under obligation to examine the record. If he does so, he will discover the existence of the mortgage, and therefore cannot be a mortgagee in good faith. If it is his duty to do so under the circumstances of the case in common fairness to others who may have taken a prior mortgage, and he fails

to make such examination, this might well be held to show an absence of good faith. Such we take it is the effect of the decisions in this state, holding that a mortgage which is not forthwith recorded is nevertheless superior to a mortgage taken after the record of the prior mortgage. The Batte & Baskin mortgage was not of record in Falls county, where Johnson lived and where the property was situated, at the time of the execution of the subsequent mortgages. But this alone is not necessarily sufficient to show a want of good faith in the subsequent mortgagees. Johnson lived very near the line of Falls and Milam counties; he had previously lived in Milam county. It does not appear from the record what, if any, inquiry the subsequent mortgagees made as to when and where Johnson obtained the mules. The trial court held that the Batte & Baskin mortgage was superior to the subsequent mortgages, by reason of the fact that it was recorded in Milam county before the execution of the second mortgage. This record not having been made "forthwith," such holding was error, for which this case must be reversed. As to whether the subsequent mortgages are superior to the Batte & Baskin mortgage will be made to depend in another trial upon whether or not the subsequent mortgagees were mortgagees in good faith. They were mortgagees for a valuable consideration and without actual notice, and therefore must be held to have been mortgagees in good faith, unless it is shown that the circumstances were such as required them to investigate the records of Milam county as to prior mortgages by Johnson.

[4] It is the contention of appellants Tarver-Henslee Company that the mortgage taken by the Marlin Bank on the cotton mentioned therein was void for uncertainty. With this we do not agree. The mortgage stated in what county the cotton was situated, and described it as cotton then being picked, and as being the property of Johnson. We think this language imports being picked by Johnson. It appears from the evidence that Johnson lived on the Tarver-Henslee farm, west of the Brazos river, and had so resided for the years 1909 and 1910, and that he did not raise cotton on any other farm in that county, and did not own any other cotton. The cotton could be identified by showing what cotton he was having picked at the time the mortgage was executed; and we think the recitations were sufficient to have put Tarver-Henslee Company upon notice, in view of the fact that they knew what cotton he had raised that year.

[5, 6] However, we do not think that this is sufficient to sustain the judgment against Tarver-Henslee Company. The evidence shows that they purchased 12 bales of cotton from Johnson after October 18, 1910; Johnson mortgaged only 10 bales, which were being picked on October 7th. For aught that appears, all of these 10 bales may have been

picked before October 13th. Again, it appears that Johnson, in the year 1910 raised about 30 bales of cotton. The mortgage would not have conveyed any specific bales of cotton, but in equity would be sufficient to convey an interest in the cotton described in the proportion of 10 bales to the entire amount then being picked by him. The evidence does not show what this would be, for which reason the judgment against Tarver-Henslee Company must be reversed.

[7, 8] There is another feature of this case to which no reference has been made in the briefs, but we think it material. Batte & Baskin obtained a judgment against appellant Burlington Bank. The burden is on this appellant to show that this judgment is erroneous. It attempts to do so in part by showing that Johnson mortgaged the mules to the Planters' National Bank, which mortgage was transferred to appellant. This mortgage mentions seven horses and mules, but does not describe the same except by color, age, and height. It does not state that Johnson was the owner of this property, nor where the same was situated. We think this mortgage as to such animals is void for uncertainty.

The judgment of the trial court disposed of a number of parties other than those mentioned herein, from which no appeal has been taken, as to whom the judgment is affirmed.

For the reasons mentioned, the judgment herein, in so far as it is in favor of Batte & Baskin against appellant Burlington State Bank, and in so far as it is in favor of the Marlin National Bank against Tarver-Henslee Company, will be reversed and the cause remanded.

Affirmed in part and in part reversed and remanded.

#### FT. WORTH STOCKYARDS CO. v. WITHERSPOON et al. (No. 604.)

(Court of Civil Appeals of Texas. Amarillo. April 25, 1914.)

#### COURTS (§ 169\*)—JURISDICTION—COUNTY COURT—"INTEREST."

Under Const. art. 5, § 16, declaring that the maximum amount for which suit may be brought in the county court is \$1,000, exclusive of interest, the term "interest" means interest *eo nomine*, and not interest allowed as damages in actions of tort; and hence the county court is without jurisdiction of an action for damages for the destruction of a number of cattle, where their value, plus the interest which accrued between the date of the destruction and the filing of the suit, exceeded \$1,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-425, 428-436, 443, 456, 458, 465; Dec. Dig. § 169.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

Appeal from Childress County Court; Frank W. Freeman, Judge.

Action by L. Witherspoon against the

Ft. Worth Stockyards Company and others. From a judgment for the plaintiff, the named defendant appeals. Reversed, and order dismissed as to the appellant; affirmed as to the other defendants.

Capps, Cantey, Hanger & Short, of Ft. Worth, and W. L. Evans, of Ft. Worth, for appellant. M. J. Hathaway and W. B. Howard, both of Childress, for appellees.

HUFF, C. J. This suit was brought in the county court of Childress county on the 7th day of June, 1913, by L. Witherspoon against the Ft. Worth Stockyards Company, the Ft. Worth Belt Railway Company, the Chicago, Rock Island & Gulf Railway Company, the Ft. Worth & Denver City Railway Company, R. D. Moore, and Jack Lancaster, for damages occasioned by the burning of 37 head of cattle in the stockyards at Ft. Worth on the 25th day of June, 1911. The allegations are substantially that the cattle were delivered to the Chicago, Rock Island & Gulf Railway Company at Boyd, Tex., by R. D. Moore, to be transported to Childress, Tex., under a contract duly entered into, by the terms of which contract it was stipulated that the cattle were to be unloaded, dipped, and inspected at Ft. Worth, Tex., and that the said Moore should have the privilege of selling said cattle on the Ft. Worth market; that the Chicago, Rock Island & Gulf Railway Company delivered the cattle to the Belt Railway, which latter company delivered them to the Ft. Worth Stockyards Company, appellant herein, and while in its possession the cattle were destroyed by fire. It is alleged, also, that R. D. Moore transferred and assigned his claim for damages on May 31, 1913, to Jack Lancaster, for a consideration of \$800, with 10 per cent. interest thereon from date, and that Jack Lancaster, on the 4th day of June, 1913, transferred and assigned the claim to appellee, L. Witherspoon, for a valuable consideration of \$800, with 10 per cent. interest from date. The allegations are that "said cattle so destroyed consisted of one Jersey bull, of the reasonable value of \$35; 19 Jersey cows, of the reasonable value of \$30 each; 10 common cows, of the reasonable value of \$25 each; and seven calves, of the reasonable value of \$10 each—aggregating the sum of \$925. The following is the prayer: "Wherefore plaintiff prays, the defendants having all appeared and answered herein, that he have judgment for his damages, \$925, together with interest thereon from June 25, 1911, at the legal rate of 6 per cent., and in the event he is not entitled to his damages for the destruction and loss of said cattle, that he then have his judgment against the defendants R. D. Moore and Jack Lancaster for the sum of \$800 and 10 per cent. interest from May 31, 1910, thereon, for costs of suit, and for such other and further relief, special and general, in law and

equity, to which he may be entitled under the law and the facts."

It will be observed at the time of the filing of the suit that 1 year, 11 months and 12 days had elapsed from the burning of the cattle, and from which time interest is claimed at the rate of 6 per cent. per annum. The value of the cattle, together with the interest claimed as damages, being something like \$110 interest, making the amount sued for \$1,035, at the time the suit was instituted. Article 5, § 16, of the Constitution of this state declares that the maximum amount for which suit may be brought in the county court is "\$1,000.00, exclusive of interest." It is now the settled rule in this state that interest, as used in the Constitution, means interest *eo nomine*, and not interest allowed as damages in actions of tort. The county court, therefore, had no jurisdiction of the subject-matter of this suit at the time it was filed as against the appellant in this case. *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163; *Herrington v. Railway Co.*, 142 S. W. 983; *Railway Co. v. Faulkner*, 118 S. W. 747; *Railway Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1055; *Railway Co. v. Hunt*, 38 Tex. Civ. App. 460, 85 S. W. 1168; *Railway Co. v. Everett*, 95 S. W. 1085; *Railway Co. v. Addison*, 96 Tex. 61, 70 S. W. 200; *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1032; *Grocer Co. v. Railway Co.*, 142 S. W. 624; *Railway Co. v. Rayzor*, 125 S. W. 619.

The county court having no jurisdiction, the case should be reversed as to appellant, and the court directed to dismiss the same as to appellant. The judgment as to Lancaster and Moore will be affirmed. Reversed and ordered dismissed in part, and affirmed in part.

#### LANDRETH v. STATE. (No. 3095.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

#### 1. CRIMINAL LAW (§ 915\*)—APPEAL—PRESENTATION BELOW—OBJECTIONS TO INFORMATION.

An objection that the information was not filed by the clerk could not be first raised in the motion for new trial; it being necessary to raise such objection at trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2152-2158; Dec. Dig. § 915.\*]

#### 2. INDICTMENT AND INFORMATION (§ 42\*)—TIME FOR FILING.

While it would be too late to file the information, after announcement of ready for trial and the parties had gone before the jury, if it had been placed with the papers prior to the calling of the case, and the court's attention had been called thereto, it would be deemed filed as of the date on which it was placed with the clerk.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 153; Dec. Dig. § 42.\*]

Appeal from Hill County Court; J. D. Stephenson, Judge.

Roy Landreth was convicted of carrying a pistol in violation of law, and appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for carrying a pistol in violation of the law.

[1] The record is before us without a statement of facts or bills of exception. Among other things, it is urged in the motion for new trial that the information was never filed by the clerk, and was, therefore, illegal and void and of none effect. This was not urged prior to the trial, but was raised for the first time in the motion for new trial. There is no evidence in the record in regard to the matter, and under the decisions it would come too late after the conviction. See Branch's Crim. Law, § 688, for collation of authorities. The evidence, if resorted to, might have shown that the information was filed at the same time and in connection with the complaint. Anyway, it is requisite to raise the question in limine, and it comes too late after conviction.

[2] Of course, if the information was filed after announcement of ready for trial, and the parties had gone before the jury, it would be too late to file it. If it had been placed with the papers, however, prior to calling of the case, and the court's attention called to it, it would then be filed of the same date at which it was placed with the clerk; but in the condition this record is, it is too late.

The judgment is affirmed.

#### BOLDEN v. STATE. (No. 3099.)

(Court of Criminal Appeals of Texas.

April 22, 1914.)

#### HOMICIDE (§ 300\*)—TRIAL—ISSUES—SUBMISSION.

In a prosecution for homicide, where accused testified that he stabbed deceased in self-defense, not intending to kill him, and there was evidence that the pocketknife used would not necessarily inflict a fatal wound, a charge on aggravated assault is necessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Reeves Bolden was convicted of murder, and he appeals. Reversed and remanded.

Baldwin & Baldwin, of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder, and his punishment fixed at 20 years' confinement in the penitentiary.

Appellant assigns many grounds in his motion for a new trial, but we are of the opinion but one of them presents reversible er-

ror. Deceased ran a store in the suburbs of Houston. Mail was left there for a number of his customers, and on the night of the homicide appellant went to the store to get his mail, and he then details the difficulty as follows: "I came in and spoke to him; he was in the rear part of the store behind the counter. I asked him for my mail, and he said, 'By God, won't you wait?' and I said, 'Any mail here for me?' He said, 'Yes; I think so.' I said, 'I would like to get it from you, sir,' and he said, 'By God, can't you wait?' I said, 'Yes; I can wait, but I would not talk to you that way.' He said, 'You son of a bitch; you talk back to me; I will knock your brains out.' I said, 'You won't do anything to me,' and he turned and walked to the counter, and he said, 'You son of a bitch, I will show you,' and I said, 'I am no son of a bitch,' so I started on out, and got up there even with that counter to turn to go out, and he rushed from the counter from the other end, and got an ax handle, and overtaken me, and ran up on me before I got anywhere out, and struck me aside the head, and when he struck me, of course, I struck him to protect myself and ran. He left a sore on my head where he struck me; there was a big knot behind my ear, but it is well now. I expect it is well. I had done nothing to him to cause him to hit me. I had not hit him, or touched him, prior to that time. When he hit me, I stabbed him with the knife. I had nothing against him. I merely stabbed him to protect myself." He further testified he had no intent to kill, and that he cut deceased with an ordinary pocketknife.

Dr. Armstrong testified: "I would say that a pocketknife driven into a man's chest about the location where I found this wound was not necessarily fatal. It would depend upon whether a blood vessel is cut and infection entering into it. \* \* \* The wound that Mr. Susholtz received was a dangerous wound. It caused his death; but such wounds in that locality are not necessarily fatal, though it caused this man's death."

Appellant prepared and requested a charge presenting the issue of aggravated assault, and excepted to the action of the court in refusing this charge, and to the failure of the court to submit aggravated assault in his main charge. Under the decisions of this state, this evidence called for the submission of that issue to the jury. Branch, in his work on Criminal Law, says: "If there is evidence rendering it doubtful whether defendant intended to *kill* when he assaulted prosecutor, court should charge on aggravated assault. Carter, 28 Tex. App. 355, 13 S. W. 147; Moore, 33 Tex. Cr. R. 306, 26 S. W. 403; Cubine, 44 Tex. Cr. R. 596 [73 S. W. 396]; Prescott, 52 Tex. Cr. R. 35, 105 S. W. 192; Thomas [60 Tex. Cr. R. 84], 131 S. W. 314; Walker, 7 Tex. App. 627; Smith, 36 Tex. Cr. R. 569

[38 S. W. 167]; Mathis, 39 Tex. Cr. R. 549, 47 S. W. 464; Scott [60 Tex. Cr. R. 318] 131 S. W. 1073; Malone [60 Tex. Cr. R. 509] 132 S. W. 769." Section 520, p. 342. Again he says: "If it is an issue whether the weapon used was a deadly weapon, the court should charge on aggravated assault. Chavana v. State, 51 S. W. 380; Cage v. State, 55 S. W. 63; Martinez v. State, 35 Tex. Cr. R. 386 [33 S. W. 970]; Smith v. State, 36 Tex. Cr. R. 569 [38 S. W. 167]; Armstrong v. State [60 Tex. Cr. R. 316] 131 S. W. 1074."

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent at consultation.

#### MODWELL v. STATE. (No. 3081.)

(Court of Criminal Appeals of Texas. April 8, 1914. On Motion for Rehearing May 6, 1914.)

#### CRIMINAL LAW (§ 1087\*)—DISMISSAL—GROUNDS—NOTICE OF APPEAL.

The record must contain a notice of appeal in order to give the Court of Criminal Appeals jurisdiction, and the appeal will be dismissed if it does not contain such notice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from Hunt County Court; Geo. B. Hall, Judge.

John Modwell was convicted of an offense, and appeals. Appeal dismissed.

Claud Isbell, of Rockwall, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. The record is before us without notice of appeal, for which reason the jurisdiction of this court has not attached. The Assistant Attorney General moves to dismiss the appeal for want of notice of appeal given in the trial court. The motion is well taken, and the appeal is dismissed.

#### On Motion for Rehearing.

On a previous day of the term the appeal herein was dismissed because notice of appeal was not given in the trial court. Motion for rehearing is filed, but no attempt is made to show that the record was incorrect in failing to embody notice of appeal. There is a letter from the clerk accompanying the record, in which it is stated there was no statement of facts filed in the trial court, and no motion for new trial made or notice of appeal given; at least no notice appears on the docket of the trial court, and in fact none appears in the record of the trial court. In that condition of the record the jurisdiction of this court cannot attach. Notice of appeal is necessary in order to attach the jurisdiction of this court. Until the jurisdiction of this court attaches no question in the record can be reviewed. The questions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



suggested therefore for revision in the record cannot be reviewed in the condition in which this record is placed before the court.

The motion therefore will be overruled.

# BAIN v. STATE. (No. 3065.)

(Court of Criminal Appeals of Texas.

April 15, 1914.)

## 1. CRIMINAL LAW (§ 1091\*)—APPEAL—REVIEW OF INSTRUCTIONS—REFUSAL OF REQUESTS.

Where neither the motion for new trial nor the bills of exception give any reasons why charges requested by accused, and refused, were requested, or show how they were applicable to any state of facts, error in refusing the requests cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

## 2. CRIMINAL LAW. (§ 1092\*)—BILLS OF EXCEPTION—TIME OF FILING.

Bills of exception containing the evidence on accused's motion for new trial must be filed during the term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

## 3. WITNESSES (§ 410\*)—IMPEACHMENT—SUPPORT.

The fact that two witnesses contradicted each other in a homicide case, in that one testified that he was in an office at the time of the shooting and called the other witness' attention to the shooting, while the other witness denied, would not entitle the witness stating the affirmative to show that he had at other times and places made statements which would corroborate his evidence at trial, though he could show by other evidence that he was at the office at the time testified by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1284; Dec. Dig. § 410.\*]

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

J. H. Bain was convicted of manslaughter, and appeals. Affirmed.

W. J. Townsend, Jr., and Martin M. Feagin, both of Lufkin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for manslaughter; the punishment being assessed at two years' confinement in the penitentiary.

[1] There were no exceptions reserved to the charge given by the court. Special charges were requested and refused. These are set forth in bills of exception, as well as in the motion for new trial. Neither in the motion for new trial nor in the bills of exception are any reasons given why the charges were asked. They were simply asked, refused by the court, and exceptions taken. No grounds are alleged, or anything stated, either in the bills or motion for new trial, as to their applicability to any state of facts or condition of the record. Under *Berg v. State*, 142 S. W. 884, and that line of cases, it would seem these matters are not so presented that they can be considered.

[2] There is a bill of exceptions setting forth the evidence on motion for new trial, but it was filed nearly a month after court had adjourned. Under the decisions of this court this bill cannot be entertained. As to bills of exception reserved to the evidence introduced on matters pertaining to motion for new trial, the rule laid down by this court is that these bills of exception must be filed during term time.

[3] There is another bill of exceptions which sets forth substantially that appellant's theory of the case was self-defense, and that he shot and killed the deceased, McHenry, in self-defense; that deceased had a pistol drawn, as if to shoot him, when he, appellant, shot and killed McHenry. It is further alleged that Bird and Kimmey testified that at the time the shot was fired by defendant the deceased, McHenry, was standing at or near the corner of the building with a pistol drawn on appellant as if to shoot him. Defendant himself testified to the same fact. Garrison testified, in substance, that he heard the report of the gun from the direction where deceased and defendant were; that he, immediately upon hearing the shot, looked in that direction and saw deceased coming from the place where the gun fired, with a pistol in one hand and a scabbard in the other. Barbo testified, for the defendant, that he was in the office of the Carter-Kelley Lumber Company at the time of the shooting. He further stated that Garrison was in the office at the time, but at a different place in the office from where Barbo was. Further testifying, Barbo said: "I was in the office that Garrison was in; I was in the front part of it, and they (meaning Garrison and others) were in the back of it. I don't think his (Garrison's) attention was called to the shooting until I called his attention to it. I saw the shooting, and told Garrison about it. I looked right straight after I heard the report of the gun. I was standing there looking out at the time. When I looked at the place of the shooting, McHenry was already there. I know that I was looking back in the direction at the very time the gun fired. I was looking right in the direction of the shooting. The first I noticed was, immediately after the shot was fired back there, he, deceased, was right close to the corner of the commissary, right at the south end of same. When I first saw him, deceased, he had the pistol in his hand. He was holding the pistol in his right hand along there. I was the first one who saw him." All of this testimony was alleged to be material on the theory of self-defense, in that defendant claimed he shot deceased while deceased was standing at the corner of the commissary with his pistol drawn on him as if to shoot, and that he shot to protect his life. It is further recited that after this evidence was admitted Garrison was called

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the state and testified that Barbo was not in the office at the time of the shooting referred to, and that in fact his testimony was a recent fabrication, and that said Garrison also testified that Barbo was not in the office with him at the time of the shooting; that Barbo did not call Garrison's attention to the shooting; that the witness Barbo was not there at the time of the shooting. Appellant then called the witness Havard, who testified that he saw John Barbo at Manning at the time of the difficulty, that just after the difficulty occurred, and before the witness left, he saw Barbo and had a conversation with him about the shooting, and that Barbo related to him the circumstances of the shooting as he, Barbo, saw them; and to corroborate and to sustain him before the jury, after the contradiction by Garrison, the defendant offered to prove by Havard that Barbo had then and there related to him on the day of the killing, and shortly afterwards, the circumstances of the shooting as he saw it, which would have been substantially the same as Barbo testified before the jury. This was excluded by the court. The statement of Barbo to Havard was offered for the purpose of corroborating Barbo as to his testimony. The court refused it, with this statement: "This bill is qualified as to the statement of facts set out in same, and the statement of facts is referred to, but the witness Havard and others were permitted to testify that they saw Barbo at the office at the time of the shooting; further, the evidence did not show that Barbo testified to anything that took place before the shooting, and there was no impeachment of Barbo, but contradiction by Garrison of him."

As qualified by the court, we are of opinion there was no error. The court permitted the evidence to sustain Barbo's statement that he was present at the time and place denied by Garrison. This was simply a contradiction of Barbo's testimony by Garrison; Barbo testifying one way, and Garrison the other, as to Barbo's presence and conversation. Corroboration was permitted to go before the jury as to the fact that Barbo was at the office at the time and place about which he testified, and in this way contradicted Garrison as to his presence. We think this was all that he was entitled to prove under this state of facts. We do not understand, because two witnesses contradict each other, that that would be a fabrication of testimony by either witness, or that it would justify him in showing that at other times and places he made statements which would corroborate what he stated on the stand. Had the state introduced contradictory statements of Barbo with reference to the matter, or there was a charge that he had fabri-

cated his testimony, or that he was testifying under corrupt motives, we would have a different question. The matter here presented was an issue between Garrison and Barbo as to whether Barbo was in the office and called Garrison's attention to the shooting at the time. Barbo testified he did, and Garrison testified he did not. This raised simply a contradiction as to what occurred between them. It did not suggest that he was testifying under corrupt motives, or was fabricating testimony. The cases cited by appellant, to wit, *Williams v. State*, 24 Tex. App. 665, 7 S. W. 333, *Jones v. State*, 38 Tex. Cr. R. 103, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719, *Keith v. State*, 44 S. W. 849, and *Ballow v. State*, 42 Tex. Cr. R. 266, 58 S. W. 1023, are not in point. They refer to cases where witnesses testified under corrupt motives or fabricated their testimony. Barbo was not charged with corrupt motives or fabrication of testimony, as we understand it; but it was simply a question of veracity between Garrison and Barbo as to what occurred at the time and place. We are of the opinion that there was no error on the part of the court in this ruling, under the circumstances indicated in the bills of exception.

Finding no reversible error in the record, the judgment is affirmed.

**HOLMAN v. STATE. (No. 8100.)**  
(Court of Criminal Appeals of Texas.  
April 22, 1914.)

**CRIMINAL LAW (§ 1022\*)—APPEAL—CONVICTIONS IN RECORDER'S COUNTY COURTS.**

Under the statutes, one having been convicted in the recorder's court of violating an ordinance, and on appeal to the county court again convicted, and fined \$20 cannot appeal to the Court of Criminal Appeals.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2581, 2582; Dec. Dig. § 1022.\*]

Appeal from Lamar County Court; Rube S. Wells, Judge.

H. L. A. Holman was convicted in the county court, on appeal from the recorder's court, and again appeals. Dismissed.

C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Complaint was filed in the recorder's court of the city of Paris, and appellant was there convicted of violating a city ordinance. He appealed to the county court, and was again tried and convicted, and his punishment assessed at a fine of \$20.

Under the statutes of this state, no appeal lies under such circumstances, and the appeal is therefore dismissed from the docket.

**DAVIDSON, J.**, absent at consultation.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**HAVARD v. STATE. (No. 3078.)**  
 (Court of Criminal Appeals of Texas.)  
 April 22, 1914.)

**1. CRIMINAL LAW (§ 598\*)—CONTINUANCE—ABSENCE OF WITNESSES—DILIGENCE.**

There is no error in refusing a continuance for absence of witnesses; the case having been long pending, it not appearing process had issued for them, and the court finding that diligence had not been used to secure their attendance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

**2. CRIMINAL LAW (§ 1166½\*)—APPEAL—HARMLESS ERROR—CHALLENGE TO JUROR.**

Prejudice from the serving of any juror not being shown, the overruling of a challenge for cause to a juror, who was subsequently peremptorily challenged and did not serve, presents no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

**3. JURY (§ 103\*)—QUALIFICATION—OPINION.**

Notwithstanding an opinion, one is a qualified juror; he stating his opinion was formed from hearsay, and not from discussion with any witness, and that he could and would entirely disregard it, and try the case as fairly and impartially as if he had heard nothing about it.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461-479, 497; Dec. Dig. § 103.\*]

**4. CRIMINAL LAW (§ 1124\*)—APPEAL—RECORD—REVIEW.**

The refusal of a motion for new trial on the ground of misconduct of the jury cannot be reviewed; the evidence heard on the motion not being included in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.\*]

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

Steve Havard was convicted of manslaughter, and appeals. Affirmed.

Mantooth & Collins and E. B. Robb, all of Lufkin, for appellant. Beeman Strong, of Nacogdoches, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the state penitentiary. This is the second appeal in this case, the opinion on the former appeal being reported in 55 Tex. Cr. R. 213, 115 S. W. 1185, and we do not deem it necessary to again make a statement of the evidence.

[1] In the first bill appellant complains of the action of the court in overruling his application for a continuance. In approving the bill the court states: "This bill of exception was presented to me on February 24, 1914, for my approval, and after being examined by me is approved with the following qualification: The indictment in this case was returned in the year 1907, and since the returning of the indictment the case has been tried four times, including this trial, and has been continued by agreement a number of

times; and the state having contested the diligence as to the witnesses named in this bill of exception, I found upon examination of the record that the defendant had not used the diligence required by law to secure the attendance of those witnesses." The appellant accepts the bill as thus qualified. No process is attached to the motion for a continuance, and none included in the bill, and under such circumstances, the court finding that diligence had not been used to secure the attendance of the witnesses, the court did not err in overruling the application.

[2, 3] In the next bill it is contended that the court erred in not sustaining appellant's challenge for cause as to Mr. Baird, who was on the jury panel. Appellant peremptorily challenged this juror, and he did not serve on the jury, and no sufficient reason is stated why any man who served on the jury was prejudicial to appellant, and this bill for this reason presents no error. In addition, in approving the bill the court states: "This bill of exception was presented to me on the 24th day of February, 1914, for my approval, and after having been examined by me it is approved, with the following qualification: The juror T. B. Baird, in answer to questions propounded, stated that the opinion he had was formed from hearsay, and not from discussing the case with any witness or witnesses in the case, and he stated that he could, and if taken upon the jury would, entirely disregard said opinion and try the case under the law and evidence, and that he felt no hesitancy in stating that he could try the case as fairly and impartially to both the state and the defendant as if he had heard nothing whatever about the case." As thus qualified, Mr. Baird, under the Code, was a qualified juror.

[4] In another bill it is shown that appellant contends that the court erred in not granting a new trial on account of the misconduct of the jury. The court, in approving the bill, shows that he heard evidence on the motion for a new trial and overruled it. This evidence is not included in the bill, nor is it included in the record in any manner, shape, or form. Without the evidence it is impossible for us to tell whether or not the court erred in the premises. Patterson v. State, 63 Tex. Cr. R. 297, 140 S. W. 1128; Probest v. State, 60 Tex. Cr. R. 608, 133 S. W. 263; Vick v. State, 159 S. W. 56; Sharp v. State, 160 S. W. 369; Matthews v. State, 160 S. W. 1185, and cases cited. In addition to no evidence being included in the bill, we are inclined to the opinion that, in the case of Arnwine v. State, 54 Tex. Cr. R. 213, 114 S. W. 796, had the evidence been included in the record, and it left questionable whether or not the affidavits attached to the motion presented the matter correctly, the law has been decided adversely to appellant's contention, as he received the lowest penalty for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

manslaughter. Anyway, as the evidence is not included in the record, we cannot review the matter.

No objection was made to the charge as given during the trial of the case, and none is made in the motion for new trial, other than that the court erred in failing to give some special charges requested by appellant. In so far as these charges are the law, the court's charge fully covered same, and the judgment is affirmed.

DAVIDSON, J., absent at consultation.

**TAFOLLA v. STATE.** (No. 2,846.)  
(Court of Criminal Appeals of Texas. May 6, 1914.)

**COSTS (§ 817\*)—IN CRIMINAL PROSECUTION—ON APPEAL.**

On affirmance of a conviction defendant's sureties were liable on the recognizance on appeal for costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1192-1195; Dec. Dig. § 317.\*]

Appeal from Bexar County Court.

Pete Tafolla was convicted of carrying a pistol, and he appeals. Affirmed. 161 S. W. 1091. Motion to withdraw and recall execution for costs. Motion denied.

Ed Haltom, of San Antonio, for appellant.

DAVIDSON, J. Upon a final disposition of the appeal in this case execution was issued by the clerk of this court to collect the cost incidental to the appeal. The mandate and execution were forwarded to the county from which the case was appealed, Bexar county. Appellant files a motion to withdraw and recall the execution for reasons stated in the motion; the general proposition being that his sureties are not responsible on the recognizance on appeal for costs. We deem it unnecessary to enter into any elaborate discussion of the question, as it has been several times heretofore decided, especially in the Arbuthnot Case, 38 Tex. Cr. R. 509, 34 S. W. 289, 43 S. W. 1024. See, also, Bonn v. State, 12 Tex. App. 100; Prater v. State, 54 Tex. Cr. R. 18, 111 S. W. 735. These cases decide the question adversely to appellant's contention.

On the authority of these cases the motion to recall the execution will be denied, and it is accordingly so ordered.

**BROWN v. STATE.** (No. 2944.)  
(Court of Criminal Appeals of Texas. April 22, 1914.)

**1. HIGHWAYS (§ 164\*)—OBSTRUCTIONS AND INJURIES—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.**

On a trial for willfully obstructing and injuring a public road, and causing it to be done, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 447-455; Dec. Dig. § 164.\*]

**2. HIGHWAYS (§ 163\*)—OBSTRUCTIONS AND INJURIES—CRIMINAL OFFENSES.**

Where accused, against the protests and objection of the properly constituted county authorities, undertook to determine for himself that a road properly constructed by such authorities was not properly constructed, and attempted to take the matter and the law into his own hands and construct it differently to suit his own desires, he was guilty of violating Penal Code 1911, art. 812, as amended by Acts 33d Leg. c. 128, making it a criminal offense to willfully obstruct or injure, or cause to be obstructed or injured, any public road or highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 444-446; Dec. Dig. § 163.\*]

**3. HIGHWAYS (§ 164\*)—OBSTRUCTIONS AND INJURIES—CRIMINAL PROSECUTIONS—PUNISHMENT.**

Under Penal Code 1911, art. 812, as amended by Acts 33d Leg. c. 128, providing that any person willfully obstructing or injuring any public road shall be fined not exceeding \$500, where accused, against the protests and objection of the properly constituted county authorities, cut a solid smooth gravel road, and put in a wooden culvert, thereby injuring and obstructing the road, and later commenced cutting the road at another point, a fine of \$50 was proper.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 447-455; Dec. Dig. § 164.\*]

**4. CRIMINAL LAW (§ 1090\*)—RESERVATION OF GROUNDS OF REVIEW.**

Under Old Code Crim. Proc. 1895, art. 717, authorizing either party to present instructions which the court shall either give or refuse with or without modification, article 719, providing that in misdemeanor cases the court need not charge the jury except at the request of counsel, but when so requested shall give or refuse such charges, with or without modification, as are asked in writing, and article 723, providing that a judgment shall not be reversed for violations of the eight preceding articles, unless the error was calculated to injure defendant's rights and was excepted to at the time of the trial, or on a motion for a new trial, in a misdemeanor case the giving and refusal of instructions cannot be considered, unless bills of exceptions are taken at the time in which the specific reasons why the court erred are given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

**5. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS COVERED BY THOSE GIVEN.**

It was not error to refuse special charges which, so far as necessary and proper, were embraced in the main charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**6. HIGHWAYS (§ 164\*)—OBSTRUCTIONS AND INJURIES—CRIMINAL PROSECUTIONS—EVIDENCE.**

On a trial for willfully obstructing or injuring a public road, in violation of Penal Code 1911, art. 812, as amended by Acts 33d Leg. c. 128, where accused claimed that he acted solely to protect his premises from backwater caused by the road, evidence that when a county commissioner sent word to accused declining to take any action, and stating that the road was not the cause of the water backing up, accused said: "It seems we have no commissioner, and no commissioners' court; just let's take the matter in our own hands and attend to it," and that when warned by a constable that he and those aiding him would be prosecuted, he replied, "Let's go ahead and cut it in five or six places anyhow,

and just let them prosecute"—was relevant on the question of willfulness.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 447-455; Dec. Dig. § 164.\*]

Appeal from Victoria County Court; J. P. Pool, Judge.

J. W. Brown was convicted of an offense, and he appeals. Affirmed.

J. L. Dupree and C. F. & C. O. Carsner, all of Victoria, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully and willfully obstructing and injuring, and causing this to be done, one of the certain public roads in said county, and fined \$50.

The record, practically without contradiction, except as hereinafter mentioned, shows this state of fact:

[1] About a year before September, 1913, Victoria county, by and through its properly constituted authorities, had graded and graveled said public road, making it a solid, smooth graveled road. The country thereabouts was flat, smooth country, except that at one point near a small town or village the road crossed a depression or drain. The county authorities put, at this place, a galvanized iron drain, about two feet in diameter, which was deemed sufficient. A day or two before September 18th a somewhat heavy rain fell in that country, and the water on both sides of this road was backed up considerably by a railroad embankment near, but below, this road culvert. The county commissioner, who for the county and by its authority had had said road constructed and was supervising it, was at said town, and, his attention being called thereto, he examined the situation, and found that the road was not backing up the water, but the backing up and lack of drainage was caused by said railroad embankment. The appellant's residence was several hundred yards above this road, and he, also nearer thereto than his residence, owned a tenant house, and he found that the water was backed up somewhat around his residence, and more so about his tenant house. He learned that said county commissioner was in the town on that occasion, and he had one of his neighbors to tell the commissioner that he and others wanted to see him about said backwater and ask him to fix some time after dinner to meet them. This friend interviewed the commissioner, as requested by appellant, and sought to make this engagement, but the commissioner told him that he had already examined the situation and found that the culvert under the road was amply sufficient to convey the water off, and was not the cause of the water being backed up about appellant's property, but was caused by said railroad, and that if they would get the railroad embankment removed, and the

culvert that he had was not sufficient, that he had another iron culvert on the ground, and he would put that in, or whatever was sufficient to properly convey the water away. As the commissioner could not wait to meet the appointment appellant sought, he left the town. After dinner the appellant, with others, met where he had sought the commissioner to meet them, and his friend reported his interview with the commissioner and the result thereof and what was told him by the commissioner. This angered appellant, and he thereupon said: "I do not consider that we have got any commissioner or any commissioners' court; they are not going to do anything; we will just take the matter in our own hands and cut it ourselves anyhow." Appellant testified he did not remember making any such statement. The others thereafter examined the ground, and substantiated what the commissioner had said as to the cause of the backwater and the claimed insufficiency of the culverts under the road. The commissioner also sent word at the time by appellant's friend, telling him and the others not to cut that road. Notwithstanding this, a day or two later, appellant bought, and with the assistance of others under his direction, on Saturday did cut the road and put a wooden culvert therein. The uncontradicted testimony shows, in effect, that the road thereby was injured and was obstructed. Some of the witnesses testified that the road, after it was thus cut by appellant and this wooden culvert put in, was not in good condition, describing how and why it was not, and stating that it was nothing like in as good condition after, as before. The appellant himself testified that at the ends where he put in the wooden culvert the road got boggy on each side, and he afterwards fixed it, saying: "Before I put in this culvert this was a solid gravel road. The road is not as smooth now as it was before I put in the culvert."

Just after appellant cut the road and put in this wooden culvert another heavy rain fell there. The railroad embankment likewise caused the water to back up substantially as it had a few days before in the first rain. On Tuesday or Wednesday after appellant had cut the road and put in this wooden culvert on the previous Saturday, the constable of the precinct saw appellant and others at another point on this same road about 100 yards from where he had previously cut it, prepared to again cut the road at that place. He thereupon went to where they were, inquired what they were going to do, and they told him they were going to put in a wooden culvert. He in effect forbade them to do so, and told them if they did he would arrest them. The constable thereupon went back to his place of business and at once communicated with the county judge and commissioners' court and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the said same commissioner who had this road in charge, and told them what appellant was in the act of doing again. They thereupon told the constable to inform appellant that he must not cut that road, and that if he did, all of them who participated would be prosecuted. The constable went back and delivered the message. The parties had just begun operations to cut the road again. Upon the delivery of the message appellant said to his associates: "Let's go ahead and cut it in 5 or 6 places anyhow, and just let them prosecute." Appellant denied saying all this, but said he did say at the time, "Let's go ahead and put in a culvert." Another one of his associates who was present at the time testified that appellant did say on this occasion, "Let's cut it anyhow."

[2, 3] We think the evidence is amply sufficient to sustain the verdict. The evidence tends to show, and we think with reasonable certainty does show, that the said road had been properly constructed by the regularly constituted and proper authorities of the county; that the appellant concluded it had not been, and he, against the positive protests and objection of the properly constituted authorities, undertook to determine for himself that the road was not properly constructed, and that he would take the matter and the law in his own hands and construct it differently to suit his own desires; that he knowingly, willfully, and intentionally violated the law, and that his acts, shown by his conduct and all the facts, were unjustified, and the punishment meted out to him was proper.

[4] He requested two special charges which the court refused. In his motion for a new trial he also had some complaints to the court's charge, but none of these matters are presented in such a way as to authorize this court to review them. As said by this court in *Giles v. State*, 148 S. W. 320: "It is the well-established law of this state that in misdemeanor cases the only way this court is authorized to consider complaints of the charge of the court and the refusal of special charges requested is by bill of exceptions taken at the time to the charge of the court in the matters attempted to be complained of, and to the refusal of the court to give the special charges requested, giving in the bill therefor the specific reasons why the court erred in giving the charge complained of, or, as the case may be, in refusing the requested charge. Articles 717, 719, 723, C. C. P. 1895 (Old); *Hobbs v. State*, 7 Tex. App. 118; *Campbell v. State*, 3 Tex. App. 33; *Goode v. State*, 2 Tex. App. 520; *Dunbar v. State*, 34 Tex. Cr. R. 596, 81 S. W. 401; *Downey v. State*, 33 Tex. Cr. R. 380, 26 S. W. 627; *Loyd v. State*, 19 Tex. App. 322; *Lucio v. State*, 35 Tex. Cr. R. 320, 33 S. W. 358; *Martin v. State*, 32 Tex. Cr. R. 442, 24 S. W. 512; *Wright v. State*, 60 Tex. Cr. R. 386, 131

S. W. 1070; *Jenkins v. State*, 60 Tex. Cr. R. 467, 132 S. W. 133; *Basquez v. State*, 56 Tex. Cr. R. 330, 119 S. W. 861. It is unnecessary to cite other cases."

[5] However, wherever necessary and proper to be given, the court in his main charge embraced all that was asked by appellant in his special charges and none of appellant's complaints of the court's charge present any reversible error, even if we could consider his complaints.

[6] He has two bills of exceptions to the introduction of evidence. One is to that part of the testimony of his friend whom he had to interview the commissioner, substantially recited above, that he himself replied: "It seems we have no commissioner and no commissioners' court; just let's take the matter in our own hands and attend to it." The other bill is to that part of the testimony of the constable of what he swore appellant said when he delivered the commissioners' court's message to the effect that he in reply thereto, said, "Let's go ahead and cut it in five or six places anyhow, and just let them prosecute." His objection to the first of these matters was that the testimony was irrelevant, immaterial, and not admissible for any purpose. And his objection to the other was because the same was irrelevant and immaterial, and not in any way connected with the act for which he was on trial, and did not show the commission of any offense and was inadmissible for any purpose. The law under which this prosecution was had (article 812, P. C., amended by Act of April 3, 1913, p. 258) requires that the state shall prove that the accused *willfully* obstructed or injured the road. Appellant claimed that he did not willfully obstruct or injure the road, but that his purpose and intention was innocent, and that if he obstructed and injured the road, he did so solely to protect his premises from backwater caused by said road. His intention, whether willful or innocent, was therefore a material question. This testimony which he objected to tended to show that what he did was willful and not innocent. Judge White, in section 1070 of his Annotated Code of Criminal Procedure, p. 676, among other things, says: "Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable. Whatever is a condition, either of the existence or of the nonexistence of a relevant hypothesis, may be shown. \* \* \* Evidence, though not bearing directly on the issue, nor sufficient per se to support a conviction, is admissible if it *tends* to prove the issue or constitutes a link in proof of it"—citing cases from this court in support of his propositions. Again, in section 1072, he says:

"However remote from the main issue in point of time, place, or other circumstances a fact may be, if relevant and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of the weight to the jury. \* \* \* Facts tending to show a motive (intent) though remote, are admissible in evidence," also citing cases from this court supporting his propositions. Again he says, in section 1231 of his Annotated Penal Code: "It is competent to prove acts, conduct, or declarations of the accused which tend to establish his knowledge or intent, though they, in themselves, constitute, in law, distinct crimes, and are apparently collateral and foreign to the main issue, and may have occurred either prior or subsequent to the act for which the accused is being tried"—citing again cases from this court supporting his propositions.

In our opinion the evidence objected to by said bills was admissible in this case.

The judgment will be affirmed.

DAVIDSON, J., absent at consultation.

#### STEELE v. STATE. (No. 3084.)

(Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied May 6, 1914.)

##### WEAPONS (§ 8\*)—OFFENSES.

Under the statute declaring that any person who shall carry on or about his person any pistol shall be punished, it is unlawful to carry a pistol, whether a new one or an old one, loaded or unloaded, or a good or an inferior one.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 7; Dec. Dig. § 8.\*]

Appeal from Nacogdoches County Court; Geo. F. Ingraham, Judge.

Roy Steele was convicted of carrying a pistol, and he appeals. Affirmed.

J. F. Perritte, of Nacogdoches, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for carrying a pistol. Appellant asked the court to charge that if the jury believed from the evidence beyond a reasonable doubt that the appellant did have a pistol, as charged, but "you further believe that the pistol was not in shooting condition, or if you have a reasonable doubt" of it, find him not guilty. He also complains of this paragraph of the court's charge: "If the defendant carried a pistol, it would not make any difference whether the pistol was an old one or a new one, or was loaded or unloaded. The law merely says that it is unlawful to carry a pistol, and makes no difference whether it was a good pistol or an inferior one, but it must be a pistol."

The court qualified appellant's bill complaining of this charge by stating: "That the witness Andrew Arriola testified, in

speaking of the gun: 'I felt something in his pocket, and pulled it out, and it was a pistol; was a common-looking blue pistol. It all seemed to be there, and as far as I know it was a whole pistol. It had hammer and all.' Tom Collins testified: 'Roy Steele and Cal Eddings' boy caught up with us. Directly Andrew came up to the wagon and said: "Look here! what I got," and showed us a pistol. -It was loaded, and the cartridges looked like they had been snapped on. It was loaded next morning when I looked at it. It was a pistol, and was an old-looking pistol, and had a hammer and trigger.' The defendant testified: 'I brought it to town with me and hid it in my slicker, and left it in my slicker until I started out, and then took it out and put it in my pocket.' The attempts to shoot the pistol were on the next morning, after the pistol had been thrown in the wagon the night before."

We think the court properly refused to give appellant's said special charge, and there was no error in giving the paragraph of his charge quoted and excepted to above. We do not regard Blackburn v. State, 58 Tex. Cr. R. 48, 124 S. W. 666, cited and relied on by appellant, as in point. The statute is: "If any person shall carry on or about his person *any* pistol, he shall be punished by fine," etc.

We think there is no error shown in the judgment of the court below, and it will be affirmed.

#### SAMPER v. STATE. (No. 3098.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

##### 1. CRIMINAL LAW (§ 1098\*)—APPEAL—STATEMENT OF FACTS—CONTENTS.

If the alleged libelous article is not contained in the statement of facts, in a prosecution for libel, the judgment of conviction will not be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865; Dec. Dig. § 1098.\*]

##### 2. LIBEL AND SLANDER (§ 155\*)—CRIMINAL RESPONSIBILITY.

It was not error, in a prosecution for libel, to permit proof of the meaning of the word "renegade," used in the libelous article, as the court could have legally defined the word in its charge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.\*]

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Carlos M. Samper was convicted of libel, and appeals. Reversed and remanded.

Greer & Hamilton, of Laredo, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of libel, and his punishment assessed at a fine of \$100.

[1] The complaint was based on an article

appearing in the *El Progreso*, of which appellant was the editor and manager. Mr. Valls testified that he took the clipping from a copy of the paper of date November 30, 1913, and translated it from Spanish into English, and the English translation is a correct and substantial translation of the Spanish; but nowhere in the statement of facts is the article copied in the record. It was doubtless introduced in evidence; but in making up the statement of facts it is omitted therefrom, and under such circumstances we would not be authorized to affirm the case. It is strange that material parts of the evidence adduced are often omitted from the record sent us; but such is frequently the case, and we hope that more care will be taken in the preparation of the statement of facts, and the officers see that it is correct before agreeing to it and permitting it to be filed.

The information we think is sufficient, and the court did not err in overruling the motion to quash it.

[2] Neither do we think the court erred in permitting the state to prove the meaning of the word "renegade." The court could have legally defined this word in his charge, and proof of its literal meaning would not present error.

The court's charge is not subject to the criticisms contained in appellant's objections thereto, and especially is this true when we take into consideration the two special charges given at appellant's instance and request.

The judgment is reversed, and the cause remanded.

### HODGES v. STATE. (No. 3093.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

#### 1. ASSAULT AND BATTERY (§ 54\*)—OFFENSES—AGGRAVATED ASSAULT.

Under Pen. Code 1895, art. 601, subd. 9, defining an aggravated assault as an assault, the assault must be committed with a fixed purpose, and not upon a rash impulse, though the length of time is immaterial if a fixed purpose appears, and the real injury inflicted is not material, except as it may tend to show that the means were calculated to inflict serious bodily injury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 75-78; Dec. Dig. § 54.\*]

#### 2. CRIMINAL LAW (§ 1173\*)—APPEAL—HARMLESS ERROR.

In a prosecution under Pen. Code 1895, art. 601, subd. 9, for aggravated assault, where both simple and aggravated assault were submitted, a failure to instruct upon the reasonable doubt in favor of defendant as between the two degrees, while of itself not error, was reversible error, where, had it been given, error in failing to give defendant's request that, if the difficulty arose from provocation arising at the time, he would not be guilty of aggravated assault would have been cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

#### 3. CRIMINAL LAW (§ 706\*)—TRIAL—MISCONDUCT OF STATE'S ATTORNEY.

In a prosecution in a prohibition county, the action of the prosecutor in asking each of defendant's witnesses if they had not been drinking that day, and if they had not drunk with defendant, and, though they denied it, failing to follow it up by affirmative testimony, was improper as an effort to prejudice the jury against defendant and some of his material witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1861; Dec. Dig. § 706.\*]

#### 4. ASSAULT AND BATTERY (§ 92\*)—ADMISSIBILITY OF EVIDENCE—CONDUCT OF DEFENDANT.

Evidence as to whether defendant had a bottle of whisky in his store that day, or had in fact taken a drink or two that day, without any contention that the assault occurred in the store, or that he was intoxicated at the time, was inadmissible.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.\*]

#### 5. CRIMINAL LAW (§ 1169\*)—ADMISSION OF EVIDENCE.

In a prosecution for assault in a prohibition county, error in the admission of evidence as to defendant's possession of whisky, and as to whether or not he had been drinking, was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

#### 6. ASSAULT AND BATTERY (§ 92\*)—ADMISSIBILITY OF EVIDENCE—ASSAULT BY ANOTHER PERSON.

In a prosecution for aggravated assault, that another person struck the person alleged to have been assaulted by defendant was immaterial, unless it was expected to show an acting together in the assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.\*]

Appeal from Collingsworth County Court; R. H. Cocke, Jr., Judge.

D. H. Hodges was convicted of an aggravated assault, and he appeals. Reversed and remanded.

Templeton & Templeton, of Wellington, W. F. Ramsey and C. L. Black, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. [1, 2] Appellant was prosecuted for committing an aggravated assault under subdivision 9 of article 601, Pen. Code 1895; the indictment charging that the assault was committed with "premeditated design and by the use of means calculated to inflict serious bodily injury." It is thus seen that, to constitute this offense under this provision of the Code, two things must combine: First, the assault must be committed upon "premeditated design"; that is, from a fixed purpose formed in the mind, and not upon a rash, inconsiderate impulse. It is true, the length of time is immaterial if the evidence shows a formed and fixed purpose and design. And, second, the assault under such circumstances must be committed by means calculated to inflict serious bodily injury. The real injury inflicted is not so



material, except in so far as it may tend to show that the means used were calculated and perhaps did inflict serious bodily injury. While the court submitted both simple and aggravated assault, yet he did not in the charge instruct the jury as regards the reasonable doubt in favor of defendant as between the two degrees; and while a failure to do this would not present error in and of itself alone, yet if he had so done, the error in failing to give appellant's special charge, in which he requested the court to charge the jury that, if the difficulty between appellant and Mr. Howell arose over provocation arising at the time, the defendant would not be guilty of an aggravated assault. The testimony offered in behalf of defendant raised the issue that he went to the place where Mr. Howell and another were engaged in a fight, not knowing who they were, and, when he approached, Mr. Howell accused him of inciting the fight between himself and Watkins, and the fight between appellant and the prosecuting witness grew out of this matter—a sudden quarrel, ill feeling already existing between them, and a fight with no premeditation. It is true that the state's evidence would sustain a finding that the assault was premeditated, and in a measure deliberate; yet, the issue being in the case, the court should have in some way clearly instructed the jury the distinguishing features between aggravated and simple assault under the section of law upon which the prosecution was based.

[3] As the case will be reversed, we will not discuss the testimony further than to say that the testimony is sufficient to sustain aggravated assault, if the jury should so find upon a fair submission of the issues; but we do not think the court should have permitted state's counsel to ask each witness for the defendant if they had not been drinking that day, and if they had not drunk with appellant. If the state had proposed to follow it up with testimony that they had drunk with appellant, when they denied it, and it was on account of their friendly relations with appellant they were testifying as they did, as affecting their credit, it might be admissible. Yet after asking these questions and eliciting that they had taken a few drinks that day, a matter with which appellant was in no way connected, and then ask them if they had not drunk with appellant, and, when denied, pursue it no further, would incline one to the opinion that it was but an effort to prejudice a jury, in a prohibition county, against appellant and some of his material witnesses.

[4, 5] Again we cannot see as to what issue in the case it was material as to whether or not appellant had a bottle of whisky in his store that day, as the fight did not take place in the store, nor near it; nor how it was material as to whether appellant had in fact

taken a drink or two that day. It is not contended that he was intoxicated at the time of the fight, nor so drunk he could not intelligently detail what occurred, nor that this fight grew out of or was about the drinking of any whisky. Appellant contends that all this testimony was calculated to prejudice the jury against him, and, from the amount of the punishment assessed, it seems that this, or some other circumstance not disclosed by this record, did cause them to assess a most unusual punishment for this character of offense, a fine of \$750. As under the facts in this case this testimony was inadmissible, and may have contributed to the punishment fixed, we cannot say it was harmless error, and on another trial it will not be admitted, unless the state expects in some way to connect it up with the transaction for which appellant is on trial. There are several bills relating to this matter, but we do not deem it necessary to discuss each of them.

It is useless to discuss the motion for a continuance, as appellant will have ample time to secure the attendance of the witnesses upon another trial.

[6] The fact that another person struck Mr. Howell would be immaterial, unless it is expected by circumstantial evidence or otherwise to show an acting together between the parties. Appellant would not be responsible for the acts of the third person, not named in the record, unless the law would make them principals in the assault. If it was intended to show that appellant did not inflict the injuries on the head, it might be admissible for that purpose; but appellant offered none of this testimony, and under the evidence before us it was inadmissible on behalf of the state, and the objections of appellant should have been sustained, and on another trial it will be excluded, unless the state expects to show that the parties were acting together in the assault on Mr. Howell.

We do not deem it necessary to discuss the other bills, as the matters herein ruled upon sufficiently applies the law to them, and on another trial the court will be governed thereby.

The judgment is reversed, and the cause remanded.

#### CHANT v. STATE. (No. 2903.)

(Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied May 6, 1914.)

##### 1. CRIMINAL LAW (§ 575\*)—SPECIAL TERMS—AUTHORITY TO CALL.

The district court, complying with Rev. St. 1911, arts. 1718-1726, has authority to call a special term for the trial of a murder case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1294-1296, 1377; Dec. Dig. § 575.\*]

##### 2. CRIMINAL LAW (§ 364\*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Where accused left the place where he killed decedent, and later in the night went to

the home of a third person and called a justice of the peace over the phone, his statements made to the third person and to the justice were inadmissible as self-serving declarations, and were not a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 864.\*]

### 3. CRIMINAL LAW (§ 957\*)—VERDICT—IMPEACHMENT BY JUROR.

A juror may not impeach the verdict, after it has been accepted by the court and the jury discharged, by proving that he yielded his judgment in an effort to agree with the other jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

### 4. HOMICIDE (§ 340\*)—INSTRUCTIONS—REVIEW.

Where accused was convicted of murder in the second degree, objections to charges on murder in the first degree will not be considered on appeal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

### 5. HOMICIDE (§ 309\*)—INSTRUCTIONS—MANSLAUGHTER.

Where accused and his sister went at night, armed, to the home of decedent, with the intent to take by force or stealth a daughter of the sister, who had eloped with and married a son of decedent, and during the difficulty accused shot decedent, and accused insisted that the killing was accidental, the issue of manslaughter was not raised, but the question was whether accused was guilty of murder in either degree, or of negligent or accidental homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

### 6. CRIMINAL LAW (§ 1059\*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

An exception that the court erred in failing to submit the law of manslaughter is too general to call for review of the question whether the evidence raised the issue of manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.\*]

### 7. HOMICIDE (§ 305\*)—EVIDENCE—INSTRUCTIONS.

Where accused accompanied his sister at night to the home of decedent to take, by force or stealth, the sister's daughter, who had eloped with and married decedent's son, and accused shot decedent while attempting to enter the home, and he claimed that the killing was accidental, the court, in submitting the issue of negligent homicide, properly charged on conspiracy by defining a conspiracy, and stating that each party to a conspiracy was responsible for any offense committed in furtherance of the common purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 637; Dec. Dig. § 305.\*]

### 8. HOMICIDE (§ 62\*)—"NEGLIGENT HOMICIDE" IN SECOND DEGREE.

Where accused engaged with another in the unlawful act of trying to take the wife away from the home of her husband by force or stealth, at night, and accused, in furtherance of the unlawful purpose, while trying to force himself into the house, killed decedent and accused claimed that his gun was accidentally discharged, he was guilty of negligent homicide of the second degree, within Pen. Code 1911, arts. 1113-1127.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 85; Dec. Dig. § 62.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4768.]

### 9. CRIMINAL LAW (§ 854\*)—SEPARATION OF JURY—GROUNDS FOR NEW TRIAL.

Where, during the trial of a homicide case, a juror became sick at night, and a physician was called to prescribe for him in the presence of an officer, and, with the consent of accused's counsel, he was placed on a cot in the court room while the other jurors were in the jury room, and, while he was lying on the cot, relatives saw him in the presence of the officer staying with him, there was no such separation of the jury as to authorize the setting aside of conviction, in the absence of anything improper occurring.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.\*]

Appeal from District Court, Edwards County; R. H. Burney, Judge.

Will Chant was convicted of murder in the second degree, and he appeals. Affirmed.

W. A. Morriss, of San Antonio, and Cornell & Wardlaw, of Sonora, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with the murder of Mary Connell, at the regular June term of the district court of Edwards county, 1913. Thereafter, on July 13th, Hon. R. H. Burney, judge of said court, called a special term of the district court of Edwards county to convene on August 11, 1913, for the trial and disposition of this and four other cases named in the order convening court, giving notice, etc., complying in every detail with the law authorizing special terms of the district courts to be held. Chapter 4, tit. 34, Rev. St. 1911.

[1] Appellant contends that the district court had no authority to call a special term of the district court, and that the arraignment and trial of him at this special term was unauthorized and void. This question has been passed on so often adversely to appellant's contention we deem it unnecessary to discuss it again. *Ex parte Young*, 49 Tex. Cr. R. 536, 95 S. W. 98; *Ex parte Boyd*, 50 Tex. Cr. R. 309, 96 S. W. 1079; *McIntosh v. State*, 56 Tex. Cr. R. 134, 120 S. W. 455; *Boyd v. Texas*, 209 U. S. 539, 28 Sup. Ct. 570, 52 L. Ed. 917.

[2] Appellant, after he had shot and killed Mrs. Connell, intentionally, as contended by the state, or accidentally, as contended by him, left the place where the killing occurred, and later in the night went to the home of Frank Kelly and called Mr. Miller, justice of the peace, over the phone, and talked to him, and he desired to prove by witnesses what he then said to the justice of the peace about the homicide, which testimony was objected to by the state on the ground that it was self-serving, and not *res gestæ* of the transaction. The court did not err in sustaining the objection, for it would have been but a self-serving declaration, and took place so long after the difficulty and under such circumstances as not to come within the rule governing *res gestæ* statements; in fact, ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pellant does not contend that it does, and in the bill nor in the brief does he state upon what grounds he believed the testimony should be admitted, he merely stating that he excepted to the ruling of the court in sustaining the objection of the state. For the same reasons the statement made to Frank Kelly at the same time and place would not be admissible. However, in the record it appears that later the court did permit Mr. Kelly to testify what appellant told him on that occasion.

[3] The only other two bills of exception in the record relate to the refusal of the court, on hearing of the motion for a new trial, to permit jurors Clark and Crausbay to testify that they, in fact, believed appellant's theory of the case, and that they agreed and consented to the verdict rendered, and yielded their judgment in an effort to compromise and agree with the remainder of the jury. A juror is not permitted thus to impeach his verdict after it has been rendered and accepted by the court, and the jury discharged.

[4] As appellant was convicted of murder upon implied malice, or, as formerly defined, murder in the second degree, we will not notice those portions of the motion for new trial and objections to the charge relating solely to those parts of the charge defining and submitting murder upon express malice, or murder in the first degree.

[5] The evidence in this case did not call for a charge on manslaughter. The facts would show that Will Connell, a son of deceased, eloped with and married Ruby Wilson, a daughter of Mrs. Mollie Wilson. After the marriage Mrs. Wilson, in some way, secured possession of her daughter, and carried her to San Antonio. Will Connell's father went to San Antonio, and Ruby returned with him, and she and Will Connell resumed their relations as husband and wife. When the district court of Edwards county convened some weeks later, Mrs. Wilson accompanied by her brother, appellant, Will Chant, went to the county seat and sought the district attorney in an effort to have Will Connell indicted for swearing falsely to obtain marriage license. She was informed by the district attorney that the grand jury would not indict Will Connell, and that, if they did, under the evidence, so far as he knew, he could not obtain a conviction, and he says he advised her to let the matter drop. She asked if the marriage could not be annulled, and he declined to advise her, and referred her to other attorneys. The only difference in the testimony for the state and defendant up to this point is that the defendant claims that the district attorney told Mrs. Wilson the marriage could be annulled. But, be this as it may, no proceedings were instituted to annul the marriage, and no other attorney visited by Mrs. Wilson that day, but she and her brother, appellant, left the county seat to return to their home. After getting to the house of appellant, he got out,

and Mrs. Wilson went over to her home. Some time later appellant leaves his home, goes by the residence of his half-brother, Luther Roberts, and borrows a Winchester rifle and a box of cartridges, and then goes to the home of Mrs. Wilson. The state's testimony shows: That later in the night, after the Connell family had retired and was asleep, Mrs. Wilson appeared in the room in which Will Connell and his wife, Ruby, were sleeping, with a shotgun loaded with buckshot. The noise she made awoke Will Connell, who sprang out of the bed and grabbed the gun by its barrels, and he and Mrs. Wilson began a scuffle for the possession of the gun, when Mrs. Connell called: "Will, come here." Mrs. Mary Connell, and her daughter, Allie, had been awakened by this time, and, as appellant came running to the door, he was met by Mrs. Mary Connell, Mrs. Ruby Connell, and Miss Allie Connell, who would not let him enter the house, and told him that Will Connell was not going to hurt Mollie. That appellant, Will Chant, then caught hold of Mrs. Mary Connell, jerked her out of the door, and off the gallery, and then shot her. We do not deem it necessary to go into further details.

Appellant admits that he went to the home of Mrs. Wilson that night, and went by Luther Roberts and got his gun; however, he says that Mrs. Wilson was moving to his home, and he went there to get the remainder of the chickens, and, as they were wild, he got the gun and carried it to kill the chickens, as some of them were wild; that he knew nothing of Mrs. Wilson's intention to go to the Connell home that night until he arrived at her home, when he tried to dissuade her from going that night, but she insisted on going, and he thought it his duty to go with her; that on the way to the Connell home he again tried to get her to wait until the next day, when he would go with her in an effort to get Ruby to return to her mother, but Mrs. Wilson would not consent, saying if she could get her hands on Ruby she would come. They went to the Connell house, and he stopped a piece from the house, his sister going on in the house. He then heard her call, "Will, O Will, come here; they are killing me;" and he ran to the house, where he was met by Mrs. Mary Connell, Ruby, and Allie, and Mrs. Mary Connell pushed him back out of the house and off the gallery, and, as she did so, he stepped on something that caused him to stagger, when the gun was accidentally discharged. However, on cross-examination, he admitted that, after this shot, he fired intentionally a second time at what he took to be a fleeing person.

It is thus seen that the state's evidence would make a plain case of Mrs. Wilson and appellant arming themselves, and, in the dead hours of night, visiting the home of the Connells, with the intention of by force taking the wife of Will Connell away from him; that, while Mrs. Wilson went in the house,

he stopped outside to watch, and when she called he rushed in to take part in the unlawful mission, and, being denied admittance, he jerked the older of the ladies, Mrs. Connell, out of the door and killed her, and, as the Connells fled, he took a shot at what he thought was one of the fleeing Connells, and, if this state of facts is found by the jury to be true, it presents the issue of murder, and murder alone. Appellant's contention is that he went unwillingly, trying to dissuade his sister, and stopped outside, not to watch, but only to wait until his sister performed her mission, and then escort her and Ruby home, if she succeeded in getting Ruby, and he only went to the house in answer to her call; that the killing was purely accidental, and the gun discharged by him stumbling when pushed back by Mrs. Mary Connell. This evidence presents accidental homicide, and the testimony as a whole also presents the issue of negligent homicide, both of which were submitted by the court to the jury, and under no theory is the question of intentional shooting under the influence of sudden passion, etc., produced by an adequate cause, presented; therefore the court did not err in failing to charge on manslaughter.

[6] No special charge was asked in regard to this matter, and the only way it is raised is in the general way: "The court erred in failing and refusing to submit to the jury the law of manslaughter." This has been held to be too general to bring the question before us for review; however, as hereinbefore shown, we have fully considered it, and hold that the court did not err in so doing.

[7] The main complaints as to the charge are directed at the following paragraphs: "You are instructed that by the term 'conspiracy,' as hereinafter used in these charges, is meant a combination and agreement between two or more persons to commit a crime or to do some other unlawful act, the furtherance and carrying out of which will reasonably and probably result in the commission of an offense, and all parties uniting or acquiescing in such agreement and combination are conspirators, and each party to any such conspiracy is responsible in law for the acts of his coconspirators, or for any offense which may be committed by any party thereto in the furtherance of a common design or purpose of the conspiracy, or that which is necessarily incident to and grows out of such common design, and follows as one of its natural and probable consequences. A conspiracy may be established by either direct or circumstantial evidence, or both, and it is not necessary, in order to warrant a finding that a conspiracy existed, for the state to show that parties thereto ever actually, in fact, entered into a formal agreement to commit the unlawful act; it is sufficient if the evidence satisfactorily shows the performance of different acts and parts of a co-design to acquiesce in and done in the fur-

therance thereof." It is contended that the evidence does not authorize a charge on conspiracy to commit an unlawful act. We do not think any one can contend that the act admitted and shown to have been the object of this night visit to the Connells was not an unlawful one; the object was to, by stealth or force, take the wife of Will Connell, Ruby, away from him. They had that day visited the county seat for the purpose of attempting to send Will Connell to the penitentiary and thus separate them, and, failing in this, if for any reason the marriage could have been annulled, instead of taking legal steps to do so, the evidence would at least circumstantially show that they determined to take the law into their own hands, and by stealth or force take Connell's wife away from him, and the dark hours of night selected to accomplish this purpose. While appellant would by his testimony show an innocent participation therein, yet the facts and circumstances introduced by the state would authorize a jury to find that his explanation of his acts on this occasion is an afterthought. It was necessary to give this definition that the court's charge on negligent homicide could be intelligently understood by the jury, and this charge, too, the court properly submitted, and appellant's contention that no such issue was raised cannot be sustained.

[8] Even if the gun was accidentally discharged, if he and his sister were engaged in the unlawful mission of trying to take Connell's wife away from the home of her husband by stealth or force, one being armed with a rifle and the other with a shotgun loaded with buckshot, and, in the furtherance of that unlawful purpose, while he was trying to force himself in the house, his gun was accidentally discharged, this would bring the case within the purview of chapter 14, tit. 15, of the Penal Code, defining negligent homicide of the second degree. If the court had not submitted that issue, appellant would have just cause of complaint, for he would then have contended that, as the facts showed he was accompanying his sister on an unlawful mission, the jury would not likely be willing to relieve from all punishment the person who had taken the life of a woman against whom neither of them had cause for complaint, and the court ought to have given them an opportunity to assess against him this minor punishment.

As to appellant's contention that he in no wise aided or encouraged his sister in this unlawful mission, and that the killing was purely accidental, while he was guilty of committing no unlawful act nor attempting to do so, the court fully and fairly submitted that theory of the case to the jury, and they find against him. The court instructed the jury: "Homicide is excusable under the law when the death of a human being happens by accident, though caused by the act of another who is in the prosecution of a lawful

object by lawful means. If, therefore, you find from the evidence that on or about the time alleged in the indictment, in Edwards county, Tex., one Mollie Wilson, for the purpose of taking her daughter, Ruby Connell, away from her husband, Will Connell, went to the house where the said Will Connell was living, and you further find that the defendant Will Chant followed her to the said premises for the purpose of trying to persuade her, the said Mollie Wilson, not to attempt to take the said Ruby Connell, or even if you find that the said Mollie Wilson, went there for the purpose of killing Will Connell, but that the defendant did not enter into any agreement to assist her in any such unlawful purpose, but merely followed her for the purpose of trying to persuade her to desist from any such unlawful purposes, if any, and that, failing in this, he stopped outside of the premises where the said Will Connell and his wife were staying, and that thereupon the said Mollie Wilson went into the house where the said Will Connell and his wife were staying, and thereupon a struggle ensued between the said Mollie Wilson and said Will Connell over a gun, which the said Mollie Wilson was armed with, if any, and, while engaged in said struggle over the possession of the said gun, if any, between the said Mollie Wilson and the said Will Connell or others, the said Mollie Wilson called to the defendant to come to her assistance, and that thereupon the defendant rushed to the scene where the struggle was taking place, and that, after reaching there, and while attempting to go to where the said Mollie Wilson was, the defendant unintentionally and accidentally discharged his gun and shot and killed the said Mary Connell, then, in case you so find the facts to be, or if you have a reasonable doubt thereof, you will acquit the defendant, and say by your verdict 'not guilty.'" Not only did they find against him on this contention made by him, but they find evidently, knowing the unlawful mission of Mrs. Wilson, he aided and abetted her therein, and that, while the killing of Mrs. Mary Connell was not a part of the mission, yet, in an attempt to take Mrs. Ruby Connell away from her home, appellant intentionally killed Mrs. Mary Connell; for they find him guilty of murder, and assess his punishment at ten years' confinement in the penitentiary, and the evidence offered by the state supports such a finding. The other criticisms we do not deem it necessary to discuss.

[9] During the trial jurymen Crausbay became sick, and at night a physician was called, who prescribed for him in the presence of an officer. The next morning he was too unwell to proceed with the trial, and he was laid on a cot in the court room, while the other jurymen were in the jury room. This was agreed to by appellant's counsel. While he was lying on the cot, his aunt, Miss Winn,

in the presence of the court and sheriff, approached the cot, inquired as to his condition, and offered to prepare him something to eat. Later Miss Winn returned with a bowl of soup and gave it to him in the presence of the officer staying with him. Appellant, in his motion for new trial, complains of all these matters, and the court heard evidence thereon. We have read this testimony, and hold, as did the trial court, that nothing improper occurred, and that this was not such a separation of the jury as would authorize a reversal of the case. In the afternoon the jurymen were able to proceed with the trial, and it is not asserted nor contended by appellant this influenced his action as a jurymen, or that anything improper was said, and the evidence, and all the evidence, shows that not to be the facts.

The judgment is affirmed.

### EDWARDS v. STATE. (No. 3063.)

(Court of Criminal Appeals of Texas. April 22, 1914.)

#### 1. INDICTMENT AND INFORMATION (§ 137\*)—MOTION TO QUASH—EVIDENCE BEFORE GRAND JURY.

The character of testimony or the quantum of proof had before the grand jury cannot be inquired into on motion to quash the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.\*]

#### 2. BIGAMY (§ 9\*)—EVIDENCE—MARRIAGE LICENSE AND RETURN.

An original marriage license, with the return thereon showing the marriage, having been filed and recorded in the county clerk's office, according to law, is admissible on a prosecution for bigamy; it having been filed with the papers in the case, and a copy thereof served on defendant at the previous term.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 34-53; Dec. Dig. § 9.\*]

#### 3. WITNESSES (§ 268\*)—CROSS-EXAMINATION. Cross-examination of a witness for defendant in bigamy, his alleged second wife, held legitimate on the issue of whether or not she was married to defendant by a certain person on a certain date.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

#### 4. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—ASSUMING FACTS.

The charge in bigamy, that if the jury find and believe from the evidence that on a certain date defendant married G., and then and there had a former wife, Y., then living, and that said former marriage had been lawfully solemnized, does not assume as a fact the former marriage, leaving to the jury only the question of it having been lawfully solemnized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771, 1853; Dec. Dig. § 761.\*]

#### 5. CRIMINAL LAW (§ 841\*)—INSTRUCTIONS—TIME FOR OBJECTION.

Under the present law, objections to the charge must be made at the trial, when it is submitted to counsel, and cannot be made for the first time in the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2022; Dec. Dig. § 841.\*]

# 6. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ISSUES.

A charge as to defendant in bigamy having been divorced from his first wife at the time of the second marriage is uncalled for; there being evidence only of divorce subsequent thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1885, 1890, 1924, 1979-1885, 1987; Dec. Dig. § 814.\*]

Appeal from District Court, Dickens County; Jo A. P. Dickson, Judge.

Earnest E. Edwards was convicted of bigamy, and appeals. Affirmed.

Woodruff, Christian & Woodruff, of Sweetwater, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of bigamy; his punishment being assessed at two years' confinement in the penitentiary.

[1] In the first bill of exceptions it is shown that appellant moved to quash the indictment on the ground that Mrs. Nora Edwards, who was alleged to be the first wife of defendant, was permitted to testify before the grand jury. It has been so often held that the courts will not inquire into the character of testimony, nor the quantum of proof had before the grand jury, we do not deem it necessary to discuss this question. *Morrison v. State*, 41 Tex. 516; *Dockery v. State*, 35 Tex. Cr. R. 489, 34 S. W. 281; *Chapman v. State*, 49 S. W. 587; *Buchanan v. State*, 41 Tex. Cr. R. 127, 52 S. W. 769; *Crain v. State*, 14 Tex. 634; *Terry v. State*, 15 Tex. App. 66; *Jacobs v. State*, 35 Tex. Cr. R. 410, 34 S. W. 110; *Kingsburg v. State*, 37 Tex. Cr. R. 264, 39 S. W. 365; *Choice v. State*, 114 S. W. 137. In these cases, especially in the cases of *Dockery* and *Buchanan*, *supra*, the very question here presented is passed upon. That the indictment in this case was sufficient to charge the offense, and not subject to any of the objections urged by appellant, is shown by the decisions of this court in the following cases: *Esser v. State*, 66 S. W. 776; *May v. State*, 4 Tex. App. 424; *Bryan v. State*, 54 Tex. Cr. R. 19, 111 S. W. 744, 16 Ann. Cas. 515; *Vinsant v. State*, 42 Tex. Cr. R. 413, 60 S. W. 550; *McAfee v. State*, 38 Tex. Cr. R. 127, 41 S. W. 627. The insistence of appellant that these cases should be overruled cannot be sustained, for appellant by the indictment is sufficiently informed of the offense for which he must stand trial.

[2] The next objection of appellant, as shown by bill of exceptions No. 2, is to the introduction of the marriage license, and return thereon, wherein it is shown that appellant on the 1st day of February, 1906, was married to Miss Nora Youngblood—his first wife. The license introduced in evidence was the original license, with the return thereon. It shows that appellant was

married to Miss Youngblood on February 1, 1906, by G. W. Goin, M. G., and had been returned to the county clerk and duly recorded on the 16th day of February, 1906. It had been filed with the papers in the case, and appellant served with a copy thereof at the previous term of the court. The court did not err in admitting the original license and return thereon in evidence under the facts in this case, as it had been duly filed and recorded in the office of the county clerk in accordance with the provisions of law. In addition to this, this marriage of appellant was amply proven by a brother of his first wife, who witnessed the ceremony.

[3] The state also introduced the marriage license and the return thereon showing that appellant was married to Miss Hattie Green on the 8th day of August, 1908; W. C. Ballard, county judge, performing the ceremony. Judge Ballard was dead at the time of this trial, but the county clerk and Misses Willie Ballard and Lois Jay testified to the issuance of the license, and the second marriage. Appellant then introduced his second wife, née Miss Hattie Green, who at his instance testified: "My name is Mrs. Earnest E. Edwards. This defendant, Earnest E. Edwards, is my husband. I will state that on or about the 8th day of August, 1908, in Dickens county, Tex., or at any other time, W. C. Ballard as county judge of Dickens county, Tex., did not perform a marriage ceremony between myself and my husband, Earnest E. Edwards." The state on cross-examination was permitted to elicit the following testimony from her: "Mr. Edwards and I have lived together as husband and wife since Saturday, this last Saturday. I have two children by Mr. Edwards. They are something over two years old. Both of them are living. I only have two by him, and they are both the same age; they are twins. There is no children dead. I think we were living in Ft. Worth when this first child was born; I do not remember the year. I only have two children, and they are twins. I think I was here in Dickens August 8, 1908, with Earnest E. Edwards, and I occupied the same room with him that night at the hotel; but we were not joined in marriage that night by Judge Ballard, but I did occupy the same room with him. I occupied the same room with him when I was not married because it suited me. I do not remember how long we lived together after that, nor do I remember the places. Mr. Edwards showed me some license that evening, I think the ones he got here for me and him to marry. Then I went with him to Judge Ballard's. He showed me some license for us to marry, and we went to Judge Ballard's, and he came out, but he did not perform the ceremony for me and him. It was performed last Saturday at Haskell, Tex. He did not use those marriage license I saw here at all. I did go

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with him over to Judge Ballard's, and went to get married, and the reason we did not get married he said there was not any witnesses present and he could not legally marry us. The folks at his home that night were all in bed. The marriage ceremony was not performed that night. There was no marriage ceremony between us until last Saturday. We got the license at Haskell, Tex., and as well as I remember the county judge married us; but I have forgotten his name. Before I was married to Mr. Edwards, my name was Hattie Green. After we left here that morning we went to my sister's after that some time. While I was there at my sister's in Stonewall county, it seems like I did see the sheriff of Stonewall county. At that time I do not remember telling him that in Dickens county, or Dickens, I had been married to Mr. Edwards and that Judge Ballard married us." This was legitimate cross-examination on the issue of whether or not she was married to appellant by Judge Ballard on August 8, 1908, and the court did not err in so holding.

[4] This case was tried in December, 1913, after the law requiring that objections shall be made in writing to the charge at the time of the trial had become effective. The charge was submitted to appellant and his counsel before being read to the jury, and the only objections made to it are as follows: "That said former marriage of the said Earnest E. Edwards to the said Nora Youngblood had been lawful in Knox county, Tex., on the 1st day of February, A. D. 1906, as alleged, for the reason that said paragraph of said charge, and in that part of said paragraph of said charge as hereinafter quoted, and the court assumed and virtually told the jury that the defendant, Earnest E. Edwards, married Nora Youngblood in Knox county, Tex., on the 1st day of February, 1906, and that he instructed said jury in effect that if they believed the marriage was lawful that they should find the defendant guilty as alleged in the indictment. Defendant further excepts to said paragraph of said charge of the court, because it is upon the weight of the evidence, and in effect tells the jury that defendant was married to Nora Youngblood in Knox county, Tex., on the 1st day of February, 1906, which fact the state had not proven, and the court's reference thereto is calculated to lead the jury to believe that in the court's mind said marriage had been proven." The charge is not subject to this criticism, for the court instructed the jury that: "If you find and believe from the evidence beyond a reasonable doubt that the defendant, Earnest E. Edwards, on or about the 8th day of August, A. D. 1908, in the county of Dickens and state of Texas, did marry Hattie Green, and the said defendant, Earnest E. Edwards, then and there had a former wife, to wit,

Nora Edwards, formerly Nora Youngblood, before her alleged marriage to the said Earnest E. Edwards, and that she, the said alleged former wife, was then and there living at the time of the alleged marriage of the said Earnest E. Edwards to the said Hattie Green, and that said former marriage of the said Earnest E. Edwards to the said Nora Youngblood had been lawfully solemnized in Knox county, Tex., on the 1st day of February, A. D. 1906, as alleged, you will find the defendant, Earnest E. Edwards, guilty as alleged in the indictment, and assess his punishment at confinement in the penitentiary for not less than two nor more than five years."

[5, 6] While in the motion for a new trial appellant complains of the charge in other respects, and of the failure of the court to give some special charges requested, the law as written for the government of this court provides that objections to the charge must be made at the time it is submitted to counsel, and complaint can no longer be made for the first time in the motion for a new trial. However, we are of the opinion that the charge as given is not subject to the criticisms of appellant. While it is true that the special charges requested submitted an issue not included in the court's charge, that is, if appellant had been divorced from his first wife at the time of his marriage to Hattie Green, he would be guilty of no offense. This is the law, and if the evidence had called for a submission of that issue it would have been error not to do so. The evidence shows that he married Hattie Green August 8, 1908, while the divorce proceedings were not instituted by his first wife until in the year 1913, between four and five years after he was married to the second wife by Judge Ballard, if he married them, and under such circumstances no such charge was called for by the evidence.

The judgment is affirmed.

DAVIDSON, J., absent at consultation.

CUNNINGHAM v. STATE. (No. 2994.)  
(Court of Criminal Appeals of Texas. April 22, 1914.)

1. DISORDERLY HOUSE (§ 16\*)—EVIDENCE—ADMISSIBILITY.

On a trial for keeping a disorderly house, evidence that some time before the date of the alleged offense accused had beer in an ice box in such house, and that parties were drinking beer there, was admissible.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 21-25; Dec. Dig. § 16.\*]

2. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The erroneous admission of testimony is not cause for reversal, where other testimony to the same effect is not objected to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

### 3. CRIMINAL LAW (§ 1137\*)—REVIEW—INVITED ERROR.

Accused could not complain of the answers of the witness in direct response to her own questions on his cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

### 4. CRIMINAL LAW (§ 1120\*)—APPEAL—BURDEN OF SHOWING ERROR.

On a trial for keeping a disorderly house, the admission of evidence that an officer stated to a witness that there was something crooked there, referring to accused's place, was not ground for reversal, where the bill of exceptions did not state facts from which it could be intelligently determined whether or not it was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.\*]

### 5. WITNESSES (§ 321\*)—IMPEACHMENT—IMPEACHING OWN WITNESS.

On a trial for keeping a disorderly house, the court properly refused to permit accused to impeach her own witness as to the man whom he saw in bed with accused, especially as it was immaterial; it appearing without question that two men were caught in bed with accused and another woman.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. § 321.\*]

### 6. CRIMINAL LAW (§ 811\*)—INSTRUCTIONS—SINGLING OUT TESTIMONY.

On a trial for keeping a disorderly house, an instruction that, even if the jury believed, beyond a reasonable doubt, that on occasions before the filing of the complaint and information two men named were at the house and in rooms with women, each of whom were prostitutes, and had gone there for the purpose of engaging in illicit sexual intercourse, yet if the jury had a reasonable doubt as to whether defendant knew of their presence, they could not convict defendant for the acts of such parties, was properly refused, as it is not proper to single out any part of the testimony and charge thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

### 7. CRIMINAL LAW (§ 834\*)—INSTRUCTIONS—BAD IN PART.

On a trial for keeping a disorderly house, where one paragraph of a requested instruction was improper, the court was under no obligation to modify it by striking out such paragraph, and giving the other, even if the other paragraph was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.\*]

### 8. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS COVERED BY THOSE GIVEN.

On a trial for keeping a disorderly house, an instruction that accused could not be convicted, unless the jury believed, beyond a reasonable doubt, that she knowingly permitted prostitutes to resort and reside to such house for the purpose of plying their vocation, or unless she kept such house for the purpose of prostitution, was sufficiently covered by instructions requiring her conviction, if the jury believed, beyond a reasonable doubt, that she unlawfully kept, or was concerned in keeping, a house where prostitutes were permitted to resort or reside for the purpose of plying their vocation, or as a house kept for the purpose of prostitution, that the burden of proof was on the state, that accused was presumed to be innocent until her guilt was established by legal

evidence beyond a reasonable doubt, and that proof that the house had the reputation of being a house of prostitution was not sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

### 9. DISORDERLY HOUSE (§ 20\*)—INSTRUCTIONS.

On a trial for keeping a disorderly house, an instruction that the jury must believe, beyond a reasonable doubt, that accused unlawfully and knowingly permitted prostitutes to resort or reside in such house for the purpose of plying their vocation, or that she unlawfully and knowingly kept such house for the purpose of prostitution, and in order to convict, and that though they believed that prostitutes did resort or reside there for such purpose, they could not convict, unless they believed, beyond a reasonable doubt, that accused had knowledge of their character, and knowingly permitted them to ply their vocation there, was properly refused, since it is necessary only for the state to prove such facts as would put her upon notice and inquiry which, if followed up, would result in knowledge.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. § 31; Dec. Dig. § 20.\*]

Appeal from Dallas County Court at Law; W. F. Whitehurst, Judge.

Hattie Cunningham, alias Mackey, was convicted of keeping a bawdyhouse, and she appeals. **Affirmed.**

El. J. Gibson, of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for keeping a bawdyhouse, and the punishment prescribed by law assessed against her.

Our statute (article 500, P. C.) is that any person who shall directly keep a bawdyhouse in any house, or shall knowingly permit the keeping of a bawdyhouse in any house, owned, leased, occupied, or controlled by him, shall be deemed guilty of keeping or knowingly permitting to be kept, as the case may be, a bawdyhouse, and on conviction shall be punished, etc. A bawdyhouse is defined (article 496, P. C.) as one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation.

The uncontradicted evidence shows that appellant was running, keeping, and had been running and keeping since some time in November, 1912, the upstairs of a certain house, containing several rooms, which was the second story over a saloon in Dallas; that she resided there herself during all this time and up to August 14, 1913, the date she is charged with this offense; that said upstairs had a back, or rear, and a front entrance. Several police officers testified that they knew the general reputation of appellant and of said house while she kept it, and that her general reputation was that of a prostitute, and that her said house had the reputation of being kept as a house of prostitution. She neither denied that her house had that reputation, nor that she did not know that it had such reputation. Some of the officers also testified that very late on the night of July 1, 1913, they caught Byron



Dunlap and Laura Harris in bed together in one of these rooms. The woman was undressed, and the man had on his nightdress. These officers swore that this Harris woman's general reputation was that of a common prostitute, and that she had formerly been in the old "Reservation"; that on this occasion, when they caught these two parties, they aroused the appellant, and at the time she and a man by the name of Loving were together in another one of the rooms; that, when they aroused her and Loving, Loving said to them, "We have got you beat this time;" appellant took it all as a joke; that she and Loving had a pillow on the floor, and the officer felt it, and it was warm, as if somebody had been lying on it. Among other inmates of the house was a Mrs. Young. Some of the witnesses testified that they knew her general reputation for virtue and chastity, and it was bad. Also among other inmates of the house was a Mrs. Tulloss. She stated to one of the officers that the house was getting such a bad name she was going to get another place to stay. Another of the women who was found there was Mrs. Riley, and she told the officers that her husband would kill her if he found she was there. On another occasion at night the officers found a woman, Flossie Thompson, in one of the rooms with a man, and she was partially undressed at the time, and considerably under the influence of liquor, if not drunk, and that at the time they found a lot of empty beer bottles lying around in the room. It seems this woman's general reputation was that of a common prostitute. On another occasion the officers caught another woman up there who was drinking, cursing, and using very vulgar and indecent language. She had stayed there the night before. Appellant was present when they caught this woman there. She claimed she was trying to get the woman to leave, and did afterwards get her to leave. At this time the appellant herself rolled and smoked a cigarette in the presence of the officers. She denied this; but two of the officers swore she did. Some of the officers testified that appellant had in one of these rooms a regular little bar—counter and fixtures—that she had glasses for drinking the beer and whisky, and from time to time they saw that she had both beer and whisky there, and on one occasion at least they found that several of these men and women were up there drinking and carousing. Some of the officers who watched the place at night for some time before the date on which the offense is charged saw men and women, couples, late at night going to and from her house, and they also saw men and women late at night alone going to and from appellant's house. These parties thus seen were not claimed to be regular roomers in the house. About 3 or 4 o'clock at night on the date on which this offense is alleged to have been committed, the officers raided the house. When they first went up

they looked over the transoms in two rooms. In one of the rooms appellant was in bed with one man, and in another Mrs. Young in bed with another. The parties were all undressed. After making the investigation, and ascertaining the facts, they demanded admittance. As soon as aroused appellant got out of the bed with the man she was with and went into the other room, aroused the man who was in that bed with Mrs. Young, he went in the room and got in the bed with the man she had been in bed with, and she got in bed with Mrs. Young. Then the officers were admitted. The officers arrested and carried all the parties to headquarters.

Appellant has some bills of exceptions and complaints to the refusal of the court to give some of her special charges. It is unnecessary to discuss all of these matters. In her brief, while she states she does not waive any of them, she presents only some of them, which we take to be the material ones, and we will discuss only those. The others present no reversible error.

[1, 2] By her fourth bill she complains that the court erred in permitting Mr. Scott, one of the police officers, to testify that in April or May he was at her place, and that there were three cases of beer in an ice box there at the time and that the parties at said place were drinking a lot of beer. The bill is wholly insufficient to require the court to review the question; but, if we could, this character of testimony in this character of case is clearly admissible. *Hickman v. State*, 59 Tex. Cr. R. 88, 126 S. W. 1149; *Wimberly v. State*, 53 Tex. Cr. R. 11, 108 S. W. 384; *Finn v. State*, 60 Tex. Cr. R. 522, 132 S. W. 805; *Robbins v. State*, 60 Tex. Cr. R. 523, 132 S. W. 770; *Wilson v. State*, 61 Tex. Cr. R. 628, 136 S. W. 447; *Sullivan v. State*, 61 Tex. Cr. R. 657, 136 S. W. 456; *Novy v. State*, 62 Tex. Cr. R. 496, 138 S. W. 139. It is needless to cite other authorities. Besides, there was much other proof of the same character of testimony, not objected to at all by appellant. As said by this court in *Wagner v. State*, 53 Tex. Cr. R. 307, 109 S. W. 169: "It is well settled in this state that the erroneous admission of testimony is not cause for reversal, if the same fact is proven by other testimony not objected to"—citing several cases.

[3] In her fifth bill she complains of testimony of said Scott which was directly drawn out by her in cross-examination. The bill is wholly insufficient to authorize us to review the question; but, if we could, the record would show that this witness had testified about seeing said Mrs. Young and another woman going out late at night from appellant's house with other men, and that on cross-examination, when she was probing him to know how he knew, he explained how he got his information. This, instead of being against appellant, was for her, and certainly appellant cannot complain, as the

court in his qualification shows that the answers were in direct response to appellant's own questions on her cross-examination.

[4] By her ninth bill she complains that the witness Jim Roddy was permitted, over her objections, to state that another officer, who was with him at the time when they were near appellant's place, remarked there was something crooked there, referring to her place. This remark may have been inadmissible; but the bill does not show it, nor does the bill show any such state of fact that we can intelligently determine whether it was or was not admissible.

[5] Her eighth bill of exceptions is quite lengthy. From it we understand the appellant introduced, as her witness, Police Officer McLure and had him testify, in effect, that at the time he and the other officers made the raid on appellant's house and arrested her and the others, as shown above, it was not G. B. Loving whom he saw in bed with her. On cross-examination he said that he saw her in bed at the time with some man, but that he had since concluded that it was not Loving, but a Mr. Meyer. The record shows that the matter was thrashed out in the testimony of her witness McLure and Mr. Erwin, the other officer who was with him at the time. She sought to impeach her own witness, as the bill shows; but the court would not permit this. The court's action was correct. Even if it had been shown that the said officer first thought it was Loving in bed with appellant at the time, and afterwards concluded it was not Loving but Meyer, would make no difference. There is no question but that, from the testimony of the two officers, the two men, Loving and Meyer, were caught in bed with the two women, appellant and Mrs. Young. It would make no difference which man was in bed with which woman. The point was whether the men were in bed with the women, or, as claimed by them, the women were together in one bed, and the men in the other, and all this matter, as stated above, was thoroughly thrashed out in the testimony. In no contingency, as we see it, was the court's action wrong or injurious to appellant of which she can legally complain.

[6-9] The only other question is the appellant complains that the court should have given two special charges, Nos. 1 and 2, shown by her bills 10 and 11.

The first of these charges is:

"In this case you are instructed, at the request of the defendant's counsel, that, even if you believe from the evidence, beyond a reasonable doubt, that on two occasions and some time before the filing of the complaint and information, Jack Dunlap and Byron Dunlap were at the house alleged to have been kept by the defendant, and alleged to be a bawdyhouse, and that each of said Dunlaps were in a room in said house with a woman, and that said women were prostitutes, and had gone to said house for the

purposes of engaging in illicit sexual intercourse, yet if you have a reasonable doubt as to whether or not the defendant knew of the presence of said parties on said occasion, you cannot convict the defendant for the acts of said parties.

"The defendant cannot be convicted in this case, unless you find and believe from the evidence, beyond a reasonable doubt, that she knowingly permitted prostitutes to resort and reside to the house kept by her for the purpose of plying their vocation, or unless you believe that she kept said house for the purpose of prostitution."

The other of said charges is:

"Before you can convict the defendant in this case, you must believe and find from the evidence, beyond a reasonable doubt, that the defendant unlawfully and knowingly permitted prostitutes to resort or reside in the house occupied by her for the purpose of plying their vocation, or that she unlawfully and knowingly kept said house for the purpose of prostitution. Even should you believe from the evidence that prostitutes did resort to said house, or reside therein, for the purpose of plying their vocation, yet you cannot convict the defendant, unless you believe from the evidence, beyond a reasonable doubt, that she had knowledge of the character of said women, having knowledge of the character of said women, knowingly permitted them to ply their vocation at said house."

We think neither of these charges should have been given. The court charged as follows: "If you find and believe from the evidence, beyond a reasonable doubt, that the defendant, in Dallas county, Tex., heretofore on August 14, 1913, or within two years prior to August 19, 1913, did unlawfully keep or was concerned in keeping a certain house then and there situate as a house where prostitutes were permitted to resort or reside for the purpose of plying their vocation, or as a house kept for the purpose of prostitution, then you will find the defendant guilty and assess her punishment," etc. He also charged the burden of proof was upon the state, that she was presumed to be innocent until her guilt was established by legal evidence, beyond a reasonable doubt, and, in case they had a reasonable doubt as to her guilt, to acquit her. The court also gave one of appellant's special charges to the effect that the jury could not convict appellant alone upon proof that the house she kept had the reputation of being a house of prostitution, etc.

This court, in *Lawrence v. State*, 20 Tex. App. 536, said: "Whilst a court may qualify or modify an instruction which is asked so as to make it present the law as the court conceives the law to be, yet the court is not bound to qualify or modify an illegal or erroneous instruction, but may refuse it outright."

Again, this court, in *Sparks v. State*, 23 Tex. App. 448, 5 S. W. 135, in construing our

statutes on the subject of giving written requested charges in misdemeanor cases, said: "This statute does not make it obligatory upon the court to prepare and give a written charge when requested to do so by the parties, but only requires the court to give or refuse such charges as are asked in writing. If charges are asked in writing, the court shall give or refuse them, with or without modification. But, if the court refuses such as are asked, it is not required to supplement them by any charges of its own; it may still, if it desires, decline to give any written charge in the case. In misdemeanors, the object and policy of the law seems to be to relieve the court of the burden and necessity of giving charges, unless the parties deem it necessary that such instructions as they may prepare in writing should be given. Such as are thus prepared may or may not be given. The court should not give instructions which it does not believe to be the law, and it is not even required to modify such charges, but may refuse them absolutely."

In *Hobbs v. State*, 7 Tex. App. 118, this court discusses fully and gives the reasons for this doctrine, and has always adhered to it. For other cases, see those collated under section 842 and subdivision 6, section 813 of White's Ann. C. C. P., and many cases decided since then by this court. *Mealer v. State*, 145 S. W. 353; *Perkins v. State*, 144 S. W. 244.

It is not proper, in this or any other case, for the court, either in his own charge, or at the request of an appellant, to single out any certain part of the testimony as was attempted to be done by appellant in the first paragraph of his charge No. 1, above quoted, and charge the jury thereon. *Stratton v. State*, 44 S. W. 506; *Copeland v. State*, 36 Tex. Cr. R. 575, 38 S. W. 210. For other authorities, see section 810, White's Ann. C. C. P. As it was improper to give this part of his said special charge, clearly the court was under no obligation to strike that out and give the latter paragraph, even if it had been proper to have given the second paragraph alone. But, as shown above, the court's charge substantially and fully embraced all of what was requested in this second paragraph.

What we have said about said first requested charge applies equally to the second. In addition, as to this latter, wherein it attempted to require, as a matter of law, that appellant had *knowledge* of the character of the women, and that she *knowingly* kept said house for the purpose of prostitution, it required more than the statute requires. It was not necessary, under the law, that she should *know* the character of women who had illicit intercourse and plied their vocation in the house she kept, nor does the law require that she shall *knowingly* keep a house for the purposes of prostitution. This charge ignores entirely the law that every person is presumed to know what is go-

ing on in his own house wherein he resides (*Whitcomb v. State*, 30 Tex. App. 269, 17 S. W. 258; *Stokeley v. State*, 37 Tex. Cr. R. 638, 40 S. W. 971) and that, in prosecutions for this character of offense, it is not incumbent on the state to prove absolute *knowledge* of an accused, but simply to make such proof that, even if knowledge be necessary, it will be presumed from such a state of facts as would put the party upon notice and inquiry which, if followed up, would result in knowledge (*Wells v. State*, 22 Tex. App. 18, 2 S. W. 600; *McGaffey v. State*, 4 Tex. 156; *Johnson v. State*, 32 Tex. Cr. R. 504, 24 S. W. 411; *Brown v. State*, 48 S. W. 176; *Wade on Notice*, § 11; 13 Ency. of Ev. 543; *Tucker v Constable*, 16 Or. 407-409, 19 Pac. 13).

No reversible error is shown, and the judgment will be affirmed.

DAVIDSON, J., absent at consultation.

#### TORES v. STATE. (No. 3088.)

(Court of Criminal Appeals of Texas. April 8, 1914. On Motion for Rehearing, May 6, 1914.)

#### 1. CRIMINAL LAW (§ 1091\*)—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

The overruling of a plea in abatement of the indictment on the ground of discrimination in the organization of the grand jury, and the overruling of a motion to quash a special venire on the ground of discrimination in the selection of jurors to prevent a fair trial, cannot be reviewed on appeal, unless exceptions are reserved and the evidence on the hearing included in the bills of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

#### 2. CRIMINAL LAW (§ 1091\*)—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

Where the record of the election of a special judge was regular, the overruling of a plea in abatement of the indictment on the ground that lawyers not practicing in the court participated in the election of the special judge, who was a nonresident of the district, not supported by any evidence, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

#### 3. CRIMINAL LAW (§ 1048\*)—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

Rulings on motions and pleas cannot be reviewed where accused reserved no exception to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. § 1048.\*]

#### 4. CRIMINAL LAW (§ 603\*)—CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES.

A continuance on the ground of the absence of a witness was properly denied, where accused did not state the facts the absent witness would prove, nor show the materiality of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.\*]

#### 5. CRIMINAL LAW (§ 406\*)—CONFESSION OF ACCUSED—ADMISSIBILITY.

Statements made by accused to a third person, who had been requested by the sheriff

to look out for accused, are admissible in evidence, where the third person did no act to lead accused to believe that he had authority to arrest him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**6. CRIMINAL LAW (§ 444\*)—EVIDENCE—ADMISSIBILITY.**

A county map, made by the land office, is properly received in evidence, though it had been torn in half and put together again.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.\*]

**7. CRIMINAL LAW (§ 1091\*)—RULINGS ON EVIDENCE—REVIEW—BILL OF EXCEPTIONS.**

A bill of exceptions, complaining of the testimony of a witness testifying without questions being propounded to him, must disclose the testimony given, and especially the part deemed objectionable, or the ruling cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

**8. CRIMINAL LAW (§ 1169\*)—REVIEW—HARMLESS ERROR.**

Where a witness testified to facts within his own personal knowledge, the error in permitting him to testify as to the contents of a letter disclosing the same facts, without first proving the loss of the letter, was not reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**9. CRIMINAL LAW (§ 1043\*)—CONDUCT OF TRIAL COURT—REVIEW.**

Where a bill of exceptions, complaining of a remark of the court that testimony was proper to impeach a witness of accused, was qualified by the court's explanation, disclosing that accused objected to the testimony on the ground of irrelevancy, and insisted on knowing the rule under which the evidence could be admitted, the bill as modified presented no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.\*]

**10. CRIMINAL LAW (§ 1111\*)—BILL OF EXCEPTIONS—QUALIFICATIONS.**

Accused, accepting and filing a bill of exceptions qualified by the court without excepting to the qualification, is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.\*]

**11. HOMICIDE (§ 45\*)—MANSLAUGHTER—ADEQUATE CAUSE.**

The statement of decedent that if accused did not leave, decedent would go for an officer to have accused arrested for his misconduct, was not adequate cause to reduce a homicide from murder to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 69; Dec. Dig. § 45.\*]

**12. CRIMINAL LAW (§ 1055\*)—REMARKS OF PROSECUTING ATTORNEY—EXCEPTIONS—REVIEW.**

Where there was no exception showing that the state's counsel made remarks in regard to which special charges were asked, the fact that such remarks were made was not verified so as to bring the matter before the court for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.\*]

**13. CRIMINAL LAW (§ 875\*)—VERDICT—SUFFICIENCY.**

The misspelling of the word "guilty" in a verdict does not vitiate it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2069, 2090; Dec. Dig. § 875.\*]

**14. CRIMINAL LAW (§ 951\*)—APPEAL—MOTION FOR NEW TRIAL.**

Accused, who on the overruling of his motion for new trial gave notice in open court of an appeal, could not, without withdrawing the notice of appeal and without leave of court, file an amended motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2349-2358; Dec. Dig. § 951.\*]

**15. CRIMINAL LAW (§§ 951, 1156\*)—MOTION FOR NEW TRIAL—TIME TO FILE—DISCRETION OF COURT.**

Whether an amended motion for new trial would be permitted after the time allowed by law for the filing of a motion for new trial is within the sound discretion of the trial court, and, in the absence of an abuse of discretion, the ruling will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2349-2358, 3067-3071; Dec. Dig. §§ 951, 1156.\*]

**On Motion for Rehearing.**

**16. CRIMINAL LAW (§ 1070½, New, vol. 11 Key-No. Series)—APPEAL—MANNER OF PERFECTING APPEAL—STATUTES.**

Under Code Cr. Proc. 1911, arts. 915, 916, providing that an appeal is taken by giving notice in open court and having the same entered of record, and declaring that the effect of an appeal is to suspend further proceedings in the trial court, until the judgment of the appellate court is received, a notice of appeal, given in open court and entered of record, perfects the appeal, and the jurisdiction of the Court of Criminal Appeals attaches.

**17. CRIMINAL LAW (§ 928\*)—NEW TRIAL—GROUNDS—IMPROPER CONDUCT OF JURORS.**

That a juror talked over the telephone before the verdict was returned into court, but after agreement, is not, as a matter of law, ground for new trial, especially where the officer in charge of the jury was present and heard what the juror said.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2263-2271; Dec. Dig. § 928.\*]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

Porfirio Tores was convicted of crime, and he appeals. Affirmed, and motion for rehearing overruled.

R. R. Smith, Jas. A. Walton, and S. B. Kennerly, all of Jourdanstown, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. At the time for a regular term of the district court of McMullen county, the Hon. F. G. Chambliss, judge of said court, being ill and unable to attend court, the members of the bar in attendance on said court elected Hon. W. W. Walling special judge of said court, who opened court, impaneled a grand jury in accordance with law, and the said grand jury, at a later day of said term, returned an indictment against appellant. The venue of this cause was then

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

changed to Atascosa county, when and where appellant was tried.

[1] Appellant filed a plea in abatement, alleging that he was a Mexican by nativity, and that he had never taken the oath of allegiance, and was only a resident here and not a citizen of this country; that in the organization of the grand jury Mexican citizens of McCullen county were excluded, and discrimination practiced. This plea did not prove itself, and if any evidence was introduced in support of it, the record before us does not contain it. Therefore the question is not presented to us in a way we can review the action of the trial court in overruling this plea. Again it is claimed that, in the drawing of the special venire which was summoned in this case, Mexican citizens of Atascosa county were excluded "for the purpose of preventing this defendant from having a fair and impartial hearing before a jury of his peers." As before stated, if any evidence was offered in support of this plea and motion, it is not included in the record before us, and for aught this record discloses such plea has no foundation, for citizens of Mexican nativity may have been on the special venire, and may have been on the jury that tried appellant. When these pleas were overruled by the court, exceptions should have been reserved, and in the bills the evidence adduced on the hearing should have been included, that we could determine whether or not there was any merit in such pleas. As the matter is presented to us, there is nothing for us to review.

[2] Appellant also filed a plea in abatement of the indictment, alleging that lawyers who were not practicing lawyers in such court participated in the election of a special judge, and that Judge Walling was not a resident of the Thirty-Sixth judicial district. Again the matter is presented in a way we cannot review it. The plea proves no fact; and, if appellant offered any evidence in support of this plea, the record does not contain it. The record of the election of Judge Walling is regular in every respect.

Appellant also asked that Alejandro Sarli, who was also indicted, charged with guilty participation in this offense, be first tried, when the court dismissed the case against Sarli, thus rendering him a competent witness, and he did testify at appellant's request on this trial.

[3] While the above motions and pleas were filed, yet appellant reserved no exception to the action of the court in ruling on either of them. So the matters are not properly presented to this court for us to act on them.

[4] In the first bill in the record appellant contends that the court erred in overruling his motion for a continuance on account of the absence of several witnesses. He states that he desired the attendance of Dr. Jameson, stating that this doctor was the first person

to arrive at the scene of the homicide, and "that this defendant nor his attorneys have ever been able to learn what was the condition of the body and its surroundings at said time, as to arms and otherwise, the nature of wounds, if any, and whether or not there were weapons on or around the body of the deceased." If appellant shot deceased under the circumstances disclosed by this record, the condition of the body and its surroundings, the nature of the wounds, and whether or not deceased had weapons would not be material to his defense. There is in the motion for continuance, nor in the evidence adduced on the trial, no contention that deceased was attempting to use a weapon, or appellant believed he was about to do so. It is true that appellant was not required to testify as a witness on the trial, yet in his application for a continuance he must state such facts as could or would show the materiality of the absent testimony. He states no fact that he can or expects to prove by this witness. He states no fact occurring at the time of the homicide that the testimony of the doctor, whatever it might be, would be material to his defense. Two of the witnesses named in the application attended the trial, while for a third no process had been issued, and as to the others, he states no facts that they would testify to—in no way shows that they would, or he expected to, prove by them anything that would or could be material to his defense; consequently the court did not err in overruling the motion.

[5] Polito Vasquez was not an officer of the law; and, although the sheriff had requested him to look out for appellant, appellant was not aware of this fact when he went to the camp of Vasquez, and made the statements he did make. Vasquez not having taken charge of him at the time the statements were made, and did no act to lead appellant to believe or suspicion that he intended to do so, or had authority to do so, the court did not err in admitting this evidence. *Hiles v. State*, 163 S. W. 717, and cases there cited.

As bill No. 4 does not show what facts appellant expected to prove by the witness C. G. Bass, the court did not err in the premises. The bill shows that the rule had been invoked, and Mr. Bass had been in the courtroom, and appellant stated: "We are not going to prove any facts by him; it is expert testimony"—and does not disclose upon what issue in the case the "expert testimony" would have a bearing, nor upon what issue he expected to testify.

[6] Another bill shows that "the state offered in evidence two pieces of a map fastened onto a piece of cloth or paper, purporting to be a map of McMullen county, made in 1888 by the Commissioner of the General Land Office of the State of Texas, with unidentified lines thereon purporting to indicate the location of the town of Fowlerton and

other points, to which defendant objected because said instrument was not a whole and complete map, but several pieces of paper tacked on a piece of paper, that said several pieces of paper were so disconnected as to leave nothing to show that the purported map was not half of one map and half of another, and that the same was not so identified as to make it properly admissible for the purpose of proving any fact in dispute." The court in approving the bill states that the map had been torn in half and placed back together, and it is shown that it was a map of McMullen county, made by the Land Office. Under the recitations of this bill herein copied no error is disclosed in the ruling of the court.

[7, 8] Several bills were taken to the testimony of Mr. Frank H. Burmeister. If one bill it is shown that this witness was permitted to testify, being a lawyer in the case, without questions being propounded to him. As this bill does not disclose any testimony he gave on the trial, of course it is impossible for us to determine that appellant was in any manner injured thereby. To bring the matter before us for review, the bill should disclose the testimony he gave, especially that portion which appellant deemed objectionable. In two other bills it is shown that Mr. Burmeister was permitted to testify that he had received a letter informing him that he had been employed by the commissioners' court to run the boundary line of McMullen county, because the work of Mr. Goff and Mr. White had been condemned, and that property up to the time testified to by him was taxed by McMullen county. The court in approving these bills stated that Burmeister testified, independently of any letter, that he was under contract with McMullen county to do this work, and that the work had been condemned; that he had served as county surveyor for a number of years, and knew the facts testified to by him. Certainly any man can testify he had been employed to do a certain character of work by the county, and had done the work. These are facts within his personal knowledge; and, while the contents of the letter were not admissible in evidence, without proving its loss, yet, as the witness testified in addition thereto from personal information and knowledge to the same facts, the bill presents no reversible error. The bills do not disclose in any way the materiality of the testimony, or how such testimony could in any wise be hurtful to appellant.

In the bill objecting to the testimony of Mr. Holmes, no portion of his testimony is given, and no fact testified to by him is stated; consequently there is nothing presented for review. However, we will state the court did not err in permitting him to testify, for he had not been in the courtroom, nor violated any rule of the court, and his testimony was pertinent and germane to the issues involved in this case.

[9, 10] In the last bill, relating to the introduction of testimony, it is shown that when the witness Humphries was testifying, appellant objected to certain portions of his testimony, and the court said: "It goes to the impeachment of your witness," to which remark appellant objected. The court in approving the bill states, "Approved, with the explanation that defendant was objecting to the testimony on the ground of irrelevancy, and insisting on knowing the rule under which such evidence could be admitted." As thus qualified, the bill presents no error, and, appellant having accepted and filed the bill without excepting to such qualification, he is bound thereby.

[11, 12] There is no evidence suggesting that appellant "shot at Ike Hill for the purpose of scaring him"; consequently the court did not err in refusing the special charge presenting this issue. Neither did the evidence adduced on this trial call for a charge on self-defense. There is no testimony that deceased assaulted appellant, or appellant believed that he was in any danger from Hill. All that deceased said was that if he, appellant, did not leave, he, deceased, would go and get an officer, when appellant shot him. The issue of manslaughter is not raised by the testimony. It is not even shown that there was anger or rage, and the only ground for resentment is that deceased told him he was going to town for an officer to have him arrested on account of his, appellant's, misconduct. This would not be adequate cause in law. There is no exception showing that state's counsel used the remarks in regard to which special charges were asked; therefore, the fact that such remarks were used is not verified in a way to bring the matter before us for review.

[13] The misspelling of the word "guilty" in the verdict does not vitiate it. The verdict was certain and sufficient upon which to enter judgment.

[14] It appears that when the verdict of the jury was returned, appellant's counsel filed a motion asking that they be given additional time to that allowed by law in which to file their motion for new trial, on grounds stated in the motion. This was by the court granted. When the motion was filed it was overruled, and appellant gave notice of appeal to this court. Subsequent to this time appellant filed an amended motion for a new trial, which the court by order entered struck from the record, on the ground it came too late, and no leave had been granted appellant to file it, to which action of the court appellant excepted, and presents the question properly in a bill of exceptions. We think appellant is correct in contending that the trial court has control over its judgments during the term at which such judgment was rendered, and, had the court thought proper to do so, upon appellant withdrawing his notice of appeal, the court could have set aside the judgment overruling the motion for new

trial, granted leave to file an amended motion, considered same, and took such action as the trial court deemed proper; and, if the amended motion was overruled, by again giving notice of appeal, appellant could have prosecuted an appeal to this court. But appellant did not take such action. After his motion for new trial had been overruled and notice of appeal given to this court, without leave of the court appellant proceeds to file with the clerk what he terms an amended motion for new trial, in which he does not ask leave to withdraw the notice of appeal theretofore given, nor in the motion does he ask that the order overruling the motion for a new trial be set aside and permission be granted to file an amended motion for a new trial. As thus presented, the court did not err in striking the motion from the record, as he had granted no leave to file it. But aside from this, the amended motion not being filed within the time allowed by law, and the court not having considered same, we hardly think we would be authorized to hold he abused his discretion.

[15] Whether another motion for a new trial will be permitted to be filed after the time allowed by law has elapsed is a matter within the sound discretion of the trial court. He can read the motion and application; and, if in his opinion he deems that no matter is presented which would authorize him to disturb the judgment, he can decline to permit it to be filed, and the only question then presented to us, is, From grounds and allegations contained in the motion, is it shown that he has abused the discretion confided to him by law? In this case we do not think any such showing is made, and the judgment is therefore affirmed.

#### On Motion for Rehearing.

The motion for rehearing in this case was not received by the clerk until the 27th day of April, four days after the mandate had issued; but, inasmuch as the death penalty was assessed, we ordered the mandate recalled, and permitted the filing of the motion for rehearing, for the members of this court, like all other citizens of Texas, do not desire this extreme penalty inflicted unless the evidence justifies and the record discloses that the appellant has had a fair and impartial trial, and there is no error in the record that could have injuriously affected appellant's rights.

[16] We have carefully reviewed the record, and the first contention of appellant is that the court erred in holding that the jurisdiction of this court attached upon giving notice of appeal and entry made thereof in the minutes, and he cites us to the cases of *Wood v. Wheeler*, 7 Tex. 13, *Puckett v. Reed*, 37 Tex. 308, *Blum v. Wettermark*, 58 Tex. 125, and *Freeman on Judgments*, in which it is held that courts have jurisdiction over their judgments until the end of the term at which such judgment was rendered. These authorities are in no wise in conflict with

the original opinion in this case, but appellant overlooks the fact that *notice of appeal* does not confer jurisdiction on the appellate court in civil cases, but this jurisdiction is conferred by *giving the bond* required by law after notice of appeal has been given and entered of record. Although one in a civil case might give notice of appeal and have it entered of record, yet if he failed to give the bond required by law, or file a pauper's oath in lieu thereof, the notice of appeal would not stay an execution in a civil case, nor would the jurisdiction of the appellate court attach until the appeal bond was filed. However, it is different in criminal cases—the jurisdiction of this court attaches and the appeal is perfected when notice of appeal is given in open court and that notice entered of record. Article 915 of the Code of Criminal Procedure provides that “an appeal is taken by giving notice thereof in open court, and having the same entered of record,” and article 916 provides that “the effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had, until the judgment of the appellate court is received by the court from which the appeal is taken.” This question is fully discussed in *Quarles v. State*, 37 Tex. Cr. R. 362, 39 S. W. 668, *Hinman v. State*, 54 Tex. Cr. R. 434, 113 S. W. 280, and *Nichols v. State*, 55 Tex. Cr. R. 211, 115 S. W. 1196, and cases cited.

Appellant's motion for a new trial having been overruled, notice of appeal given and entered of record, the trial court was without authority to make any other orders in the case, except in those cases wherein the statute specially authorizes it to be done, unless appellant should withdraw his notice of appeal; then and not till then would the trial court in criminal cases be authorized to give permission to file an amended motion for a new trial and consider same, and if the court should then overrule the motion, appellant could again give notice of appeal. As before said, as the trial court had overruled the motion for new trial, notice of appeal given and entered of record prior to the time it was sought to file an amended motion, a paper filed with the clerk, without permission of the court, and without withdrawing the notice of appeal, would not be a legal filing, and before the court would be authorized to act thereon, the notice of appeal must be withdrawn, as the jurisdiction of this court attached when notice of appeal was given and entry thereof made of record, for the jurisdiction of this court when it attaches is exclusive. During the term notice of appeal can be withdrawn by the appellant, and reinvest the district court with jurisdiction, but even this cannot be done after the end of the term.

While the amended motion placed with the clerk does recite “that, leave of the court being first had and obtained, he files this amended application for a new trial,” yet the indorsement of the court on the applica-

tion shows no such leave was granted, for he says: "This instrument was first presented to the court on the 6th day of December (five days after it bears file marks), and that the instrument was not placed with the clerk until after the motion for new trial had been overruled, exception taken, and notice of appeal regularly entered, and the court declined to consider the instrument for any purpose as coming too late." We cannot say the court erred in this matter. No one except appellant could withdraw his notice of appeal entered of record when the original motion for new trial was overruled, and he at no time made this motion nor offered to do so.

[17] However, as stated in the original opinion, we have read the affidavit which is sworn to before one of appellant's attorneys, and this was improper, and we do not think it presents grounds as to the conduct of the jury which would authorize us to hold that the court abused his discretion under the circumstances in declining to entertain the amended motion, even if notice of appeal had been withdrawn. The affidavit does not show that the talking over the telephone took place before the jury had agreed on a verdict; only that the talking took place before the verdict was returned into court, and it is further shown that the officer in charge of the jury was present when the conversation took place, and heard all the juror said. This should not have been permitted; but, as the matter is presented to us, we cannot review the action of the trial court.

The other grounds in the motion were all passed on in the original opinion, and we think correctly so.

The motion for rehearing is overruled.

#### ROBBINS v. STATE. (No. 2876.)

(Court of Criminal Appeals of Texas. April 15, 1914.)

#### 1. CRIMINAL LAW (§§ 14, 1206\*)—PROSECUTION AND PUNISHMENT—MODIFICATION OF LAW.

Under Pen. Code 1911, arts. 15-19, providing that, where a penalty is ameliorated by a subsequent law, a party committing an offense prior to the adoption of the subsequent law shall be punished under the later law unless he shall elect otherwise, but that in other respects the defendant shall be tried under the old law, where a defendant was charged with committing a murder before Pen. Code 1911, arts. 1140, 1141, defining murder, were amended by Act April 3, 1913 (Acts 33d Leg. c. 132), the court should charge the jury as to the definition of murder under the old law, but, as to the penalty, under the new law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 15, 3271-3277, 3279, 3280; Dec. Dig. §§ 14, 1206.\*]

#### 2. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ—DECLARATIONS OF DEFENDANT'S WIFE.

Where the defendant killed his wife and another at the same time, declarations by the wife, just after the shooting and prior to her death, which were part of the *res gestæ*, were admissible, in a prosecution for the killing of

the other, notwithstanding they were uttered by the defendant's wife.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

#### 3. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—DECLARATIONS—HEARSAY.

In a prosecution for homicide, dying declarations of the deceased, to the effect that defendant's wife had appealed to deceased for protection, early in the evening, and that defendant had threatened to kill her, were hearsay evidence of statements by the defendant's wife, and were inadmissible, although his statements as to how the shooting occurred and what was done and said by the parties at that time were admissible both as *res gestæ* and as dying declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

#### 4. CRIMINAL LAW (§ 369\*)—HOMICIDE—EVIDENCE—INDICTMENT FOR PREVIOUS ATTEMPT.

Where defendant killed his wife and another at the same time, evidence, in a prosecution for the killing of the other, that the defendant had been indicted for an assault with intent to murder his wife was admissible; the state's contention being that defendant killed his wife to prevent her from testifying in the other prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

#### 5. CRIMINAL LAW (§ 369\*)—HOMICIDE—EVIDENCE—PREVIOUS ATTEMPT BY DEFENDANT.

Where defendant killed his wife and another, evidence, in a prosecution for the killing of the other, that defendant had previously assaulted and seriously injured his wife, which occasioned an indictment in another county, was admissible to support the state's contention that defendant killed his wife to prevent her from testifying in the other prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

#### 6. HOMICIDE (§ 158\*)—EVIDENCE—DECLARATIONS OF DEFENDANT'S WIFE—PRESENCE OF DEFENDANT.

Declarations by defendant's wife that he had made threats against her on various occasions, and testimony that she had called upon a deputy sheriff for protection against him, were admissible, in a prosecution for the killing of another at the same time as defendant killed his wife, provided such statements were made in defendant's hearing or brought to his knowledge before the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

#### 7. HOMICIDE (§ 231\*)—EVIDENCE—FOUNDATION FOR THE ADMISSION OF DECLARATIONS.

In a prosecution for homicide, the state can show, by either direct or circumstantial evidence, that the defendant had heard, prior to time of the killing, statements made by his wife which were offered in evidence against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 479; Dec. Dig. § 231.\*]

#### 8. HOMICIDE (§ 158\*)—EVIDENCE—DECLARATIONS OF ACCUSED.

Where defendant killed his wife and another at the same time, evidence that on the same evening a witness heard defendant cursing his wife was admissible and pertinent, in a prosecution for the killing of the other.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

Davidson, J., dissenting in part.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Mose Robbins was convicted of murder in the first degree, and he appeals. Reversed and remanded.

Marsene Johnson and Elmo Johnson, both of Galveston, N. C. Walker, of San Saba, and Roy Johnson, of Galveston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. On November 2, 1911, appellant was indicted for the murder of I. T. Blake, alleged to have been committed in Ft. Bend county on June 15, 1911. The venue was properly changed to Galveston county, where this trial occurred in July, 1913. The proof showed that appellant killed the deceased by shooting him in the back with a pistol, and that in the same transaction he shot his wife, which resulted in her death. The jury found him guilty of murder with express malice—in effect murder in the first degree—and assessed the death penalty.

It is unnecessary, in the disposition we make of the case, to state the evidence. It was sufficient from the state's standpoint to show murder in the first degree. It also raised murder in the second degree and complete justifiable homicide, as appellant himself testified that he caught deceased in the act of adultery with his wife at the time of the killing, and perhaps manslaughter. All of these issues were submitted to the jury by the court.

At the time the case was tried, the court, as well as the attorneys, it seems, believed the Indeterminate Sentence Act of April 3, 1913, p. 262, was valid. This act, after this trial, was held void in *Ex parte Marshall*, 161 S. W. 112. Being thus misled, the court did not tell the jury what penalty was authorized to be assessed for either murder in the second degree or manslaughter. Of course, this will not occur on another trial. There are other questions as to the validity of the charge in not expressly requiring the jury to find, in case they convicted of murder in either degree, of what degree they convicted appellant, and assess the penalty therefor in the event they did not assess it at death.

[1] As the crime was alleged to have been committed prior to the act of April 3, 1913, amending our law on the subject of murder (articles 1140 and 1141, P. C.), this case must be tried under the law of murder as it existed at the time of the alleged crime, so far as the crime of murder is concerned (articles 15 to 19, P. C.). But, as the punishment for murder in the first degree is ameliorated, the new punishment must be charged, unless appellant himself elects otherwise, as prescribed by law. However, he must be tried according to the new procedure law, as amended and added to by the act of April 5, 1913 (articles 735 to 743). See Acts 33d Leg. c. 138. With the corrections indicated above, the charge of the court on murder in the first and second degree, manslaughter, and complete justifiable homicide are admi-

nable charges and substantially submit every issue raised correctly and in accordance with the evidence as the record before us shows it to be.

It is useless to discuss appellant's first bill to the argument of the district attorney, as that matter doubtless will not occur on another trial.

[2] It is our opinion that the statements of appellant's wife, Jane Robbins, to the effect that she called somebody to come and help her, that she was dying, etc., and when the doctor did come to her she asked, "How was the poor man" (meaning deceased)? and that she exclaimed, when told, "Poor man! Poor man! He lost his life trying to protect me!" shown by appellant's bills 3 and 4 of this record, are *res gestæ* statements and were admissible as such. *Rainer v. State*, 148 S. W. 735, and authorities there cited. They were the transaction, the acts themselves, speaking, and although uttered by appellant's wife and testified to by other witnesses, being *res gestæ*, they were admissible as such. This question has been clearly and definitely settled by this court. In *Cook v. State*, 22 Tex. App. 525, 3 S. W. 751, this court said: "With regard to the declarations of the wife, made during the progress of the difficulty, just preceding and subsequent to the shooting of Russell, they were admissible as verbal acts and were clearly parts of the *res gestæ*, and consequently did not come within the rule announced in article 795 (775) Code of Criminal Procedure, which prohibits a husband and wife from testifying against each other in a criminal prosecution. \* \* \* Mr. Wharton, in his work on Evidence, § 252, says: 'It is in any view clear that declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*.' Again, in section 263, he says that 'the wife's declarations, forming a part of the *res gestæ*, are admissible against the husband.' This doctrine is maintained in civil cases at common law. *Johnson v. Sherwine*, 3 Gray [Mass.] 374; *Walton v. Green*, 1 C. & P. 621; *Gilchrist v. Bale*, 8 Watts [Pa.] 355 [34 Am. Dec. 469]; *Aveson v. Lord Kenard*, 6 East. 188; *Thompson and Wife v. Freeman*, 1 Skinner, 420. At common law, the rule which in civil cases excluded the husband and wife from testifying against each other was the same as that which is announced by our statutes with regard to criminal cases. There is no law of this state which governs or regulates the admission of declarations of the wife affecting the husband, when they constitute a part of the *res gestæ*; and, there being no specific rules prescribed by statute, other rules of the Code relegate us to the common law for the rules which are to govern. Code Crim. Proc. arts. 26 (27) and 783 (763). We shall therefore adhere to the common-law rule, as expressed in the authorities above cited, and hold the declarations of the wife admissible against the husband as a part of

the *res gestæ*, for it is indispensable to a correct understanding of every transaction that every act attending it, verbal as well as physical, by whomsoever it may be committed, be placed before the court for its enlightenment. This rule as to *res gestæ* overrides all other rules known to the law governing the admissibility of testimony."

[3] The evidence of Dr. O'Farrel as to what the deceased told him when he first got to and examined the deceased and saw that he was fatally wounded, to the effect that appellant's wife had appealed to him for protection early in the evening, and that she was there by his invitation so he could give her protection from her husband, Mose Robbins, who had threatened to kill her, shown by appellant's bills 5 and 6, should not have been admitted. This evidence was in effect giving the hearsay evidence of the appellant's wife, not in the presence or hearing of the appellant, and was not admissible. For the error in admitting this testimony, this judgment must be reversed.

The testimony of Dr. O'Farrel and other witnesses of what deceased said as to how the shooting occurred and what occurred and was done and said by the parties at that time was clearly admissible, both as *res gestæ* and as dying statements. Appellant made no objection to the introduction of that testimony.

[4] The court did not err in permitting the state's witness Robert Blair to testify that appellant, shortly prior thereto, had been indicted in Matagorda county for an assault with intent to murder his wife, and that that case was set for trial June 19th, just four days before appellant killed deceased and his wife. In addition to this witness' evidence on this subject, the state also proved, by the copy of the proceedings in the case in Matagorda county, the same facts. All this was admissible; the state's contention in this case being that appellant killed his wife to prevent her from testifying in said assault to murder case, and the testimony tending to show that such was the case.

[5] So was the testimony of the same witness for the same reason that appellant had cut up his wife, and that her face, breast, and forehead showed the scars therefrom which were committed by appellant on her which occasioned the said indictment in Matagorda county against him.

[6] Appellant also objected to the testimony of said witness Blair to what appellant's wife said to him of the threats appellant made against her the evening shortly before the killing, and she called on him for protection, and that he advised her to go to Mr. Blake, the deceased, for protection against appellant. We are unable to tell for certain from the record whether what deceased's wife said to this witness, in substance shown above, was in the presence or hearing of the

appellant or not. If he was present, or it occurred in his hearing, or he knew thereof before the killing, such evidence would be admissible. On another trial this should be made more certain. If it did not occur in appellant's hearing or in his presence, or he did not know thereof before the killing it would not be admissible against him.

[7] The state could show he knew or heard, etc., by circumstantial or direct evidence. *La Grove v. State*, 61 Tex. Cr. R. 170, 135 S. W. 121.

So the testimony of the state's witness Bert Carr, the deputy sheriff of Matagorda county, that the year before this killing, while appellant and his wife lived in that county, he had been called upon 18 or 20 times to protect her from her husband, appellant, would not be admissible, unless appellant knew of it at the time or it occurred in his presence. The record does not make it clear whether this occurred within appellant's knowledge or notice or not. Whatever times, if any, the officer was called upon to protect appellant's wife against him which were known to or occurred in appellant's presence was admissible, but if it did not occur in his presence, or he did not know thereof, then it would not be admissible. The introduction or exclusion of this evidence can be properly controlled on another trial.

[8] Clearly the testimony of the state's witness, said Blair, to the effect that on the same evening, before the killing of deceased, he heard appellant curse his wife and accuse her of staying with other men was admissible and pertinent in this case.

For the error above pointed out, the judgment must be reversed, and the cause remanded.

DAVIDSON, J. I agree to the reversal of the judgment on questions as decided. There are other rulings which show error. I will not discuss them. They may not arise upon another trial, or, if they do, may come in different form.

I cannot agree to the statement that murder in the first degree is in the case. As I understand the facts, there is nothing more than manslaughter in most favorable aspect for the state, and justifiable homicide for appellant. Deceased had taken appellant's wife to his room, carried her trunk to the same room; it was at night; they had retired, one sleeping in one part of the room and the other in another part of the room. Appellant went to the room and found them in bed together and killed both, as his evidence shows. Dying declarations of deceased show he was going to the bed of appellant's wife to notify her that appellant was coming, when appellant shot him. The mosquito bar over the bed of appellant's wife had bullet holes in it. I do not care to elaborate. The judgment is properly reversed.

## VALENTINE v. EDWARDS. (No. 250.)

(Supreme Court of Arkansas. April 6, 1914.)

## 1. LANDLORD AND TENANT (§ 823\*)—EXISTENCE OF RELATION.

Where plaintiff agreed to furnish F. a team and tools to make a crop on plaintiff's land, which was to be plaintiff's property, but agreed that, after he had reserved one-half of the crop for the use of his land, teams, and tools, and enough of the remainder to pay for the supplies furnished F., the remainder should belong to F., the relation between the parties was that of employer and employé, so that title to the crop was in plaintiff until he had his share and had been paid for the supplies furnished.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1350, 1351, 1355, 1356; Dec. Dig. § 823.\*]

## 2. LANDLORD AND TENANT (§ 328\*)—BONA FIDE PURCHASER.

If a crop raised on plaintiff's land by the labor of another was raised under a contract making the other plaintiff's employé, so that title thereto was in plaintiff, a purchaser of the crop from the employé was not an innocent purchaser, though he did not know of plaintiff's interest therein.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1388, 1390-1392, 1394; Dec. Dig. § 328.\*]

## 3. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action by the owner of land to recover cotton sold to defendant by one who had agreed with plaintiff to raise a crop on plaintiff's land with a team, etc., furnished by plaintiff, with the understanding that, after plaintiff had received one-half of the crop for the use of his teams, etc., the balance should belong to the cropper, the court instructed that plaintiff claimed that defendant bought two bales of cotton from his tenant, and that the bales belonged to him, and that the tenant stole the cotton and sold it, and, if the jury found that to be true, they should find for plaintiff, but, if the alleged tenant "did not steal them, or if he had an interest in the cotton, you will find for defendant." *Held*, that the instruction was erroneous, as practically directing a verdict for defendant; since the alleged tenant did have an "interest" in the cotton, even though he was only an employé.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

## 4. PRINCIPAL AND AGENT (§ 106\*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

If plaintiff authorized another to sell his cotton, the purchaser obtained a good title, though the agent afterwards wrongfully converted the purchase price to his own use.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 311, 312; Dec. Dig. § 106.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by W. A. Valentine against W. M. Edwards. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Appellant sued to recover two bales of cotton, or their value, which appellee had purchased from one Forsythe. According to the evidence of appellant, he had agreed to furnish Forsythe the team and tools to make a crop on his land, and the crop raised was

to be his property; but, after he had reserved one-half of it for the use of his land, team, and tools, etc., and enough of the residue to pay for the supplies for Forsythe, which had been sold him by a merchant and charged to appellant's account, the balance was to belong to Forsythe.

Appellee contended and offered evidence to show that, whatever the relation may have been between appellant and Forsythe, appellant had authorized Forsythe to take the cotton to market and sell it, and that the cotton in controversy was sold pursuant to this authority, and bought by appellee. The contention is also made that Forsythe was a tenant, and not a share cropper or employé, and that appellee was an innocent purchaser of the cotton, having bought without notice of the landlord's lien, or of any facts which would have put him upon inquiry in regard thereto.

The court gave, over appellant's objection, the following instruction, No. 4: "Gentlemen of the jury, this is a suit for the recovery of two bales of cotton, or their value, \$99.50. The plaintiff claims in the suit that the defendant bought two bales from his tenant; that the two bales belonged to him; and that the other fellow stole the cotton and sold it. If you find this to be true, you will find for the plaintiff. If he did not steal them, or if he had an interest in the cotton, you will find for the defendant."

Other instructions were given and refused, to which action of the court in giving and refusing instructions exceptions were duly saved, but we do not set them out, as our discussion of the instruction numbered 4 indicates our view of the law of this case.

J. P. Kerby, of Little Rock, for appellant. Chas. A. Walls, of Lonoke, for appellee.

SMITH, J. (after stating the facts as above). [1] The relation which appellant testified existed between himself and Forsythe constitutes that of employer and employé, and the title to a crop so raised vests in the employer, until he has received his share and has been paid for any supplies furnished to enable the employé to make the crop. *Hammock v. Creekmore*, 48 Ark. 264, 3 S. W. 180; *St. L., I. M. & S. Ry. Co. v. Hardie*, 87 Ark. 475, 113 S. W. 31; *Bourland v. McKnight*, 79 Ark. 427, 96 S. W. 179, 4 L. R. A. (N. S.) 698; *Neal v. Brandon*, 70 Ark. 82, 66 S. W. 200.

[2] And the court should have told the jury that if they found that relationship to exist, appellee was not an innocent purchaser, and a recovery could not be defeated because he did not know of appellant's interest in the cotton.

[3] Instruction No. 4 apparently recognizes this proposition, but it further told the jury that, if Forsythe did not steal the cotton, or that if Forsythe had an interest in the

cotton, the jury should find for appellee. This instruction practically directed a verdict, as Forsythe had an interest in the cotton, although he may have been only a share cropper or employé, and the instruction is therefore erroneous and prejudicial.

[4] Notwithstanding the fact that the evidence is undisputed that Forsythe was a mere employé, and that the title to the crop was therefore in appellant, we do not enter judgment here on that account, because there was evidence tending to show that Forsythe was authorized to sell the cotton and deliver the proceeds to appellant, and, if this authority was, in fact, conferred, the sale to appellee passed the title, although Forsythe thereafter wrongfully converted the money to his own use.

For the error in giving the instruction numbered 4, the judgment will be reversed, and the cause remanded.

### MT. OLIVE STAVE CO. v. HANDFORD et al. (No. 275.)

(Supreme Court of Arkansas. April 20, 1914.)

#### 1. DEEDS (§ 90\*)—CONSTRUCTION—INTENTION OF PARTIES.

The court, in construing a deed, must ascertain and give effect to the intention of the parties by giving to all parts of the deed such construction, if possible, that they may stand together.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.\*]

#### 2. DEEDS (§ 97\*) — CONSTRUCTION — REPUGNANCY BETWEEN GRANTING AND HABENDUM CLAUSES.

Where there is a repugnancy between the granting and habendum clauses of a deed, the former controls.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.\*]

#### 3. DEEDS (§ 124\*) — CONSTRUCTION — RIGHTS ACQUIRED.

A deed which recites that the grantor conveys to the grantees a strip of land described, to have and to hold the same to their use for a public railroad or other public roadway, to be kept open and free to the public, grants the land in fee, and the right of the grantees to use the same as a way remains, though the public has abandoned the way.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

Appeal from Independence Chancery Court; Geo. T. Humphries, Chancellor.

Suit by J. S. Handford and others against the Mt. Olive Stave Company. From a decree for plaintiffs, defendant appeals. Affirmed.

John T. Warner and McCaleb & Reeder, all of Batesville, for appellant. Ernest Neill, of Batesville, for appellees.

HART, J. Prior to the 10th day of June, 1891, Theo. Maxfield and his brothers were the owners of a strip of land consisting of about 15 acres, extending east and west along the north bank of White river, and

joining the city of Batesville on the west. On the above-mentioned date the Maxfields sold the eastern portion of said tract, consisting of 7.75 acres, to J. S. Handford and others, the appellees in this action. Pursuant to an agreement made when this deed was executed, on the 20th day of October, 1897, the Maxfields executed a deed for a strip of land 30 feet wide running through the remaining portion of said tract. This deed, after reciting the agreement under which it was executed, and describing the strip of land 30 feet in width, contains the following: "Now, therefore, in consideration of the premises above recited, and of the sum of one dollar to us in hand paid, we, the said Theodore Maxfield and Charles W. Maxfield, do hereby grant, bargain, sell, and convey unto the said C. R. Handford, W. H. Hallett, and J. S. Handford, partners as C. R. Handford & Co., their and each of their assigns, the said parcel of land herein above last described, being the width of 30 feet. To have and to hold the same to their use and behoof for a public railroad or other public roadway, to be kept open and free to the public."

The west end of the 30-foot strip intersected River street, a street running north and south in the city of Batesville. Before this last conveyance was made, the railroad track had been laid along the 30-foot strip of land, and a public road also extended along it parallel with the railroad track. Appellees had a cedar yard on the 7.75-acre tract first conveyed to them, and the public used the road along the 30-foot strip in going to and from this cedar yard, and also traveled across appellees' 7.75-acre tract in going to and from a ferry on White river. At that time there was no fence around any part of this land. On the 6th day of November, 1906, Maxfield conveyed the western portion of the 15-acre tract, across which extended the 30-foot strip, to the appellant, Mt. Olive Stave Company. In about two years thereafter the railroad track was taken up from the 30-foot strip of ground, and, according to the testimony of appellant, appellees ceased to run a cedar yard on their 7.75 acres of land and fenced it up and began to use it for agricultural purposes. The witnesses for appellant also say that some time thereafter the public ceased to use the public road on the 30-foot strip of land, and that the public railroad thereon was abandoned. They also state that appellees had egress from their 7.75-acre tract of land by a public road which ran along their eastern boundary line. Appellees admitted fencing up their 7.75 acres of land, but state that they continued to use it thereafter for the purpose of storing cedar, and that the public used the public road on the 30-foot strip of land; that appellees and their tenants continued to use this road for the purpose of ingress and egress to their land until the same was obstructed by appel-

lant in the year 1911. Appellees also introduced evidence tending to show that they had no other means of egress and ingress to their 7.75 acres of land.

This action was instituted in the chancery court by appellees against appellant, and the prayer of their complaint was that appellant be restrained from closing and keeping closed the strip of land above mentioned, 30 feet in width, and that they have damages against appellant on account of the injury suffered by the obstruction already placed on said road. The chancellor found in favor of appellees and granted a perpetual injunction in accordance with the prayer of the complaint, and the case is here on appeal.

[1, 2] In construing a deed, the object sought is to ascertain and give effect to the intention of the parties, and this is to be effected by giving to all parts of the deed such construction, if possible, that they will stand together. But, if there is repugnancy between the granting and the habendum clauses, the former will control the latter. *Dempsey v. Davis*, 98 Ark. 570, 136 S. W. 975; *Whetstone v. Hunt*, 78 Ark. 231, 93 S. W. 979, 8 Ann. Cas. 443.

[3] In the application of these cardinal rules of construction it may be said that the strip of land 30 feet in width in controversy in this action was granted to appellees in fee simple, and by the habendum clause a right of way for a public road and for a railroad was also given. In other words, by the express terms of the deed the land itself was granted to appellees, and in the habendum clause the restriction was added that the land granted should be used by the public for a public roadway and for a public railroad. It cannot be said, as contended by counsel for appellant, that the parties intended that the deed should only convey an easement for a public road and for a railroad, and that, whenever the railroad track was taken up, and the public ceased to use the roadway, the right of appellees to the land was extinguished. Such construction would give no effect to the grant to appellees. As above stated, by the express terms of the deed the land itself was granted to appellees, and by the habendum clause there was an added right given to the public to use the land in controversy for a public road, and also that it might be used for railroad purposes. In this way all parts of the deed harmonize with each other. To give to the deed the construction contended for by appellant would cause the granting and habendum clauses of the deed to conflict, and, according to the settled rules of construction, the latter must give way to the former because of the repugnancy between them. In either event, the decision of the chancellor was correct, for, if it be said that there was a repugnancy between the granting and habendum clauses of the deed, no easement was granted to the

public over the strip of land in controversy, and the rights of appellees to use it could in no sense depend upon the abandonment of its use by the public. So, too, if the construction which we have placed upon the deed is correct, the land itself was granted to appellees, and their right to use the same as a passageway to and from their land did not depend upon the use of it by the public. Their right to use it as such passageway, having been expressly granted to them by the terms of the deed, remains to them, notwithstanding the public may cease to use the strip of ground as a public road.

Other questions are discussed by counsel for the respective parties in their briefs; but we do not deem it necessary to consider them or to set out the evidence relating to them. They are in no way connected with, or related to, the issue we have determined, and, having adopted the construction of the deed announced above, it is wholly unnecessary to discuss or determine them. From the construction we have placed on the deed, it follows that the decree of the chancellor was correct, and it will be affirmed.

#### PORTER v. GOSSELL (No. 255.)

(Supreme Court of Arkansas. April 13, 1914.)

##### 1. CONTRACTS (§ 26\*)—EXECUTION—LETTERS AND TELEGRAMS.

A valid contract may be entered into by negotiations carried on through the mail and by telegrams.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.\*]

##### 2. CONTRACTS (§ 26\*)—ACCEPTANCE BY LETTER.

When parties conduct negotiations through the mail, the contract is completed the moment a letter accepting the offer is mailed, provided it is done with due diligence after receipt of the proposal, and before any intimation that it is withdrawn.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.\*]

##### 3. SALES (§ 22\*)—VALIDITY OF CONTRACT—COUNTER OFFER.

There can be no binding contract of sale until the minds of the parties have met, and the meeting of an offer by counter offer will create no such contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. § 22.\*]

##### 4. SALES (§ 22\*)—CONTRACTS—WHAT CONSTITUTES.

Where defendant offered to sell a car of bulk oats at 42 cents, provided plaintiff would accept the city scale weights, plaintiff's reply, requesting defendant to rush the shipment, but demanding an affidavit attached to the scale weights, was not such an unqualified acceptance as would create a binding contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. § 22.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by F. L. Gossell against J. I. Porter. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mehaffy, Reid & Mehaffy, of Little Rock, for appellant. Mann & Shofner, of Little Rock, for appellee.

**McCULLOCH, C. J.** Appellee instituted this action below against appellant to recover damages resulting from appellant's failure or refusal to perform his alleged contract whereby he sold and undertook to deliver to appellee a car load of oats. The case was tried before the court sitting as a jury, and the only question we have to determine is whether the testimony, viewing it in the light most favorable to appellee, is sufficient to sustain the finding of the court.

Appellant resided at Stuttgart, Ark., and appellee at Little Rock; the negotiations between the parties being conducted entirely by letters and telegrams.

[1] A contract may be entered into by that method, and all of the correspondence may be read together for the purpose of establishing the contract. *Mann v. Urquhart*, 89 Ark. 239, 116 S. W. 219.

[2] "When parties conduct a negotiation through the mail," said this court in *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775, "a contract is completed the moment a letter accepting the offer is mailed, provided it be done with due diligence after receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn.

[3, 4] Appellant was engaged in the business of selling hay and lumber, and the negotiations between him and appellee concerning the sale of the oats grew out of correspondence about the sale of hay. The first communication on the subject was that of appellee in a letter dated June 23, 1911, concerning the purchase of hay, and adding the following inquiry about purchase of a car load of oats: "Do you know of any one that has any oats which they might offer in car load lots in your section of the country? If so, I would be glad to have you write me what you think they can be bought at, or would like to have you give me their names, and I will write them concerning the same."

Appellant replied by letter on the same day as follows: "Yours of 23d to hand and noted. I have no oats on hand, but can quote you for immediate delivery, car load lots, bulk oats, at 42 cents or, sacked, 45 cents, f. o. b. tracks here. This is a close price, and, if you are in the market for any oats now, would be glad to hear from you right away so that we may be looking out for them."

That letter constituted a proposal to enter into a contract with respect to the sale of a car load of oats at the price and terms therein named. Appellee replied on June 26th as follows: "Your favor of the 23d at hand, and would say, if the oats you quote are No. 3 or better red oats, destination weights and grades guaranteed, I could use a car at 42

cents, f. o. b. your track, immediate shipment. I think the price you name is just a little bit high though, and in fact have been offered No. 2 oats from Oklahoma on the same basis. I wish you would please write or wire me immediately upon receipt of this if you will ship car as above."

It will be observed that this letter did not constitute an unconditional acceptance, and was not so regarded by appellee. He stated the condition that, if the oats quoted were of a certain grade and the weights were guaranteed at destination, he would purchase a car at 42 cents. The letter shows that he did not intend it as an acceptance of appellant's offer, but intended it as a counter proposition, for he requested an immediate response by letter or wire from appellant, indicating whether the latter was willing to accede to those terms. Negotiations had not then proceeded to a contract, for the minds of the parties had not yet met.

In *Emerson v. Stevens Gro. Co.*, 95 Ark. 421, 130 S. W. 541, we said: "There can be no binding contract of sale until the parties have agreed to the same proposition which is the subject of the contract. There must be an offer to sell upon the one hand and an acceptance of the same offer before it can be said that the contract of sale has been consummated. Mere negotiations for entering into the contract will not suffice; but the proposition to which the negotiations lead for the agreement must be finally assented to by both parties. So, in determining whether or not a contract of sale has been made, the material inquiry is: Did the minds of the parties meet, and did they mutually assent to the same thing?" See, also, *Cage v. Black*, 97 Ark. 613, 134 S. W. 942, announcing the same principle.

Appellant replied to the last letter above named on June 28th as follows: "I would not want to load and ship the oats without you would take the city scale weights here. Oats are advancing some; but I can get you a car of bulk oats at 42 cents, I think, if you will take the city scale weights."

Now, inasmuch as appellee had not accepted the terms of appellant's original proposition, the latter had the right to withdraw from the negotiations entirely or to offer new terms. He did this in the letter just quoted by imposing the condition that city scale weights (meaning, of course, the weights of the city weigher at Stuttgart) must be accepted. It will be observed that appellee had asked that the weights be guaranteed at destination; but in this letter appellant, in substance, declined that offer, and substituted the new proposal that the city scale weights should be accepted.

Appellee, on the next day (June 29th), replied by wire as follows: "Your letter. Rush car oats, your city scale weights, affidavit attached, satisfactory." He followed this up with letter, written on the same day,

saying: "However, as advised you, please furnish me with sworn weight certificate at your end, and it will be perfectly satisfactory. I ask this simply because I know party doing the weighing will necessarily be more careful in furnishing sworn certificate."

The case turns on the question whether appellee's letter and telegram constituted an unconditional acceptance of appellant's offer so that the minds of the parties met on the same proposition, or whether they constituted a new offer which required acceptance upon the part of appellant before a contract was established.

We are of the opinion that the letter and telegram were not an acceptance of appellant's offer, but constituted a proposal containing another condition or qualification, namely: That an affidavit of the weigher should be furnished. Now, that was a condition to which appellant was not bound to accede. There having been no unconditional acceptance of his offer, he had the right to recede from the negotiations. The qualification thus imposed by appellee was a material one, for the reason that appellant had no control over the weigher and could not require him to furnish an affidavit. If it had been merely a matter of appellant furnishing his own affidavit as to the weights, the case might be different; but appellee demanded the affidavit of the weigher, a person over whom appellant is not shown to have had any control, and therefore it was an important qualification of the terms originally proposed by appellant. It changed the terms, in other words, to the extent that it prevented the minds of the parties from meeting, and the negotiations, therefore, did not result in a contract. *Northwestern Iron Co. v. Meade*, 21 Wis. 480, 94 Am. Dec. 557; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Bolton v. Huling*, 195 Ill. 384, 68 N. E. 140.

"It is an undeniable principle of the law of contracts," said the Supreme Court of the United States, "that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556.

Appellant replied to appellee's communication by stating that the party from whom he expected to get the oats had decided not to sell. Appellant, in his testimony, explained that he was not engaged in the business of handling oats at all, and was conducting negotiations merely as an accommodation for another person. The negotiations were thus

terminated without the parties entering into a binding contract, and, there being no contract established between them, there is no liability for appellant's refusal to deliver the oats.

The whole transaction being set forth in the correspondence, no useful purpose would be subserved by remanding the case for a new trial. The judgment is therefore reversed, and the cause dismissed.

STATE ex rel. MOOSE, Atty. Gen., v. EHLE.  
(No. 258.)

(Supreme Court of Arkansas. April 13, 1914.)

ATTACHMENT (§ 4\*)—RIGHT TO WRIT—NON-CONTRACT—ACTIONS—"DEBT OR DEMAND ARISING UPON CONTRACT."

Kirby's Dig. § 844, subd. 8, providing that an attachment shall not be granted on the ground that defendant is a nonresident, for any claim other than a "debt or demand arising upon contract," only applies to liabilities based upon contractual relations voluntarily established by the parties, so that an attachment was improper in a proceeding by the state at the relation of the Attorney General against a nonresident to recover penalties for violations of the anti-trust laws.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 8-10; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Proceeding by the State of Arkansas, on the relation of Wm. L. Moose, Attorney General, against L. C. Ehle, doing business under the firm name of the Little Rock Cotton Oil-mill, in which an attachment was sued out. From a judgment sustaining a motion to quash the attachment, the State appeals. Affirmed.

Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State. Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellee.

McCULLOCH, C. J. The Attorney General instituted this action on behalf of the state against the defendant, L. C. Ehle, to recover penalties for alleged violations of the anti-trust laws of the state, it being alleged in the complaint that defendant owns certain oil-mills in the state and is engaged in the business of selling and buying cotton seed in several of the cities and towns, and that he unlawfully entered into and became a member of a pool or trust with certain corporations engaged in the same line of business to fix and maintain the price of cotton seed in the state. Defendant was, and is, a nonresident of the state, and the Attorney General, at the commencement of the action, sued out a writ of general attachment and caused same to be served upon property of defendant. Defendant appeared specially by his attorney and, without entering his appearance in the action, moved to quash the attachment on the ground, among others, that the cause of ac-

tion set forth in the complaint does not constitute a debt or demand arising upon contract. The court sustained the motion and quashed the attachment, and the state has appealed.

The defendant being a nonresident and absent from the state, there was no method of acquiring jurisdiction by personal service nor by constructive service, unless it be held that the attachment was proper. The statutes of this state provide that "an attachment shall not be granted on the ground that the defendant or defendants, or any of them, is a foreign corporation or nonresident of this state for any claim other than a debt or demand arising upon contract." Kirby's Digest, § 344, subd. 8.

In the case of *Messinger v. Dunham*, 62 Ark. 326, 35 S. W. 435, which is the only decision of this court bearing directly on the question, Judge Riddick, speaking for the court, said: "This restriction of the right to attach to debts and demands arising upon contract is for the purpose of excluding actions for torts and actions where the contract relations between the parties do not furnish a basis upon which the measure of liability may be ascertained"—citing 1 *Wade on Attachments*, § 12.

Another decision of this court bearing, to some extent, upon the question is that of *Baltimore & Ohio Telegraph Co. v. Lovejoy*, 48 Ark. 301, 3 S. W. 183, where it was held that the language of the Constitution limiting the jurisdiction of justices of the peace excluded an action to recover a penalty. The court said: "Unless, therefore, this is an action *ex contractu*, the objection must be sustained. Now, a relation of contract does exist between the sender of a message and the telegraph company. But the action to recover the statutory penalty does not arise on the contract to transmit, but on the statute which imposes the penalty for neglect of the duty which the company owes to the public."

The authorities seem to be uniform, as far as an expression has been made at all, on statutes confining the right to attachments to actions arising *ex contractu*.

"In order for plaintiff to be entitled to the writ, it is essential that contractual relations exist between him and defendant, or else that the contract be made for his benefit." 4 *Cyc.* 440.

Our statute is almost a literal copy of the provision of the Kentucky Code on this subject, except that the latter adds the words "express or implied, or a judgment or award," and the Kentucky Court of Appeals construed the statute to confine attachments against nonresidents or foreign corporations to those based upon contract. *Stewart v. Blue Grass Canning Co.*, 133 Ky. 118, 117 S. W. 401.

The Ohio statute contains the same provision with reference to attachments against

nonresidents, and the Supreme Court of that state decided that an attachment could not be issued unless the cause of action was "based solely on a breach of duty," and "that the duty arose by contract." *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 481.

In *Shinn on Attachments*, vol. 1, § 26, the statement on this subject is that "it is an almost universal rule that an attachment may not issue for the recovery of a penalty."

The Attorney General, among other authorities, relies upon a decision of the Alabama court. *Geo. F. Dittman Boot & Shoe Co. v. Mixon*, 120 Ala. 206, 24 South. 847. But decisions of that court on this subject are of no value, for the reason that their statute is entirely different. In that state the right to an attachment is not limited to actions of "debt or demand arising upon contract," as in this state, but they allow the remedy in any case where the cause of action is based upon "any money demand."

The Attorney General also relies upon the general principle that when a nonresident or foreign corporation does business in the state there is a contract implied that the laws of the state will be complied with and all just demands of the state satisfied. There is, in a sense, an implied contract to respond to all just demands and liabilities, whatever the source may be; but that is not what is meant by our statute, which was intended to embrace only debts and demands, that is to say, liabilities, based upon contractual relations voluntarily established by the parties.

It is also argued that the right to recover the penalty and the amount thereof is fixed as definitely by the statute as any liability can be fixed by contract, and that the elements of certainty as stated in the opinion of this court in *Messinger v. Dunham*, supra, are met as completely in the one kind of action as in the other. But the lawmakers have seen fit to prescribe the contractual relation as the test, not the mere certainty fixed by statute.

The decision of the circuit court is correct, and the judgment is therefore affirmed.

MURRAY v. MILLER (RICE, Intervener).  
(No. 227.)

(Supreme Court of Arkansas. March 30, 1914.)

1. BROKERS (§ 10\*) — CONTRACTS — SUBSTITUTION.

Defendant executed a contract on February 12th, by which plaintiff was authorized to furnish a buyer for land for a commission of 5 per cent., the contract providing that the agency should remain in effect until plaintiff "is notified in writing to the contrary." On February 26th the parties made another contract, by which plaintiff was given exclusive agency for the sale of the property during the succeeding 12 days on the terms stipulated. Plaintiff did not procure a purchaser within that time, but wrote to defendant on March 12th requesting an extension of time until April 1st, to which defendant replied, that he did not care to extend



the time, as the property was listed with other agents, but would extend plaintiff's agency until April 10th, provided that his agency should not be exclusive. *Held*, that the exclusive agency given on March 12th, as well as the subsequent extension of plaintiff's authority, operated to supersede the original contract and revoked plaintiff's agency thereunder.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10.\*]

## 2. BROKERS (§ 50\*)—AGENCY—TIME OF SALE.

If the broker fails to find a purchaser for land within the time limited by his contract with the owner, he is not entitled to a commission, though a sale is subsequently made to a purchaser who negotiated with the broker within such time, provided the owner acted in good faith, and did not interfere with the agent's effort to make the sale within a specific time.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.\*]

## 3. BROKERS (§ 55\*)—RIGHTS TO COMMISSIONS.

If the owner, during the life of a contract with a broker authorizing the sale of realty, sold the property to a purchaser procured through the broker's efforts, the broker would be entitled to commission, but, if the sale was made through another broker, whose efforts had equally contributed to procuring the purchaser, the agent who finally secured the purchaser would be entitled to the commission, provided the owner did not interfere with the efforts of either broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.\*]

## 4. BROKERS (§ 55\*)—GOOD FAITH OF OWNER.

The owner of land, who authorized several agents to secure a purchaser therefor, must exercise strict neutrality between them.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.\*]

## 5. BROKERS (§ 55\*)—RIGHTS OF AGENT.

The fact that plaintiff first began negotiations with the purchasers of land did not give him the right to continue the negotiations exclusive of other agents who were also authorized to procure a purchaser.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.\*]

## 6. CONTRACTS (§ 47\*)—CONSIDERATION.

A statement by the owner of land to one of several agents authorized to find a purchaser that such agent was entitled to the commissions could not constitute a contract to pay him the commissions, if it was made after a sale had been consummated through another agent; there being no consideration for such alleged promise.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. § 47.\*]

## 7. COSTS (§ 42\*)—PERSONS LIABLE—ADMISSION OF LIABILITY.

Where, in an action by a broker for commissions, the owner admitted his liability for a commission either to plaintiff or to an intervening broker, it was error to tax the owner with the costs of the action upon awarding judgment in favor of the intervening broker; plaintiff being liable for the costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 137-164; Dec. Dig. § 42.\*]

Appeal from Circuit Court, Clark County; Jacob M. Carter, Judge.

Action by J. R. Murray against W. E. Miller, in which E. R. Rice intervened. From a judgment for intervener against defendant and against plaintiff, plaintiff appeals, and defendant Miller takes a cross-appeal. Judgment for intervener affirmed, judgment

against defendant for costs reversed, and judgment entered against plaintiff for costs.

T. J. Murray, of Eagle Pass, Tex., and McMillan & McMillan, of Arkadelphia, for appellant. Jno. H. Crawford, of Arkadelphia, for appellees.

McCULLOCH, C. J. Appellant, J. R. Murray, instituted this action in the circuit court of Clark county against W. E. Miller, one of the appellees, to recover the sum of \$1,665, alleged to be due as commissions on sale of Miller's ranch in Maverick county, Tex.; appellant claiming that he was the procuring cause of the sale which was consummated by Miller, and that he was entitled to above-named sum under his contract. Appellee E. R. Rice intervened in the action, claiming that he had made the sale of the ranch and was entitled to the commission. Miller admitted that he was indebted either to appellant or Rice for a commission on the sale, and offered to pay the money into court, but in his answer denied that appellant was entitled to the commission. The court ordered judgment to be entered against Miller for the amount of the commission, but impaneled a jury to try the issue between appellant and Rice as to which of them was entitled to it. After all the testimony was introduced, the court gave a peremptory instruction to the jury in favor of Rice, and the jury returned a verdict accordingly, and judgment was entered in Rice's favor.

The question, therefore, on this appeal is whether the evidence presented a disputed issue of fact which called for submission to the jury.

Miller owned a large ranch in Maverick county, Tex., and put it on the market for sale, listing it with several real estate agents or brokers, among them both appellant and Rice, who were operating in that territory. The precise date when Rice was first authorized to make the sale is not given. The first authority given to appellant was evidenced by a written agreement signed by Miller, dated February 12, 1912, whereby he gave appellant the agency for the sale of the place at a stipulated price and agreed to pay a commission of 5 per cent. on the price "if the purchaser or purchasers are furnished by the said J. R. Murray," and concluding with the statement that: "This agency agreement is to remain in effect until the said J. R. Murray is notified in writing to the contrary." On February 26, 1912, Miller entered into another written contract with appellant concerning this matter, in which he agreed to give appellant an option or an exclusive agency for the sale of the property during a period of 12 days thereafter, on terms stipulated in the writing, and agreed to pay a 5 per cent. commission if he "should furnish him a buyer for the

same within the time mentioned." Appellant did not consummate a sale of the property, but on March 8, 1912, wrote to Miller, who resided at Smithton, Ark., a letter, in which he called attention to the fact that the option had expired that day, and asked for an extension of the time until April 1st. He explained in the letter that he was having engineers go over the property to figure out an irrigation project, and that he would continue the work, and thought that he had a good chance of "moving the property." Miller replied to this by letter dated March 12, 1912, stating, in substance, that he did not care to extend the option, for the reason that other agents had the property listed for sale, but, in view of the improbability of a sale being made that he would extend appellant's agency until April 10th, explaining, however, that appellant's right to sell would not be exclusive. Miller was then in correspondence with Rice, and informed him by letter of the extension of appellant's authority to April 10th. The lands were finally sold by Miller early in May to Evans, Vaughan, Carson, Smith, Sanford, and Bonnett, parties in Texas, who subsequently formed a corporation to hold the property, and the deed of conveyance from Miller was executed to Rice as trustee for them. The sale was made through Rice, who, it seems, was operating with them in real estate matters. During the life of appellant's 12-day option, he began negotiations with Rice and the other parties for a sale of the property, but nothing resulted from the negotiation, and on March 18, 1912, he notified Miller by telegram that these parties, naming them, were his prospective purchasers, and that, if a sale was made to them, he would expect a commission. Miller replied to the letter by a telegram stating that, the option having expired, Rice had an equal privilege of making the sale. Miller's sale to Evans and others was consummated on May 6, 1912, as evidenced by written contract, and it appears from the other evidence that it was closed verbally a few days before that and earnest money paid.

It is insisted, in the first place, that, notwithstanding the intervening option agreement dated February 26, 1912, and the extension of appellant's authority under Miller's letter of March 12th, the former written authority dated February 12, 1912, whereby he was authorized to sell at any time until authority should be revoked, continued in force, and that, at the time the sale was made, he had a continuing authority to negotiate for a sale.

[1] This contention is unsound, for the reason that the contract for an option or exclusive agency dated March 12th, as well as the subsequent extension of the authority on the terms named, was a substitution of a new contract, and superseded the old one. *Ozark & Cherokee Central Ry. Co. v. Ferguson*, 92 Ark. 254, 122 S. W. 624. The con-

tract of February 12, 1912, gave Miller the right to revoke the agency upon notice, and the subsequent contracts covering the same subject-matter necessarily operated as a revocation of the former authority. Appellant's right, therefore, must be tested according to the authority given him in the letter of March 12, 1912, in which Miller agreed to extend appellant's authority, not the exclusive right to sell, but in common with other real estate men with whom the property was listed, until April 10, 1912, and stating that, "if you make sale on this basis, I will protect you with agent's usual 5 per cent. commission." Appellant's authority was limited to the period of time named, and, unless he complied with the terms of the contract, he was not entitled to a commission. He does not claim that he produced a purchaser "ready, willing, and able" to purchase within that time, but he alleges that he was the procuring cause of the sale, in that he first instituted negotiations with the parties who finally purchased, and that it was his effort that first initiated the negotiations which resulted in the sale.

Learned counsel for appellant rely upon decisions of this court holding that, as between the owner and the agent, the latter is entitled to commission where he is the procuring cause of the sale, notwithstanding the sale is made by direct negotiations between the owner and the purchaser.

[2] According to the undisputed evidence in this case the appellant has not shown himself entitled to a commission, and the court was correct in giving a peremptory instruction. This is so on two distinct grounds. In the first place, appellant's authority was limited to a specified time, and the rule is that, under a contract thus limited, the agent must produce a purchaser "ready, willing and able" to purchase within the time specified. If he fails to do that, he is not entitled to a commission, even though a sale is subsequently made by the owner to a purchaser who had negotiated with the agent. *Brown v. Mason*, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328. This is, of course, subject to the rule that the owner must act in good faith, and not hinder or interfere with the agent in his effort to make a sale during the period of the contract. Good faith on the part of the owner is the test of his liability, under a contract thus limited, unless the agent produces a purchaser within the time limited in the contract. *Addressograph Co. v. Office Appliance Co.*, 106 Ark. 536, 153 S. W. 804; *Greenspan v. Miller*, 163 S. W. 776.

[3] Of course, if, during the life of appellant's contract, Miller, the owner, had made a sale of the property directly to a prospective purchaser with whom appellant had been negotiating, and whose effort had brought about the direct negotiations with the owner which resulted in the sale, then he would be entitled to a commission. But, even

if the sale had been made under those circumstances by the owner through another agent who had an equal right with appellant to negotiate a sale, and whose effort contributed equally in bringing about the sale, then the agent who finally secured the purchaser, and not appellant, was entitled to the commission, and the owner is not liable to appellant, if he acted in good faith, and did not interfere with appellant's efforts to consummate the sale.

[4] Good faith and strict neutrality on the part of the owner as between the rival agents seeking to make the sale is the test of the owner's liability. The authorities are practically unanimous on that proposition. Gross on Real Estate Brokers, §§ 97, 98; Mechem on Agency, § 969; Ward v. Fletcher, 124 Mass. 224; McGuire v. Carlson, 61 Ill. App. 295; Glenn v. Davidson, 37 Md. 385; Glascock v. Van Vleet, 100 Tenn. 603, 46 S. W. 449; Hennings v. Parsons, 108 Va. 1, 61 S. E. 866, 15 Ann. Cas. 765; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Vreeland v. Vetterlein, 33 N. J. Law, 247; Edwards v. Pike, 49 Tex. Civ. App. 30, 107 S. W. 586.

The doctrine stated by Chief Justice Beasley in the New Jersey case cited above is stated so forcibly and demonstrates the justice of the rule so clearly that we cannot refrain from quoting liberally therefrom: "It is certainly true, as a rule of law, that, under ordinary circumstances, where a broker, employed to sell property, brings about an introduction of a buyer, and when a negotiation, resulting in a purchase, ensues on that foundation, the owner and the buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration. \* \* \* But it appears to be equally obvious that another principle must be applied to cases in which several agents are avowedly employed by the owner. Under such circumstances, it would be impracticable to resort to the same rule as when a monopoly to sell is given to one. In the latter case, the implied understanding is that the seller will not take advantage of the endeavors of the agent, and that no other person is authorized to do so. But in the instance of a number of agents, the agreement of noninterference is not so wide, for it extends to the act of the seller only. Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor, and in such case he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. On the other hand, if fortune should be propitious, a bidder for the property on sale, who has been solicited by his rival, may come to him, and by his means

effect the bargain. Now, in this competition, the vendor of the property is to remain neutral; he is interested only in the result. But, when either of the agents thus employed brings a purchaser to him, and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor: This purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principle upon which such a position could rest. It is contrary to the usages of every day commerce. \* \* \* The task would be difficult and the risk great, if vendors were called upon to decide between the claims of contestants. How would it be possible for such vendor to say whose influence it was that produced the sale, where the purchaser has been solicited by both agents. It would be at variance with all practical rules to require the party selling to pronounce, under the penalty of paying double commissions, upon the metaphysical question, which agent, under such circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale is carried to completion is entitled to the commissions."

There is no evidence in this case that Miller acted unfairly towards appellant or interfered with him in his negotiations for a sale. He was advised of the limitation of his rights to make the sale, and knew that other agents were authorized to do so, and therefore assumed the risk of losing his labor on account of the sale being made by another agent.

[5] Nor is there any evidence that Rice acted unfairly in taking the purchasers away from him. The fact that appellant had first begun negotiations with the purchasers did not give him the exclusive right to continue the negotiations as against other agents who were clothed equally with authority to sell.

Counsel for appellant also insists that there is testimony to the effect that, at the time Miller consummated the sale through Rice, he stated to appellant that the latter was entitled to the commission, and that he would put the money in the bank so that appellant and Rice could "fight it out" concerning the right to commission. This testimony was offered, we presume, in the nature of an admission on the part of Miller of his liability to appellant for the commission. We do not think, however, that it can be viewed in the light of an admission, for the reason that appellant stated at the time that he was going to put the money in the bank so that it could be determined in litigation who was entitled to it.

[6] Certainly the alleged statement of Miller cannot constitute a contract, for there was no consideration for it, inasmuch as the sale was then being consummated, or had been consummated, through Rice. And, if

treated as an implied admission as to liability, it can have no force as such, for the undisputed evidence in the case establishes the fact, beyond controversy, that the commission was earned by Rice, and not by appellant.

So, in any view that we take of this case the evidence plainly shows that appellant has not earned the commission, and is not entitled to recover anything in this action. The court was correct, therefore, in giving a peremptory instruction against him.

[7] Miller cross-appeals from that part of the judgment which awards the costs against him, and our conclusion is that that part of the judgment is erroneous. Miller was not liable for any costs in an action instituted by appellant; for the latter has failed to establish any right of action. Miller has not disputed the claim of Rice, but, on the contrary, conceded the right of the latter to recover the commission. He should not, therefore, be subjected to the payment of costs at the instance of appellant.

The judgment in favor of Rice is therefore affirmed, and the judgment against appellee Miller for costs of the action is reversed, and judgment will be entered here against appellant for the costs of the action, as well as for the costs of this appeal.

#### RUSSELL v. STATE. (No. 237.)

(Supreme Court of Arkansas. March 30, 1914.)

##### 1. EMBEZZLEMENT (§ 11\*)—ELEMENTS—CONVERSION—INVESTMENT IN CORPORATION.

A city collector who had invested funds belonging to an improvement district in a certain corporation was guilty of embezzlement, whether he became personally interested in the corporation, or loaned the money to others who became interested, or to the corporation itself.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.\*]

##### 2. EMBEZZLEMENT (§ 23\*)—DEFENSES—REPAYMENT AFTER INDICTMENT.

It is no defense to a prosecution for embezzlement that the amount of the shortage had been repaid by the defendant or his friends after the finding of the indictment.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31-35½; Dec. Dig. § 23.\*]

##### 3. EMBEZZLEMENT (§ 5\*)—ELEMENTS OF OFFENSE—INTENT.

Where the defendant embezzled money which was in his lawful custody, but which he was not entitled to use, any use of it by him was a conversion, notwithstanding an intention on his part to return it, and the state need not prove a specific intent to deprive the owner permanently of his property, as is the case where the property involved was specific personal property.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 3; Dec. Dig. § 5.\*]

##### 4. EMBEZZLEMENT (§ 23\*)—DEFENSES—CORRECT ACCOUNTS.

It is no defense to a charge of embezzlement by a city collector that he made no attempt to conceal the shortage and did not falsify his accounts.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31-35½; Dec. Dig. § 23.\*]

##### 5. CRIMINAL LAW (§ 830\*)—REQUESTED INSTRUCTION—INSTRUCTION GOOD IN PART.

An instruction, requested by a defendant charged with embezzlement, that his confession could not be considered by the jury in determining his guilt, that is, it would not be sufficient to justify a conviction unless corroborated, was properly refused, although the latter part was correct, since when the instruction was taken as a whole it was confusing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

##### 6. CRIMINAL LAW (§ 830\*)—APPEAL—REFUSAL OF IMPROPER INSTRUCTIONS.

A defendant charged with a crime, who has not asked a proper instruction on the subject, cannot complain of the refusal of the court to give an improper one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

##### 7. CRIMINAL LAW (§ 538\*)—SUFFICIENCY OF EVIDENCE—EXTRAJUDICIAL CONFESSION.

Under Kirby's Dig. § 2385, providing that an extrajudicial confession will not warrant a conviction unless accompanied with other proof that the offense was committed, such a confession is evidence tending to prove the crime, although not of itself sufficient to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1227-1229; Dec. Dig. § 538.\*]

##### 8. CRIMINAL LAW (§ 534\*)—CONFESSIONS—CORROBORATIONS.

Proof that a city collector failed, at the expiration of his term, to pay over to the proper parties certain money collected by him, and that the city clerk audited his books and ascertained that he was short an amount which corresponded to that stated by the defendant, is sufficient corroboration of defendant's extrajudicial confession to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1206, 1222-1224; Dec. Dig. § 534.\*]

##### 9. CRIMINAL LAW (§ 1184\*)—APPEAL—DETERMINATION—SENTENCE EXCESSIVE IN PART—EFFECT.

Under Kirby's Dig. § 2434, providing that where a jury assessed a punishment greater than authorized by law, the court must disregard the excess, a judgment, sentencing a city collector convicted of embezzlement of funds of an improvement district, the punishment for which was by imprisonment only, to fine and imprisonment, erroneously imposed under Acts 1909, p. 223, which made a collector of an improvement district who loans or uses its funds punishable by fine and imprisonment, will be modified by striking out that portion assessing the fine, and affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. § 1184.\*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

A. G. Russell was convicted of embezzlement, and he appeals. Modified and affirmed.

Appellant was city collector of the city of Pine Bluff, and by virtue of his office was ex officio collector for all the improvement districts within that city. He was indicted on the 24th of June, 1913, for the crime of embezzlement, it being alleged that as such collector he had collected the sum of \$2,990.38 belonging to paving district No. 26, and it was there recited that he "unlawfully and

fraudulently did make way with, embezzle and convert to his own use without the consent of said paving district No. 26," the said sum of money. A demurrer to the indictment was filed and overruled. At the trial the state offered the evidence of a number of gentlemen to the effect that appellant had invited them to attend a meeting of his friends at the Y. M. C. A. building in the city of Pine Bluff, and that when these gentlemen assembled, appellant addressed them and stated that he had made a very great mistake, and that he had invested large sums of money in an enterprise which he referred to as the Watson Company, and that he had lost this money. He further stated that this money was not his own, but was the property of various paving, sewerage, and other improvement districts in that city, and he called off the sums of money due to each of these districts, and admitted that his total shortage exceeded \$13,000. The purpose of this meeting was to advise his friends of his embarrassment, and to call upon them for assistance, and at his trial appellant undertook to show that he had paid over the various sums due by him; but the court excluded all evidence relating to payments subsequent to the date of the indictment, and there was no offer to prove any payment of any shortage prior to that time. A commissioner of paving district No. 26 testified that appellant admitted his shortage to him, and endeavored to negotiate a loan of money to cover the defalcation. At the trial the jury was instructed that if appellant received any sum of money whatsoever belonging to said paving district, or invested the same or any part thereof in the Watson Company, or otherwise made use of any of said funds for his own purpose, he was guilty as charged. And the jury was further told that it was not necessary, in order to warrant a conviction, that appellant should have used the money, or any part thereof, for his own purposes, but that the appellant was guilty if he permitted others to use it. And the jury was further told that if the appellant used for his personal purposes any money which came to him as collector of the paving district, the fact, if it was a fact, that he afterwards paid the proper authorities of the district the money so unlawfully used was immaterial, and should not be considered in determining the question of the guilt or innocence of the defendant.

The appellant requested the court to charge the jury as follows:

"(1) The court instructs the jury that the mere failure to pay over to the treasurer or commissioners of paving district No. 26 the money in his hands by defendant, at the proper time, would not, of itself, constitute the offense of embezzlement, but, to constitute embezzlement, it must appear that the defendant did retain money of paving district No. 26 that came to his hands by rea-

son of his position as collector, by attempting to, in some manner, conceal from the commissioners of paving district No. 26 the fact that he was in possession of same, or by falsely and fraudulently keeping his accounts so as to prevent the commissioners of paving district No. 26 from knowing the defendant had it in his possession, and, the taking and receiving the same being lawful, the appropriation thereof must appear to have been felonious.

"(2) You are instructed that statements made by defendant cannot be considered by you in determining whether the defendant committed the crime charged against him; that is, such statements alone will not be sufficient to justify you in finding that the defendant committed the crime charged against him, but they must be considered by you along with other circumstances, if there are such circumstances, tending to show that the crime was in fact committed.

"(3) You are instructed that in order to embezzle the property the defendant would have to convert or dispose of the property, or do something which amounted to the holding in active dispute of the owner's right—in this case, improvement district No. 26—and such acts on his part must have been with the fraudulent intent to deprive the owner of the property.

Each of these instructions were refused, and proper exceptions were saved to the giving and refusing of the various instructions.

The jury returned the following verdict: "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at a fine of \$500 and imprisonment in the state penitentiary at a period of one year."

Motion for a new trial was filed and overruled, and appellant prosecutes this appeal from the judgment of the court pronouncing the sentence in accordance with the verdict of the jury.

The Attorney General has filed a confession of error upon the ground that the only evidence tending to show that appellant had appropriated the funds of paving district No. 26 was his alleged confession, and that the court should therefore have given instruction No. 2, asked by appellant.

E. J. Kerwin and A. H. Rowell, both of Pine Bluff, for appellant.

SMITH, J. (after stating the facts as above). [1] The confession of error presents the real question in this case, and that is whether or not there is a sufficiency of evidence, aside from the confession, to support the verdict. If the confession is properly supported by the evidence, appellant must necessarily be guilty of the crime of embezzlement, for by his own statement it appears that he had converted large sums of money belonging to paving district No. 26

and to other improvement districts, and that he had lost this money by his investments in the Watson Company. And it would be immaterial whether he became personally interested in this company, or had loaned the money to others who were interested in that company, or had loaned the money to the company itself, as in any of these cases this use of the money would be a conversion of it to his own use.

[2] Appellant made no attempt to show that he had paid over these sums of money until after he had been indicted, and payment at that time would be no defense if he had previously converted the money to his own use. The record indicates that appellant's friends made good the shortage; but, as has been stated, there is no proof that this action was taken prior to the finding of the indictment, and such payment is no defense against a prosecution for embezzlement. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1.

[3] The second instruction given by the court, which told the jury that the state was not required to prove the intent with which the money was taken, was not improper under the facts of this case, because, if appellant made the use which his confession shows he made of the money of the paving district, he must necessarily have converted that money to his own use, and when he did this, the offense of embezzlement was complete, and he cannot be heard to say that he did not intend to do that which he must have done voluntarily and knowingly. In other words, by his own confession, he converted nearly \$3,000 of the money of paving district No. 26, to his own use, and more than \$10,000 of the money of other improvement districts, and, having done this, it would be no defense for him to show that he had expected to return this money. We have in mind the case of *Conley v. State*, 69 Ark. 454, 64 S. W. 218, in which case it was said: "The language in the court's charge, 'convert to his own use,' is the language used in the statute; but we are of the opinion that the lawmakers did not intend that anything short of a conversion of property by a bailee with the intent to make same his own, and thus permanently deprive the owner of the use and benefit thereof, should constitute the crime of embezzlement. They make the conversion of it 'for his own use' larceny, placing it in the same grade as larceny. So far as the conversion is concerned, the essential elements of criminality are the same in embezzlement as in larceny, i. e., there must be the felonious intent at the time of the conversion of the property by the bailee to make the same his own. *Fleener v. State*, 58 Ark. 98 [23 S. W. 1]. If the bailee only intends to use the property, and to return it [the specified property] finally to the owner, he is not guilty of embezzlement, although such use may be without the knowledge and consent, and contrary to the

expressed wishes and directions, of the bailor. Such is the purport of the authorities." But it will be observed that the court was there dealing with specific property, and it was said not to be embezzlement for one to use property for a longer period than he was authorized to do, provided he did not intend to thus permanently deprive the owner of his property. But there is no question here about the use or return of specific property. The appellant had the lawful custody of the money, but he had no legal right to the use of any of it, and when he used it, he must necessarily have converted it to his own use, and he cannot excuse that act by showing his good intentions to return it.

[4] Instruction No. 1, asked by appellant, not only told the jury that mere failure to pay over the money would not constitute embezzlement, but it went further and said that it must appear that the defendant retained the money of the district by attempting to in some manner conceal the fact that he was in possession of it, or by falsely and fraudulently keeping his accounts so as to prevent the commissioners from knowing he had it in his possession. The effect of this instruction is to tell the jury that the crime of embezzlement can be committed only surreptitiously, and that that crime was not committed if appellant's books were kept so that his shortage appeared from an inspection of them. It appears to have been a fact that appellant's books were kept properly, and that the amount of his shortage was readily ascertained from an inspection of them, but this of course can be no defense. One guilty of embezzlement can claim no immunity because he did not attempt to conceal the evidence of his crime.

What we have already said about the intent disposes of the third instruction requested by appellant.

[5] The second instruction presents the real question in the case and because of its refusal the Attorney General confesses error. But this instruction, considered by itself, is not correct, for the latter part of it is in conflict with the first part of it. The latter part of this instruction correctly tells the jury that the defendant's statements alone will not be sufficient to justify the finding that appellant committed the crime charged against him; but that such statements could be considered by the jury along with other circumstances, if there are such circumstances, tending to show that the crime was in fact committed. But the first part of this instruction told the jury that statements made by the appellant cannot be considered in determining whether the appellant committed the crime charged against him, and this, of course, is not a correct statement of the law, and, when read as a whole, as all instructions should be, it is not entirely clear what weight the jury should give in considering appellant's statements. An instruction, of which this is practically

a copy, was given by the court in the case of *Meisenheimer v. State*, 73 Ark. 407, 84 S. W. 494. But the instruction was not expressly approved in that case; on the contrary it was there given instead of one which had been asked by the defendant on the same subject. The discussion in that case shows that the instruction which the defendant asked was not the law, and all of the one given was as favorable as he could ask, and he was therefore not prejudiced because it was not technically correct.

[6] One who has not asked a proper instruction on the subject cannot complain of the refusal of the court to give an improper one. *West. Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528.

[7] It is of course true that "a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed" because section 2385 of Kirby's Digest so provides; but such confessions are not to be disregarded in determining whether the defendant committed the crime charged against him. The proper construction of the above-quoted section of the Digest was discussed in the case of *Meisenheimer v. State*, supra, where it was said: "The authorities sustain the proposition that a confession may be considered as evidence tending, but insufficient of itself, to prove the corpus delicti, as well as the connection of the defendant with the crime. The New York statute is similar to the one under consideration, using the term 'additional proof' where this uses 'other proof.' The Court of Appeals says, after stating the same objection that is urged here: 'But we are of opinion that when, in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a noncompliance with the requirement of the statute. The words of the statute, "additional proof that the crime charged has been committed," seem to imply that the confession is to be treated as evidence of the corpus delicti; that is, not only of the subjective criminal act, but also the criminal agency of the defendant, in other words, as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction.'" *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374. In *People v. Badgley*, 16 Wend. (N. Y.) 53, the court said: "Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient." In *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676, the court said: "There must be some other evidence of the existence of the criminal fact

to which the confession relates." And in the *Meisenheimer Case* it was further said that "the proposition that the confession is evidence, but not sufficient per se, to prove the crime seems fully established." Appellant's confession was extrajudicial, but it is not unsupported by other evidence.

[8] The evidence was undisputed that appellant's term of office expired on the 7th of April, and that he did not then pay over to his successor, nor to the treasurer of the various districts, the sums of money collected by him, and in no event could he lawfully retain possession of his collections beyond the expiration of his term of office. The city clerk audited appellant's books, and experienced no difficulty in ascertaining from them the amount of the shortage, and the sums thus found to be due corroborated the statements made by appellant to his friends when he advised them of his embezzlement. Here the undisputed proof shows, independently of any confession made by appellant, that he had collected large sums of money of which \$2,990.38 belonged to paving district No. 26, and that this money had not been paid over when the audit of the books was completed, about the 1st of June thereafter. Under the rule laid down in the case of *Meisenheimer v. State*, supra, this is sufficient corroboration of appellant's confession to show the commission of the crime and his guilt.

[9] It thus appears that the evidence, under the instructions of the court, was sufficient to sustain a conviction for embezzlement; but the punishment appears to have been assessed under Act No. 80 of the Acts of the General Assembly of 1909, which provides that any person violating any of the provisions of that act shall, on conviction, be fined any sum not less than \$500 nor more than \$5,000 and imprisonment in the state penitentiary not less than 1 year nor more than 10 years. This act is an enlargement of the embezzlement statute in its application to boards of improvement in cities and towns in this state. This act makes it unlawful for the collector or treasurer of the improvement district, or any other subordinate officer appointed by the board, to loan or use, or to be interested in the loan or use, of any fund raised by the improvement district. The acts and omissions made unlawful by this Act No. 80 are not as technical as the crime of embezzlement is; but we need not determine the application of that act to the facts of this record, because appellant was indicted for embezzlement, and the proof is legally sufficient to sustain his guilt of that crime. In assessing a fine the jury imposed a punishment in excess of that provided by law, and in such cases the court should disregard the excess. Section 2434 of Kirby's Digest so provides.

The judgment of the court will therefore be modified by striking out that portion assessing a fine, and is otherwise affirmed.

**ST. LOUIS, I. M. & S. RY. CO. v. DE LAMBERT.** (No. 286.)

(Supreme Court of Arkansas. April 24, 1914.)

**1. MASTER AND SERVANT (§ 236\*)—CONTRIBUTORY NEGLIGENCE.**

A railroad mechanic, engaged in testing, on the track, a motor car he was repairing, was required to exercise care for his own safety in avoiding trains, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

**2. MASTER AND SERVANT (§ 210\*)—RISK ASSUMED.**

A railroad mechanic engaged in testing a motor car, which he was repairing, assumed the risk of a collision with a hand car running on the same track, if the hand car operators were not negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.\*]

**3. MASTER AND SERVANT (§ 96\*)—INJURIES TO SERVANT—LIABILITY OF MASTER.**

A railroad company was not liable for injuries to a mechanic engaged in testing on the track a motor car, which he was repairing, caused by a collision with a hand car, if the hand car operators were not its employes and not authorized to operate the car; the company not having given any general permission to the public to operate hand cars on its tracks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 157, 158, 162; Dec. Dig. § 96.\*]

**4. MASTER AND SERVANT (§ 276\*)—MASTER'S LIABILITY.**

The fact that hand cars were frequently operated on railroad tracks to carry passengers would not show a general custom to permit any person who desired to operate a hand car on the track, so as to make the railroad company responsible for the negligent acts of one operating a hand car who was not authorized to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**5. MASTER AND SERVANT (§ 265\*)—NEGLIGENCE—BURDEN OF PROOF.**

There is no presumption of negligence by an employer, and an employe suing for personal injuries has the burden of showing facts making the employer liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**6. MASTER AND SERVANT (§ 265\*)—INJURIES TO EMPLOYE—NEGLIGENCE OF THIRD PERSON—LIABILITY OF EMPLOYE.**

In order to make a railroad company liable for injuries to an employe from the operation of a hand car on the tracks by persons not authorized by it to do so, it must be shown that there was a custom of permitting the operation of hand cars on the tracks by persons not specifically authorized, and that such custom was actually or impliedly known to the railroad officials.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from Circuit Court, Bradley County; H. W. Wells, Judge.

Action by Leslie F. De Lambert against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plain-

tiff, defendant appeals. Reversed and remanded for a new trial.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and Jas. C. Knox, of Monticello, for appellant. Jones & Owens, of Little Rock, and J. R. Wilson, of Monticello, for appellee.

**McCULLOCH, C. J.** This is an action to recover damages on account of personal injuries received by plaintiff while he was working as mechanic in the service of the defendant at McGehee, Ark. Plaintiff was working as repair man in and about the shops at McGehee. The particular line of work in which he was engaged at the time of his injury was that of repairing motor cars. It was his duty to repair the cars, and in doing so it was necessary to take them out on the railroad track to try them out to ascertain whether or not they were in working order. There was a branch line from McGehee to Arkansas City, on which there was only one train a day each way, and, according to the testimony, the instructions to plaintiff from his superior were to test the motor cars on that track. It was while he was engaged in this work that his injury occurred. On Sunday, July 14, 1912, he was at work on a motor car which was needed and which it was necessary for him to get in repair as speedily as possible. He took the car out on the track that morning, tested it, and found that it was not in satisfactory condition, and continued his work repairing it during the day. Late in the afternoon or early in the evening he got it in condition to test it again and took it out on the track for that purpose, waiting first for the train to leave McGehee for Arkansas City. He took several persons along with him to assist him in lifting the car off the track when it became necessary to turn around or in the event he met a train or a hand car or speeder. He left McGehee after dark, and after going out 1½ or 2 miles the motor car he was driving collided with a hand car coming from Arkansas City. He and his companions were thrown from the motor car, and he received serious injuries sufficient to warrant an assessment of damages in the amount awarded by the jury.

There is no controversy as to whether plaintiff was acting within the line of his duty in taking the car out on the track. But the testimony was sufficient to warrant the finding in his favor on that issue. The evidence is also sufficient to warrant the conclusion that he was not guilty of any negligence which contributed to his own injury, but that the collision resulted from negligence of those operating the hand car in running the car at a high speed without keeping a lookout or displaying a light. The right to recover damages from the company on account of the collision rests, if it exists



at all, upon negligence of those in charge of the hand car and the company's responsibility for their act, for there is no liability if there was no negligence in the operation of the car or if the car was operated without the knowledge or consent of the company's servants.

[1, 2] It was the duty of plaintiff to exercise care for his own safety in watching out and avoiding trains and other cars, and, if there was no negligence in the operation of the hand car, then he cannot recover from the company, for the collision resulted from a danger the risk of which he assumed in undertaking to do the work.

[3] The evidence is sufficient, as before stated, to establish negligence on the part of the persons who were operating the hand car; but there is, in our opinion, no evidence establishing a state of facts which would make the company responsible for the acts of those persons. They were not servants of the company and were not authorized to operate the hand car along the track. There is no dispute about what car it was that was being operated that night, and there is no testimony whatever that the servants of the company had anything to do with it. The car belonged, according to the undisputed evidence, to some engineers who were superintending the work of a levee district or drainage district. They bought the car for use over a log road operated by the Desha Lumber Company and had permission to do so. There is no proof that they were ever given permission to use the car on the tracks of the defendant company. On the day in question a crowd came over from Warren to Arkansas City to play a ball game, and late in the afternoon some one took the hand car in question from the tracks of the Desha Lumber Company and carried it over to the tracks of the defendant company for the purpose of transporting some of the ball players back to McGehee that night in time to catch a train over the main line. There is no proof whatever that any servant of the defendant company participated in this movement or knew anything about it. The testimony shows that Dr. McCammon, the company's surgeon, was there at his residence near the track when the car was loaded and left Arkansas City, and that he undertook to give directions about the operation of the car. He states that what he did was only a friendly act to the engineers, who were acquaintances of his, and that when he saw that the car was about to be overloaded to the extent that it was likely to break down he directed some of the men to get off in order to lighten the load. It is not contended that he had any authority to act for the company, and there is no evidence that he did have any such authority. It is not shown who was at the head of the movement to use the car, but there was an entire absence of any evidence to connect any servant of the company with it.

Plaintiff undertook, however, to show that there was a general custom, whereby any person with a hand car was allowed to operate it along this track. Some testimony was introduced to the effect that it was customary for hand cars to be operated for the purpose of transporting passengers from Arkansas City and other points to McGehee, and the case was submitted to the jury upon the theory that if such a custom existed those who operated the car were doing so under license from the company, and that the latter would be responsible for their negligent act which caused injury to persons rightfully on the track.

[4] The testimony is, perhaps, sufficient to show that it was customary for persons to be transported over the track on hand cars, but the testimony falls short of proving that there was any general custom whereby a license was extended to all persons to operate hand cars along the track. Nor was there any testimony either that this hand car was ever operated over defendant's track before this instance, or that the persons who operated the car on this occasion were ever authorized to operate the hand car on defendant's track. The fact that hand cars were frequently operated for the purpose of transporting passengers does not show a general custom to permit any person who saw fit to operate a hand car and to confer a license to do so, so as to make the company responsible for the negligent acts of all persons who might see fit to accept the license.

The defendant introduced as witnesses its servants and officials in charge of that department to show that they never permitted any person to operate a hand car, and numerous instances are given in the testimony where persons were observed using hand cars and were prevented from doing so. It was also shown by undisputed testimony that the section foreman never permitted his car to be used by other persons, and that he had nothing to do with the operation of the car which caused the injury, nor had any knowledge that it was being operated on that occasion. There is some proof that one, or perhaps two, of the men who ran the hand car were regular section hands; but this was on Sunday, when they were off duty and not working for the company.

[5] There is no presumption of negligence in this case, and the burden rested upon the plaintiff to make out his case by showing a state of facts which renders the company liable for the damages which he sustained.

[6] In order to make the company liable for the negligence of those operating the hand car, authority to operate the car must be shown, either by proof that they were servants of the company, or were authorized to operate the hand car, or that there existed a custom of such a general nature as was sufficient to extend the privilege of operating hand cars to every person who might see fit to do so. Proof merely that persons

occasionally operated hand cars, with or without authority, is not sufficient to establish the essential facts in this case, for, "in order to make the company liable, there must be proof, not only of the custom, but that it was actually known by the officials who conducted the affairs of the railway company, or that it was so general and of such long continuance that it must be fairly inferred that it was known and assented to by them." St. Louis, Iron Mountain & Southern Ry. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418.

Our conclusion, therefore, is that the evidence does not sustain the verdict, and for that reason the judgment is reversed and the cause remanded for a new trial.

CALLAWAY et al. v. HARLEY, County Judge.

AYERS v. SAME. (No. 280.)

(Supreme Court of Arkansas. April 20, 1914.)

1. APPEAL AND ERROR (§ 77\*)—FINAL ORDER—APPEALABILITY.

An order of the county court in proceedings to establish a drainage district, which directs the payment of warrants for services by attorneys for the district, and by the engineer employed to make the preliminary survey, out of the funds of the district, instead of out of the county general fund, is final, and, under Kirby's Dig. § 1487, appealable within six months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 444-463; Dec. Dig. § 77.\*]

2. MANDAMUS (§ 4\*)—ADEQUACY OF OTHER REMEDY.

A party who had a complete remedy by appeal from an adverse order of the county court must pursue that remedy, and mandamus does not lie, after the time to appeal has expired, to compel the court to grant the relief demanded.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Clark County; C. W. Smith, Special Judge.

Petitions for mandamus by J. E. Callaway and another and by one Ayers against Stan C. Harley, County Judge, to compel the issuance of warrants. From judgments sustaining demurrers to the petitions, petitioners separately appeal. Judgments affirmed.

These cases have not been consolidated, yet they involve the same questions and may be considered and decided together. Callaway & Hule were the attorneys representing the petitioners in the formation of the Terre Noir drainage district in Clark county, and the appellant Ayers was the engineer employed to make the preliminary survey. The proceedings for the establishment of the district were had under Act No. 279 of the Acts of 1909. The petition of the attorneys for mandamus was filed on September 2, 1913, and alleged that they presented to the Clark county court on April 3, 1912, a day of said court, a petition for the allowance of an attorney's fee of \$500 for services rendered as attorneys for

the drainage district, and the court allowed said fee, but, instead of directing the clerk to issue a warrant payable out of the county general fund, the court directed the clerk to issue the warrant payable out of the funds of the drainage district. The petition for mandamus further alleged that, notwithstanding the drainage district had been established in 1908, no assessment of benefits had been collected on account of litigation in which the district had been engaged. Petitioners alleged they had repeatedly requested the county judge to issue them warrants payable out of the county general fund, but the judge had failed and refused to do so. Appellant Ayers alleged in his petition for mandamus, which was filed the same day, that he held warrants amounting to \$500, which had been issued to him as engineer of said district, and were made payable out of the funds of the said district; his warrants having been issued at the same term of court at which warrants for the attorney's fees were issued. The demurrer interposed to each petition was sustained, and appeals have been duly prosecuted.

Callaway & Hule, of Arkadelphia, for appellants. Jno. H. Crawford, of Arkadelphia, for appellee.

SMITH, J. (after stating the facts as above). [1] Appellee insists in his brief, in the case involving the attorney's fees, that the county court had no authority to order warrants reissued payable out of the county general fund, and that the act of 1909, under which the proceedings for the establishment of the drainage district were had, makes no provision for the allowance of an attorney's fee, and that if such provision was made it would be unconstitutional. And in the case of the engineer the contention is made that the work done, as recited in the petition, was not a preliminary survey within the meaning of the statute, and that the county court had no authority to reissue warrants payable out of the county general fund, and that if such provision was made it would be unconstitutional. In both cases it is asserted that appellants should have appealed, if they felt aggrieved, from the action of the county court in ordering their warrant paid out of the funds of the drainage district, and in refusing to make them payable out of the county general revenue, and that, having waited more than 17 months before instituting these proceedings to mandamus the county judge, they have lost their right of appeal, and cannot use this proceeding as a substitute for that right. We think this last position is well taken, and it will therefore be unnecessary to discuss the other grounds of demurrer. The action of the county court in ordering the warrants paid out of the funds of the drainage district was a final order of that court, from which an appeal

could have been taken at any time within 6 months, but not thereafter. Section 1487, Kirby's Digest.

[2] Having a complete remedy by appeal they should have pursued it. In the case of Rolfe v. Spybuck Drainage District No. 1, 101 Ark. 29, 140 S. W. 988, it was said: "It is well settled that the remedy of mandamus will only be granted in unusual cases, where other remedies fail, and where there is a clear legal right thereto. Mandamus will not lie to control or review the exercise of the discretion of judicial officers, but such remedy can only be invoked to compel such officers to exercise such discretion and act. Collins v. Hawkins, 77 Ark. 101 [91 S. W. 26]; Branch v. Winfield, 80 Ark. 61 [95 S. W. 1007]; McBride v. Hon, 82 Ark. 483 [102 S. W. 389]; Maxey v. Coffin, 94 Ark. 214 [126 S. W. 729]; Garland Power & Development Co. v. State, 94 Ark. 422 [127 S. W. 454]. As a general rule, the party applying for a writ of mandamus must show a specific legal right to its issuance, and also the absence of any other legal remedy; for it is a well-settled principle that mandamus will not be allowed to take the place of, or usurp the functions of, an appeal. Automatic Weighing Co. v. Carter, 95 Ark. 118 [128 S. W. 557]."

The demurrers were properly sustained, and the judgment in each case will be affirmed.

CARTER et al. v. YOUNGER. (No. 270.)  
(Supreme Court of Arkansas. April 20, 1914.)

1. DOWER (§ 69\*)—ALLOTMENT—JURISDICTION—PETITION.

A petition by a widow for allotment of dower, which alleges that her husband died a citizen of the county, possessed of personal property described, that she is entitled to a third thereof, and that the executors have refused to assign dower, states facts vesting jurisdiction in the probate court to allot dower, under Kirby's Dig. § 1340, vesting the probate courts with jurisdiction in matters of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 239-246; Dec. Dig. § 69.\*]

2. DOWER (§ 69\*)—ALLOTMENT—JURISDICTION—PETITION.

The jurisdiction of the probate court to assign dower cannot be defeated simply by a denial that the widow petitioning for dower is entitled thereto, nor by an allegation that she has relinquished her dower by agreement of separation.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 239-246; Dec. Dig. § 69.\*]

3. DOWER (§ 69\*)—ALLOTMENT—JURISDICTION—PETITION.

Where, in proceedings in the probate court by a widow for the allotment of dower, the answer alleged that petitioner and her deceased husband had entered into an agreement of separation, which stipulated for a payment to her in consideration of her release of any claim of dower, and she alleged that the separation agreement had been abrogated by subsequent cohabitation, the probate court had jurisdiction only to determine whether the separation agreement had been abrogated, and, if abrogated, it could award dower, but it could not

determine whether the separation agreement was fair and just.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 239-246; Dec. Dig. § 69.\*]

4. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—ABROGATION BY SUBSEQUENT COHABITATION.

Where husband and wife, who made a valid separation agreement, subsequently reassumed the marital relation, the agreement was annulled, and their marital rights must be determined by statute.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 571; Dec. Dig. § 279.\*]

5. HUSBAND AND WIFE (§ 281\*)—SEPARATION AGREEMENT—REVOCATION—BURDEN OF PROOF.

Where a widow, petitioning for allotment of dower, admitted the execution of a separation agreement adjusting her property rights, but alleged that the same had been abrogated by a subsequent reassumption of marital relations, the burden of proof rested on her to show abrogation of the agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 573; Dec. Dig. § 281.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Suit by Amanda V. Younger against B. E. Carter and another, as executors of Samuel Younger, deceased, and others for the allotment of dower. From a judgment of the circuit court allotting dower, rendered on appeal from a judgment of the probate court denying relief, defendants appeal. Reversed and remanded for new trial.

Appellee instituted this suit in the probate court for allotment of dower. She alleged that she was the widow of Samuel Younger, who died April 19, 1911, being then a citizen of Sebastian county, Ark., and possessed of a large amount of personal property, which was set forth in a schedule attached to the petition. She alleged that she was entitled to one-third of the property described; that defendants had failed to comply with her request for assignment of dower. No written pleadings were filed by the defendants in the probate court. On a trial of the issues judgment was rendered against the appellee, and she appealed to the circuit court. In the circuit court appellants answered and set up that the court had no jurisdiction. They denied the appellee was entitled to dower as alleged in her petition. They then set up that on the 10th day of June, 1909, Samuel Younger and appellee, while they were husband and wife, but while they were living apart from each other, entered into an agreement of separation; that among other things it was stipulated in the agreement that, in consideration of several promises and covenants of the said Amanda V. Younger, Samuel Younger, her husband, agreed to pay her the sum of \$525 in cash upon the execution of the agreement of separation, and to deliver to her also his promissory note for \$525. It was stipulated that, in consideration of the payment of the sum of \$525, as above, and the execution of the note, Amanda V. Younger

thereby released the said Samuel Younger from any claim or obligation for her support or maintenance, and also released and relinquished to Samuel Younger, his heirs and assigns, any right or claim of dower that she had acquired or might acquire to the estate of said Samuel Younger by virtue of their marriage. It was further stipulated that the parties would live apart on the terms and conditions above set forth. The defendants further alleged that the contract was entered into in good faith by Samuel Younger, and voluntarily by Amanda V. Younger, and without any compulsion or undue influence or fraud upon the part of Samuel Younger. Defendants further alleged that the consideration paid by Samuel Younger, according to the separation agreement, fully equaled the value of appellee's rights of dower. They alleged that the contract was never abrogated or set aside. They set up that an accounting was necessary to arrive at the amount of dower, if the appellee was entitled to any, and moved the court to dismiss the cause for want of jurisdiction. Appellee filed a reply to the answer, reiterating that she was entitled to dower out of the estate of Samuel Younger, deceased; she being his widow. Admitted "that on the 10th day of June, 1909, she entered into an agreement of separation with her husband, Samuel Younger," but alleged that "said agreement of separation was duly canceled and abrogated," and that, "by mutual agreement between her and her husband, Samuel Younger, before his death, and in good faith, she again returned to live with her husband, and nursed him, washed his nightshirts, providing him with food, and gave him every attention that was possible for her to do for several weeks before his death, all of which was done in good faith by plaintiff after the cancellation and abrogation of the agreement of separation." She denied that the agreement was fair and equitable, and alleged that the amount paid her, to wit, \$1,050, was not "fair and equal, reasonable in its terms, according to his estate at the time, and did not fully equal the then value of her expectant or possible right of dower in her said husband's estate." She then proceeded to allege matters to show that the consideration paid her was not fair and equal. She concluded her reply with a prayer that the court allow and award her dower as described in her complaint. The appellants, after the reply was filed, moved to dismiss on the ground that their answer raised questions of which a court of equity alone had jurisdiction, and moved also to transfer to equity for the same reason. The court overruled the motions, and sent the issues to a jury, instructing them, over the objection of appellant, as follows: "(3) The burden of proof rests on defendant to show, by a fair and reasonable preponderance of the evidence, that she is not entitled to dower." The verdict and judgment were in favor

of the appellee, and this appeal has been duly prosecuted.

Jas. B. McDonough and Geo. F. Youmans, both of Ft. Smith, for appellants. J. F. O'Melia and Cravens & Cravens, all of Ft. Smith, for appellee.

WOOD, J. (after stating the facts as above). [1] I. The petition of the appellee properly stated sufficient facts to give the probate court jurisdiction to assign her dower in the property. Probate courts of this state are vested with jurisdiction in matters of dower. Kirby's Digest, § 1340; Jones v. Jones, 28 Ark. 19. See *Ex parte Hilliard*, 50 Ark. 34, 6 S. W. 326; *Hilliard v. Hilliard*, 52 Ark. 283, 12 S. W. 578. The court therefore did not err in refusing to dismiss the appellee's petition for allotment of dower.

[2, 3] This jurisdiction of the court to assign dower as shown by appellee's petition could not be defeated simply by a denial of appellants that she was entitled to dower, nor upon an allegation that she had relinquished her dower by an agreement of separation. The answer, however, set up other facts which, if true, were sufficient to restrict the jurisdiction of the probate court, and to show that the case was cognizable alone in a court of chancery. See *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399. Appellant, however, replied to the answer, in which she admitted the agreement set up, but alleged that same had been abrogated. Under these allegations of the pleadings, we are of the opinion that it was within the province of the probate court, as incident to its jurisdiction to assign dower, to determine whether the separation agreement, which she admits that she executed, was afterwards abrogated by the parties who made it. For if the separation agreement was not abrogated, appellee, having admitted that she executed it, would be bound thereby, and would not be entitled to dower. On the contrary, if the separation agreement had been abrogated by the parties to it again assuming the marital relation, then appellee would be entitled to dower. This is as far, however, as the probate court had jurisdiction to inquire. It had no jurisdiction to determine as to whether or not the separation agreement was fair and just. These were issues that could only be determined in another forum. The probate court had no jurisdiction to grant equitable relief.

[4] II. Where the parties to a valid separation agreement afterwards come together, and live together as husband and wife, where their conduct towards each other is such that no other reasonable conclusion can be indulged than that they had set aside or abrogated their agreement of separation, then such agreement should be held as annulled by the parties to it, and their marital rights determined accordingly. See *Dennis v. Perkins*, 88 Kan. 428, 129 Pac. 165, 43 L. R. A. (N. S.)

1219. The court, without objection, sent this issue to the jury, and this was the only issue that should have been submitted. It could serve no useful purpose to set out in detail the testimony tending to show, on one hand, that the contract was abrogated, and on the other that it was not. We are of the opinion that there was testimony to warrant a finding that the contract had been abrogated by the appellee and her husband again assuming the marital relation, and that they sustained this relation to each other at the time of his death. The court, however, did not properly submit the issue to the jury.

[5] The third instruction, granted at the request of the appellee, put the burden of proof on the appellant to show that appellee was not entitled to dower; whereas, under the pleadings, the burden was upon the appellee to show that she was entitled to dower. Appellee, having admitted that she entered into the agreement set up in the answer after separation from her husband, the burden was upon her to show that such agreement had been abrogated; otherwise, under the pleadings, she would not have been entitled to dower, and the burden of proof was upon her to show that fact. As to whether or not there had been an abrogation of the agreement concerning the separation was an exceedingly close question of fact, under the testimony, and the instruction, placing the burden upon the appellants to show that appellee was not entitled to dower, was prejudicial.

Other objections are reserved and urged as to the rulings of the court upon the admission of certain testimony, and also as to the granting and refusing of prayers for instructions, but we are of the opinion that what we have already said is sufficient to indicate what the rulings of the court should be on these matters at another trial.

For the error in granting appellee's prayer for instruction as to the burden of proof, the judgment is reversed and the cause will be remanded for a new trial.

HART, J. The probate court, under our statute, has only a limited jurisdiction in the assignment of dower. I think the title to dower is involved in this suit, and that therefore the probate court had no jurisdiction to assign dower.

#### BENSON v. STATE. (No. 265.)

(Supreme Court of Arkansas. April 20, 1914.)

##### 1. RAPE (§ 59\*)—INSTRUCTIONS.

Accused requested instructions that, in order to convict of assault with intent to commit rape, the jury must believe, from the evidence, that he assaulted prosecuting witness, and that, at the same time, with the intent to use whatever force was necessary to overcome said witness, and for sexual intercourse with her, and, unless they so found, the jury should acquit accused of the felonious assault, and

that unless they believed from all the evidence, beyond a reasonable doubt, that accused assaulted prosecuting witness with intent to ravish her, and intended to use so much force as was necessary to accomplish that purpose and overcome her resistance, they should acquit. *Held*, that the requested instructions were correct statements of law, and their refusal would be reversible error, if not covered by other instructions.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

##### 2. CRIMINAL LAW (§ 829\*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

The refusal of the instructions was not reversible error, where the same idea was conveyed by other instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

##### 3. CRIMINAL LAW (§ 1166½\*)—APPEAL—HARMLESS ERROR—CONDUCT OF COURT.

The action of the court in admonishing the jury, that prosecuting witness must "just testify," and confine herself to answering questions, after prosecuting witness, while on the stand, had referred to accused by using an epithet, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

##### 4. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR.

Any prejudicial effect, because of the reference to accused's being drunk, in testimony by an officer that, when he went to arrest accused, he found him and his wife together, and recognized accused by being with his wife because of the fact that she had been to police headquarters looking for him, claiming that he was drunk, was cured by an instruction not to consider such statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3068, 3130, 3137-3143; Dec. Dig. § 1169.\*]

##### 5. CRIMINAL LAW (§ 596\*)—DISCRETION OF TRIAL COURT—POSTPONEMENT OF TRIAL.

It was within the trial court's discretion to refuse to suspend trial to enable accused to procure another witness to contradict prosecuting witness concerning her testimony in the examining court, where accused had produced several other witnesses to testify to the same contradictory statements by prosecuting witness, since accused should have summoned the particular witness before trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1330; Dec. Dig. § 596.\*]

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

J. G. Benson was convicted of assault with intent to commit rape, and appeals. Affirmed.

Jones & Owens and Jackson & Jones, all of Little Rock, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. The defendant was convicted of the crime of assault with intent to commit rape.

The state relied mainly upon the testimony of the woman alleged to have been assaulted, and her testimony is sufficient to sustain the charge that the defendant assaulted her at the time and place named in the indictment

with intent to have sexual intercourse with her forcibly and against her will. Other witnesses corroborated her testimony. The defendant denied that he was present on the occasion named or that he assaulted the witness. The evidence was sufficient to sustain the verdict.

Defendant requested the court to give the following two, among other, instructions, which the court refused, and those rulings are assigned as error:

"No. 5. You are instructed that, before defendant can be convicted of assault with intent to commit rape, you must believe from the evidence that he assaulted the prosecuting witness, and that at the same time, with intent to use whatever force was necessary to overcome said witness, and for sexual intercourse with her, and unless you so find, you should acquit him of the felonious assault."

"No. 6. Unless you believe from all the evidence in this case, beyond a reasonable doubt, that the defendant assaulted the prosecuting witness with the intent of ravishing her, and that he intended to use so much force as would be necessary to accomplish that purpose and overcome her resistance, then you are authorized to find the defendant not guilty of an assault to commit rape."

[1] Those instructions are correct statements of the law, and, if not covered by other instructions, would constitute reversible error. *Paul v. State*, 99 Ark. 558, 129 S. W. 287. We are of the opinion, however, that the substance of those instructions was covered by others given by the court in its oral charge. Counsel for appellant rely upon the case of *Paul v. State*, supra, as sustaining their contention that this constitutes reversible error. In that case, however, the judgment was reversed and the cause remanded for a new trial on account of two other errors of the court. It was said in the opinion that the refusal to give those instructions was error, but it was not said that the case would be reversed on that account. The case was in fact reversed on other grounds, and the error in refusing those instructions was mentioned in view of another trial of the case.

[2] Those two instructions were appropriate in this case, and the trial court should have given them, we think, as clear enunciations of the law on the subject. But, as before stated, the same idea was conveyed to the jury in other instructions, and we do not think that the refusal of the court to give these operated to the defendant's prejudice.

[3] Another ground urged for reversal is that the prosecuting witness, while on the witness stand, pointed the defendant out and referred to him by using an epithet. Objection being made by defendant, the court admonished the jury that she must "just testify," and confine herself to answering ques-

tions. Defendant contented himself with saving exceptions without asking the court specifically to give any directions to the jury. We are of the opinion that the incident did not constitute reversible error.

[4] It is next insisted that the court erred in permitting the officer who arrested defendant to refer in his testimony to the fact that defendant was drunk. The officer stated that, when he went to arrest the defendant, he found him and his wife together, and that he recognized him by being with his wife on account of the fact that she had been up to police headquarters looking for defendant, claiming that he was drunk. As soon as objection was made, the court instructed the jury not to consider this statement, which removed any prejudicial effect which otherwise might have resulted.

[5] Another error is assigned in the court's refusal to suspend the trial during the progress thereof and postpone further proceedings to await the procurement of another witness to contradict the prosecuting witness concerning her testimony in the examining court. Defendant had produced several other witnesses who testified to the same contradictory statements of the prosecuting witness, and, if it was desired to have this particular witness, he should have been summoned before the commencement of the trial. We do not think any error was committed in this ruling. It was a matter within the discretion of the court under the circumstances of the case, and no abuse of that discretion is shown.

Judgment affirmed.

GRANT COUNTY BANK et al. v. McCLELLAN, County Judge, et al. (No. 278.)

(Supreme Court of Arkansas. April 20, 1914.)

1. DEPOSITARIES (§ 6\*)—DEPOSIT OF PUBLIC MONIES—DESIGNATION—BIDS.

A bid by a bank seeking to become a depositary of public funds of a county under Sp. Acts 1911, p. 929, to pay a specified per cent. per annum more than any other bid, is not valid, since no proposition can be a bid unless it is complete in itself; and since there can be no real competition unless all bidders bid on the same basis.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 20; Dec. Dig. § 6.\*]

2. DEPOSITARIES (§ 6\*)—DEPOSIT OF PUBLIC FUNDS—SELECTION OF DEPOSITARIES—DISCRETION OF COURT.

Sp. Acts 1911, p. 929, providing for a depositary for the public funds of a county, authorizing bids, and empowering the county court to reject any and all bids, but no bid shall be received for less than a specified per cent. per annum, computed on the daily balances of cash on hand, etc., requires the selection of the highest bid received in response to an advertisement for bids, and the court has no jurisdiction to select a bank which has not presented a valid bid.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 20; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

Proceedings for the selection of a depository of the public funds of Grant county. From a judgment of the circuit court, adjudging that the county has no depository, rendered on the appeal of the Grant County Bank from a judgment of Isaac McClellan, County Judge, designating the Citizens' Bank the depository, all parties appeal. Affirmed.

The Grant County Bank and the Citizens' Bank, both located in Grant county, sought to be designated as the depository of the public funds of that county, and each filed a proposition in writing with the clerk of the county court of that county. The action was taken in response to an advertisement published by the county judge inviting bids for the use of the public funds of that county, under the authority of Special Act No. 326 of the Acts of 1911. The bid of the Grant County Bank was an offer to pay  $4\frac{1}{4}$  per cent. on daily balances, while the Citizens' Bank proposed to pay "one-fourth of one per cent. per annum more than any other bid" offered. When said bids were opened, the Grant County Bank objected to the bid of the Citizens' Bank being considered, but the county court construed the bid of the last-named bank to be an offer of 4.5 per cent., which construction was then and there ratified by the cashier of that bank, but the court continued the hearing until the following Saturday, at which time all interested parties were notified to appear and show cause why the Citizens' Bank should not be selected as the depository. On this adjourned day the Grant County Bank amended its bid by offering to pay 4.51 per cent. on the daily balances. The court held that the amended bid of the Grant County Bank could not be considered, because it was not made on the day required by law, and entered an order declaring the Citizens' Bank to be the depository for all the funds of that county for the ensuing two years, and ordered the Grant County Bank, the then depository, to pay over all public funds to the Citizens' Bank. One P. T. Lewis, the cashier of the Grant County Bank, as a citizen and taxpayer of that county, made himself a party to the proceedings and prayed an appeal to the circuit court, and the Grant County Bank also prayed an appeal, as an unsuccessful bidder. Upon the trial in the circuit court numerous declarations of law were asked, reflecting the view of the respective litigants, and the court entered up a judgment reciting the declarations of law made, as follows: First. That a proposition from any bank, trust company, or other financial institution, that may desire to be the depository of the public funds of this Grant county, must file its bid in due form, which bid must contain a distinct proposition, which can be acted upon taken alone and without reference to anything outside itself. Second. That the bid filed by the

Citizens' Bank was not in proper form, because said bid did not contain a distinct proposition that could be taken and acted upon alone, without reference outside itself, and was therefore under the law no bid at all. Third. That the county judge was not authorized to accept said bid of the Citizens' Bank and declare said bank the depository of the funds of Grant county, because the bids for said funds filed by said bank was irregular, indefinite, and uncertain. Fourth. That the bid filed by the Grant County Bank for 4.25 per cent. on daily balance was a distinct proposition, which could have been acted upon taken alone and without reference to anything outside of itself. Fifth. That the county judge under section 3 of the act, at page 931, has the power to reject any and all bids. The court found that the action of the county court in designating the Citizens' Bank as the county depository was unauthorized, and that the action of the county court in accepting the bid of the Citizens' Bank operated as a rejection of the bid made by the Grant County Bank, and therefore the county has no depository. The order awarding the funds to the Citizens' Bank was declared void, and the clerk of the county court was ordered to proceed to readvertise for bids for said funds. All parties have appealed to this court.

W. D. Brouse, of Benton, for appellants.  
D. D. Glover, of Malvern, for appellees.

SMITH, J. (after stating the facts as above). The findings of the court below are set out in full because they express fully the views of the majority of the court.

[1] There can be and is no real competition unless all bidders are required to bid upon the same basis, and no proposition can be construed to be a bid unless it is complete in itself as declared by the court. Bank of Eastern Ark. v. Bank of Forrest City, 94 Ark. 311, 126 S. W. 837; Casey v. Independence County, 159 S. W. 24.

[2] Appellee says, however, that the special act applicable only to Grant county gives the judge of that county a discretion not given to county judges by the general law, and that under this special act the county judge is not required to award the contract to the highest bidder. Section 3 of this special act reads as follows: "At 1 o'clock p. m., of the said first day of the county court as aforesaid, the court shall publicly open each and every bid so received and shall cause each to be entered of record, and shall elect from among said bids one to be the depository of the public funds of said county; provided, the county court shall have the power to reject any and all of said bids; and, provided further, that no bid shall be received for less than three and one-half ( $3\frac{1}{2}\%$ ) per centum per annum, computed by the daily balances of cash on hand, belonging to the county, and if no bid shall be received from any of the aforesaid firms residing or doing business in the coun-

ty, the county court shall have power and is hereby authorized to loan banks, bankers or trust companies, who reside in other counties in this state, the funds of the county, not exceeding seventy-five per centum (75%) of said funds at any one time, for not less than three and a half per centum (3½%) interest, on the same terms and conditions as to banks, bankers and trust companies who may reside or are doing business in said county." This act does provide that the county court "shall select from among said bids one to be the depository of the public funds of said county," and the direction is not expressly given to select the highest bidder; but, while that direction is not expressly given, it is necessarily implied. The whole theory and purpose of such legislation is to secure the highest returns for the use of the public funds. And such is the purpose of this special act. It provides what shall be done by the successful bidder to make its bid effective. A study of the act leaves no doubt that the legislative will was that there should be competition, and not favoritism. Indeed, the county court awarded the contract to the Citizens' Bank, not in the exercise of any discretion, but upon the theory that its bid was the highest.

Under this special act the county court is authorized to let no contract for the deposit of the public funds, except by bids received in response to the advertisement inviting bids. The court might in a single advertisement invite bids, both from the banks and trust companies located in that county, and also from "loan banks, bankers or trust companies, who reside in other counties in this state"; and, if no bid was received from any local bank which complied with the law, the court could then contract with some institution located outside of that county. But the Citizens' Bank made no bid, and it had not qualified itself to be contracted with, and the order designating it as the county depository was void.

The judgment of the court below will be affirmed, and the clerk of the county court will proceed at once, if he has not already done so, to again advertise for bids.

**WILLIAMS et al. v. WILLIAMS.** (No. 273.) (Supreme Court of Arkansas. April 20, 1914.)

**1. APPEAL AND ERROR (§ 1036\*)—REVIEW—HARMLESS ERROR—PARTIES.**

A judgment will only be reversed for errors prejudicial to the appellant, and the fact that, in an action for the possession of certain mules, one having no interest therein was joined with the owner as plaintiff, was not prejudicial to the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066-4074; Dec. Dig. § 1036.\*]

**2. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICTS—CONCLUSIVENESS.**

A verdict upon conflicting evidence cannot be disturbed on appeal, though the preponder-

ance of the evidence be against it, as the jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**3. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE IN PRODUCING EVIDENCE.**

Where the issue was the ownership of certain mules, which plaintiff testified she secured by trading two mules purchased from H., who testified that he thought he sold them to defendant's husband, the discovery that two of H.'s clerks would also testify that they were sold to defendant's husband, and that S. would testify that he traded him the mules in controversy for such mules, was not ground for a new trial, as the defendant should have foreseen plaintiff's evidence, and could by exercising diligence have secured such testimony before the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

**4. NEW TRIAL (§ 47\*)—GROUNDS—MISCONDUCT OF JUROR.**

That a juror was seen conversing with a party outside the jury room while the jury was deliberating therein was not ground for a new trial, where the record on appeal did not show whether the jury were permitted to separate, and it was not shown that the conversation pertained to the case, since Kirby's Dig. §§ 6198, 6199, authorize the court to permit the jury to separate, even after submission of the case, and, if permitted to separate, the jurors could speak to those with whom they came in contact.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 88-95; Dec. Dig. § 47.\*]

**5. TRIAL (§ 325\*)—VERDICT—GENERAL VERDICT—POLLING JURORS.**

The answer of a juror, while the jury were being polled, that he did not believe the verdict right, but agreed to it for the sake of harmony, was not to be considered a negative answer, but as merely meaning that after discussion of the case, in an effort at harmony, he had receded from the position first taken by him; for, while the law does not contemplate that any juror should yield his opinion for the mere purpose of agreement, it does contemplate that the jury shall, by discussion, harmonize their views, if possible, for in no other way would a verdict be possible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 765-767; Dec. Dig. § 325.\*]

Appeal from Circuit Court, Clay County; W. J. Driver, Judge.

Action by Cinda Williams and another against Susie Williams. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is a suit by Cinda Williams and Ed Williams against Susie Williams to recover the possession of a team of mules valued at \$500. Cinda Williams for herself testified substantially as follows: "I am the owner of the mules in controversy. In the year 1906 I purchased two mules from J. M. Hawks, and later on swapped these two mules, with their harness, for the mules in controversy, and gave \$20 in exchange. My husband had been dead about a year before I purchased the mules. My sons all lived at home with me at the time I bought them, but in the spring of 1909 I permitted my son Lon Williams to take the mules away from my house

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and to keep them until his death in December, 1912. After the mules were in the possession of my son Lon, I always furnished the money to him with which to pay the taxes on them. A few days before he died I was at his house, and he told me that he would never be able to work any more and that I could take the mules home. His widow, Susie Williams, came home with us after the funeral in a wagon drawn by the mules in controversy. Before she went home I told her that the mules belonged to me. She drove them home, however, and subsequently refused to give them to me, and I brought this suit to recover possession of them." Two other children of Mrs. Williams testified that the mules belonged to their mother, and that she always furnished the money with which to pay the taxes on them after she let her son Lon have them.

J. M. Hawks, for the defendant, testified substantially as follows: "I do not remember definitely, but my impression is that I sold the pair of mules of Lon Williams, and not to his mother. I know that subsequently Lon Williams claimed the mules, and, with my advice, swapped them for the mules in controversy." Mrs. Susie Williams testified for herself as follows: "I was married to Lon Williams about three years before he died, and at the time of our marriage he had the mules in controversy in his possession. He claimed them as his own, and neither Cinda Williams, his mother, nor any of her children, claimed to have any interest in them. After the funeral of my husband, I went home with Mrs. Cinda Williams, and stayed all night. We went to the funeral in a wagon drawn by the mules in controversy. While I was at the home of Cinda Williams, after the funeral, she told me that the mules should not be taken off of the place, and said that they were her mules." Other evidence was introduced by Susie Williams tending to corroborate her testimony.

The jury returned a verdict for the plaintiffs, and the defendant has appealed.

C. T. Bloodworth, of Corning, for appellant. Cinda Williams, pro se.

HART, J. (after stating the facts as above). [1, 2] Cinda Williams and Ed Williams were the plaintiffs in this action, and the jury returned a verdict for the plaintiffs. It is now contended by counsel for defendant that, under the undisputed evidence, Ed Williams had no interest in the mules, and that he and Cinda Williams could not maintain a joint action for them. In this connection it may be stated that no objection was made to the instructions given by the court. If the jury believed the testimony of the plaintiffs, the mules belonged to Mrs. Cinda Williams, one of the plaintiffs, and it was immaterial to the defendant that she joined Ed Williams with her in the suit to recover possession of the mules. It is the settled law of this state that the Supreme Court will only reverse a judg-

ment for errors prejudicial to the rights of the party appealing, and the defendant in this action cannot be prejudiced by the fact that Ed Williams was made a party plaintiff with his mother. We have not set out the testimony in full, and do not deem it necessary to make any extended comment on it. It may be true, as stated by counsel for defendant, that the great preponderance of the evidence was in her favor; but that question was settled by the verdict of the jury, and we are not at liberty to disturb the verdict. The jury were the sole judges of the credibility of the witnesses and the weight to be given to their testimony. According to the testimony of Mrs. Cinda Williams, the mules belonged to her, and it is not within our province to disturb the verdict, even though we may believe that the jury was wrong in its finding.

[3] A new trial is also asked because of newly discovered evidence. Counsel for defendant say that they can prove by two of the clerks in the store of Mr. Hawks at the time he sold the mules that Mr. Hawks sold them to Lon Williams, and not to his mother. Counsel also claims that he can prove by a Mr. Shoat, the person to whom the first mules were swapped for the mules in controversy, that he swapped with Lon Williams and that the mules belonged to him. Counsel insists that neither he nor his client knew of the existence of this testimony, and could not by reasonable diligence have discovered it before the trial. In the case of *Mutual Life Insurance Co. v. Parrish*, 66 Ark. 612, 52 S. W. 438, the court held: "To prevent a miscarriage of justice, it is proper to grant a new trial for newly discovered evidence rebutting the undisputed evidence on which the verdict was based, where the party asking for a new trial had no knowledge of such rebutting evidence, and could not reasonably have been required to make effort to ascertain it before or during the trial." Counsel contends that the decision in that case rules his present contention. We cannot agree with him. We think the case falls within the rule announced in *Petty v. State*, 76 Ark. 515, 89 S. W. 465, where the court held: "A party cannot claim to have been surprised by the testimony of witnesses of the opposite party, nor by evidence introduced by such party, if the same tends to support the issues joined, and is such as might have been reasonably anticipated." See, also, *St. L. & S. F. Ry. Co. v. Kilpatrick*, 87 Ark. 47, 54 S. W. 971; *McDonald v. Daniel*, 103 Ark. 589, 148 S. W. 271. The only question at issue in this case between the parties was that of the ownership of the mules, and counsel for defendant might have reasonably anticipated that any testimony tending to establish that issue would be introduced at the first trial. The evidence on account of which they now seek a new trial was necessarily germane to the only issue in the case, and was such that its existence must have oc-

curred to counsel for defendant in his preparation for trial. If counsel had exercised proper diligence before the trial, he could have discovered this testimony. Two of the witnesses lived in the same community. It was the contention of the defendant that Lon Williams, her deceased husband, had purchased the mules from Mr. Hawks. Mr. Hawks was a witness, and testified in her behalf. By questioning him before the trial, she, or her counsel, could have readily ascertained that these new witnesses were employed in his store, and that they might likely know something about the transaction. By exercising diligence they might have also ascertained the residence of the man with whom the swap was made.

[4] It is next contended by counsel for defendant that the judgment should be reversed and a new trial granted because he states in an affidavit that he was present in the courtroom while the jury impaneled to try the case was deliberating in the jury room, and that he saw one of the jury, while out of the jury room, conversing with a party other than the officer in whose charge the jury had been placed. In civil trials the jury may be permitted to separate, either during the trial or after the case is submitted to them. Kirby's Digest, §§ 6198, 6199. The record in this case does not show whether the court permitted the jury to separate. The court might do so in the exercise of its discretion, and this, we believe, is almost the universal practice in the trial of civil cases. If the jury was permitted to separate by the court, the jurors would necessarily speak to persons with whom they came in contact. If they violated the admonition of the court not to speak about the case, the burden of showing that fact would be upon the defendant, and he has not attempted to show that the conversation that the juror had in any wise pertained to the case which the jury had under consideration.

[5] Finally, it is contended by counsel for defendant that the judgment should be reversed because, when the jury announced its verdict in favor of plaintiffs, counsel for defendant asked that the jury should be polled. While this was being done, one of the jurors answered that he did not believe the verdict right, but agreed to it for the sake of harmony. Section 6203 of Kirby's Digest provides in substance that, when the verdict is announced, either party may require the jury to be polled, and that, if any one answers in the negative, the jury must again be sent out for further deliberation. In the case of *Commonwealth v. Tvey*, 8 Cush. (Mass.) 1, the court said: "The jury room is, surely, no place for pride or opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause. The single object to be there effected is to arrive at a true verdict; and this can only be done by deliberation,

mutual concession, and a due deference to the opinions of each other. By such means and such only, in a body where unanimity is required, can safe and just results be attained; and without them the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it."

While the law does not contemplate that any juror should yield his opinion for the mere purpose of agreement, it does contemplate that the jury shall, by discussion, harmonize their views, if possible, for in no other way would a verdict be possible. We think, when this fact is considered, it cannot be said that the juror answered in the negative, but that he simply meant to say that after discussion of the case with the other jurors, in an effort to harmonize the views of the individual jurors, he had receded from the position first taken by him when the jury retired to deliberate. In other words, we think that he did not answer in the negative, but answered in the affirmative that the verdict was his own. Therefore the judgment should not be reversed on this account.

It follows, from what we have said, that we find no prejudicial error in the record, and the judgment must be affirmed.

**LAMBERTON v. HARRIS et al.** (No. 272.)  
(Supreme Court of Arkansas. April 20, 1914.)  
**ACCORD AND SATISFACTION (§ 18\*)—AGREEMENT—PERFORMANCE.**

Where a landlord, entitled to cash rent, agreed to take, in lieu of rent, cotton delivered to him free of expenses of preparing it for market, and the tenant delivered the cotton, after preparing it for market, there was an accord and satisfaction which precluded the landlord from recovering rent under the lease.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 98-109; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Independence County; R. E. Jeffery, Judge.

Action by Mrs. E. C. Lamberton against N. F. and A. R. Harris. From a judgment for defendants, plaintiff appeals. Affirmed.

Appellant instituted this action against the appellees, alleging that she rented them certain lands for which they agreed to pay her, for the year 1911, the sum of \$999; that they had paid her the sum of \$405, leaving a balance of \$593.63, for which she asked judgment. The appellant set up a written contract evidencing the lease, signed by the appellees.

The appellees answered, admitting that they rented the lands, and set up that appellant had been paid in the following manner, to wit: That the year 1911 was a bad crop year; that the defendants were in bad financial straits, and, in view of the failure of their crop, they were not able to pay the rent first agreed on; that appellant knew this,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

and, when the rent came due, appellant agreed with the appellees that if they would pick the crops of cotton grown on the lands and turn it all over to her, free of picking and ginning charges, she would accept it in settlement and full satisfaction of her claim for rent, and that she would give to appellees their corn crop of that year free of any lien or claim for rent; that the defendants gathered and turned over to the plaintiff, free from all picking and ginning charges, all the cotton grown on said lands during said year, amounting in all to nine bales, more or less, and that plaintiff received the same under the agreement and in full satisfaction of the rent on said lands for said year.

Appellee Noah Harris testified in part as follows: "We had a conversation with plaintiff [concerning the rent for 1911]. She said there was not anything made hardly, and I asked her what she was going to do about it. She said, 'Well, I am going to treat you right; go ahead and gather the crop, and I will do you right.' This was all she told me at that time. I was up there at another time [about two weeks after]. She then said, 'Go ahead and gather the crop of cotton and gin it.' We had the gin rented. That was in a separate contract though. The gin had nothing to do with the rent contract. She said: Turn the cotton over to her clear of ginning and picking charges and keep the corn. She never named owing any rent until 1912. She was just to take the cotton clear of any expenses. She was to take the cotton in consideration of the rent. I didn't know any better until 1912, late in the fall, after she had got her 1912 rent. She said we were to haul the cotton for her to market free of charge. I told her I didn't care for that, and I hauled it for her."

Appellee A. R. Harris testified in part, concerning the rent for 1911, substantially as follows: "We baled the cotton and turned it over to her at the gin. Appellant said, 'Turn the cotton over clear of expenses,' and to put the corn in the crib and keep it. She said she would take the cotton for the rent. We were to turn it over to her clear of expenses. That was to cover ginning and picking. She agreed to take the cotton and let us keep the corn."

Another witness testified that during the fall of 1911 he heard the plaintiff say, during a discussion of the poor crops and the reductions that the different landlords were making, that she had told her boys to pick the entire crop of cotton, and turn it over to her clear of ginning and picking, and that she would let them keep the corn.

The testimony on behalf of appellant was in direct conflict with the above testimony on behalf of appellees, and tended to show that she did not agree to take the cotton clear of ginning and picking in settlement of her rent. She denied that she released them from the rent of 1911, or that she intended by any act of hers to release them.

The court instructed the jury as follows: "If you find from a preponderance of the evidence in this case that the plaintiff, for any reason, agreed with the defendants to accept from them in settlement and satisfaction of her claim for rent, and as the rent on the land for which rent is claimed herein, all the cotton raised that year on said lands, and that in pursuance of such offer the defendants delivered said cotton to the plaintiff, and that it was accepted by the plaintiff in settlement and satisfaction of her claim for rent, then your verdict will be for the defendants." And further: "If you find that the plaintiff, for any reason, agreed to and did accept the cotton grown on the lands in settlement and satisfaction of the rent of that year, the fact that the cotton may have been of less value than the amount of rent as claimed here would be immaterial, and your verdict would be for the defendants."

The verdict was in favor of the appellees, and, from a judgment rendered in their favor, this appeal has been duly prosecuted.

Charles Coffin and Samuel M. Casey, both of Batesville, for appellant. Dene H. Coleman, of Batesville, and Grant & Mack, of Newport, for appellees.

WOOD, J. (after stating the facts as above). The court correctly submitted the only issue in the case as to whether or not there was a valid accord and satisfaction. The testimony, viewed in its strongest light for the appellees, was sufficient to sustain the verdict.

Conceding that the appellees turned over the cotton grown by them during the year 1911 to the appellant in satisfaction of the balance due for rent of that year, as contended by them, appellant nevertheless insists that inasmuch as there was no formal instrument of release purporting to release the appellees from the debt due by them for rent, and inasmuch as appellant did not turn over to the appellees the written contract, evidencing the amount of the balance due on their indebtedness, the agreement to accept the cotton in satisfaction of the rents, even if true, as stated by appellees, was based upon no consideration, and therefore void. To support her contention, appellant relies upon *Heaslet v. Spratlin*, 54 Ark. 185, 15 S. W. 461. In that case we held: "The duebill, which represented his debt, was not surrendered to the debtor, and the partial payment was made in money after the debt was due." There was no executed release, but only testimony tending to show a parol release. In that case we held that the agreement for the release was based upon no consideration, and therefore void.

But the testimony on behalf of the appellees, in this case, giving it its strongest probative force in their favor, shows that appellant accepted the cotton of the year 1911, and their services in connection with the

ginning and marketing of the same, in satisfaction of the balance due by appellees on the rent for that year. While appellant had a lien on the cotton for her rent, she did not have the title thereto, and there was no legal obligation upon appellees, under their contract of rent, to gin the cotton and to haul the same to the market and market the same for her. Their lease contract only required that they should pay the rent in money to her. Instead the testimony tended to show that she agreed to take the cotton itself, when delivered to her free of expenses of preparing it for market, in payment of the rent; and the proof showed an executed accord and satisfaction by delivery of property and the performance of services in favor of the appellant. The delivery of property to the creditor and the performance of services by the debtor for the creditor, which are received and accepted by the creditor in satisfaction of his debt, and which are of benefit to him, no matter how small the value may be, is a sufficient consideration to support an accord agreement. See *Pope v. Tunstall*, 2 Ark. 224; *Dreyfus v. Roberts*, 75 Ark. 360, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67, 5 Ann. Cas. 521; 1 Cyc. 335, 336.

The judgment is correct, and it is affirmed.

#### BROWN v. VESTAL et al. (No. 263.)

(Supreme Court of Arkansas. April 13, 1914.)

#### 1. CONTRACTS (§ 319\*) — PERFORMANCE — ENTIRE CONTRACT.

If an entire contract to drill a well for a stipulated price was not performed and the work was not accepted, no recovery can be had upon the written contract or for the value of the work actually done.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. § 319.\*]

#### 2. CONTRACTS (§ 353\*) — ACTIONS — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action on a contract for boring a well, the court instructed that, if plaintiffs contracted to drill defendant a well for an agreed price per foot, and pursuant thereto began performance on the contract and continued until they reached water sufficient to make a flowing well, which could be operated by a windmill, as agreed, and were then prevented by defendant from further performance, plaintiffs could recover the full contract price, less the cost of cutting off the pipe a proper distance from the ground, and putting cement around the pipe to complete the well. Plaintiffs' evidence was that they had drilled a satisfactory well which conformed to the contract, and were about to complete it when by defendant's direction certain extra work became necessary, which plaintiffs were offering to perform without extra charge, when they were compelled to abandon the work by defendant's refusal to keep his agreement, and that at that time plaintiffs had substantially completed their contract, except the cutting off of the pipe the proper distance from the ground and putting cement around it. *Held*, that the instruction was supported by the evidence, and was proper.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.\*]

Appeal from Circuit Court, Bradley County; H. W. Wells, Judge.

Action by B. A. Vestal and P. T. Taylor against G. B. Brown. From a judgment for plaintiffs, defendant appeals. Affirmed.

This action was instituted by appellees in a justice court of Bradley county to recover on an oral contract for boring a well for appellant. Appellees recovered judgment, both before the justice of the peace and in the circuit court on appeal, for the sum of \$181.50, the alleged contract price. Appellant denied any liability, but, on the contrary, prayed judgment over against appellees for their failure to perform their contract to bore the well in the sum of \$185.50.

Appellee Taylor testified: That he made a contract with appellant to put down a well near Moro Bay. That he and Vestal made appellant two propositions; one was that they would bore the well for 50 cents per foot, the appellant to board them while at work, and also furnish the wood and water and necessary casing, or that they would bore the well for \$1 per foot and furnish everything themselves. That appellant accepted the 50-cent proposition, and they commenced boring a well, and after going down about 60 feet struck quicksand, and, because they had no proper casing, they were compelled to abandon that well and begin another. That after going down in this second well about 80 feet, they lost their drill in the well, and were unable to recover it, and it became necessary to start on the third well. That they went 365 feet in this third well and struck water, which flowed something like 8 feet over the top of the pipe. That trouble was experienced in putting in the casing, and when they had finished boring the well, about 8 feet of pipe was projecting out of the ground and the water was running out of the pipe. That appellant then told them to pull the casing up slightly for the purpose of increasing the flow of the water, but Vestal declined to do this because, as he said, it would ruin the well, and consented to pull it up only when appellant ordered this done, and agreed to assume the risk of damage to the well. The casing was pulled up and the pipe was found to be securely coupled, but the pull caved in the well, and the sand ran in below the casing and cut off the flow of water. That to restore the flow of water they pulled the casing and attempted to pump out the sand so that the casing would go back down and cut off the sand, and that they were thus engaged for several days when appellant advised them he would board them no longer, and they were compelled to quit work. That they had a good well, and needed only to cut off the pipe and do the concrete work, when appellant required them to draw the casing, after assuming the responsibility for that act, and then refused

to board them, as the contract required, while the damage was being repaired.

Appellant testified that he agreed to furnish everything necessary about the well and to board the men, while engaged in boring the well, and to pay 50 cents per foot for a well of flowing water, or one in which a windmill could be used. Appellant admitted that the well was flowing as full as the pipe would permit, but he said the casing had not been put down, and that he never interfered, or gave directions for doing that work, and that all he had to say was merely in the way of making suggestions, and that appellees used their own judgment in putting in the casing, and that when the well caved in appellees never repaired this damage, but quit the job and left.

The court gave all the instructions requested by either side, except one asked by appellant, which directed the jury to return a verdict in his favor. There was evidence tending to substantiate the respective contentions.

Among other instructions given was the following, numbered 1: "The court instructs the jury that if you find from a preponderance of the evidence in this case that the plaintiffs entered into a contract with the defendant to make defendant a well at and for an agreed price per foot, and you further find that the plaintiffs, in pursuance of their contract, began the performance of said contract, and continued in performance of same until they reached water sufficient to make a flowing well, and sufficient to make a well that could be operated by a windmill, and were then prevented by the defendant from further performance of their obligation under the contract, then the court instructs you that the plaintiffs would be entitled to recover the full contract price of said well, less the cost of cutting off the pipe a proper distance from the ground and putting cement around said pipe, with interest thereon from August 1, 1900."

J. E. Bradley and B. L. Herring, both of Warren, for appellant.

SMITH, J. (after stating the facts as above). There is no serious question as to what the contract between the parties was under which the labor here sued for was performed, but the principal question in the case is one of fact, and that is whether the contract was performed.

[1] The law of such contracts, as the one here sued on, is stated in the case of *Blackburn v. Texarkana Gas & Electric Co.*, 102 Ark. 152, 143 S. W. 588, where it was said: "The right of plaintiff to recover herein must be determined by the written contract upon which his cause of action is primarily based. That contract is entire, with a stipulated price named for the performance of the

whole contract. If, therefore, the entire contract was not performed, and the work done in drilling the well was not accepted, then plaintiff cannot recover upon the written contract, nor for the value of the work that he actually has done. There can be no recovery where there is an entire contract, with a stipulated price for the whole, and only part thereof is performed, and such part is not accepted. Under such circumstances, the price is not payable until the whole work is completed in accordance with the terms of the entire contract."

[2] Instructions given at the request of appellee stated the law as announced in that case. Instruction numbered 1, set out above, and which was given at the request of appellees, is not in conflict with the doctrine announced in the *Blackburn Case*, supra; in fact, appellant's objection to it is that it is abstract, "as there is not sufficient evidence in the whole case from which the jury could have inferred that appellees were prevented by appellants from the performance of their contract with him." We cannot concur in this view that the instruction was abstract. According to appellees a satisfactory well, and one meeting the requirements of the contract, had been bored and was about to be completed when, in obedience to the directions of appellant, certain extra work became necessary which appellees were offering to perform without extra charge therefor, for the purpose of performing their original contract, when they were compelled to abandon the work by appellant's refusal to keep his agreement. According to appellees, they had completed their contract substantially, except cutting off the pipe a proper distance from the ground and putting the cement around the pipe; but the instruction numbered 1 directed the jury to deduct the cost of this uncompleted work. Appellant could not prevent appellees from completing their contract, and then refuse payment for the work that had been done because of that failure.

We think the evidence sufficient to sustain the verdict, and the judgment is affirmed.

#### JONES HOUSE FURNISHING CO. v. ARKANSAS WATER CO. (No. 262.)

(Supreme Court of Arkansas. April 13, 1914.)

##### 1. WATERS AND WATER COURSES (§ 206\*)—PUBLIC WATER SUPPLY—LIABILITY OF WATER COMPANY FOR INSUFFICIENT SUPPLY.

A property owner and taxpayer in a city has no right of action against a water company, on its contract to furnish water to a city at public hydrants sufficient for fire purposes, for damage to his property by fire, occasioned by the company's failure to so furnish water, since there is no privity of contract between such owner and the company.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.\*]

**2. WATERS AND WATER COURSES (§ 206\*)—WATER COMPANY—SUPPLY TO PRIVATE CONSUMER—BREACH OF CONTRACT—LIABILITY.**

A water company, contracting with a private owner to furnish water for a specific purpose or in a specific quantity, is liable for all damages proximately caused by the breach of such contract, but its liability is only such as is created by the contract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.\*]

**3. WATERS AND WATER COURSES (§ 206\*)—WATER COMPANY—SUPPLY TO PRIVATE CONSUMER—BREACH OF CONTRACT—LIABILITY.**

Under a contract of a water company to furnish water for a sprinkling system in plaintiff's warehouse at an annual license, providing that the license did not contemplate any special service or conditions on the part of the company, and exempting it from any claims for damage or injury to property of the licensee or to any other persons or property by fire, failure to supply water or pressure, or any cause whatsoever, the company was not liable to the licensee for damages resulting from a fire, which its compliance with the contract would have prevented.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by the Jones House Furnishing Company against the Arkansas Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The parties to this litigation entered into the following contract:

**"License for Special Connection.**

"This agreement, made this 20th day of November, 1908, by and between the Home Water Company, of Little Rock, Ark., its successors or assigns, hereinafter known as the water company, and Jones House Furnishing Company, of Little Rock, Ark., their heirs, successors or assigns, hereinafter known as the licensee, witnesseth: That the water company hereby licenses and grants unto the licensee the right to connect a four-inch pipe with the street main of the water company, located on Main street, and to attach thereto the following fixtures or openings: One thousand sprinkling heads and one steamer connection through which water may be used at times of fire and for the extinguishment of fire and for no other purpose; in consideration for which privilege and license the licensee hereby agrees to pay the water company the annual sum of fifty dollars in semiannual installments in advance on the first days of January and July. This license is granted subject to the following conditions:

"First. That the superintendent of the water company or his agents may have access to the premises of the licensee at any time for the purpose of making an inspection of said pipes and appurtenances.

"Second. That all pipes and appurtenances beyond the street main shall be put in and

maintained by and at the expense of the licensee.

"Third. That a valve of a design approved by the water company shall be placed on said connection by the licensee at or near the curb line, which valve shall be under the control of the chief of the fire department of said city or his successors in office, and the licensee agrees to obtain the approval of said chief of the fire department or his successors in office to this license.

"Fourth. That all fixtures and openings shall be kept closed and sealed and not opened or used except during times of fire and for the extinguishment of fire upon the premises of the licensee and for no other purpose, and when so opened or used the licensee will immediately notify the water company of such fact so that the said fixtures or openings may again be sealed.

"Fifth. That this license does not contemplate any special service or conditions on the part of the water company, and the licensee hereby declares the water company to be free and exempt from any and all claims for damages or injury to persons or property of the licensee or any other persons or property by reason of fire, water, failure to supply water or pressure, or any other cause whatsoever.

"Sixth. This license does not contemplate any purposes or fixtures other than herein stated. All other uses must be taken from a service pipe separately connected with the street main.

"Seventh. The superintendent is not authorized to change or vary the conditions of this license and the connections authorized by this license shall at all times be subject to the rules and regulations of this water company that now exists or may hereafter be adopted.

"Eighth. This license is for a period of one year from the 1st day of December, 1908, and shall be continued thereafter until canceled by written notice in advance by either party to the other.

"In witness whereof, the said parties have hereunto signed their names the day and year first above mentioned."

The appellant, who was the plaintiff below, sued for the breach of this contract, and in his complaint alleged substantially the following facts: That it was a corporation under the laws of this state, with its principal place of business in the city of Little Rock, and that the defendant, the appellee water company, was also a corporation under the laws of this state, with its principal place of business in the city of Little Rock. That plaintiff is engaged in the business of buying and selling furniture and was the lessee of a large storehouse situated on main street between sixth and seventh streets in said city, and that on the 20th day of November, 1908, it, being then the occupant and lessee of said

storehouse, installed, for its use in protecting its goods and merchandise from damage and loss by fire, an automatic sprinkling plant, the purpose of which plant was, in case of fire, to automatically sprinkle the premises so as to extinguish and to prevent the spread of fire. That, after the execution of the contract above set out, appellee permitted connection to be made with its water mains, and approved the plans which appellant had made for the water connection, and furnished appellant with water, as provided by said contract, until its building was destroyed by fire. That said contract was to continue between the parties for one year from the 1st of December, 1908, and thereafter until canceled by written notice in advance by either party given to the other; but that said contract has never been canceled by writing, or in any other manner, and was still in full force and effect. That, after appellant's building was destroyed by fire, the landlord rebuilt said building similar in every respect to the one destroyed by fire. That appellant again installed in the new building a sprinkling plant of substantially the same dimensions and located in substantially the same place as it was formerly. That on the 8th day of November, 1911, appellant notified appellee that the new building was completed and occupied by it as a furnishing and furniture store, and that the sprinkling equipment was ready to have the water turned on, and appellant then and there demanded and requested the appellee to turn on and connect the water to said sprinkling plant, and that appellant was then ready and willing to pay the rates fixed by the ordinances of the city of Little Rock, and called for by its contract with appellee, when the water should be turned on. That appellant had an advantageous and profitable lease on the premises mentioned for a period of eight years, and had sublet a portion of the premises leased; said lease containing a clause that, in case the premises were destroyed by fire, the lease would thereby be canceled. That the lessor refuses to rebuild and lease the said premises, except at a price that would cause appellant to lose the sum of \$45,525. That appellee failed and refused to turn on said water without any lawful or reasonable cause, and negligently and wrongfully permitted plaintiff's sprinkling apparatus to remain without water, with plaintiff's stock exposed to any fire that might occur, and that on the 30th day of November, 1911, fire broke out in appellant's store and its entire stock and fixtures were consumed. That, if appellee had performed its duty under said contract and under its charter and the ordinances of the city of Little Rock governing it, appellee would have been able to extinguish said fire immediately and without any appreciable damage to appellant.

Appellant filed a bill of particulars showing in detail the loss it had sustained by rea-

son of the fire, and alleged that it was damaged in the sum of \$229,967.67, and prayed judgment for that amount. Appellee demurred to the complaint, for the reason that the facts alleged in the complaint were insufficient to constitute a cause of action against the appellee, and did not entitle the appellant to a recovery in said action.

The court sustained the demurrer and dismissed the complaint, and this appeal has been duly prosecuted from that action of the court.

J. W. Blackwood, Dan W. Jones, and W. L. Terry, all of Little Rock, for appellant. Moore, Smith & Moore, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). Appellee insists that the demurrer was properly sustained for the following reasons: First. That, at the time of the fire in question, the agreement relied on had been discharged by the destruction of the first building and the sprinkler system, and that the obligations of both the parties under the agreement had ceased. Second. That, under the terms of the license agreement, the water company did not contract and was not obligated to perform any special service, and that the only purpose of the recital in the first clause and the fourth paragraph of the license was to limit the use that could be made of water discharged into the sprinkler system. Third. That, under the express provisions of the fifth paragraph, the water company was to be exempted from liability for any cause whatsoever in connection with or growing out of the license. It will be unnecessary to discuss either of the first two reasons offered by appellee in support of its demurrer, as we think the third reason is well taken and is decisive of this case.

[1] It is settled that the complaint states no cause of action unless one is created by the provisions of the contract sued upon. In the case of *Collier v. Newport Light & Power Co.*, 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458, it was said (quoting the syllabus): "A private citizen cannot sue a water company to recover damages for losses by fire sustained by him by reason of the water company's failure to furnish a certain pressure of water for the extinguishment of fires, as there is no privity of contract between him and the water company which will allow him to sue for a breach of the contract, or of the duty growing out of the contract with the city." The allegations of the complaint in that case were that the water company had entered into a contract with the city whereby it had agreed to furnish said city with pure, wholesome water for the use of its citizens and "for any quantity sufficient to protect the residents of the city from loss by fire." The authorities were there reviewed, and it was said the great weight of au-

thority is against a recovery by a private property owner, who in that case had no special contract with the water company.

But appellant alleges its right to recover under the contract herein set out and says: "Whatever the rights of the appellant may have been under the ordinance (of the city of Little Rock granting the franchise to the water company), there can be no question about what its rights are under the contract, or license, set out in its complaint."

Appellant cites a number of cases where the recovery of damages against water companies was sustained for a failure to furnish water, but a number of these cases was reviewed in the case of *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107, and it was there said: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contracts in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which, in the exercise of its governmental functions, the plaintiff had obtained for the whole town."

In the case of *Niehaus Bros. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045, an action was brought to recover damages for an alleged breach of a contract to supply water to the premises of the plaintiff for fire protection. The court held the duty of the water company, engaged in supplying water to a city, to furnish water on the consumer's premises for fire protection can only be created by an express contract between the water company and the consumer. In that case it was contended, with respect to the liability of the defendant, that it was not necessary to show an express or special contract between the parties for fire protection; that from the fact that plaintiff had installed hydrants on its premises for use, should a fire occur, and defendant had connected its water system therewith and charged the ordinance rates for water and for the hydrants, a contractual relation was thereby assumed by defendant to have constantly on hand, or at least to exercise ordinary care to have, a sufficient supply of water available at the hydrants to extinguish any fire which might arise on the premises, with a corresponding liability for any loss occurring as a direct result of its failure to do so. Discussing that question,

it was there said: "Before proceeding to a discussion of this claim, it is to be noted that respondent bases its right of recovery solely on contract—a contract which it asserts existed by reason of the relation between the parties. Necessarily its right to recover must be supported by contract, because there is nothing in the constitutional provisions of this state impressing the distribution of appropriated water with a public use (Const. art. 14) or in the legislation thereunder (St. 1881, p. 54), which imposes upon a water company any obligation to furnish to the municipality, or its inhabitants, any specified quantity of water; or water for any particular purpose. Hence no action in tort for failure to have a supply of water at the premises of a consumer in a city or town for the extinguishment of fire, or for any other purpose, is given under any statute or rule of law in this state; and hence, where liability is sought to be created, it can only arise from a private contract between the company and a consumer, under which an obligation to furnish water for a specified purpose is undertaken by the company." *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107. And in concluding a review of the authorities on this subject, it was there said: "In all those cases, the liability was not sought to be imposed or sustained on an implied contract springing from the ordinary relation of a public water company and its consumers, but upon a contract whereby private water companies, for particular concessions and privileges extended them by the cities, had expressly agreed to furnish water for protection against fire, and they were held liable for a failure to give what they had expressly obligated themselves to furnish."

The right of the water company to make such a contract as the one here sued on, and in which an attempt is made to limit its liability for damages flowing from a breach thereof, was discussed in the case of *Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co.*, 71 N. J. Law, 350, 59 Atl. 31, in which case the court held that by the terms of the contract, involved in that case, the defendant water company agreed to furnish the plaintiff "water for fire protection," and the plaintiff agreed to pay for the same at the rate of \$15 per year for a period of five years. The contract provided that the rules and regulations of the company were made a part thereof with like effect as though written therein. One of the rules referred to was in the following words: "The company reserves the right to shut off the water for alterations, extensions, and repairs, and to stop and restrict the supply of water whenever it may be found necessary, and the company shall not be liable under any circumstances for a deficiency or failure in the supply of water, whether occasioned by



shutting off water to make repairs or connections, or for any cause whatsoever." The court said: "Consequently the only matter now presented for consideration is the true construction of the clause, in the rule cited, relieving the defendant from liability for a deficiency or failure in the supply of water, for the holding of the trial judge above referred to eliminated from the case the question whether a public agent (such as a water company usually is) may, by contract with a consumer, limit its liability for a failure in the supply of water agreed to be furnished, due to its own negligence. The meaning of the clause does not seem open to doubt. Except for its presence in the contract, the liability of the defendant would have been absolute to respond for all damages sustained by the plaintiff by failure of the defendant to supply sufficient water for fire protection. *Middlesex Water Co. v. Knappmann-Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 692 [49 L. R. A. 572] 81 Am. St. Rep. 467. The manifest object of its insertion was to do away with that absolute liability. By its terms the plaintiff agreed not to hold the defendant responsible for damages resulting from 'a deficiency or failure in the supply of water, whether occasioned by shutting off water to make repairs or connections or for any other cause whatsoever.' The use of the word 'whatsoever' is significant. If that word had not been present, it might well be considered that the parties intended that the defendant should be relieved from responsibility only when the failure of water was due to some cause similar to those specifically mentioned. But 'any cause whatsoever' embraces every possible cause, not only those arising out of the exigencies of the defendant's business, but those resulting solely from the defendant's negligence. The plaintiff having agreed that the defendant should not be responsible for damages sustained by it, resulting from the failure of the latter to furnish it with sufficient water for fire protection, even though such failure was due to the negligence of the defendant, a verdict in its favor was without legal justification."

[2] The law, therefore, appears to be that if a water company enters into a contract with a private owner to furnish water for a specific purpose, or any specific quantity, it is liable for all damages proximately caused by the breach of such contract; but it also appears to be settled that the liabilities of a water company are such only as are created by the contract entered into for furnishing water.

[3] What, therefore, are the engagements of appellee under the contract herein sued on? This contract is to be construed as a whole; and while it does provide for a specified water service, in consideration of the sum of money there named, it was there expressly stipulated that the license thus to

connect with appellee's mains and to use its water did not contemplate any special service or conditions on the part of the water company, and the license expressly declares the water company to be free and exempt from any and all claims for damages or injuries to persons or property by reason of fire, water, failure to supply water or pressure, or any other cause whatsoever." Appellant insists that this limitation of liability is void because it is against public policy to permit a public service corporation to relieve itself from damages for the nonperformance of its contractual or charter duties, and cases are cited in support of that proposition, and it is urged that the same reason of public policy, which prevents common carriers from stipulating against their own negligence, would operate to prevent a public service corporation like appellee from stipulating against liability for a breach of its contract to furnish water. But appellant's analogy is not well taken. There would be no liability against appellee but for the contract, and that liability is only such as the contract creates. Whereas the liability of a carrier is not created by its contract with the shipper; its duties are fixed by the common law; and its written or special contract with the individual shipper is usually for the purpose of limiting or restricting its liability, and certain limitations are said to be contrary to public policy and therefore void. Here appellee, by the terms of the contract sued on, assumed a certain obligation, which was created by the contract, and which otherwise had no existence; and it assumed this obligation only upon the condition stated in paragraph 5 of the contract. This paragraph does not undertake to exempt the water company from damages for the breach of this contract, but only provides that it shall "be free and exempt from any and all claims for damages or injury to persons or property by reason of fire, water, failure to supply water or pressure, or any other cause whatsoever." This exemption relieves from a liability which would arise under the contract from a failure to furnish water in the event of a fire. But while it does contain an exemption from a consequential liability, which might follow the failure to turn on the water, it does not contain any exemption from liability for a direct breach of it. The only right of action under this contract is the one *ex contractu*, and this action could be maintained independently of the fact that a fire has occurred, and the damages recoverable for the breach of the contract are not augmented by the occurrence of the fire.

The only damages here sued for are those which resulted from the fire, and we conclude, therefore, that the demurrer was properly sustained, and the judgment of the court below is therefore affirmed.

**HAWKINS v. REEVES. (No. 257.)**

(Supreme Court of Arkansas. April 13, 1914.)

**1. DEEDS (§ 129\*) — ESTATE CONVEYED — LIFE ESTATE.**

A deed to one and the heirs of her body only conveyed a life estate to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. § 129.\*]

**2. GUARDIAN AND WARD (§ 62\*) — SALE OF WARD'S LAND—PURCHASE BY GUARDIAN.**

A life tenant, holding under a conveyance of mortgaged lands to herself and the heirs of her body, could not have confirmed, as against the remainderman, her minor daughter, the title which she attempted to acquire at the mortgage foreclosure sale; Kirby's Dig. § 3757, making the mother the natural guardian of her daughter.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 288-293; Dec. Dig. § 62.\*]

**3. JUDGMENT (§ 736\*) — CONCLUSIVENESS — QUESTIONS INCLUDED—QUESTIONS NOT IN ISSUE.**

Since the right of a life tenant, holding under a conveyance of mortgaged lands to herself and the heirs of her body, to purchase at mortgage foreclosure sale as against her daughter could not be raised in the foreclosure proceeding, the decree of foreclosure would not prevent the daughter from denying her right to purchase in a proceeding by the life tenant to confirm the sale; the burden being on the life tenant to show, in such proceeding, that she had a title to quiet.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.\*]

**4. GUARDIAN AND WARD (§ 130\*)—DUTY TO OFFER.**

A life tenant, holding mortgaged property under a conveyance to herself and her bodily heirs, who purchased the property at the mortgage foreclosure sale, cannot, in an action to confirm her title, as against her minor daughter, the remainderman, assert her right to recover, notwithstanding the insufficiency of the petition, on the ground that defendant should have offered contribution for the purchase price; plaintiff having declined to amend her petition so as to ask foreclosure of the lien on the property.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 440-446; Dec. Dig. § 130.\*]

Appeal from Greene Chancery Court; Chas. D. Frierson, Chancellor.

Suit by Willie H. Hawkins against Minnie Pauline Reeves. From a judgment dismissing the petition, petitioner appeals. Affirmed.

November 30, 1887, W. H. Sollis executed a mortgage to the American Mortgage Company on a certain tract of land in Greene county to secure a note of the mortgagor of the same date. He afterwards conveyed the same land to appellant and the heirs of her body, warranting the title against all lawful claims except the mortgagee. After this Sollis died. The mortgage was afterwards foreclosed by suit in chancery court against the administrator and heirs of Sollis. At the sale, made under the direction of the chancery court, appellant purchased the land, paying therefor the sum of \$718, and received a deed of the commissioner, which was duly approved

by the court. On the 10th day of December, 1912, appellant filed her petition in the Greene chancery court to confirm title, under section 661 of Kirby's Digest et seq., alleging that she was the owner of the land described by reason of the conveyances mentioned, and that there was no person in possession of the property claiming title adverse to her, unless it was the said defendant, Mary Pauline Reeves, etc. Summons was issued against the appellee and served upon her. Appellee at the time was a minor, about 15 years old, and the only bodily heir of the appellant. R. E. L. Johnson was appointed by the court guardian ad litem for the appellee, and on her behalf filed a demurrer to the petition, setting up that it did not state facts sufficient to constitute a cause of action. The guardian ad litem also filed an answer, denying specifically each of the allegations of the complaint. Upon the hearing, the proceedings of the chancery court under which appellant obtained her title were introduced, and tax receipts for the years 1910, 1911, and 1912. The court found that the proceedings for confirmation as to notice, tax receipts, etc., were in due form. The court, after hearing the argument, offered to grant petitioner leave to amend her petition so as to ask a foreclosure of the lien in her favor against the property described in the petition. The petitioner declined to amend, but stood upon her petition. The court thereupon sustained the demurrer, and dismissed the petition for want of equity.

Hawthorne & Hawthorne, of Jonesboro, for appellant. R. E. L. Johnson, of Paragould, for appellee.

WOOD, J. (after stating the facts as above).

[1] I. Appellant, under our statute and decisions, acquired a life estate to the land in controversy by virtue of the deed of Sollis to her. *Horseley et al. v. Hilburn*, 44 Ark. 458; *Wilmans et al. v. Robinson*, 67 Ark. 517, 55 S. W. 950.

[2] Her purchase of the land at the foreclosure sale gave her no title which she could confirm as against the appellee. Appellant was the natural guardian of appellee. Kirby's Digest, § 3757.

In *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, on petition of the curator of the estate of minor children, the probate court ordered a sale of certain lands belonging to them. The land was purchased by one who stood in the relation of quasi natural guardian to the minors at their request. The sale was reported to and confirmed by the court. In that case we said: "No one placed in a situation of trust or confidence in reference to the subject of the sale can be purchaser on his own account of the property sold." And, after reviewing many cases of our own and other courts, Judge Battle, speaking for the court, said: "The doctrine

as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale." Again: "If the trustee, or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise, and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the cestui que trust or other person to come at his option, and without showing actual injury or fraud, have the sale set aside."

In the recent case of *Burel v. Baker*, 89 Ark. 168, 116 S. W. 181, we held that a mother occupies a relation of trust or confidence to her children, which precludes her from purchasing their land. If the purchase at foreclosure sale by a mother, a life tenant, of lands belonging to the heirs of her body gives her no title which she could hold against them, and which could be set aside at their instance, then, of course, it necessarily follows that she could not have a title, which she had acquired by purchase of their lands, confirmed as against them. The doctrine announced in the above and other cases of our own court necessarily rules the question under consideration. See other cases cited there.

Appellant relies upon cases which hold that the relation of the life tenant to the remainderman is not of such a fiduciary character that he cannot purchase the property at a foreclosure sale which will give him a fee-simple title. But there is a contrariety of view as to whether or not the purchase by a life tenant of an outstanding title gives him a fee-simple title, one that he can assert against the rights of the remainderman. The solution of that question does not arise upon the facts alleged in the complaint under review. It is the fact of fiduciary or confidential relation, and not the fact of her life tenancy, that precludes the appellant from the right to purchase, and the right to have the title acquired by her purchase at the foreclosure sale confirmed as against the appellee. Therefore, the authorities, which merely hold that a tenant for life occupies no position of trust or confidence to the remainderman, where no relation of trust or confidence is shown, are not applicable to the facts disclosed by this record.

[3] II. Appellant contends that appellee was bound by the decree of foreclosure, and that the approval of the deed under that decree gave appellant title as against the appellee. But the issue now between appellant and appellee was not raised, and could not

have been raised, in the foreclosure proceedings. Appellant is seeking to quiet title against appellee, and the burden is upon appellant to show that she has title to quiet. This she fails to do.

[4] III. The appellant next contends that she should recover in this action, as the appellee, in order to defend, should have offered contribution. The record shows that the court "offered to grant petitioner leave to amend her petition so as to ask a foreclosure of the lien against the property described in the petition to confirm." This the appellant declined, but stood upon her petition. The only question, therefore, is as to whether her petition stated a cause of action. The court correctly ruled that it did not.

The judgment is therefore affirmed.

# FORBES et al. v. REINMAN & WOLFORT. (No. 261.)

(Supreme Court of Arkansas. April 13, 1914.)

## 1. CARRIERS (§§ 235, 280\*)—PRIVATE CARRIERS —LETTING AUTOMOBILE WITH DRIVER—CARE REQUIRED.

Those of whom one hires an automobile with a chauffeur to drive him and his guests where he directs become a private carrier for hire, and as such required to use ordinary care and diligence in the performance of the duty imposed on them by the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 966, 967, 1085-1092, 1093-1103, 1105, 1106, 1109, 1117; Dec. Dig. §§ 235, 280.\*]

## 2. MASTER AND SERVANT (§ 301\*)—LIABILITY OF MASTER — INJURY TO OCCUPANTS OF HIRED AUTOMOBILE.

Those who let an automobile with a chauffeur to drive the hirer with his guests, he having no authority over the chauffeur, except to direct where the car shall be driven, are liable, as master, for the negligence of the driver, whereby the occupants are injured; their duty not being limited to care in selection of a car and driver.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Two actions, one by Mary Forbes, administratrix of George Forbes, deceased, the other by Mrs. E. L. Smith, both against Reinman & Wolfort, consolidated for purpose of trial. From a judgment on a verdict directed for defendant, plaintiffs appeal. Reversed and remanded for new trial.

Bradshaw, Rhoton & Helm, of Little Rock, for appellants. Baldy Vinson and Mehaffy, Reid & Mehaffy, all of Little Rock, for appellee.

HART, J. Appellants brought separate suits against appellees to recover damages on account of the alleged negligence of appellees, and the cases were consolidated for the purpose of trial.

[1, 2] The facts, so far as are necessary for a determination of the issue raised by

the appeal, are as follows: Appellees had been engaged in the livery business in the city of Little Rock for several years, and, in connection therewith, rented automobiles to such persons as they chose. In May, 1912, George Forbes telephoned to appellees for an automobile and driver to be used by him and some guests in driving about the city of Little Rock. Forbes had hired automobiles from appellees before this time. Appellees sent an automobile and driver to the place designated by Forbes. Forbes, and Mr. and Mrs. E. L. Smith as his guests, entered the automobile and gave directions to the driver as to the places where they wished to go. The driver had control of the machine, and the management of it, and drove it to the places directed by Forbes. While going along High street, in the city of Little Rock, the automobile ran into an express wagon, and Forbes was killed and Mrs. Smith severely injured. The testimony on the part of appellants tends to show that the collision occurred by reason of the negligence of the driver of the automobile, while the testimony of appellees tends to show that it was caused by the negligence of the driver of the express wagon. Appellees testified that the chauffeur in charge of their car was an experienced driver, and had been in their employment as long as they had been in the business of hiring out automobiles; that he had never had an accident before, and was both careful and skillful; that the car in question cost \$3,500, and was in perfect condition. The circuit court directed a verdict in favor of appellees on the ground that the only duty appellees owed to the occupants of the car was that of exercising ordinary care in furnishing a safe automobile and a careful and reliable chauffeur. To reverse the judgment rendered, appellants have prosecuted this appeal.

Mr. Hutchinson, in his work on Carriers (3d Ed. vol. 1, § 35), says that private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion, undertake for compensation to carry the goods of others upon such terms as may be agreed upon. At section 37, the same author says that, the bailment to the private carrier for hire being for the mutual benefit of the parties, the law exacts of him a higher degree of diligence than of the carrier without hire; that the measure of his duty is what is known as ordinary care or diligence, and for the lack of this he will be held liable. Again, at section 96 of the same volume, he says: "Ordinarily livery stable keepers engaged in the business of letting for hire teams and vehicles, either with or without drivers, are not carriers of passengers within the legal meaning of the term. They do not hold themselves out as undertaking, for hire, to carry indiscriminately any person who may apply." So it may be said at the outset that the relation between the hirer of the vehicle and the owner is that of bailee and bailor,

and the liability of the owner is governed by the rules applicable to such a contract of bailment. Appellees hired to Forbes an automobile and driver to be used by him and his guests in driving around the city of Little Rock; and thus they became a private carrier for hire, and as such were required to use ordinary care and diligence in the performance of the duty imposed upon them by the contract. Counsel for appellees contend that the duty imposed upon the latter was to exercise ordinary care and skill in the selection of the motor vehicle, and also to exercise ordinary care and prudence in the selection of a careful and skilled chauffeur. They cite, in support of their contention, the following cases: *McGregor v. Gill*, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919; *Payne v. Halstead*, 44 Ill. App. 97; *Stanley v. Steele*, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561, 2 Ann. Cas. 342; *Parker v. G. O. Loving & Co.* (Ga. App.) 79 S. E. 77.

It must be admitted that language is used in all these opinions which tends to sustain the contention of counsel for appellees; but in regard to the last two mentioned cases it may be said that the injury to the occupant of the carriage resulted from a defect in the carriage itself, and the court said that the hirer of the carriage was only bound to use ordinary care and diligence in the selection of the vehicle. The language of the court to the effect that the owner was only required to use ordinary care and diligence to select a safe and careful driver is obiter, for the question of whether the master had furnished a competent and careful driver was not an issue in the case. In the first two cases, viz., *McGregor v. Gill*, supra, and *Payne v. Halstead*, supra, the injury was caused by the alleged negligence of the driver, and the court held that the only duty the owner owed to the person hiring the carriage was to use ordinary care in selecting a competent and skillful driver; but we do not think the holding of these courts can be sustained upon reason and principle. Indeed, a contrary doctrine to that announced by the Illinois Court of Appeals in *Payne v. Halstead* was afterwards held by the Supreme Court of that state in a case which we shall refer to later. It is a general rule of law that an injured person may recover against one or both of two wrongdoers between whom there is no concert of action, whose concurring act produces the injury. In the application of this rule, this court held, in the case of *Hot Springs Street Ry. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245, that one riding in a private conveyance as a guest of its driver, over whom he has no authority or control, and who is injured by the negligence of a third party and the contributory negligence of his entertainer, is not to be defeated in his action against the negligent third party by imputed contributory negligence. The reason that the driver's negligence is not imputed to the injured occupant of the carriage in such cases

is that the relation of master and servant, or principal and agent, does not exist between the driver of the carriage and the person riding in it with him. If, on the other hand, a master is riding in his own carriage with his servant driving, and the master is injured by the concurring negligence of his driver and a third person, the master cannot recover damages for his injuries from the third person because the negligence of his driver may be imputed to him. The reason that the negligence of the driver is imputed to the master is because the servant is under the direct control of the master. It is also generally held that the owner of an automobile who leases it with a licensed chauffeur in charge of it at a stated sum is liable to strangers for the negligent acts of the chauffeur, where the lessee has no control over him except as to when and where the car shall be driven. *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 28 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648, and cases cited. The court held that this case turned upon the law of master and servant, and, in discussing the question of whether the servant in such cases was the servant of the hirer or the person who hired the carriage, said: "In the application of these principles to the hiring of a carriage with horses and a driver, to be used for the conveyance of the hirer from place to place, it has been held almost universally that in the care and management of the horse and vehicle the driver does not become the servant of the hirer, but remains subject to the control of his general employer, and that therefore the hirer is not liable for his negligence in driving."

The reason the owner of the automobile was held liable in that case was because he stood in the relation of master to the chauffeur, who was the wrongdoer. He had selected the chauffeur as his servant from the knowledge, or the belief, of his skill and care, and the servant was bound to receive and obey his orders. If the owner of a motor vehicle hired to a third person, who exercises no control over the driver of the automobile other than telling him where to go, is liable in damages to pedestrians or the occupants of other vehicles who are injured by the negligence of the chauffeur, we can see no difference in principle in such a case and in one where the occupants of the carriage are injured by the negligence of the chauffeur; for the liability of the owner in each case turns upon the question of whether the chauffeur is his servant or not. If the chauffeur is the servant of the owner, as to strangers, it cannot upon principle be said that he is the servant of the person hiring the vehicle when the latter is injured and sues the owner for damages.

Counsel for appellants have cited numerous cases in their brief; but many of them have only an indirect application to the facts of the present case, and we shall only cite those which we deem squarely in point. In

the case of *Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678, 21 L. R. A. (N. S.) 81, the court held: "The owner of a passenger-carrying automobile cannot escape liability for injury to a passenger caused by collision between the automobile and a street car, if the chauffeur negligently ran near the car at high speed without having the machine under control, and, without such negligence, the accident would not have happened, although the immediate cause of the accident was the breaking of a brake rod through a latent defect, for which the owner was not responsible."

In the case of *Gerretson v. Rambler Garage Co.*, 149 Wis. 528, 136 N. W. 186, 40 L. R. A. (N. S.) 457, the Supreme Court of Wisconsin held: "A chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the lessee merely as to routes, is the servant of the owner of the garage, and the latter will be liable for injury inflicted upon occupants of the car through his negligence."

In the case of *Meyers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113, the Supreme Court of Minnesota held: "Where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver except to direct him where to go and what route to take, and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence." The court said: "Both on principle and authority, we decline to follow the rule that the defendant is liable only for the exercise of care in the selection of the driver. We apply the ordinary rule of respondeat superior to this case, and hold that, where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver except to direct him where to go and what route to take, and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence."

In *Routledge v. Rambler Automobile Co.* (Tex. Civ. App.) 95 S. W. 749, plaintiff was riding as guest of others who had hired an automobile and chauffeur. It was held he was entitled to recover for an injury caused by the negligence of the chauffeur.

As we have already seen, a private carrier is not bound to exercise the highest degree of care for the safety of his passengers, as in the case of a common carrier; but he is bound to exercise ordinary care and diligence to carry his passengers safely. If a private carrier should drive his own vehicle and should cause injury to his passengers by his negligent driving, he could not escape liability by proving that he was ordinarily a

safe and careful driver. The reason is that in such case he is a wrongdoer, and, his primary negligence being the proximate cause of the injury, he is liable for the damages sustained. So, too, if he delegates to another the duty to drive his vehicle, and his passengers are injured by reason of the negligence of his driver, the rule of respondeat superior applies, and the owner is liable. In the case at bar, under the facts shown by appellants, the occupants of the car exercised no authority whatever over the driver, except to direct him where to go. The operation and management of the car was exclusively in charge of the driver. The testimony of appellants also shows that the occupants of the car were injured by the negligence of the driver. It would not be doubted for an instant that in such a case the driver himself would be liable. This is so because, under the circumstances, he would be a wrongdoer, and, his primary negligence being the proximate cause of the injury to the passengers, he would be liable therefor. If, as we have already seen, he was at the time the servant of the owner of the car, such owner would also be liable in damages under the doctrine of respondeat superior. This rule is especially applicable in the case of one letting out automobiles for hire. Motor vehicles are complicated machines, and are capable of being run at a very high rate of speed. It is necessary for the safety of their occupants, as well as for the protection of pedestrians and other persons in vehicles using the streets, that the drivers of such machines should be competent persons, and that such drivers be required to exercise ordinary care and diligence in running their machines. Under the authority cited above, and upon principle, we do not think that the owner of an automobile, under the facts shown by appellants, can absolve himself from liability by proving that he had employed a careful and competent driver. He also owes the occupants of the automobile the duty to exercise ordinary care to carry them safely to their destination.

It follows that the court erred in directing a verdict for appellee, and for that error the judgment will be reversed and the cause remanded for a new trial.

#### MARTIN v. MONGER. (No. 258.)

(Supreme Court of Arkansas. April 13, 1914.)

##### 1. TRIAL (§ 85\*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

A general objection to all of a witness' testimony, part of which is competent, is insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.\*]

##### 2. GUARANTY (§ 26\*)—FRAUD—QUESTION FOR JURY.

Whether plaintiff induced defendant by fraud to enter into the contract of guaranty of

payment of accounts turned over in payment held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 106; Dec. Dig. § 26.\*]

##### 3. GUARANTY (§ 46\*)—ABSOLUTE GUARANTY.

The agreement of one turning over accounts in payment "to make them all good at collection time, all due August 15, 1913. \* \* \* I certify that the accounts are true, and will make them all good, and will collect all I can free of costs"—is an absolute guaranty to pay at collection time, under which no attempt by the guarantee to collect is necessary.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 56, 57; Dec. Dig. § 46.\*]

##### 4. APPEAL AND ERROR (§ 1068\*)—PREJUDICIAL ERROR—INSTRUCTIONS.

It being impossible to tell whether the verdict was based on an erroneous instruction, the giving of it requires a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Appeal from Circuit Court, Madison County; J. S. Maples, Judge.

Action by H. H. Martin against John Monger. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

On the 20th of August, 1913, appellant instituted this suit in the Madison circuit court to recover upon the following instrument: "For value received I turn over \$545.00 worth of my jack and horse accounts to H. H. Martin, and agree to make them all good at collection time, all due August 15, 1913. [Various accounts mentioned, amounting to \$545.00.] I certify that the accounts are true, and will make them all good, and will collect all I can free of costs. [Signed] John Monger. Dated April 3, 1913." Appellant alleged that he sold to appellee a stallion for the consideration of \$545, to be paid for as evidenced by the instrument set out; that there had been paid the sum of \$73, leaving a balance of \$472, which appellee had refused to pay, and he prayed judgment for that sum.

Appellee answered, admitting the sale of the stallion by appellant to him, but denying that appellee agreed to make good the accounts as set forth in the instrument set out in appellant's complaint. Appellee averred that he was not to stand good for any of the accounts, except those for all mares which found a colt and the colt lived to be five days old; that on such accounts appellee was to stand good for same to the appellant, but none others; that this was the verbal contract between the appellant and appellee, and that appellee requested appellant to prepare a written contract to that effect; that appellant presented the contract in suit to the appellee, and that appellee, not having his glasses, did not read the same, but signed it upon the representations of the appellant to the effect that the written contract as prepared by him was in keeping with their verbal contract. Appellee denied that the con-

tract set forth in the complaint was the contract into which the parties entered, and averred that the appellant obtained the signature of appellee to the contract sued on through fraud and misrepresentation; that the representations made by the appellant to the appellee, to the effect that the written contract was the same as their verbal contract, were false and fraudulent, and that appellee signed the same upon the faith of such representations.

Appellant filed a reply, denying the allegations of appellee's answer.

The testimony on behalf of the appellant tended to prove the allegations of his complaint. His evidence tended to show that he sold the stallion to the appellee and agreed to take in payment the accounts mentioned in the instrument and complaint, amounting to \$545, as evidenced by the written contract set up in the complaint. Appellant says he wrote the first of the contract and then read it to the appellee. He told appellee that \$545 was not enough for the horse, and appellee said that was all he would give. Appellant then wrote the last part of the contract, and handed it to appellee, and said: "If you will sign that, it is a trade." Appellee "took the paper and looked at it long enough to have read it, and then he took the pen and signed the contract. There was never anything said about the colts living to be five days old." Appellee "had plenty of time to read the contract. There was nothing agreed to outside of the contract."

Appellee testified, in part, as follows: "I told appellant that I would give him the horse and jack accounts, five or six hundred dollars, just as they stood, for the horse, and that my horse and jack were stood upon an agreement that all mares that had colts that lived to be five days old, they would be liable, and the debt would be good; otherwise, nothing due. Appellant asked me how many of the mares would bring colts, and I told him that I didn't know, but that I knew of several mares close around me that would bring colts, and that I would assign and turn over to him the accounts for what they were worth for the horse. I told him I would not pay cash for the horse at any price, and I told appellant all the way through that I would not stand good for the accounts, and Martin knew and understood this contract. Martin [appellant] said: 'I am going to trade with you.' So we went to the house to take off the accounts, and see just what they were, and fix the matter up. I told Martin I would call the accounts off, and he could put them down. Martin wrote a few lines, and then read it; but I know he did not read it like this paper reads now. I did not see it then, and did not read it. I haven't much education, and did not pay much attention to it, as we had made the contract out at the lot, and I thought and understood that he was fixing it so I could sign the accounts over to him as we had agreed to at the lot. I called

off the accounts; he put them down on the paper, and added them up, all amounting to \$545. Martin said, 'That is not enough' I said, 'That is not quite as much as I thought there was, but that is all I'll give; call it off if you want to.' Martin said, 'No; I am going to trade.' So he then wrote something at the bottom of the paper, and shoved it over to me, and I at once signed it without reading it. I never read the contract, being that I did not have my glasses, and I trusted Martin to fix the contract as we had agreed to at the lot."

Appellant "excepted to all the evidence which tended to contradict the terms of the contract." It is unnecessary to set forth more of the testimony.

The court, among other instructions, gave, at the instance of the appellee, the following: "I charge you that, although you may find that the defendant is liable on the contract in controversy as a guarantor of the sole plaintiff, unless you further find from a preponderance of the evidence that the plaintiff has used due diligence to collect said accounts, or that the persons who owe said accounts not collected are insolvent and unable to pay same, you should find for the defendant." The appellant excepted to the ruling of the court in granting the above prayer.

The verdict and judgment were in favor of the appellee, and this appeal has been duly prosecuted.

Festus O. Butt, of Eureka Springs, for appellant. W. N. Ivie, of Harrison, for appellee.

WOOD, J. (after stating the facts as above).

[1] The appellant did not make any specific objection to the admission of the testimony which he now contends was incompetent, because it tended to contradict the terms of a written contract. At least part of the testimony admitted was competent, and the appellant is not in an attitude to complain of the ruling of the court in admitting it all, for he only made a general objection. "A general objection to the entire testimony of a witness is insufficient, where a portion of the testimony is competent." *Central Coal & Coke Co. v. Niemeyer Lumber Co.*, 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570. See, also, *Maxey v. State*, 76 Ark. 276, 88 S. W. 1009; *Mallory v. Brademyer*, 76 Ark. 539, 89 S. W. 551; *Kansas City So. Ry. Co. v. Leslie*, 167 S. W. 83.

[2] It was a question for the jury, under the testimony, as to whether or not the appellant perpetrated a fraud upon appellee in entering into the contract.

[3] The court erred in granting appellee's prayer for instruction No. 7, above set forth. If the contract was free from fraud in its making, then appellee is bound to perform it according to its terms; for it is unambiguous, and was an absolute guaranty to pay the accounts by August 15, 1913. The lan-

guage of the instrument, when construed as a whole, shows an absolute guaranty on the part of the appellee to make all accounts "good at collection time," and collection time was August 15, 1913. The court, as indicated by the seventh prayer for instruction, granted at the instance of appellee, construed the contract, not as an absolute, but as a conditional, guaranty. This was error.

In the case of "an absolute guaranty, the guarantor is bound immediately upon the failure of the principal debtor to perform his contract, without any further steps taken by any one, or without further conditions to be performed." 20 Cyc. 1450-1458. "An absolute guaranty will not be affected by failure of the guarantee to make demand or give the guarantor notice of the principal's default." *Lane v. Levillian*, 4 Ark. 76, 37 Am. Dec. 769.

The instrument sued on evidenced an original undertaking upon the part of appellee to make good all the accounts described therein at collection time, and in such case nothing was necessary to be done, as we have seen, on the part of the guarantee by way of attempting to collect the accounts. See *Friend v. Smith Grain Co.*, 59 Ark. 86, 26 S. W. 374; *Braddock v. Werthelmer*, 68 Ark. 423, 59 S. W. 761; *Stewart v. Sharp Co. Bank*, 71 Ark. 585, 76 S. W. 1064, and other cases cited in brief of counsel for appellant. If the language of the instrument had been simply, "I certify that the accounts are true," and ended at that, or if the language were, "I guarantee that the accounts are good," then counsel for appellee may have been correct in his contention that the instrument in controversy was but a conditional guaranty; but it will be observed that the language of the instrument shows that the appellee intended to "make the accounts good at collection time." The language can only mean an absolute guaranty to pay at collection time.

[4] Appellee's seventh prayer for instruction, therefore, was inherently defective. Inasmuch as it is impossible to tell whether or not the verdict was based upon this instruction, for the error in granting it, the judgment must be reversed, and the cause remanded for a new trial.

#### CHICAGO, R. I. & P. RY. CO. v. GUNN. (No. 259.)

(Supreme Court of Arkansas. April 13, 1914.)

#### 1. RAILROADS (§ 376\*)—DUTY TO TRESPASSER—LOOKOUT LAW.

Under the lookout law requiring train operatives to keep a lookout for trespassers, they, discovering a light ahead on the track, should use care in approaching it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.\*]

#### 2. RAILROADS (§ 398\*)—KILLING TRESPASSER—NEGLIGENCE—EVIDENCE.

In view of the lookout law, evidence in an action for the killing by a train, running 35

miles an hour, with a lantern in place of a headlight, the headlight having been broken, of a trespasser riding on a speeder held to authorize a recovery; the light on the speeder having been seen, though not recognized as such, when the train was a quarter of a mile distant, only a crossing signal having been given, and no effort to stop the train having been made till it was nearly on the speeder.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. § 398.\*]

#### 3. APPEAL AND ERROR (§ 1057\*)—HARMLESS EVIDENCE—REJECTION OF EVIDENCE.

Rejection of evidence, in an action for death of a white man, that the negro woman who was accompanying him was a strumpet, was harmless; other evidence admitted tending as fully to show his dissolute character and depraved disposition.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

#### 4. DEATH (§ 69\*)—EVIDENCE—PECUNIARY LOSS—HABITS OF DECEASED.

Though the action is only for the pecuniary loss sustained by deceased's children from his death, evidence that he taught his little girl her Sunday school lessons, and wanted her to go to Sunday school, and made her practice her music lessons, is admissible to show he had an affection for his children, took an interest in their welfare, and on that account would be likely to contribute in the future to their support.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 86, 87; Dec. Dig. § 69.\*]

#### 5. APPEAL AND ERROR (§ 1060\*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Improper argument of counsel, the only injurious effect of which would be to enhance damages, will be deemed harmless; the verdict not being complained of as excessive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

Appeal from Circuit Court, Monroe County; Jno. D. De Bois, Special Judge.

Action by Jas. Gunn, administrator, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee instituted this action against appellant to recover damages for the death of his intestate, which, it was alleged, was caused by the negligence of appellant. The facts are substantially as follows: An inspector of appellant lived at Brinkley, Ark., and used a speeder on the tracks of appellant in the discharge of his duties. He was not permitted to use the speeder after dark, nor was he allowed to employ any one as a substitute. He did, however, employ Charles L. Hodges to perform his duties for him; but appellant company had no knowledge of this fact. About 11 o'clock on the night of October 11, 1912, Charles L. Hodges, who was a white man, left a negro dance hall in Brinkley with a negro woman and a negro man, to go to Biscoe, a station on appellant's line of railway about 13 miles west of Brinkley. They went on the speeder which Hodges had been using while discharging the duties of the inspector for him. When they got to Biscoe, the negro man, who had been carried



along for the purpose of helping Hodges propel the speeder, stayed with the speeder, and Hodges and the negro woman went to a saloon and stayed about an hour. They returned with two quarts of whisky and some beer, and appeared to have been drinking while at the saloon. Hodges and the negro woman both continued to drink on the way home, and the negro man who was with them testified that they were drunk. When they had arrived at a point about one mile west of Brinkley, a passenger train going east struck the speeder, and Hodges was thrown from it and killed. The track of appellant from Brinkley west, as far as Eden, which is 5 miles distant, is perfectly straight. It was dark at the time the passenger train struck the speeder, and the engine on the passenger train had no headlight, except a lantern. The negro man who was on the speeder with Hodges testified that he looked back every time he thought of it, and did not observe the approach of the train until it was about to strike the speeder; that the train was running pretty fast, and gave no warning of its approach; that he jumped off of the speeder just before the train struck it; that he was not drunk at the time, and had only taken one drink of whisky on the trip.

John T. Maloney, for appellant, testified substantially as follows: "I was locomotive engineer on the passenger train that killed Hodges. I took my train out of Little Rock on that night at 1:05 a. m. for Memphis. The engine had an electric headlight on it, and it was in perfect order when I left Little Rock. The headlight was the regular size, and remained in perfect condition until I got to Biscoe. When I got there I had to take the siding, and, in compliance with the rules, I turned the headlight off. When the train for which I took the siding had passed by, I turned on the steam to the headlight, but the headlight would not burn. I examined the wires and lamp in the headlight, and examined the dynamo. I then found that the wire connecting the magneto insulator was broken, and this cut off the current from the headlight. I could not find any wire with which to patch the headlight, and took the porter's lantern and turned the light up to what we would call about four candle power light, and put it in the headlight. I then proceeded on my way at the rate of about 35 miles an hour. When I got near Brinkley, I saw that I was about 45 minutes late, and the train was still running at about 35 miles an hour. I noticed a light on the track about a quarter of a mile ahead of my engine. I was then between Eden and Brinkley, and near what we call the second road crossing out of Brinkley. There is a little dip or sag there. I blew the whistle for the second road crossing out of Brinkley, and as soon as I came out of the sag I blew the road crossing whistle again. When I first

saw the light, I thought they had sent a messenger out from Brinkley to see what our trouble was. When I got within about three or four telegraph poles of the light, I said to myself, 'The fellow must be walking along;' and I reached up and blew the road crossing whistle again. When I got within about 50 feet of the light, I saw there was a speeder on the track, and blew the whistle four or five times, and slammed on the emergency brake."

On cross-examination, the engineer stated that he could have stopped the train in time to have avoided striking the speeder if he had tried to do so when he first saw the light on the track; that he did not at first see any object on the track, but saw the lantern; that he thought it was either some one coming to meet them to see why the train was late, or that it was a passenger train.

Other evidence will be referred to in the opinion. There was a verdict and judgment for appellee in the sum of \$3,000, and the case is here on appeal.

Thos. S. Buzbee and Geo. B. Pugh, both of Little Rock, for appellant. C. F. Greenlee, of Brinkley, for appellee.

HART, J. (after stating the facts as above). [1] In the case of Chicago, Rock Island & Pacific Ry. Co. v. Bryant, recently decided by this court and reported in 162 S. W. 52, the court said: "Prior to the passage of the new lookout statute quoted above, there was, of course, no liability on the part of a railroad company to trespassers or those guilty of contributory negligence, except on account of negligence in failing to avoid an injury after discovering the perilous situation of the injured party. But the law as it now stands requires the train operatives to keep a lookout for trespassers and all others, and makes the company liable for negligence in that regard, notwithstanding the contributory negligence of the injured party. St. L., I. M. & S. R. Co. v. Gibson, 155 S. W. 510. The Legislature, in passing this statute, necessarily had in view all of the requirements of the law imposed for the protection of persons on the track, and attempted to lay down a rule of conduct for those in charge of the train. This, of course, implied a duty to comply with all the requirements of the law exacted for the protection of persons on the track, and, in order to make the new lookout statute effective, it must include the duty to equip the locomotive with a headlight of sufficient power and brilliancy to enable the engineer or motorman to keep a proper lookout. It cannot be the state of the law that the trainmen are required to keep a lookout and yet the company not bound to provide means for making the lookout efficient. The purpose of the statute in requiring a headlight of high candle power was to enable the engineer and

fireman to discover objects on the track, and, when the Legislature subsequently declared the duty of those operatives to maintain a lookout, and fixed liability on the part of the company for their failure to do so, this necessarily carried with it the statutory duty of the company to equip the locomotive with proper headlight, and to make the company liable for damages caused by a failure to do so."

Objection is made by counsel for appellant to certain instructions given by the court; but we do not deem it necessary to set out the instructions or to discuss them in detail. When the principles of law announced in the case quoted from above are considered, we are of the opinion that the instructions were as fair to the appellant as it could ask. The court instructed the jury that, if it should find from the evidence that at the time decedent was struck and killed on appellant's track he was not at a regular road crossing, and if it further found that the engineer or fireman on the engine was keeping such a lookout towards the front as was practicable under the circumstances, and that, by reason of the fact that the electric headlight had gone out, and could not be relighted, just before the accident, they could not see far enough in front of the train to enable them to stop the train in time to prevent striking the decedent after discovering him on the railroad track, the appellant was not liable, and that the verdict of the jury should be for appellant. The court further said in this connection that, when appellant discovered a light ahead on the track, it should have used reasonable care in approaching the same. This instruction presented appellant's theory of the case in as favorable a light as it was entitled to.

[2] We are also of the opinion that the evidence justified the verdict. The accident occurred between Brinkley and Eden. The track between those points was perfectly straight. The engineer was running his train at the rate of 35 miles per hour when he first saw the light about a quarter of a mile away. He admits that he could have then stopped the train in time to have avoided striking the speeder on which decedent was riding. It was dark, and the engineer should have proceeded more cautiously, knowing that his electric headlight was not in use, than he would have done had it been in operation. The engineer testified that he thought the light on the track in front of his engine was from some one coming out from Brinkley to meet the train to ascertain why it was late. The jury had a right to carry into the jury box their knowledge gained in the everyday affairs of life, and it might have found that the engineer should have known that a lantern carried in the hands of a person walking on the track would sway with the motion of his body, and that one carried on a hand car

propelled on the track would remain in a stationary position; that by observing the light in question he could have ascertained that it remained in a stationary position, and was therefore notice to him that it was a light on a hand car being propelled on the track; and that the persons on the hand car were oblivious to the approach of the train. Under these circumstances, he gave no warning of the approach of the train, except to blow the whistle for the crossing. The train was running at the rate of 35 miles per hour, and he made no effort whatever to stop it until he was within a very short distance of the speeder. He was only about 50 feet away when he applied the emergency brakes. Therefore the jury was justified in finding a verdict for appellee.

[3] Appellant offered to prove that the negro woman who accompanied the decedent to Biscoe was a strumpet, and that they were at a negro dance hall, which was also a house of prostitution, at the time decedent left with her and the negro man to go to Biscoe; but the court refused to admit this testimony. The decedent was a white man, and lived with his mother and sister. He had two children, a daughter 12 years of age, and a son 6 years old. It was admitted that decedent was instantly killed. It was not alleged in the complaint that the children lost anything in the way of moral or mental training, and the only element of damage sought to be recovered was for the contribution that decedent made to their support. Counsel for appellant therefore contend that the excluded testimony would have tended to show that decedent was a man of dissolute habits and depraved disposition, and, on that account, not likely to contribute any further to the support of his children. Appellant was permitted to prove, by other evidence, that the decedent was a constant drinker, and frequently in the habit of getting drunk; that decedent was at a negro dance hall before he left for Biscoe on the night he was killed; that both he and the negro woman got off of the speeder at Biscoe and went to a saloon and got some beer and whisky, and remained away from the speeder for about an hour. The evidence showed that decedent was a white man, and the testimony admitted tended as fully to show the dissolute character and depraved disposition as the testimony excluded, and we do not think the action of the court in refusing the offered testimony was prejudicial error for which the judgment should be reversed.

[4] The court permitted the sister of the decedent to testify that the deceased would teach his little girl her Sunday school lessons, and wanted her to go to Sunday school, and made her practice her music lessons. It is urged by counsel for appellant that the admission of this testimony was erroneous because it was not alleged in the complaint that

the children lost anything on account of the moral or mental training by their father. They say the testimony was objected to specifically on that ground. As we have already seen, the court limited the recovery of appellee to the pecuniary loss sustained by decedent's children. The testimony was not admitted for the purpose of showing that the children had suffered a loss of mental and moral training by their father on account of his death, but was admitted for the purpose of proving that the father had an affection for his children, took an interest in their welfare, and that, on that account, would be likely to contribute in the future to their support. Therefore we do not think the testimony was erroneous.

[5] It is next urged by counsel for appellant that the judgment should be reversed on account of the closing argument of counsel for appellee. It appears from the record that the attorney for appellee stated to the jury in his closing argument that, if he had brought this action for more than \$3,000, the appellant would have removed it to the federal court; that he brought the suit for the maximum amount that he could sue for in the state court, and urged the jury to return a verdict for the full amount sued for. At the time of decedent's death, he was 42 years of age, and his life expectancy was 26½ years. It was admitted that he was in good health at the time of his death. According to the testimony of his sister, he had been at work pretty regularly for several years before his death. He had been making from \$1.50 a day to \$75 per month. He contributed about \$25 per month to the support of his children. She also stated that he was not in the habit of getting drunk, and did not spend most of his wages for whisky; that he contributed regularly to the support of his children. Now, the only effect that counsel for appellant contends the argument had upon the jury was to arouse their prejudice and tend to make them return a larger verdict in favor of appellee than they otherwise would have done. Counsel for appellant does not contend here that the verdict is excessive, and have not asked us to reverse the judgment on that account. While the proof introduced by appellee as to the contribution made by decedent to the support of his children is contradicted by that introduced by appellant, yet the jury were the judges of the credibility of the witnesses and the weight to be given to their testimony, and, under the testimony adduced by appellee, the jury would have been warranted in rendering a larger verdict than they did. Therefore we do not think we should reverse the judgment on account of the argument, even if we concluded that it was erroneous. *St. L., I. M. & S. R. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884. In that case the court held that an improper argument will not be deemed prejudicial, where

its only injurious effect would have been to enhance appellee's damages, if appellant does not complain that the verdict was excessive. The judgment is affirmed.

# JONESBORO, L. C. & E. R. CO. v. GAINER. (No. 269.)

(Supreme Court of Arkansas. April 20, 1914.)

## 1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for personal injuries to plaintiff, a logger, operating a hand car on defendant's track, testimony of one witness that he did not know whether it was the custom of loggers to use hand cars on the track to haul feed to the log camps, that they had some agreement with the company about running such cars, and that he had never seen a hand car hauling feed, did not tend to establish a custom for loggers to use hand cars on defendant's road for the purpose of hauling feed, and hence was not prejudicial to defendant on that ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.\*]

## 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railroad for personal injuries to plaintiff, a logger, operating a hand car on its track, admission of testimony for plaintiff that, if there was any light at or any one on the flat cars in front of the engine, witnesses did not see him or it was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.\*]

## 3. WITNESSES (§ 380\*)—CREDIBILITY—CONTRADICTION OF OWN WITNESS.

Plaintiff in such action, upon surprise by testimony of the fireman, called by him, that the headlight was not lit, that he did not know whether there was any one on the flat cars in front of the engine or not, that he saw one stop signal and a white light which looked to be on the flat car, and that the stop signal looked to be on the car, on laying a predicate by asking the witness whether he had not said that, if there was any one on the lookout, he did not know it, eliciting the response that he said a headlight, but saw a stop signal given with a lantern, was properly allowed to contradict him by testimony of witnesses who heard him, asked whether there was any one or any headlight on the flat cars, and answered that, if there was, he knew nothing about it.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1210–1219; Dec. Dig. § 380.\*]

## 4. TRIAL (§ 255\*)—INSTRUCTIONS—REQUEST FOR INSTRUCTION.

In an action for personal injuries to plaintiff, operating a hand car on defendant's track, defendant, if it desired a ruling as to whether its failure to provide a headlight, as required by statute, made it absolutely liable for injury resulting therefrom, should have made a specific objection to the instruction on the headlight statute to the effect that it did not make its liability depend on its negligent failure to provide the statutory headlight and lookout.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627–641; Dec. Dig. § 255.\*]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Action by E. P. Gainer against the Jonesboro, Lake City & Eastern Railroad Com-

pany. Judgment for plaintiff, and defendant appeals. Affirmed.

This suit was instituted by appellee against appellant to recover damages for personal injuries. Appellee alleged that his injury resulted from negligence of appellant in operating its train without an electric headlight, as prescribed by the statute of 1907, and without keeping a lookout, as prescribed by the statute of 1911.

On the 13th of December, 1912, appellee, who was a timber cutter or logger, took a hand car which was standing near appellant's railroad at a lumber camp three miles south of Ross. He and a collaborer, James Macklin, placed the hand car on the railroad track, and started south to what is known as Chisenhall's spur, for the purpose of securing feed. Appellee and his assistant knew at the time that there was a train on the track behind him, approaching from the north and going south, in the same direction that appellee was going. After appellee and his assistant had proceeded about a quarter of a mile, and when they had reached Chisenhall's switch, they lifted the hand car from the main line to the rails of the switch or spur track, and started to push it along the spur in order to let the train pass them. The engine on the train was pushing two flat cars ahead of it and one of these struck appellee, inflicting the injury of which he complains. The night was very dark. The headlight on the engine was between 1,100 and 1,300 candle power, but at the time of the injury it was not burning at all. The train crew tried to light it at Ross. It would flash and burn for a quarter of a mile, and then it would not burn for a mile or two. They had had the same trouble with the light on the previous night, and once or twice before that. When the employes of appellant attempted to turn on the light at Ross, the engine didn't have sufficient steam to heat the coring, and that is why the light didn't work.

Ross, the place where they first tried to light the headlight, was between 15 and 20 miles from Wilson, and Midway, another station, is only a short distance from Wilson, the end of the line. By the time they had reached Midway, they had up enough steam to heat the coring and make the light work, and it burned from then until the train reached Wilson. Appellee was injured about three miles from Ross.

Appellee and his companion, while removing the hand car from the main line, looked towards the train, and saw no light on the flat cars or elsewhere; they could have seen lights if there had been any burning. They heard the engine puffing, and supposed it was the front end of the train. They were unconscious of the fact that there were two flat cars in front of the engine. They looked for the headlight in order to see if they had time to get the hand car off the track

and to get themselves in the clear. They didn't see any one on the flat cars in front with a lantern.

One witness was asked, over the objection of the appellant, if it was not the custom of loggers to use hand cars on the track for the purpose of hauling feed to the log camps, and the witness replied: "I don't know; I could not say; they have an agreement with the company about running these speeders and hand cars; I don't know anything about it; I never saw a hand car with the feed on it."

The court permitted the attorney for the appellee, over the objection of appellant, to ask witnesses the following question, "State whether or not you heard me ask this fireman, Metcalf, whether or not there was any light out or any one out on the flat cars," and in permitting the witnesses to answer, "If there was they didn't see him or it."

The verdict and judgment were in favor of the appellee in the sum of \$2,000, and this appeal has been duly prosecuted. Other facts stated in the opinion.

C. A. Cunningham, of Blytheville, and Coleman & Lewis, of Little Rock, for appellant. J. T. Coston, of Osceola, for appellee.

WOOD, J. (after stating the facts as above). [1, 2] I. The testimony admitted over the objection of appellant did not tend to establish a custom for loggers to use hand cars on appellant's road for the purpose of hauling feed. The ruling of the court in permitting the questions objected to and the answers of the witnesses was in no wise prejudicial to appellant.

[3] II. Witness Metcalf, who was the fireman on the engine of appellant, was called by the counsel for appellee and testified that the headlight was not lit. He did not know whether there was any one on the front of the cars or not. He saw one stop signal and a white light just as he got on the seat box. The light looked to be on the flat car. He saw the stop signal given with a white lantern, but did not know who gave it. It was between 7:30 and 8 o'clock; had not been dark very long. The light looked to be on the flat car. He was then asked by counsel for appellee the following question, "Didn't you say a few minutes ago, in the back room, to me, in response to a question, if there was any one on the lookout, you didn't know it?" and answered, "I said a headlight, but I saw a stop signal given with a lantern by some one."

Counsel for appellee, being surprised by the testimony of witness Metcalf, called the witnesses, and asked them whether or not they were in the witness room, and asked them whether or not they heard counsel ask Metcalf if there was any one or any headlight on the flat cars in front of the engine, to which the witnesses, over objection of appellant, answered in the affirmative, and the

witnesses were further asked what Metcalf said, and answered: "He said if there was he didn't know anything about it."

There was no error in the admission of this testimony. Where a party is taken by surprise at the testimony of his own witness, such testimony being entirely different from what the witness had given the party calling him to understand that his testimony would be, the party who is taken by surprise and who is prejudiced by the testimony of his own witness may contradict him with other evidence, and by showing that he had made statements different from his present testimony, provided the proper foundation is laid for contradiction of the witness by calling his attention to the circumstances of the time and place, etc. *Ward v. Young*, 42 Ark. 553. Here the proper foundation was laid and the testimony was competent for the purpose of contradicting witness Metcalf, whose testimony was a surprise to the appellee, inasmuch as he made a different statement to appellee from the testimony given at the trial.

III. The instructions of the court on the headlight and lookout statutes were in conformity with the law as announced by this court in the construction of the statutes in the recent case of *C. R. I. & P. Ry. Co. v. Bryant*, 162 S. W. 51. See, also, *C. R. I. & P. Ry. Co. v. Gunn*, Adm'r, 166 S. W. 568. And it could serve no useful purpose to reiterate the doctrine announced in the foregoing cases.

The question as to whether or not the statute creates an absolute liability for failure to comply with its terms, and whether or not such failure is negligence per se or only prima facie evidence of negligence is not presented by this record.

[4] Appellant made no specific objection to the instruction, and, if it desired a ruling on the question as to whether or not the failure to provide a headlight as required by the statute made the company absolutely liable for an injury resulting therefrom, appellant should have made a specific objection to the instruction to the effect that it did not make appellant's liability depend on its negligent failure to provide the headlight and to keep the lookout required. Furthermore, the uncontradicted evidence showed that the engine was only provided with a headlight of between 1,100 and 1,300 candle power, when the statute requires a headlight of 1,500 candle power. See Acts 1907, p. 1018.

Again, the testimony showed that the reason that such headlight as was provided did not burn to its full capacity was because the engine was not carrying sufficient steam. The engineer testified: "Our fuel was not very good that day, and sometimes it takes considerable heat to heat up the coring in the headlight. If the core is not heated, it has a tendency to cause the light to flash."

IV. There was no prejudicial error in the rulings of the court in giving or refusing prayers for instructions, or in the admission or rejection of testimony, and there was ample evidence to sustain the verdict.

The judgment is therefore correct, and it is affirmed.

# ST. LOUIS, I. M. & S. R. CO. v. WIRBEL. (No. 260.)

(Supreme Court of Arkansas. April 13, 1914.)

## 1. APPEAL AND ERROR (§ 1097\*)—FORMER APPEAL—LAW OF THE CASE.

Opinions on former appeals are the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.\*]

## 2. NEGLIGENCE (§ 134\*)—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries to plaintiff, who went into its yard to seek employment and was injured therein, evidence held sufficient to show that there was a custom for master mechanics to hire firemen in the yards, which had existed for several years, so that plaintiff was not a trespasser.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

## 3. NEGLIGENCE (§ 124\*)—ADMISSIBILITY OF EVIDENCE—GENERAL CUSTOM.

Where the existence of the custom of defendant's master mechanic to employ firemen at the yard was in issue, evidence of a general custom of the defendant road and of other roads for master mechanics to hire firemen at the yards, and evidence of a local custom at a particular yard, included in the general custom on the system, was admissible to show such custom at that yard, and that plaintiff was rightly there.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 235-238; Dec. Dig. § 124.\*]

## 4. NEGLIGENCE (§ 33\*)—INJURIES TO LICENSEES.

In such case plaintiff, who was not shown to have any knowledge that he could not be employed as a fireman because of his minority, in view of a custom of master mechanics to engage firemen at the yards, had a right to be in defendant's yard.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 45-47; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Desha County; Antonio B. Grace, Judge.

Action by Harry Wirbel against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and Jas. C. Knox, of Monticello, for appellant. C. P. Harnwell, of Little Rock, for appellee.

HART, J. Appellee instituted this action to recover damages for injuries sustained by him on account of the alleged negligence of appellant, and recovered judgment. This is the third appeal in the case. The opinion on the first appeal is reported in 104 Ark. 236, 149 S. W. 92, under the style of "St. Louis, Iron Mountain & Southern Railway Co. v.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Wirbel." The opinion on the second appeal is reported in 158 S. W. 118, under the style of "St. Louis, Iron Mountain & Southern Ry. Co. v. Wirbel." Wirbel, while a minor, went to the office of the master mechanic, situated in the railroad yards at McGehee, Ark., for the purpose of securing employment as a fireman. The person in charge of the office told Wirbel to look for the master mechanic in the yards. Wirbel went into the yards to look for him. He went into the roundhouse, and inquired there for the master mechanic. Upon being informed that he was not there, he went down towards the coal chute, and started to go into a building, where an engine for hoisting coal was operated, to inquire for the master mechanic. Just as he looked into the door, the coal hoisting machinery burst, and injured his leg so badly that it afterwards had to be amputated.

Evidence was also adduced by appellee tending to show that the machinery was defective, and that appellant knew of that fact. It has been the contention of appellee throughout that he was rightfully on the premises of appellant, and that appellant owed him the duty to exercise ordinary care to keep from injuring him. On the other hand, it is the contention of appellant that appellee was a trespasser, and that therefore the injury that resulted to him was not one that could have been reasonably foreseen and anticipated by appellant, and it is not liable.

[1] The opinions on the two former appeals are the law of the case. In the opinion on the first appeal the court said that it devolved upon appellee to show, by a preponderance of the evidence, that he was rightfully at the place where he was injured, and that if such was the case the company was bound to the exercise of ordinary care to protect him against injury; that if the injury which occurred from the bursting of the machinery was not one that could reasonably have been foreseen as the natural and probable consequence resulting from the failure to repair the machinery, in the light of the attendant circumstances, it was not caused proximately by the failure of the appellant to repair the machinery, and appellee had no cause of action at all; that the question as to whether his injury did proximately result from such negligent acts was one for the jury. The court also said there was no testimony tending to show that the master mechanic had authority to employ firemen, nor that he had ever employed them, in his office or in the yards of the company. On the retrial of the case, in order to show that he was rightfully at the place where he was injured, appellee introduced evidence that the master mechanic had the authority to employ firemen at McGehee, and also introduced testimony which he claimed was sufficient to show that it was the custom of the master mechanic to employ firemen in the

yards. The railroad company, in that trial, admitted that the master mechanic had authority to employ firemen, but introduced testimony tending to show that it was against the rules of the company for him to employ them anywhere except in his office, and that he had never employed them in the yards of the company. On appeal we said: "A custom must be certain, uniform, definite, and known, and the existence of a particular custom of the kind under consideration here may be testified to by any person who possesses knowledge of the custom. For instance, as applied to the present case, if one or more persons had knowledge that the master mechanic commonly and uniformly performed the duty of hiring locomotive firemen in the yards of the company at McGehee for a certain and definite period of time, such testimony would establish a reasonable presumption or inference that the master mechanic in so doing was acting in the line of his duty, as a matter of custom, acquiesced in by the appellant for the purpose of its business." We also held that the testimony was not sufficient to show the existence of a custom on the part of the master mechanic to employ firemen in the yards at McGehee, and for that reason the judgment was reversed.

[2] When the case was again tried in the circuit court, appellee, in order to show that he was rightfully at the place where he was injured, adduced evidence tending to show that the master mechanic had authority to employ firemen, and that he was accustomed to do so in the yards of the company at McGehee. On this appeal, counsel for appellant again challenge the sufficiency of the evidence to establish such a custom; but we are of the opinion that the testimony introduced by appellee was sufficient to meet the requirements prescribed in our former opinion. Two or three witnesses, who had been in the service of the company for a number of years, and who had been employed in and around the yards of the company at McGehee for several years, testified that the master mechanic had authority to employ firemen, and that he exercised such authority by employing firemen in the yards of the company at McGehee. They said that if a man wanted employment as a fireman, it was customary for him to seek the master mechanic at his office, and that if he was not found there, to go out into the yards and look for him, that the master mechanic at McGehee had been accustomed to employ firemen in the yards of the company, and that they, of their own personal knowledge, knew of the existence of this custom. Some of the witnesses testified that there was a general custom throughout the whole Iron Mountain system for the master mechanic to employ firemen in the yards of the company. On the other hand, testimony was adduced by appellant tending to show that it

was against the rules of the company for the master mechanic to employ firemen in the yards of the company, and that the rules of the company in this respect had never been violated by the master mechanics. F. C. Reed was the master mechanic at McGehee at the time appellee was injured. He is not now in the employment of the company, and lives in the state of Nebraska. He was present at the trial, however, and testified that it was against the rules of the company for the master mechanic to employ firemen in the yards of the company, that he had no authority to employ them at any other place than his office, and that he had never employed firemen in the yards of the company. He also stated that he had no authority to employ a minor as a fireman. In rebuttal, the attorney for appellee testified that he went to the state of Nebraska and talked with Reed, the master mechanic at McGehee at the time appellee was injured; that Reed told him positively that it was his custom to hire firemen in the shop and yards; that he was in the yards a great deal of the time; and that if a man wanted a job he necessarily had to hunt him up. Other evidence was also adduced by appellee tending to show that the master mechanic spent the greater part of his time in the yards, and not in his office. The jury were the sole judges of the credibility of the witnesses, and the testimony adduced in favor of appellee was sufficient to show that there was a custom at McGehee for the master mechanic to hire firemen in the yards, and that such custom had existed for several years. From this testimony, taken in connection with that of appellee himself, the jury might have inferred that appellee was rightfully at the place where he was injured, and was not a trespasser.

[3] Counsel for appellant also assign as error the action of the court in admitting the testimony of the witness McCuen, to the effect that it was the custom of the master mechanic at Argenta, Ark., to hire firemen in the yards. They claim that proof of a local custom at Argenta would have no tendency to prove the same custom at McGehee, and that the testimony was erroneous and prejudicial. The witness McCuen also testified that it was a general custom of the Iron Mountain Railroad, as well as other railroads for which he had worked, for the master mechanics to hire firemen in the yards of the company. Other witnesses also testified that it was the general custom on the Iron Mountain Railroad system for master mechanics to hire firemen in the yards. This testimony of a general custom was competent for the purpose of tending to show that appellee was rightfully at the place where he was injured. He could establish the fact that he was rightfully there by a general custom, as well as by a particular custom at McGehee. He says that he went out into

the yards of the company by direction of the person in charge of the master mechanic's office to seek the master mechanic for the purpose of securing employment as a fireman. If a general custom existed on the Iron Mountain Railroad system for its master mechanics to employ firemen in the yards of the company, this would give one who sought employment as a fireman the right to go into the yards of the company to seek the master mechanic, if he could not find him in his office. The testimony of McCuen to the effect that it was the custom of the master mechanic at Argenta to employ firemen in the yards there was included in the general custom of the master mechanics on the Iron Mountain Railroad everywhere to employ firemen in the yards of the company, and was therefore not prejudicial to the rights of appellant.

It is insisted by counsel for appellant that the court erred in certain instructions given to the jury; but we do not deem it necessary to set out these instructions, or to discuss them at length. As we have already seen, it was the theory of appellee that he went to the office of the master mechanic at McGehee to seek employment as a fireman. He was directed by the person in charge of the office to go out into the yards and look for the master mechanic. He did so, and while so engaged he was injured by the bursting of the hoisting machinery. On the other hand, it is the contention of appellant that its master mechanics had no authority to employ firemen in the yards of the company, and that they had never exercised such authority. Hence they claim that appellee was a trespasser, and that if the jury further found that the injury that resulted to appellee was not one that could reasonably have been foreseen or anticipated by appellant, in the light of the attending circumstances, its negligence in failing to repair the hoisting machinery was not the proximate cause of appellee's injury, and that it was not liable. We think that when all of the instructions of the court are read and considered together the respective theories of appellant and appellee were fully and fairly submitted to the jury. The court even submitted to the jury the question of appellee's contributory negligence when there was no testimony at all tending to show that appellee was guilty of contributory negligence. If he had a right to go to the place where he did go in search of the master mechanic, it cannot be said that there is any testimony whatever tending to show that he was guilty of contributory negligence, for the machinery burst just as he put his head into the door of the building where it was situated.

[4] Again, it is insisted by counsel for appellant that the undisputed evidence shows that the master mechanic had no authority to employ a minor as a fireman, and that appellee was a minor at the time he was

injured. In answer to this it may be said that the evidence does not show that appellee had any knowledge whatever that he could not be employed as a fireman on account of his age. He was a stout, able-bodied young fellow, and, in the absence of evidence tending to show that he knew that he was not eligible for employment as fireman, under the circumstances adduced in evidence by him, he had a right to seek such employment.

The judgment will be affirmed.

### CITY OF JONESBORO v. PRIBBLE. (No. 279.)

(Supreme Court of Arkansas. April 20, 1914.)

#### 1. TRIAL (§ 84\*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

Where a question to a witness was whether a tile drain was large enough to drain the place in "a reasonable time," but no specific objection was made to the question on that ground, and there was no request that the witness should make the answer more specific, the exclusion of the question and answer could not be sustained on the ground of indefiniteness of the answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.\*]

#### 2. EVIDENCE (§ 536\*)—EXPERTS—ADMISSIBILITY OF EVIDENCE.

A witness who had taken various levels, and who in making plans for the grading of a street had undertaken to provide for the drainage of abutting property by opening ditches and putting in tiling, was competent to state the result of the calculation which he had made to ascertain the size of ditches and tiling to carry off surface water.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347; Dec. Dig. § 536.\*]

#### 3. APPEAL AND ERROR (§ 1056\*)—PREJUDICIAL ERROR—EXCLUSION OF EVIDENCE.

Where the case presented a close question of fact as to whether the grading of a street caused damage to an abutting owner by impeding the flow of water, the exclusion of competent evidence that ditches and tiling to carry off surface water had been put in was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from Circuit Court, Craighead County; J. F. Gautney, Judge.

Action by W. S. Pribble against the City of Jonesboro. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee was the owner of a lot fronting on Huntington avenue in the city of Jonesboro, and alleged in his complaint that the city had so graded that avenue as to retard the flow of surface water off his lot, and that the water was impounded thereon after rainfalls. It was alleged that appellee had applied for an arbitration of his damages, as provided by section 5495 of Kirby's Digest, and that he had selected an arbiter, and the city had selected one, and these two a third, and these arbiters had recommended that changes be made in the street grade, or

that culverts be supplied in lieu thereof, but that no action had been taken upon this recommendation. Damages were prayed in the sum of \$500. The answer contained a denial of all the material allegations of the complaint.

There was a verdict and judgment in favor of appellee for \$300, and the city has appealed. The evidence, while conflicting, is legally sufficient to support the verdict, upon the theory that the grading has permanently obstructed the flow of water from appellee's lot. No objection was made to any instruction, and appellant complains chiefly of the insufficiency of the evidence, and of the action of the court in excluding certain testimony of the city engineer, who had directed the work of grading and filling Huntington avenue.

Baker & Sloan, of Jonesboro, for appellant. H. M. Mayes, of Jonesboro, for appellee.

SMITH, J. (after stating the facts as above). We have said that the evidence was legally sufficient to sustain the verdict, although it is very earnestly insisted that such is not the case. The city engineer testified that certain drainage had been established, as a part of the improvement, and while he admitted that water had been impounded, during the progress of the improvement, he testified that this had not been the case since its completion, and that he had placed a 12-inch tile just east of the northeast corner of appellee's lot, and had also put in some 24-inch tiling and, since then, there had been no complaint within his knowledge about standing water. This witness testified to entire familiarity with the property in question and with the respective levels of it, as compared with other property having the same outlets for drainage. The witness was asked these questions: "Q. Is the tiling placed under the sidewalk in front of Mr. Berger's lot sufficiently large to drain out all the water within a reasonable time that might be expected to drain through there?" And he answered, "Yes, sir." This question and answer was excluded. This question was then asked, "The time that you provided the tile under the walk of Huntington avenue on the Berger property, state whether or not you made a calculation of the water that it was necessary for that tiling to carry;" and he answered, "Yes, sir; I did." And he was then asked, "State whether or not you found the opening made there from that calculation of sufficient size to carry the water that has to go through there;" and he answered, "Yes, sir." Upon motion of appellee this last question and answer was also excluded, and appellant duly saved its exceptions.

[1] The record does not show the ground upon which the court excluded these an-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



swers; but appellee in his brief insists that the answers were properly excluded, because in the first answer the witness does not define or explain what he means by a reasonable time, and that the last answer should have been excluded because the witness does not show himself sufficiently familiar with the locus in quo to express an opinion. It would have been entirely proper to have required the witness to explain what he meant by reasonable time, when he said the tiling under the sidewalk was sufficiently large to drain off all the water. But the words "reasonable time" were embraced in the question, and not in the witness' answer, and no specific objection was made to the question, nor was there any request that the answer be made more definite.

[2] We think, too, the witness had shown himself sufficiently familiar with the premises to testify as an expert. His evidence indicates that he had taken various levels, and, in making his plans for the grading, had undertaken to provide for the drainage of the affected property, and this had been done by opening up certain ditches and by putting in certain tiling. The witness here was not undertaking merely to express an expert opinion, but was offering to state the result of a calculation which he had made to ascertain the size of openings that should be provided. Such evidence is competent, where a witness shows himself qualified to express an opinion, or to make such calculations. *Railway v. Cook*, 57 Ark. 387, 21 S. W. 1066; *Railway Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170.

[3] If the evidence of the engineer was competent, its exclusion was necessarily prejudicial. This record presents a close question of fact as to whether this grading has occasioned appellee any damage on account of impeding the flow of water, and the excluded evidence related directly to that question.

For the error indicated, the judgment will be reversed, and the cause remanded.

ENGLISH v. NORTH et al. (No. 271.)  
(Supreme Court of Arkansas. April 20, 1914.)

1. VENDOR AND PURCHASER (§ 44\*)—FRAUD—SUFFICIENCY OF EVIDENCE.

To justify a court of equity in rescinding and canceling a written contract for the conveyance of land on the ground of misrepresentation, a clear case should be made out by the evidence.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 69-76; Dec. Dig. § 44.\*]

2. VENDOR AND PURCHASER (§ 33\*)—RESCISSI—GROUNDS—MISREPRESENTATIONS.

Misrepresentations which will justify the rescission of a contract for the sale of land must be of a decided and reliable character relating to some matter of inducement to the making of the contract calculated to mislead the purchaser and induce him to buy on the faith

and confidence thereof, and in the absence of means of information to be derived from his own observation and inspection, and must injure the party seeking to rescind.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. § 33.\*]

3. EXCHANGE OF PROPERTY (§ 3\*)—RESCISSI—ACTIONS—SUFFICIENCY OF EVIDENCE.

Representations by a party to an exchange of lands relating exclusively to the value thereof afford no ground for rescission in the absence of fraud or imposition; representations as to value generally being matters of opinion about which there might be a divergence of views.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 3, 7; Dec. Dig. § 3.\*]

4. EXCHANGE OF PROPERTY (§ 3\*)—RESCISSI—MISREPRESENTATIONS.

Where one who exchanged 125 acres of land for city property, not only misrepresented its value, but also represented that all except possibly 10 acres was susceptible of cultivation in some form, when in fact not more than 45 acres was tillable, though he had special information regarding the character of the land acquired by personal observation, and was told by the other party that he would take the land in reliance on such representations, and it appeared that the other party was injured by the exchange, a rescission would be decreed.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 3, 7; Dec. Dig. § 3.\*]

5. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSI—SUFFICIENCY OF EVIDENCE.

In an action to rescind an exchange of lands, evidence held to show that plaintiff relied upon defendant's representations as to the land, though he also wrote another party for an opinion as to the value of the land.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

6. EXCHANGE OF PROPERTY (§ 3\*)—VALIDITY—MISREPRESENTATIONS.

Where a party to an exchange of land who had special information respecting its character acquired from personal observation was told by the other party that he was relying upon his representations, it was his duty to make correct and truthful statements.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 3, 7; Dec. Dig. § 3.\*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Peter English against Mabel North and husband. From a decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

This suit was instituted by appellant against the appellees to rescind a trade involving an exchange of real property between appellant and appellees. The appellant alleged that he had conveyed a certain lot in the city of Little Rock to appellee Mabel B. North in consideration of a conveyance by her to appellant of a certain tract of land in Sharp county; that appellant had never seen the land conveyed to him by appellee; and that the land was represented by appellee Arthur North, who acted as agent for his wife, Mabel North, to be all tillable, productive bottom land except 7 acres, and that it was situated on Spring river, had a mill on it, and that it was worth \$15 per acre in cash and \$16 per acre by way of exchange.

He stated that he had never seen the land at the time of the trade, and that he acted entirely upon North's representations. He alleged that the representations of North were false and fraudulent, and he tendered a deed, offering to reconvey the land to appellee Mabel North, and prayed that the sale and exchange be canceled, and that appellees be required to execute a deed reconveying to him the lot which he had conveyed in exchange.

Appellees answered, denying the allegations of fraud, and alleging that North told appellant that the land had been estimated to him to be worth \$15 per acre, and that appellant, through his agent, wrote to the Farmers' Bank of Hardy, asking an opinion of the value of the land; that the bank gave the appellant an opinion, upon which appellant acted in making the exchange, and not upon any representations made by appellees. Appellees further alleged that the land was worth as much as the lot which they obtained from appellant in exchange.

The testimony on behalf of the appellant tended to show that Arthur North advertised that he had a tract of land in Sharp county that he would trade for city property. He described the land to a real estate agent who had for sale certain property in the city of Little Rock owned by Peter English. North described the land to the agent as containing 125 acres, and that the larger part of it, something like 100 acres, would be good agricultural land. The rest of it could be put in fruit land, and there was a small tract in the corner that would not be of value for agricultural purposes. He stated that some 30 or 40 acres had been in cultivation, that the timber on part of it had been cut off, and there was a strip of it that the timber had not been cut off. The part that had not been cleared had good tie timber and saw timber on it. Five acres was a mill site that had an old mill on it, a couple of houses, and some sheds. There was lumber enough left to build such barns and sheds as a man might want, and to do fencing around the house. Spring river ran across the corner of it and cut off a small piece of the land. It was made land from the stream—not such river bottom land as we have here, but was not subject to overflow. North said the land was worth \$15 an acre in cash.

The agent gave English the description of the property that had been given him by North and arranged to have North and English meet in order to effectuate an exchange of the city house and lot belonging to English for the land of North. English and North met in the office of Witherspoon & Chew, agents of English. North described the property in Sharp county to English as containing 125 acres of river bottom land; that Spring river cut off 5 acres. He drew a rough sketch of the land on paper and showed English how the land lay. There

was about 35 acres of it cleared—the balance of it timber land, having all kinds of timber, such as oak, ash, hickory, walnut, etc., on it. He stated that the timber on the land was worth more than what he was asking for the land; that there was a sawmill on the 5 acres and two or three other buildings; that the sawmill had been put up two or three years before for the purpose of sawing timber, but for some reason the mill had not been operated; the buildings were out of repair and fences down; that there was lumber enough left on the premises to repair all the buildings and repair the fences; that the 35 acres of cleared land had not been cultivated for a couple of years, and had grown up in brush; that the land was all river bottom except about 7 acres that was stony. It was all tillable; but 7 acres of it was rough and stony. The land was worth \$15 an acre cash or \$16 in trade. English said to North that "it was customary to see land or property before buying it, and asked him how he was going to see it." North said it was not necessary to go up there, and referred English to the Farmers' Bank of Hardy, and stated that they could tell just what it was worth. English had Sutton, his agent, write to the bank concerning the land. The bank replied that the land was worth \$15 or \$16 an acre, but made no statement as to the character of the land. North's statements were the only source from which English got his information as to the character of the land. English thought Dr. North was telling him the truth, and relied on what North told him. Putting North's statements and the bank's statement together, English thought that it was all right, and on that account traded North his lot in the city for the land. He would not have traded on what the bank said alone. He wrote to the bank to find out whether the land was worth \$15 an acre. He wanted land worth that much. If the land had not been worth \$15 an acre, he would not have considered it all right, regardless of how the land was situated; but the statements of North made as to the character of the land "had a whole lot of influence" with English in causing him to make the trade.

English stated that, while he and North were conducting negotiations looking to closing the deal in the office of Witherspoon & Chew, there was a difference between them in regard to the insurance on the house which English was proposing to trade for the land. North wanted the insurance transferred to him, and English objected, unless North would pay him for the unexpired part of it. Chew suggested that they settle the matter between them by North paying half of the unexpired part, and English donating the balance. During the conversation about the insurance English told North that he (English) would take the land on the representation that he (North) had made. He

took it expecting to find it just as North represented it. English told North that he thought North was getting the best of the trade; that he (North) had seen what he was getting, but that he (English) had not seen what he was getting. In reply to that North referred English to the bank, stating that the bank would verify what had been said, and that English would find it just as he (North) represented it to be. The trade was then closed.

A month or so after that English visited the land. He found it exactly the reverse of what North had represented it. The land was rolling from the river to the top of the mountain, jumping from one precipice to another like steps or stairs of rock, except the 5 acres where the mill site was. There were two or three little old shacks on this site, not tenantable at all. Was nothing left of the sawmill, except some part of the old machinery where the mill had been burned down. English did not find any timber land on it except around the 5 acres—no land such as he expected to find. The spot around where the mill stood, the 5 acres, could be tilled; but there was a good deal of rock there. The 5 acres did not touch the river. The 5 acres where the mill stood was about 200 feet from the river. The timber was very poor, except occasionally, a long distance apart, a good-sized tree could be found for sawing purposes if they could be gotten out; but there was no way to get at them. There was no accessible timber to justify the running of a sawmill.

The basis of the trade was that North was to give English the 125 acres for the house and lot on Twenty-Second and Spring streets in Little Rock, and assume \$1,000, the amount of a loan that English had obtained on the same. English valued his house and lot at \$3,000. It was shown that the house and lot were worth from \$1,900 to \$3,000.

Witnesses on behalf of appellant, who were familiar with the land in Sharp county, testified that there were from 20 to 45 acres of tillable land in the tract; from 5 to 10 acres of creek bottom; the balance all hill land, rough and stony. The land was worth from \$4 to \$5 an acre. One witness, who formerly owned the land, and who had traded the same to another party, wrote appellant to the effect that in the trade he valued it at \$1,300, but that he was offering the land for \$600. The witness stated in the letter: "You see it will trade if you can trade without letting the other fellow see it; but there is no one that likes it when they see it." This witness offered, in his letter, to give English for the land a soda fountain and a note for \$250, or he would give English "a bunch of Arizona horses, 35 head," and stated, "Some of our fellows up here have done well trading in them."

It was shown on behalf of appellant by a surveyor who, at his instance, had examin-

ed the land, and who was familiar with farming lands, and who had had experience in judging the character and fitness of land for various uses, that there was practically no farm land on it on account of its being so excessively rocky and on a hillside; that all the timber of value, except for farm purposes, had been taken off years before; that there were probably 5 or 10 acres, maybe a little more, in the northwest corner, that might be used as orchard, but under great difficulty. There was no land that witness would class as successful farming land outside of possibly 5 acres, and not over 35 acres of orchard land under the most favorable conditions. "The nearest that the land comes to the river," according to this witness, "is from a quarter to a half a mile. The Sharp county land in question is not fit for farming as a practicable proposition." Witness was employed by appellant's attorney to examine the ground, and was paid \$5 per day and expenses. He familiarized himself with the whole 125 acres. It took him about two hours to go over it.

Another surveyor testified on behalf of appellees that it would have taken the surveyor who examined the land from eight to nine hours if there was much timber or brush.

Appellee Arthur North, on behalf of appellees, testified in part as follows: "I described the land as rolling land, and told him [English] that it was situated maybe a couple of miles south of the town of Hardy, and was on Spring river, and that the railroad ran across the corner of it or near the corner; that about half of it was considered in good timber or fair timber. I told him from the description I had of the place it was about half in fair timber and good tie timber anyway—something to that effect. I told him it was land we had recently bought, and that I had just been up and seen the place, and had spent a couple of hours on the place. I believe I might have said two or three hours; I don't know, but something to that effect. When I got the place I had a little sketch made me, showing how the land lay, and I gave English a copy of the sketch, describing the land, telling him that was the way it had been described to me. I did not know land values in Sharp county. The proposition was made to my wife to buy it, and we got the information as to the worth of the land through the Citizens' Investment Company and then through the Farmers' Bank of Hardy. I conveyed to Mr. English the way I found out what the value was, and he said, 'How will I find that value?' and I said, 'You can either go up there, or you can do like I did, inquire through the bank.' He asked me what bank, and I told him the Farmers' Bank of Hardy, Ark. He turned to Mr. Sutton and said, 'I believe we will write up to these people;' and that ended the proposition. I didn't know the man who gave

English the information; never had any dealings with the bank, except once I placed with it a note for collection amounting to \$250 some time in December. Mr. English told me that when they heard from the bank they would call me up. I was living at Fourche Dam at the time. So we made an engagement for the next day to come in and bring the deeds along. I told English there had been a sawmill on the place at some previous time that had burned down. I didn't represent that there was a sawmill there on the land. I told him there was a big long shed that had been used by the mill for putting horses in, and there was quite a lot of lumber in it, and that from one end of that shed he could get enough lumber to fence in the house and make such repairs as was needed on the houses. I told him it was rolling land, and that I supposed maybe three-fourths of it, maybe 80 or 85 acres of it, could be put in cotton and corn, and that 7 or 8 acres, maybe possibly 10 acres, of it would not be fit for anything, unless he used it for a pasture; that the other land would make good fruit land. I described it to him as I had received my information through the bank, and from my two hours' sight that I had of the place when I went up there. I distinctly told him that it was upland, farm land, and that it had shale all the way through it, and that about 30 acres had been in cultivation about three years before, and that it had been neglected, and had grown up again. I didn't say anything to Mr. English that would give him to understand that the land was all tillable land. I distinctly told him that there were several acres, 7 or 8, possibly 10 acres, in one corner that stood up like a ledge nearly on one side. I advertised the place for \$15 an acre for trade in the paper, and as such Mr. Sutton answered the advertisement, and I told Mr. English how I got the figures that the land was worth \$15 an acre. I certainly did not tell Mr. English that it was hardly necessary for him to go up there to look at the land, for I advised him to either see the land or get outside information on it. In view of that fact he either wrote there or got his agent to write. I put it squarely up to him to either see the land or take the action through the bank, which he did, and he waited five or six days before he told me he would take the place. He didn't close the deal until after he wrote to the bank himself, through his agent."

Another witness on behalf of appellees testified that he was at one time the owner of the 125 acres of land in question, and sold it for \$1,250. He estimated the land to be worth \$15 per acre. He had been offered \$7.50 an acre for it by one who lived near the property. At least half of the land was in fairly good timber, consisting of white oak, post oak, red oak, hickory, ash, and

walnut. Witness paid \$1,300 for the land when he bought it.

The cashier of the bank testified that he gave as his opinion, from information he had received from a man who lived adjoining the land, that it was worth \$15 per acre; that the bank had no lien on or any interest in any way in the land.

From a decree in favor of the appellees, based upon the above facts, this appeal has been duly prosecuted.

Moore, Smith & Moore, of Little Rock, for appellant. Ben D. Brickhouse, of Little Rock, for appellees.

WOOD, J. (after stating the facts as above) [1, 2] In *Kincaid v. Price*, 82 Ark. 20, 24, 100 S. W. 76, 77, we said: "To justify a court of equity in rescinding and canceling a written contract for the conveyance of land on the ground of misrepresentation, a clear case should be made out by the evidence. Where the parties have deliberately entered into a written contract for the sale of property, it ought not to be set aside by a court, unless there be clear and satisfactory evidence to show that there was a misrepresentation by the defendant as to a material fact, that plaintiff relied upon it, and was induced thereby to make the contract."

As early as *Yeates et al. v. Pryor*, 11 Ark. 66, this court announced the following rule: "The misrepresentation, in order to affect the validity of the contract, must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on account of his superior information and knowledge in regard to the subject of the contract, for, if the means of information are alike accessible to both, so that, with ordinary prudence or vigilance, the parties might respectively rely upon their own judgment, they must be presumed to have done so, or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness. Such representations, therefore, to amount to fraud, must be of a decided and reliable character, holding out inducements to make the contract calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and in the absence of the means of information to be derived from his own observation and inspection, and from which he could draw conclusions to guide him in making the contract independent of the representations of the vendor."

These principles have been often recognized by this court. See *Hill v. Bush*, 19 Ark. 528; *Matlock v. Reppy*, 47 Ark. 164, 14 S. W. 546; *Neely v. Rembert*, 71 Ark. 91, 71 S. W. 259; *Ryan v. Batchelor*, 95 Ark. 375, 129

S. W. 787; *Carwell v. Dennis*, 101 Ark. 608, 143 S. W. 135.

In *Matlock v. Reppy*, *supra*, the court prescribed four tests to determine whether the rescission of contracts upon the ground of fraudulent representations could be maintained, as follows: "(a) Was the fraud material to the contract; did it relate to some matter of inducement to the making of the contract? (b) Did it work an injury? (c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other? (d) Did the injured party rely upon the fraudulent statements of the other, and did he have a right to rely upon them?"

There can be no misapprehension, therefore, of the law governing cases of this kind. The difficulty always is in making application of the principles to the facts in hand. Each case must depend, of course, upon its own peculiar facts.

Applying the principles above announced to the facts in this record, we are of the opinion that the chancellor erred in denying the appellant the relief sought.

[3, 4] If the representations of North had related exclusively to the value of the land, they would have afforded no ground for rescission of the sale or exchange of property between the appellant and appellees, for representations as to value are generally matters of opinion about which there might be a divergence of views, and mere inadequacy of consideration, unaccompanied by circumstances showing fraud or imposition, is not sufficient to warrant the cancellation of an executed or executory contract. *Storthez v. Williams*, 86 Ark. 464, 111 S. W. 804. But appellee Arthur North, in addition to the representation as to the value of the land, made further representations as to the nature and character of the land, giving such a detailed statement of facts concerning same as to justify appellant in relying upon the truth thereof. While appellant would have been satisfied in acquiring land in the trade that was of the value of \$15 per acre, appellee North stated facts which were calculated to induce appellant to believe that the land in Sharp county was of the value that North had represented it to be.

The evidence shows clearly that North represented that at least the larger part of the land—all except a few acres, not exceeding 10—was agricultural or tillable land. Appellee Arthur North himself testified that he told English that "maybe 80 or 85 acres of it could be put in cotton and corn, and that 7 or 8 acres, possibly 10 acres, would not be fit for anything, unless he used it for a pasture; that the other land would make good fruit land."

This testimony of appellee Arthur North shows that he represented that all of the land except possibly 10 acres was susceptible of cultivation in some form, either for agri-

cultural products or fruit; whereas, the great preponderance of the evidence shows that not more than 45 acres, according to the highest estimate of any witness, was tillable land. It therefore satisfactorily appears by a clear preponderance of the evidence that North's representations as to the character of the land for cultivation were untrue. This was a very material fact in determining its value, and, if his representations as to the character of the land for agricultural and fruit purposes had been true, this would have constituted a fact tending strongly to show that his representation as to the value of the land was also true.

[5] English told North before the negotiations were closed that he would take the land on the representations that he (North) had made. The representations North had made as to the character of the land had "a whole lot of influence" with him in causing him to make the trade. When the bank replied to his letter of inquiry as to the value that the land was worth \$15 an acre, he took that statement, together with North's statement, as showing that the land was worth that much, and on that account traded. North had special information in regard to the character of the land in Sharp county, acquired by personal observation of it, that English did not have. English reminded him of this, and North replied that English, upon inquiry of the bank at Hardy, would find it just as he (North) had represented it to be.

The proof clearly warrants the conclusion that appellant, English, did rely upon the representations of North, and that he had the right to rely upon them in the belief of their truth. It is clear that, while English sought information from the bank as to the value of the land, he would not have made the trade upon this information from the bank as to the value of the land if it had not been for the representations of North concerning the situation and character of the land.

In *Winter v. Bandel et al.*, 30 Ark. 363-373, we said: "If, however, the plaintiff mainly and substantially relied upon the fraudulent representation, he will have his action for the actual damage he sustains, although he was in part influenced by other causes." *Carvill v. Jacks*, 43 Ark. 454.

[6] Suppose North had stated that the land was of the value of \$15 per acre, but that only 10 acres of it was susceptible of cultivation, and that it was stony and rocky ground, having scarcely any timber thereon, and not suitable for agricultural purposes. In such case can it be doubted that English would have refused to make the trade, even though North represented that its value was \$15 per acre, and even though the bank corroborated such statement? Stating the proposition in this form shows clearly that English relied upon the representations of fact made by North as to the character of the land. When English advised North that he was relying

upon his representations, North was bound to make correct and truthful statements, for he and English were not placed in the same relative situation in regard to the property. Their means of information as to the particular description of the land was not the same. In *Neely v. Rembert*, supra, we said: "A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when, from his special means of information, he ought to have known it, and thereby induces his vendee to purchase to his damage, is liable, in an action at law, for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser."

A clear preponderance of the evidence shows that English was injured by reason of the exchange of properties. Therefore, under the facts, he has met every test which the law requires to entitle him to a rescission. The decree of the court will therefore be reversed, and the cause remanded, with directions to cancel the deed from English to North and from the Norths to English, and for such other proceedings as may be necessary not inconsistent with this opinion.

#### TILMAN v. STATE. (No. 228.)

(Supreme Court of Arkansas. March 30, 1914.)

##### 1. HOMICIDE (§ 234\*)—SUFFICIENCY OF EVIDENCE.

Evidence in a murder case, held to sustain a finding that accused murdered deceased and secreted her body in a well after the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.\*]

##### 2. HOMICIDE (§ 142\*)—EVIDENCE—VENUE.

It is sufficient that the evidence show that accused committed the murder in the vicinity of the place where it is claimed to have been committed; that being the county of the venue.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.\*]

##### 3. HOMICIDE (§ 338\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission in evidence, in a homicide case, of pictures of the murdered girl, and the place where her body was found, and where, according to the state's theory, she was murdered, was not prejudicial to accused, where she was fully described in the evidence, and her age and size, as well as the condition of the well in which she was found, were given, both at the time of the murder, and of the discovery of the body.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

##### 4. HOMICIDE (§ 339\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the father of the murdered girl only testified for the state as to the age and disappearance of the girl, and the finding of a letter from accused to her, all of which was undisputed, the exclusion of evidence of statements by such witness shortly before the finding of the girl's body that it was no use to look for her north of the road, but that when found she would be south of the road, with a bullet hole in her head and a rock tied around

her neck, and in a well, in which condition she was actually found, was not prejudicial to accused, when such evidence was considered merely for impeachment purposes; the evidence of the girl's father not having any substantive force.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.\*]

##### 5. WITNESSES (§ 390\*)—IMPEACHING EVIDENCE—COMPETENCY.

A test of competency of evidence, contradicting a denial of a witness on cross-examination that he made a certain statement, is whether accused was entitled to prove the statement as a part of his case, independently of the denial of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.\*]

##### 6. HOMICIDE (§ 178\*)—ADMISSIBILITY OF EVIDENCE—GUILT OF ANOTHER.

Accused, in a homicide case, could introduce evidence to show that the crime was committed by some other person, for the purpose of showing that he was not guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 307-309; Dec. Dig. § 178.\*]

##### 7. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY.

Declarations or confessions of guilt by third persons are excluded under the hearsay rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

##### 8. HOMICIDE (§ 178\*)—EVIDENCE—CONFESSIONS OF THIRD PERSONS.

Evidence that the murdered girl's father stated, shortly before her body was found in a well with a bullet hole in her forehead, that when the girl was found she would be south of a certain road, with a bullet hole in her forehead and a rock tied around her neck, and in a well, was not admissible in evidence as tending to show that the father committed the crime, under the rule that confessions of guilt by third persons are not admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 307-309; Dec. Dig. § 178.\*]

##### 9. HOMICIDE (§ 178\*)—EVIDENCE INCRIMINATING ANOTHER.

In a prosecution for murdering a girl who was shown to have had intercourse with accused and several others, in which accused sought to connect B. with the crime, by showing frequent sexual intercourse, and that he had been charged with being the father of the girl's child, evidence of statements by B. as to his criminal intimacy with the girl was not admissible as substantive evidence to show B.'s guilt of the crime, accused only being entitled to prove, in rebuttal of B.'s testimony that he had never had intercourse with the girl, that he had made statements admitting intercourse with her.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 307-309; Dec. Dig. § 178.\*]

##### 10. HOMICIDE (§ 178\*)—ADMISSIBILITY OF EVIDENCE—GUILT OF ANOTHER.

Accused, in a homicide case, could prove any fact tending to show another's guilt of the crime, except statements by such other amounting to a confession.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 307-309; Dec. Dig. § 178.\*]

##### 11. HOMICIDE (§ 178\*)—EVIDENCE INCRIMINATING ANOTHER.

In a homicide case, in which it appeared that about two years before the death of the murdered girl she had become pregnant, evidence was not admissible as to acts of inter-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

course between the girl and another before the time of her pregnancy, such evidence being too remote from the time of the killing, and evidence of improper relations by the girl at a less remote period having been admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 307-309; Dec. Dig. § 178.\*]

**12. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

An instruction in a homicide case, calling the jury's attention to accused's improper relations with the girl as a motive for killing her, was not erroneous as on the weight of the evidence, where the court also instructed that all of the evidence should be considered in determining guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

**13. CRIMINAL LAW (§ 730\*)—APPEAL—HARMLESS ERROR—REMARKS IN ARGUMENT.**

In a prosecution for murdering a girl, in which the evidence showed that accused had had improper relations with her, the prosecuting attorney stated in argument that accused was the girl's sweetheart, and in that way gained her confidence and seduced and debauched her, and "after seducing and ruining her, the low-down scoundrel murdered her and threw her in the well," the court stated, in reply to an objection to the quoted statement, "That is improper, and will be excluded from the jury, and they will not consider it," and stated, in reply to an objection to the statement that accused had seduced and debauched the girl, that the question of seduction was for the jury. The instructions required the jury to disregard the proof of intercourse with the girl by any person except upon the question of motive, and to try the case according to the evidence. *Held*, that the remarks of the counsel could not have been prejudicial, in view of the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

Appeal from Circuit Court, Logan County.

Arthur Tillman was convicted of first degree murder, and appeals. Affirmed.

W. B. Atkinson, of Clarksville, and Robt. J. White, of Paris, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

**MCCULLOCH, C. J.** The defendant, Arthur Tillman, appeals from a judgment of conviction for the crime of murder in the first degree, alleged to have been committed on March 10, 1913, by killing Amanda Stephens, a young woman about 19 years of age.

Defendant and deceased were reared together in the same community in Delaware township, Logan county, Ark. It was a thickly settled community around a post office or country village called Delaware, or Delaware Hall. They had known each other from childhood, and were on intimate terms up to the time of the disappearance and death of deceased. The girl resided with her parents on a public road a mile or so northeast of the store and post office. Defendant was 22 years old at the time of the death of the girl, and resided with his parents about a mile southwest of the post office. Amanda

Stephens disappeared from the home of her parents and from the community on Monday, March 10, 1913, and was last seen in the afternoon of that day at the house of a neighbor, where she made some statements containing hints or suggestions that she was going to leave the community. Her body was found in an old well on a small farm adjoining that of defendant's parents. There was a bullet hole in her head, entering in front and on top of the head, and ranging downward towards the base of the brain, and there were a few minor scratches on her body, not indicating any violence, but rather wounds inflicted on the body in placing it in the well. A heavy rock was attached to her neck by a piece of telephone wire, and the rock curbing around the well was thrown into the well over her body, completely covering it, and holding it down to the bottom of the well. The well was covered over with plank, scantlings, and sticks, which were held down by rocks. The well was near an old abandoned house, and was not a great ways from the home of defendant's parents. It was in view from another house on the same farm, which was unoccupied on the day or night the murder is alleged to have been committed, but was occupied by a man and his wife when the body was found.

There is no direct evidence as to the identity of the girl's murderer, but the state relies upon many circumstances tending to connect defendant with it.

The girl was unmarried, and a post mortem examination disclosed the fact that she was about four or five months advanced in pregnancy. There is abundant testimony that defendant had been keeping company with her and had been frequently having sexual intercourse with her for several months before her death. This the defendant did not deny, but, on the contrary, admitted it from the witness stand. There was a pine thicket about a mile north of the post office commonly designated in the neighborhood as the "Pines," and deceased and defendant resorted to that place for sexual intercourse. They were seen together there during the forenoon of the day that deceased disappeared. On Sunday, the day before the killing, defendant went to a physician in the neighborhood, and, according to evidence adduced by the prosecution, stated to the latter that deceased was pregnant as result of their intercourse, and asked the physician to furnish him with some kind of a medicine or remedy that would destroy the unborn child. To this request the physician replied that he had nothing of the sort. On Monday morning (March 10th) defendant mailed a letter at the Delaware post office addressed to deceased, asking her to meet him once more, and stating that he had decided to marry her if she wanted him to do so, and requested her to meet him at the "old place" on the fol-

lowing Thursday, saying "We will fix this up," and adding, at the conclusion of the letter, that it would only take about five minutes for the meeting. Defendant admitted in his testimony that he had mailed the letter, and explained that it was written in reply to a letter he had received the day before from deceased, demanding that he should marry her. This letter never reached deceased, but was found in the mail box Monday afternoon after she had left home for the last time. It is shown that shortly after defendant mailed the letter, deceased passed along the road, going up in the direction of the pine thicket already mentioned, and that defendant followed her, and that they went off together in the direction of thicket. Something less than an hour later he returned down the road, and, being accosted by an acquaintance, stated that he had been to the thicket with deceased for the purpose of having intercourse with her. He asked whether the mail carrier had come along, and, upon seeing the carrier drive up about that time, he started off in a trot towards the post office. When he reached there he asked the postmaster to give him the letter which he had mailed that morning, but the postmaster declined to do so, on the ground that the mail had already been made up ready for the carrier. Defendant was attending the school at that place, and, after leaving the post office, returned to the schoolhouse. Late that afternoon, somewhere near sundown, and after the store was closed, defendant left his home and walked up towards a store about half a mile north of his father's residence, and he testified that he went there for the purpose of buying a pencil tablet to use that night in preparation of his lessons. When he got up near the store, according to his statement, he found it was closed, and turned and went back home. Witnesses for the state testified that, in going to the store, he traveled an unaccustomed route, and the storekeeper testified that he was near the store at the time in readiness to unlock it to wait on any customer who might apply, and that defendant well knew his habits in that respect. The telephone wire was cut not a great distance from the store and the route pursued by defendant in going up to the store, and the proof shows that this was done late in the afternoon, as the telephone was found about that time to be out of commission. Some of the telephone wire was missing, and the wire corresponded precisely with that with which the rock was attached to deceased's body. In fact, it seems to be treated in the case as an undisputed fact that the wire used in attaching the rock to the body was that which had been taken from the telephone line. The wound inflicted in deceased's head was by a shot from a 22-caliber pistol or rifle, and it is shown that there was a rifle of that caliber at defendant's home, owned by some of the members of his family.

The next day after the disappearance of deceased, or possibly the day thereafter, her father instituted inquiry, having in the meantime found and read the letter which defendant had written to her. Defendant left the community on Wednesday, and went over to Knoxville, a small town on the railroad in the adjoining county, where he had an uncle residing and, perhaps, other relatives. On Wednesday night deceased's father went before a justice of the peace and swore out a warrant against defendant, charging him with the crime of seduction. The officer arrested him at Knoxville at night, but he made his escape from the officer; the evidence tending to show that the officers at that time did not know or realize that a murder had probably been committed, and had no information of it, and were not unwilling for the defendant to make his escape and thus evade the charge of seduction made against him. His illicit relations with deceased had become well known in the community. Defendant, at the time he was arrested, stated that he would die before he would be taken back to Logan county. He remained at Knoxville several days, not altogether in seclusion, the proof tending to show that he remained most of the time at the house of his relatives, but visited around to some extent. During this time he visited several other young ladies of his acquaintance. On Sunday, March 16th, he went back to Logan county to the home of his father, going a circuitous route, avoiding the public roads through the settlement in the vicinity of Delaware, and passing through the old field near the well where deceased's body was found the next day. Ambrose Johnson and his wife, who had formerly lived in the house a short distance from the well, returned to the house after the day of the disappearance of deceased, and were living there on the Sunday that defendant returned to the neighborhood. They saw him on the afternoon of that day go to the old well, get down on his hands and knees and look down into the well for a few moments, and then arise and go out of sight behind a thicket, and thence over towards the home of his father. Johnson reported this occurrence the next day to some of his neighbors, and at his suggestion a searching party went to the well, removed the rubbish and pile of rocks and found the body. Defendant admitted in his testimony that he visited the old well at the time named and gazed down into it as related by the Johnsons, but that he did so because he noticed the appearance of the well was somewhat changed, and he feared that some of his father's stock may have fallen in. The testimony of the state in rebuttal, however, tends to show that the stock was not accustomed to range in the field, and that the fence was sufficient to keep them out. Defendant went from the old well to his father's house, and then went over a short



distance to the house of his uncle, where he spent the night, and, as he says, his father advised him to leave on account of the charge of seduction. He left the next morning, being taken over to the railroad station by some of the members of his family, and went to Memphis, where he stayed awhile, and then went to Ft. Smith, Ark., where he was arrested by the officers after the body of deceased had been discovered.

Defendant testified in his own behalf and undertook to explain all these circumstances so as to avoid an unfavorable effect. He admitted, as before stated, his improper relations with the girl, and admitted that he had had intercourse with her about two years before that time. He admitted frequent meetings with her at the Pines and at other places. He testified that he met her at the house of a man named Bolden. He said that Bolden also was having intercourse with the girl, and that when she was found to be pregnant, the girl stated to him that either he or Bolden was the father of the child. He stated that when he met the girl at the Pines on Monday morning, after he had mailed the letter, she agreed to go away if he and Bolden would furnish her the money, and that he gave her \$8, which was all the money he had, and told her to get the balance of the required sum from Bolden.

Bolden testified that he had never had intercourse with the girl and contradicted defendant about the latter being in bed with the girl at his house when he was present.

Defendant explained his flight from the community by saying that he had heard of the charge of seduction, and had been advised by his father to leave, and that he supposed the girl had left the community pursuant to their agreement at the pine thicket on Monday, and had no knowledge that she was dead.

Defendant also introduced members of his family who were at home on Monday night, March 10th, the time that it is claimed the girl was murdered, who testified that defendant remained at home that night.

These explanations of the defendant addressed themselves to the jury in passing upon the weight of the incriminating circumstances against him.

[1] The evidence was sufficient, we think, to warrant the jury in reaching the conclusion that the deceased was murdered by the defendant, and that he secreted her body in the old well, where it was later found by the searching party.

[2] The state has not undertaken to locate the precise spot where the murder was committed, but it was evidently done in the vicinity of the old well or the house, which was near by. It is sufficient that the circumstances warranted the finding that the defendant committed the murder in that vicinity, which was in the county in which the charge is laid.

Learned counsel for defendant have pre-

sented a number of assignments of error as grounds for reversal, and we will consider such of them as we deem of sufficient importance to require notice.

[3] In the first place, it is said that the court erred in permitting the state to introduce several photographs of the girl, the old well, and the vacant house near by, some of them represented separately in the photographs, and some of the scenes grouped together in one picture. The court overruled the objection on the ground that the defendant had consented to the introduction of the photographs; but it is contended by counsel that, at the time the first photographs were admitted in evidence they did not know that others, now urged as objectionable, were among the lot, and that they objected to them as soon as they were introduced. We are really unable to see what bearing those photographs could have had upon the case, or how their introduction could have operated to defendant's prejudice. The photographs all represented scenes that were described to the jury, and were but pictures of the girl and the place where her body was found, and where, according to the state's theory, she was murdered. The girl was fully described to the jury, her age and size, and also the condition of the old well, both at the time of the murder and at the time of the discovery of the body. Those photographs added nothing to the mental picture drawn before the jury, and we cannot see how they aided in any manner the state's case, or prejudiced the defendant's side of it.

It is urged in oral argument that the picture of the girl, showing her youth and apparent immaturity, might have inflamed the minds of the jury to a high pitch, and induced them to return a verdict of guilty against the defendant on account of the prejudice against him thus excited. But we must indulge the presumption that the jurors were men of fair intelligence, and that their feelings and prejudices were not played upon by the mere exhibition of the photographs. Of course, if the photographs had not been authenticated, and were introduced to afford a description of some place about which the testimony substantially conflicted, then it could have been said that prejudice resulted. But we are unwilling to say that the introduction could or might have had any influence at all upon the jury, or tended in any degree to influence them in making up their verdict.

There is an assignment concerning the refusal of the court to permit a witness to testify that defendant had told him that he was going to Ft. Smith when he left the community on Wednesday after the disappearance of the girl. The record shows that the court at first refused to permit the witness to testify to that conversation, because it was a different time from that as to which the witness had testified in chief, but at last the witness was permitted to testify concerning the

mits to the jury the question of the guilt or innocence of the defendant, and directs them to consider all the testimony in the case. The court told the jury explicitly that "whether the circumstances in this case are sufficient to warrant a conviction is a question for the jury, along with the instructions of the court pertaining to the law."

All the other instructions in the case have been approved in decisions of this court, and further discussion of them is useless.

[13] The last assignment relates to remarks of counsel for the state, which it is claimed were erroneous and prejudicial. The record shows that Mr. Cochran, one of the counsel for the state, in his argument made the statement that "he [meaning defendant] was her sweetheart, and in that way gained her confidence and seduced and debauched her." Counsel for defendant made an objection on the ground that there was no proof of seduction, and the court replied that that was a question for the jury. Counsel then proceeded with the statement that the defendant "after seducing and ruining her, the low-down scoundrel, murdered her, and threw her in the well" (at this point being interrupted by the objection of counsel for defendant), and the court said: "That is improper, and will be excluded from the jury; they will not consider it." Now, it is a little uncertain whether the court's ruling related to the whole of the statement; but we are inclined to think that defendant's counsel are correct in their interpretation of the record that the court only excluded the last statement, leaving the first statement unrebuked.

The prosecuting attorney, in his closing argument, made the remark that "if she [referring to Amanda Stephens] was base before Arthur Tillman began with her, why didn't you prove it." Counsel for defendant arose, and stated that they had offered to prove it, but that the court had excluded the proof, and the trial judge remarked in the presence of the jury that he did not recall that such evidence was offered. After the conclusion of the argument the court gave the jury the following additional instruction: "Gentlemen of the jury, a few moments ago counsel for the defendant objected to the argument of the prosecuting attorney, who has just closed. The objection was to that portion of the argument in which he said the defendant hadn't offered any testimony tending to show that anybody else had sexual intercourse with Mandy Stephens. Counsel for the defendant said that they had offered that testimony, and it had been excluded by the court. I said I could not remember that. The defendant did offer the testimony of Bob Lynn to show that in 1910 at some time he and another party saw Bill Fisher having inter-

course with Mandy Stephens. That testimony was objected to by the state and excluded by the court. It is of no consequence at all whether any person had intercourse with her in 1910 or not. If any other testimony was offered on that point, I don't recall it. That being the state of the case, and the court having held it inadmissible, I feel certain that no statements were called for on either side in regard to it. There is no evidence to warrant them—at least no legal evidence. In this case it can be of no consequence whether anybody had intercourse with her in 1910, and if the defendant had intercourse with her is only material in showing whether he may or may not have had a motive in taking her life. That is the only reason it is admitted in this case." Then followed some further remarks to the jury, admonishing them that they should not treat the trial as a battle of lawyers, but must consider the question of defendant's guilt or innocence entirely upon the evidence adduced in the case. Now, as to the first objection of counsel, we are of the opinion that, when it is viewed in the light of the evidence, it only referred to the illicit relations which indisputably existed between the defendant and the girl, and not to the technical crime of seduction. The court carefully instructed the jury that proof of that kind was admitted for the sole purpose of showing whether or not defendant had a motive for committing the crime, and when the whole charge of the court is considered together, especially the conclusion, in which he admonished the jury to disregard proof of intercourse with the girl by any person except upon the question of motive for committing the crime, and to try the case according to the evidence adduced, we are of the opinion that the remarks of counsel were freed of any prejudicial effect.

That Amanda Stephens was murdered by some one cannot be disputed. The crime was one of peculiar atrocity, but the identity of the offender depends entirely upon circumstances. It is not incumbent upon us to decide whether or not that question is entirely free from doubt, but we are clearly of the opinion that the evidence is legally sufficient to warrant the jury in finding the defendant guilty of the crime.

The record is a very large one, and the testimony is voluminous. Upon the whole, we are of the opinion that the case was fairly presented to the jury, and that no prejudicial error appears in the record. Under those circumstances it becomes our duty to leave the verdict undisturbed, for the defendant has had a fair trial before a jury of his own selection, and must expiate the crime of which he has been found guilty.

Judgment affirmed.

lished by the authorities. They amounted to no more than an admission that he knew where the body was, and, therefore had some knowledge of the commission of the crime. The body was discovered, not in consequence of his admission, but as a result of witness Ambrose Johnson becoming suspicious on account of appellant's conduct at the well, the alleged statement of Stephens alone as an admission, unaccompanied by any act susceptible of proof. The fact that the body was afterwards found at the place indicated in his alleged confession does not change the character of the statement as hearsay testimony, nor give it any additional force concerning the guilt or innocence of the defendant. We are of the opinion therefore, that the court did not err in excluding the testimony.

[9, 10] This disposes, also, of the assignment concerning proof of statements alleged to have been made by Bolden as to his alleged criminal intimacy with the deceased girl. Effort was made to connect Bolden with the commission of the crime by showing that he had been having sexual intercourse with her frequently, that he, too, had been charged by the girl with being the father of her unborn child, and that other circumstances pointed to his guilt of the crime of murder. Defendant testified that he had intercourse with the girl at Bolden's house upon the latter's invitation, and that on one occasion he got out of the bed and Bolden took his place with the girl. Bolden was introduced by the state in rebuttal, and testified that he had never had intercourse with the girl, and that the defendant's testimony was not true. The court permitted defendant's counsel to ask him whether he had made statements to other parties admitting his improper relations with the girl, and also permitted defendant to introduce witnesses to contradict Bolden by testifying that he had made these statements to them. This was admitted purely as impeaching testimony, but not as substantive testimony of the fact of Bolden having intercourse with the girl. This was the correct view of the law, and the court did not err in thus limiting the purpose for which the testimony might be considered. The defendant was attempting to present to the jury the theory that the crime was committed by Bolden, and that his illicit relations with the girl and the probability of having begotten the child afforded motive for him to commit the crime. It was competent to prove any fact which tended to prove Bolden's guilt of the crime, but not to prove statements which amounted to confessions of guilt.

[11] It is urged that the court erred in refusing to permit defendant to prove that one Fisher and other men had had intercourse with the girl about two years before. It developed in the testimony that about two years before the death of the girl she had become pregnant, and prematurely gave birth

to a child. Defendant volunteered the statement, when he went on the stand, that he had had intercourse with her himself about that time, on the suggestion of two other young men in the neighborhood, who stated to him that they had been having intercourse with her, and they had seen one Fisher having intercourse with her out under a tree. Defendant then offered to prove by witnesses acts of intercourse between the girl and Fisher prior to the time of the first pregnancy of deceased; but the court refused to admit the testimony, doubtless upon the theory that it is too remote from the killing to throw any light upon that issue. We think the court was entirely correct in its ruling in that respect, for the question as to who was having sexual intercourse with her two years prior to the killing was too remote a field to enter upon. Defendant could not open up the field of inquiry by his own voluntary statement that he had had intercourse with her himself at that time. The court did not shut out any proof of improper relations between the girl and any one at a period of time not too remote from the date of her death.

[12] Error of the court is assigned in giving the thirteenth instruction, which it is alleged called to the attention of the jury for their consideration the motive of the defendant for the killing by reason of his illicit relations with the girl. The instruction did not, in terms, attempt to instruct the jury upon the weight of this circumstance, but it is argued that singling it out necessarily gave it undue weight, and that it was improper for the court to do so.

Counsel rely upon the decision of this court in *Ince v. State*, 77 Ark. 418, 88 S. W. 818, where it was decided that the court properly refused an instruction which singled out the motive as one of the facts of the case and presented it specially to the jury for their consideration. They also rely upon the recent case of *Scott v. State*, 159 S. W. 1096.

In the case of *Hogue v. State*, 98 Ark. 816, 124 S. W. 783, 130 S. W. 167, we discussed this question at length, and, after reaffirming the doctrine of the *Ince* Case that the practice of framing separate instructions in such manner as to single them out was not commendable, and that the court would not be reversed for refusing to give such an instruction, we laid down the further rule that, while the giving of such an instruction was not a practice to be commended, yet it did not constitute prejudicial error, where the court, in the whole charge, directs the jury to consider all the facts and circumstances proved in the case.

There is nothing in the opinion in the *Scott* Case, when considered as a whole, which conflicts with that view.

The charge of the court given in the present case, when taken as a whole, fairly sub-

ed January 7, 1857, authorizing the election of five levee inspectors in Chicot county to supervise the construction and repairing of levees in that county, and pursuant to the terms of the statute the five persons named as such inspectors met, organized as a board, and proceeded to discharge their duties under the act, and laid off the county into five levee districts. The General Assembly of 1861 (Acts 1861, p. 325) passed another statute, entitled "An act to protect all land in Chicot county which is subject to overflow," and authorizing the qualified electors of the county to elect five swamp land commissioners, and providing that the districts then established in that county, known as "levee districts," should thereafter be known as "swamp land districts."

In the case of *State v. Southwestern Land & Timber Co.*, 93 Ark. 621, 126 S. W. 73, this court held that the swamp land commissioners provided for under the act of January 10, 1861, were successors to the board of levee inspectors provided for in the act of January 7, 1857, and that the act of March 20, 1883 (Acts 1883, p. 163), providing for the building and repairing of levees in Chicot county, in effect revived the act of January 7, 1857, and "as a consequence property owned by the boards created by the earlier acts passed in succession to the board created by the later act." The effect of that decision is that plaintiff in this action, the board of levee inspectors of Chicot county, is the successor of the boards provided for in the prior acts referred to above, and that the plaintiff succeeds to any property rights held by its said predecessors.

On May 5, 1857, the board of levee inspectors met and passed a resolution authorizing and instructing C. W. Campbell, the president of the board, to apply to and contract with the state engineer for the building of all levees in Chicot county which could be built under the provisions of the act of January 13, 1857, which authorized the Governor, on the recommendation of the state engineer, to let contracts to close all gaps in levees previously constructed and pay for the work in money out of the swamp land funds, and where there were no swamp land funds in the treasury to issue certificates which could be exchanged at the auditor's office for levee warrants when there was money in the treasury to apply on the payment of the warrants.

Pursuant to that authority Campbell entered into 20 or more contracts, for and on behalf of the board of levee inspectors, with the state of Arkansas, acting by and through the state engineer, for the construction or repair of certain portions of the levee in that county, and on December 2, 1857, the board of levee inspectors again met and ordered the president to sublet at private lettings contracts which he had made with the state, requiring the said subcontractors to re-

ceive payment for work at such time and in the manner that he should receive payment from the state under the contracts with the state, and to receive the same rates as should be paid by the state, "unless said work can be subcontracted at less rates." Pursuant to that authority Campbell sublet the contracts to do the levee work, and he afterwards received from the state certificates (there being no swamp land funds in the treasury) aggregating the sum of \$19,041 in payment for the work done under the contract. These certificates were not delivered to the subcontractors in payment for work as stipulated in the former resolution of the board, but were held by the president, one Daniel H. Sessions, who had been elected to succeed Campbell.

The records of the board of levee inspectors disclose the fact that from time to time accounts were filed with the board by subcontractors, showing the amount of work done, and certificates were issued to them. Sessions, as president of the board and pursuant to a resolution of the board of levee inspectors, used those certificates in purchasing from the state the lands in controversy, and certificates of entry were duly issued by the swamp land agent to Sessions as president of the board.

On December 5, 1867, Sessions executed to D. H. Reynolds a power of attorney, reciting the purchase of these lands and others, the issuance of certificates of entry to Sessions as president of the board, and a resolution of the board, adopted at a meeting held on September 2, 1867, appointing Reynolds as the agent and attorney in fact of the board "to take charge of all of said lands, and to sell and dispose of the same, or any part thereof, upon such terms as to him might seem best, and to redeem any of said lands that may have been heretofore sold or forfeited for nonpayment of taxes, and to pay taxes upon any of said lands from time to time," and proceeding to constitute Reynolds as the attorney in fact of said board of levee inspectors, and for him (Sessions) as president, "to sell and convey all of the lands mentioned in said certificates to such person or persons, and for such price, as he shall think fit and convenient, and to assign and transfer any or all of said certificates, or to make and execute any deeds or other instruments in writing in relation to the sale of any or all of the said lands, and of the transfer of any or all of said certificates."

On January 10, 1882, Reynolds, pursuant to the power conferred upon him as aforesaid, assigned the certificates of entry to John T. Burns, and on August 10, 1883, Burns assigned the same to defendant, and on the following day the defendant applied to the commissioner of state lands for patents, which were duly issued.

It is contended, in substance, that the title to the lands was vested in the board of levee

inspectors of Chicot county, the predecessor of plaintiff; that the power of attorney, purporting to authorize Reynolds to assign the certificates, was void, for the reason that the board of levee inspectors could not delegate to Reynolds the authority to sell the lands, and that Sessions had no power, as president of the board, to do so; that the assignment by Reynolds was absolutely void, and that the procurement of patents operated as a fraud upon the rights of the plaintiff as the successor in title to the original owner of the lands. The chancellor denied the relief sought, and dismissed the complaint for want of equity.

[1-3] We are of the opinion that the conclusion reached by the chancellor was the correct one. He denied the relief upon several of the defenses put forward by the defendant; but, without passing upon them all, we are content to affirm the decree on the ground that the relief should not be granted for the reason that the cause of action is barred by laches. The facts present a typical case for the application of that equitable doctrine. This action was instituted about 30 years after the certificates were assigned and the patents thereon were issued. The issuance of the patents created a presumption that the officer of the state charged with that duty investigated the facts and issued the patents to the proper persons. *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S. W. 609. This put the burden on the attacking party to show that the assignment of the certificates was void and that the patents were issued to one who was not entitled to receive them.

[4] The plaintiff comes into equity to invoke the peculiar jurisdiction of that court, and must show that it has proceeded with diligence under such circumstances that it is not open to the charge of lack of diligence; for, as has been repeatedly said by this court (quoting the language of another): "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing." *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

The lands were of very little value at the time the patents were issued to the defendant, and have increased more than tenfold in value since that time. The defendant has paid out large sums of money in the discharge of tax liens for state and county taxes, as well as levee taxes, and, above all that, lapse of time has caused the obliteration of the evidences upon which the good faith of the transaction and the authority for the transfer of these certificates rest. Nearly every one connected with the original transaction has been dead many years, and the evidence is only fragmentary. What purports to be the record of the old levee board

is in existence in the hands of the county clerk of Chicot county; but it is in dispute whether this is the original record or whether it is complete. There is much testimony, perhaps enough to show a preponderance, in favor of a finding that a considerable portion of that record book has been mutilated and that a considerable portion of it is gone. The evidence is disputed whether there was a valid meeting of the board of levee inspectors in 1867 at the time when it is claimed Reynolds was constituted the agent and attorney in fact of the levee board to dispose of the lands. There is only one person living who pretends to know anything about the transactions of the old board of levee inspectors, and he is an old man, from whose memory most of the facts have faded. D. H. Reynolds, who appears to have been the principal actor and central figure in the transactions which involve the title to the lands, has been dead several years, and his testimony is therefore lost. It is probable that he, more than any other person, could have given an account of the facts upon which his authority rested, or whether his sale and transfer of the certificates had ever been ratified.

These changes occurred by lapse of time, and are sufficient to call for the application of the equitable doctrine of laches, which bars any recovery in this case. *Osceola Land Co. v. Henderson*, 81 Ark. 432, 100 S. W. 896; *Dickson v. Sentell*, 83 Ark. 385, 104 S. W. 148; *Segers v. Ayers*, 95 Ark. 178, 128 S. W. 1045; *Finley v. Finley*, 103 Ark. 58, 145 S. W. 885; *Davis v. Harrell*, 101 Ark. 230, 142 S. W. 156. In the case last cited above we quoted from the Supreme Court of the United States in *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, as follows: "The cases are many in which this defense has been invoked and considered. It is true that, by reason of their difference of facts, no one case becomes an exact precedent for another. Yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in conditions or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

[5] But it has been said that the doctrine should not be applied, because the present members of the board did not become aware of their rights until this court rendered the opinion in the case of *State v. Southwestern Land & Timber Co.*, *supra*, holding that the state had no right to recover these lands, and that the plaintiff succeeded to the rights

of the old board of levee inspectors. It is claimed that they accidentally learned, upon the rendition of that decision, that the board had rights in these lands and that they proceeded with diligence then to sue to recover.

This is no excuse for the delay, for the reason that the transactions were matters of record and could have been ascertained by any decree of diligence on the part of those who had in charge the interests of the district. It is no excuse under those circumstances to say that they had no knowledge of the facts, for there has been no concealment, and the authorized agents of the district were chargeable with knowledge of all facts which could have been ascertained by reasonable diligence. *Williams v. Bennett*, 75 Ark. 312, 88 S. W. 600, 112 Am. St. Rep. 57.

The proof in this case shows, further, that several members of the board were living for years after these certificates were transferred, and some of them were men who had originally belonged to the levee board, when they knew, or ought to have known, that the certificates had been issued to Sessions as president of the board. At any rate, the transactions were of a public nature, and the records of the land office would have shown to any investigator the source of these titles, and the plaintiff cannot, under those circumstances, hide behind lack of knowledge on the part of the members of the board in order to escape the force of their negligence.

[6] We have never before decided the question directly whether a levee board, or other governmental agency, is exempt from the application of the doctrine of laches. In *Book v. Polk*, 81 Ark. 244, 98 S. W. 1049, the court held that the St. Francis levee district was estopped by the conduct of its officers; and in *City of Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, it was held that municipal corporations are bound, the same as individuals, by the statute of limitations, unless the statute expressly provides otherwise.

[7, 8] The well-recognized rule is that the maxim, "nullum tempus occurrit regi," applies only to the sovereign itself, and not to public corporations or other such governmental agencies to whom powers are delegated. Levee districts are, as we have said in many cases, only governmental agencies, clothed with such powers as are expressly conferred or by necessary implication. They are, however, quasi corporations, with power to sue and be sued. Board of Directors St. Francis Levee District v. Fleming, 93 Ark. 490, 125 S. W. 132, 659. If such agencies are barred by the statute of limitations, they are equally barred by delay of enforcement of rights under circumstances which would invoke against individuals the equitable doctrine of laches. *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231; *Iowa v. Carr*, 191 Fed. 257,

112 C. C. A. 477; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 68 L. R. A. 264, 106 Am. St. Rep. 890.

[9] The application of this doctrine comes with peculiar force in the present case, for the reason that the plaintiff, through its president, held title to these lands merely for the purpose of discharging its obligations to the subcontractors who built the levee. It may be conceded to be true, as claimed by learned counsel for the plaintiff, that the claims of the subcontractors may have been discharged, or may be barred by the statute of limitations, and yet the plaintiff have the right to hold the lands; but the fact that it was acting merely as trustee, and holding the lands for the purpose of raising a fund to discharge the obligations to the subcontractors, who were really entitled to the proceeds, makes it inequitable for the plaintiff at this late day to sue to set aside a conveyance which the evidence, if still preserved, might show had been made for the purpose of raising funds to pay off those just obligations, and that the funds were so applied. It cannot be known what are the real facts of the transaction, for, on account of the mutilation of records and the death of witnesses, evidence which might clear up this transaction has been lost.

Without undertaking to pass upon the other defenses presented, we hold that this action is barred by laches, and that the decree of the chancellor was, on that account, if no other, correct.

Affirmed.

#### UNION RY. CO. v. CARTER.

(Supreme Court of Tennessee. April 18, 1914.)

#### 1. DEATH (§ 83\*)—ACTIONS FOR DEATH—DAMAGES.

Under Shannon's Code, §§ 4025-4028, authorizing an action for death by wrongful act, and the recovery of the damages suffered by the beneficiaries for the loss of decedent and such damages as decedent could have recovered had he survived, a widow, suing for the death of her husband by wrongful act, may recover, not only the damages she has sustained as the result of her husband's death, but such damages as he might have recovered had he survived.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 107; Dec. Dig. § 83.\*]

#### 2. DEATH (§ 93\*)—ACTIONS FOR DEATH—PUNITIVE DAMAGES.

In an action under Shannon's Code, §§ 4025-4028, for death by wrongful act, exemplary damages are recoverable.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.\*]

#### 3. DEATH (§ 99\*)—ACTIONS FOR DEATH—DAMAGES—EXCESSIVE DAMAGES.

Where the declaration, in an action for death by wrongful act, demanded exemplary damages, and the court found that decedent was shot by an employe of defendant, acting as a special officer, while attempting to arrest decedent for the misdemeanor of stealing a ride on a train of defendant, a judgment for \$2,000

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would not be disturbed as excessive, for punitive damages were recoverable.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-180; Dec. Dig. § 99.\*]

Certiorari to Court of Civil Appeals.

Action by Josie Carter against the Union Railway Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff, and defendant brings certiorari. Writ of certiorari denied.

J. W. Canada, of Memphis, for Union Railway Co. Bell, Terry & Bell, of Memphis, for Carter.

GREEN, J. This suit was brought by Josie Carter to recover damages for the killing of her husband by an employé of the Union Railway Company. The case was tried without a jury, and the circuit judge rendered judgment in favor of the plaintiff below for \$2,000. This judgment was affirmed by the Court of Civil Appeals, and a petition for certiorari has been filed by the railway company to bring the case to this court.

The plaintiff in error, the Union Railway Company, is a common carrier, operating its lines in and near the city of Memphis. John Carter, the husband of plaintiff below, while stealing a ride on a train operated by the plaintiff in error, was put under arrest by one Earl Barnard, an employé of the railway company, who was also commissioned by the city of Memphis as a special police officer.

The circuit judge found that Carter was shot in the back of the head by this special officer while the former was running away trying to escape arrest. Carter was riding on top of a freight train with some other negroes, and for this misdemeanor Barnard attempted the arrest. Although there was a conflict in the evidence, and the special officer claimed that he shot Carter in self-defense, the proof introduced by the plaintiff below abundantly sustained the finding of the trial judge.

The principal question made in the petition for certiorari is that no evidence was introduced to support a judgment for as much as \$2,000 damages.

The wife of deceased testified that her husband worked for certain coal dealers at Memphis and made \$9 a week. His age, however, was not shown, nor was any proof offered as to the condition of his health, his expectancy, or his habits with reference to the support of his family.

A number of witnesses testified in behalf of the railway company that deceased was a worthless negro, of bad habits and dangerous character, and it is insisted that his wife has sustained no damages by reason of his death, and has not attempted to show any.

[1] Under Shannon's Code, §§ 4025-4028, the damages recoverable by those authorized to bring suit on account of a wrongful killing are of two kinds: First, the damages suffered by the beneficiaries by reason of the loss of deceased; and, second, such damages as deceased himself would have been entitled to recover had he survived. *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967, and cases reviewed.

So the widow's claim for damages in this case under our statute is not limited to damages that she may have sustained as the result of her husband's death, but she may also recover damages for the injury done to deceased himself. She may recover substantial damages in a suit like this without any special showing of pecuniary loss to herself. Had deceased survived, totally disabled, and brought suit, a verdict of \$2,000 would scarcely have been deemed excessive, no matter what his age and expectancy were.

His beneficiaries under the statute are entitled to include in their recovery all damages he could have obtained under the circumstances just indicated. *Collins v. Railroad*, 9 Helsk. 851; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967. In other words, our statute was not only enacted for the protection of designated beneficiaries, but is a survival statute as well. *Railroad v. Shewalter* (Knoxville, 1913) 128 Tenn. —, 161 S. W. 1136.

[2, 3] Moreover, as we have stated, this case was tried without a jury, and the declaration laid ground for exemplary damages. Such damages are recoverable in suits founded on our statute. *Haley v. M. & O. Railroad*, 7 Baxt. 239; *Railroad v. Daughtry*, 88 Tenn. 721, 13 S. W. 698. On the findings of the trial judge, this is a proper case for punitive damages. If the judgment is in excess of compensatory damages, it should nevertheless be sustained, and the difference charged as smart money.

It has become customary throughout the state for large enterprises of every character to have certain employes appointed special officers and clothed with police authority. While this practice may be desirable for the protection of the property of such concerns, it has led to many abuses. These men so clothed with official power lack the experience and discretion of regular state and municipal officers, and their conduct has very generally been oppressive and flagrant.

In view of the well-known tendencies of these special officers, parties so employing them will be held to a strict degree of accountability for the acts of such dangerous agents.

Other matters presented by the petition have been orally discussed, and the writ of certiorari will be denied.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 166 S.W.—88

WOOLEN, State Comptroller, v. STATE ex rel. PORTIS, Sheriff.

(Supreme Court of Tennessee. April 18, 1914.)

1. COSTS (§ 294\*)—IN CRIMINAL PROSECUTIONS—LIABILITY OF STATE.

Under Shannon's Code, §§ 7606, 7619-7622, declaring that costs shall include the safe-keeping of accused before and after conviction, and providing that costs in felony cases shall be paid by the state, the state is liable for costs for confining in the county jail one convicted of a felony; the commutation in the sentence not changing the grade of the offense.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1105-1108; Dec. Dig. § 294.\*]

2. COSTS (§ 294\*)—IN CRIMINAL PROSECUTIONS—LIABILITY OF STATE.

Acts 1891, c. 123, § 11, providing that the state shall pay for the board of state prisoners, covers safe-keeping in a workhouse before and after conviction, on commutation from penitentiary confinement.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1105-1108; Dec. Dig. § 294.\*]

Appeal from Circuit Court, Tipton County; S. J. Everett, Judge.

Mandamus by the State, on the relation of N. B. Portis, Sheriff, against George P. Woolen, State Comptroller. From a judgment granting the writ, defendant appeals. Affirmed.

William H. Swiggart, Jr., Asst. Atty. Gen., for appellant. Nat Tipton, of Covington, and Steele & Steele, of Ripley, for appellee.

WILLIAMS, J. This is an action in the name of the state of Tennessee, on relation of one Portis, sheriff and jailor of Tipton county, against the comptroller of the state, seeking the grant of a writ of mandamus to compel the issuance of a warrant on the treasury for a sum alleged to be due from the state for the board of certain prisoners in the county jail, who were convicted of felonies, but whose sentences had been commuted by trial juries to imprisonment in jail from imprisonment in the state penitentiary.

The comptroller answered, denying liability on the part of the state to the jailor for such board, and contending that the county was liable. The circuit judge ruled against this contention, and granted the writ of mandamus, with result that an appeal was prayed by the comptroller to this court.

[1] The Code of 1858, in section 5577 (Shannon, § 7606), defines criminal costs as follows: "The costs which may be adjudged in criminal cases include all costs incident to the arrest and safe-keeping of the defendant before and after conviction, due and incident to the prosecution and conviction, and incident to the carrying of the judgment or sentence of the court into effect."

The Code, in section 5585 (Shannon, § 7619), provides that the state or the county, according to the nature of the offense, "pays

the costs accrued in behalf of the state" in certain contingencies named.

Acts Extra Session 1891, c. 22 (Shannon's Code, §§ 7620-7622), defined more closely on which of the named contingencies the payor should be the state or the county, as between themselves, and this act again defines criminal costs as follows: "What is meant by costs in the foregoing sections is all costs accruing under the *existing laws* on behalf of the state or county, as the case may be, for the faithful prosecution and safe-keeping of the defendant, including the cost \* \* \* of the jailor."

By the last-named act, the test of liability, as between the state and the county, is placed on the grade of the offense. All costs of the prosecution of crimes punishable otherwise than by death or confinement in the penitentiary are made payable by the county.

We are of opinion, and hold, that in cases of felonies, where the punishment has been commuted from confinement in the penitentiary to confinement in a county workhouse or jail, there is worked by the commutation no change in the grade of the offense, so as to disturb the above test of liability for costs. They are payable by the state, except where the statute provides to the contrary.

As seen, "costs," within the purview of the earlier statutory provision, included "safe-keeping of the defendant before and after conviction," and, in the later act, the equivalent "costs of the jailor." Thus is made a legislative distribution of an entire burden as between state and county.

[2] It is insisted by the comptroller, for the state, that the general county workhouse act (Acts 1891, c. 123), in section 11, wrought a change in the measure of the state's burden. This contention is based on a construction of the word "safe-keeping," appearing in that section, which would assign to it a narrower meaning than did the earlier statute, and improperly confine it to a keeping of a defendant *before* conviction. The above section 11 provides that the state shall pay for the board of state's prisoners, and this we construe to cover a safe-keeping in workhouse or jail, both before and after conviction, on commutation from penitentiary confinement.

It is insisted by counsel of the comptroller that the ruling in the case of Knox County v. Fox, 107 Tenn. 724, 85 S. W. 404, is favorable to his contention. It was in that case ruled that the costs accruing after conviction, such as jail fees, were not costs to be taxed against and worked out by the convicted defendant. This being so, it becomes all the more manifest that sections 7606 and 7622 of Shannon's Code, quoted above, govern the taxation of cost as between the state and county rather than as between the state and defendant. We have so construed them.

The circuit judge did not err in granting the writ. Affirmed.



## CRAWFORD v. WIEDEMANN.

(Court of Appeals of Kentucky. May 14, 1914.)

## 1. PARTNERSHIP (§ 20\*)—EXISTENCE AS BETWEEN PARTIES—CONTRACTS.

A partnership, as between the parties themselves, does not arise by operation of law, but is created only by contract and the intention of the parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.\*]

## 2. PARTNERSHIP (§ 53\*)—EXISTENCE—EVIDENCE—SUFFICIENCY.

Evidence held not to show a partnership as between the parties themselves.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.\*]

## 3. CORPORATIONS (§ 327\*)—GUARANTORS OR SURETIES—LIABILITY.

Where stockholders, who were guarantors or sureties on a note executed by the corporation, executed renewal notes and put up their stock as collateral, but there was no agreement that their liabilities were to be in the proportion of the stock each owned, their liability was unaffected by any difference in the quantity of stock held by each, and they were equally liable as between themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1444; Dec. Dig. § 327.\*]

Appeal from Circuit Court, Campbell County.

Action by the German National Bank of Newport against Charles Wiedemann and Leonard J. Crawford. From a judgment adjudging that defendants were equally liable on the note sued on, defendant Leonard J. Crawford appeals. Affirmed.

James C. Wright, of Newport, and Hazelrigg & Hazelrigg, of Frankfort, for appellant. Dolle, Taylor & O'Donnell, of Cincinnati, Ohio, and Ramsey Washington, of Newport, for appellee.

OLAY, O. This action was originally brought by the German National Bank of Newport, Ky., against Charles Wiedemann and Leonard J. Crawford, on a promissory note for \$15,000, dated July 15, 1909, and payable four months from date, and guaranteed by Wiedemann and Crawford. When the suit was filed, Wiedemann and Crawford each filed an answer and cross-petition against the other; Crawford alleging that there was a partnership between him and Wiedemann, and that his liability on the note was  $29\frac{22}{70}$  per cent. thereof, while Wiedemann's liability on the note was  $70\frac{47}{70}$  per cent. Wiedemann denied that any partnership existed between him and Crawford, or that the note sued on was a partnership note, and pleaded that they were liable on the note in equal proportions. The bank obtained a judgment against both defendants. Wiedemann paid the judgment and took an assignment thereof from the bank. Thereafter he caused an execution to issue against Crawford for one-half the amount of the judgment and costs. Crawford moved to quash the execution. The motion was sustained, and the execution

quashed. Wiedemann appealed. This court held that, before quashing the execution, the court should have heard and determined the question of the liability of the parties as between themselves. The judgment was therefore reversed, and the cause remanded for proceedings consistent with the opinion. Wiedemann v. Crawford, 149 Ky. 202, 147 S. W. 951.

During the pendency of the appeal, Crawford moved that the cause be referred to the master commissioner to hear proof and report on the issues joined. Wiedemann objected, but the motion was sustained. For some time nothing was done under the order of reference. After the evidence was heard and the case taken under submission by the master, the opinion of this court was rendered. On August 10, 1912, the master reported that no partnership existed between Crawford and Wiedemann, and that the liability of the parties on the note in question were in no wise affected by the alleged partnership. Thereafter Crawford filed exceptions to this report. The court, after reading the evidence, entered an order confirming the report, and adjudged that Crawford and Wiedemann were equally liable on the note. The cross-petitions of the two parties were dismissed without prejudice. From the judgment so entered, Crawford appeals.

It appears from the record that both Crawford and Wiedemann were stockholders in the Highlands Hotel Company, a corporation organized for the purpose of conducting a hotel in the district of Highlands, Campbell county. As early as June 25, 1906, the Highlands Hotel Company and certain stockholders executed to L. J. Crawford and Charles Wiedemann their promissory note for \$7,500, negotiable and payable four months after date at the German National Bank at Newport. Attached to the note as collateral were certain shares of stock owned by the stockholders. This note was negotiated by the German National Bank. Subsequently an additional note for the same sum and by practically the same parties was also negotiated by the bank. For a while these two notes were renewed as separate notes. Subsequently they were incorporated in one note for \$15,000. About that time Crawford and Wiedemann had acquired nearly all the stock of the corporation. Afterwards this \$15,000 note was renewed by the Altamont Hotel Company, and guaranteed by Crawford and Wiedemann, and that is the note sued on in this action.

The Highlands Hotel Company did not prosper, and Wiedemann, who was a large stockholder and creditor of the company, instituted proceedings for the appointment of a receiver and a sale of the property. On January 29, 1909, Crawford and Wiedemann entered into a contract whereby they agreed to purchase all the real estate, except the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Sheley Arms property, of the Highlands Hotel Company, and all its personal property, at a figure not exceeding the claims (excepting the stock claims) against said hotel company, and that their interest and ownership in such purchase should be in proportion to the sum theretofore invested by them in the hotel enterprise, including both common and preferred stock and loans. Some time later the real estate of the company was sold, and one Widrig, representing both Crawford and Wiedemann, became the purchaser. After the purchase of the Altamont Hotel, it was intended to form a corporation to take over the property. Crawford contended that the hotel should be conducted as a partnership, while Wiedemann declined to accede to this arrangement. Being unable to agree on this proposition, the parties proceeded to litigate their rights.

According to Crawford's evidence, when the notes for \$7,500 each were originally executed, the stockholders put up certain stock as collateral; Mr. Wiedemann putting up two shares to his one. When the contract was entered into between him and Wiedemann to purchase the property, he stated to the bank that he and Wiedemann had large claims against the company for money loaned, and if they purchased the property they would want to continue the loan at \$15,000. On these claims there was a dividend of about \$4,500, which was first paid to the bank, and then assigned to them, and used in paying for the property in proportion to their respective interests of  $29\frac{23}{70}$  per cent. and  $70\frac{47}{70}$  per cent. He never discussed the question of partnership with Mr. Wiedemann until the latter's return from Europe. He then said to Mr. Wiedemann: "Well, Mr. Wiedemann, you have a partnership now." Wiedemann said: "Then I will dissolve it." Crawford replied: "Very well, then, it is dissolved." Prior to April 1, 1909, he did not claim that any partnership existed between him and Wiedemann, unless it arose by operation of law out of the retention of the manager who was employed to conduct the hotel. There was no partnership in the ownership of the land. That was owned jointly in the proportions referred to. After they began to operate the hotel during the summer, he paid \$150 towards the expense of the manager. That was the only thing he contributed towards the expense of the hotel. Though the lands and buildings were not partnership property, and the furniture and fixtures of the hotel were purchased at the same time, the personal property, in his opinion, was partnership property. There was never any discussion between him and Mr. Wiedemann as to what interest he should have in the property, or what proportion of the losses he should bear. There was no discussion as to what he was to do as partner. He contributed the property, the use of the real estate, and the use of the personality

which comprised all the furnishings and equipment of the hotel. This was under no arrangement, but simply by "pleasant brotherly acquiescence" in the operation of the hotel. In making payments to the master commissioner, none of it was partnership money. In executing the new note for \$15,000, in lieu of the \$15,000 note due by the Highlands Hotel Company, the partnership received only the old note for \$15,000. There was no liability on the part of the partnership to pay the Highlands Hotel Company note for \$15,000 prior to the execution of the note in this case. There was never any express agreement between him and Mr. Wiedemann as to what per cent. each was to pay in the event of the dishonor of the note. He and Mr. Wiedemann always believed that the hotel company would pay the note, and that they would not be called on to pay it. In regard to the distribution of the \$4,500 dividend, derived from the assets of the old Highlands Hotel Company, witness stated that its distribution, as between him and Mr. Wiedemann, in no way affected their liability on the note.

Wiedemann testified that, when the original notes of \$7,500 each were executed, the bank agreed to let the company have the money on his and Mr. Crawford's credit. The stock deposited as collateral was placed with the note merely for their protection. There was never any agreement between the signers of the note or between him and Crawford as to what their respective liabilities on the note would be in event of any default. After he and Mr. Crawford had secured a greater part of the stock, the hotel company continued to lose money. Finally he got tired of it, and it was suggested that receivership proceedings be instituted. When he and Crawford agreed to purchase the hotel, they went to the bank, and the cashier stated that the bank would take care of the note for the new company. In purchasing the hotel, they retained the manager. Witness understood that the company was to be operated as a corporation. The hotel was run under the name of the Altamont Hotel Company. After witness returned from Europe, Crawford insisted that the hotel be conducted as a partnership. It had previously been understood that a corporation be formed. When Crawford suggested a partnership, he declined to be a party to it. After acquiring the stock in the Highlands Hotel Company, he and Crawford did agree that, in advancing money to it, he should put up about two-thirds and Crawford one-third. It was not true that, in borrowing money originally, stock was put up as collateral in proportion to their holdings as stockholders. When the hotel itself failed, the stock was of no value.

Clarence Wagner, Wiedemann's attorney in fact, testified that he invariably attended to the execution of the original notes for \$7,500, and their subsequent renewal as

separate notes and as one note. At no time was there ever any discussion as to the respective liabilities of the makers of the notes. At Mr. Crawford's suggestion a resolution was passed by the Highlands Hotel Company indemnifying Crawford and Wiedemann against any loss by reason of their suretyship on the note. After the purchase of the hotel the account was kept in the name of the Altamont Hotel Company. This name was suggested by Mr. Larkin, the cashier of the German National Bank. It was understood that a corporation was to be formed, to take the property over. In the meantime the hotel was operated. In operating the hotel, it was not operated as a partnership. No mention was ever made of the word "partnership." The dividend received from the assets of the old Highlands Hotel Company was never apportioned in any way. It was considered as being due Crawford and Wiedemann in equal sums. A check for the dividend, amounting to \$4,589.25, was made payable to L. C. Widrig. Widrig indorsed it to Anderson, the master commissioner. The master commissioner paid it to the bank. Later the bank paid the same sum to Wiedemann. Instead of the sum being credited on the new note, the Altamont Hotel Company executed its note for the entire \$15,000. The dividend of \$4,589.24 was not taken into consideration in apportioning the amount due either from Mr. Crawford or Mr. Wiedemann on account of the purchase of the property.

[1, 2] The question in this case is, not whether Crawford and Wiedemann were partners as to third parties, but whether they were partners as between themselves. Crawford contends that as to the personal assets purchased along with the Highlands Hotel, and in the conduct of the hotel as the Altamont Hotel, there was a partnership which arose by operation of law. Strictly speaking, a partnership never arises by operation of law. It is a question of contract and intention, appearing from all the facts of the case. It may be true, however, that where the parties enter into a contract which embraces every element necessary to constitute a partnership, the relation between the parties will be that of partners, it matters not by what name the relation may be designated. Thus, if A. and B. engage in a joint business, each contributing his money, time, and skill in certain proportions, under an agreement by which they are to share the profits and losses as profits and losses, a partnership between them necessarily exists. In such a case, however, the partnership grows out of the contract and the intention of the parties. In this case not only the real estate but the personal property was purchased under an agreement that it was to be owned in certain proportions. Crawford says that the question of partnership was never mentioned between him and Wiede-

mann. Wiedemann and Wagner testify to the same effect. Crawford admits that there was no partnership as to the realty. It is difficult to see upon what theory it can be said that there was a partnership as to the personality and not as to the realty, when the personality was bought under exactly the same arrangement as the realty. After the purchase of the hotel, it was operated as a going concern. There was no agreement as to terms. A manager was employed. Mr. Crawford seems to have advanced \$150 towards paying for the manager. Aside from this contribution towards the expenses, and the fact that he was a guest at the hotel, there are no facts from which it could be reasonably inferred that a partnership was intended. There was no discussion as to what each should do as a partner. There was no agreement as to how the hotel should be conducted; but it was conducted, in the language of Mr. Crawford, by "pleasant brotherly acquiescence." There is nothing to show that the parties contemplated a co-ownership of the profits as such, or that the profits were actually divided as profits among them. Indeed, the elements necessary to constitute a partnership are altogether lacking. But, even if there was a partnership in the conduct of the hotel, the note sued on is not an obligation growing out of its management after its purchase by Wiedemann and Crawford. The note in question is simply the renewal of the two old notes for \$7,500 each which were the primary obligation of the old Highlands Hotel Company, a corporation, and on which Wiedemann and Crawford were guarantors or sureties. The record fails to show any agreement between the parties at the time of the execution of the original notes, or of their subsequent renewals, with reference to their respective liability. Certainly the parties were not partners at that time, but were mere stockholders in the corporation.

[3] It may be true that on certain renewals Crawford and Wiedemann put up the stock of the corporation as collateral in the proportion of one to two. Doubtless this was done because that was the proportion in which they owned the stock. There being no agreement that their respective liabilities on the note were to be in that proportion, the mere fact that the stock was deposited as collateral in that proportion is not sufficient to authorize us to conclude that the parties understood or intended that their liability should be fixed in proportion to the stock so deposited as collateral. Indeed, the only ground on which an unequal liability on the notes may be based is the fact of the inequality in the stock ownership. Such a circumstance is not of itself sufficient to overcome the legal presumption that an equal liability was intended. But it is insisted that the distribution of the dividend from the sale of the assets of the Highlands Hotel Com-

pany was made on the basis of the respective interests of the parties after the purchase in the receivership proceedings. At first Mr. Crawford made this contention. Afterwards he claimed that the division of this dividend had nothing to do with the case. Relying on this fact, he declined to go into a discussion of the figures. On the other hand, Wagner claims that no such distribution was made. The accounts between the parties are not before us. The record shows that the check was drawn by the George Wiedemann Brewing Company to Widrig, who purchased the property for Crawford and Wiedemann. Widrig indorsed it to the master commissioner. The master commissioner paid it to the bank. The bank returned the money to Wiedemann. What was thereafter done does not appear. On the evidence before us, we cannot say with any reasonable certainty how, if ever, the dividend was apportioned between the parties. That being true, its apportionment throws no light on the case. As we see the case, the \$15,000 note sued on represents simply the old debt of the Highlands Hotel Company, upon which Crawford and Wiedemann were jointly liable. If prior to the purchase of the hotel property by them the bank had demanded payment, they would have been liable in equal proportions for any balance due after crediting the note with any dividend arising out of the sale of the assets of the hotel company. Instead of discharging the note at that time, the bank permitted the parties to renew the note in the name of the Altamont Hotel Company, with the understanding that they were to continue thereon as guarantors. In the absence of any agreement to the contrary, or facts from which it could be reasonably inferred that the parties otherwise intended, their liability on the note as thus renewed continued the same as on the note in renewal of which it was given, and was not affected by the difference between their holdings in the property purchased, or the manner in which the hotel was conducted. It not appearing that the note was a partnership note, or that the parties ever agreed, understood, or intended that their liabilities thereon should be in proportion to their respective holdings in the hotel property, the trial court did not err in adjudging that they were equally liable on the note.

Judgment affirmed.

#### SOVEREIGN CAMP WOODMEN OF THE WORLD v. LANDRUM et al.

(Court of Appeals of Kentucky. May 13, 1914.)

##### 1. TRIAL (§ 25\*)—CLOSING ARGUMENT—BURDEN OF PROOF.

In an action on a mutual benefit certificate containing a suicide clause, the petition alleged that decedent died by his own hand, but that at the time of his death his mind was unbalanced, so that he was not mentally responsible,

and the answer denied the allegation as to decedent's mental condition, and affirmatively alleged that he had mind enough at the time to know that the action would probably result in death, and intended that it should do so, which latter allegation was denied. *Held*, in an action on the certificate, that plaintiff had the burden of proof, under Civ. Code, § 526, on the question of the decedent's mental condition, so that she was entitled to the closing argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

##### 2. WITNESSES (§ 177\*)—INCOMPETENCY—DECLARATIONS OF DECEDENT.

Where, in an action by the beneficiary on a life certificate in which it was claimed that decedent committed suicide, defendant introduced evidence that one of the beneficiaries had stated that decedent said at the time of his death that he was going to kill himself, such beneficiary could testify that no such conversation took place, and that decedent made no articulate statements at the time, but looked wild out of his eyes.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 718; Dec. Dig. § 177.\*]

##### 3. INSURANCE (§ 788\*)—LIFE INSURANCE—SUICIDE CLAUSE.

A provision avoiding a mutual benefit certificate if insured died by his own hand or act, whether sane or insane, will be enforced only when insured, at the time of his self-destruction, had mind enough to know that his act would probably result in death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.\*]

##### 4. INSURANCE (§ 819\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a mutual benefit certificate in which it was claimed that insured committed suicide, *held* to sustain a finding that decedent was mentally incompetent at the time, so as not to realize that his act would result in his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

Appeal from Circuit Court, Trigg County.

Action by Lindsey A. Landrum and others against the Sovereign Camp Woodmen of the World. From a judgment for plaintiffs, defendant appeals. Affirmed.

Coleman & Wells, of Murray, for appellant. C. H. Bush, of Hopkinsville, and Kelly & King, of Cadiz, for appellees.

TURNER, J. In 1910 Alfred Wallis, upon his application, was granted a beneficiary certificate for \$1,000 in the Sovereign Woodmen of the World; his three sisters, the appellees, being designated as beneficiaries therein. He paid all dues and assessments, and died a member in good standing on May 16, 1912.

In due time after his death the beneficiaries furnished proper proof of death, and demanded payment, which was refused; whereupon they instituted this action on the certificate.

One of the provisions on the back of the certificate, which is referred to in the face thereof, is that: "If the member holding this certificate \* \* \* should die \* \* \* by his own hand or act whether sane or in-

sane \* \* \* this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits, which shall have accrued on account of this certificate shall be absolutely forfeited without notice or service." And a similar provision is in the constitution and by-laws.

The plaintiffs in their petition allege affirmatively that the decedent came to his death by his own hand, but that at the time his mind was unbalanced, and he was so far bereft of reason as not to know what would be the consequence of his act, or that it would probably result in death or bodily injury, and that he was not at the time in such condition as to be mentally responsible for his act.

The only issue of fact made by the first paragraph of the answer is a denial of the allegation as to the mental condition of Wallis at the time he killed himself; but in a second paragraph it is pleaded affirmatively that at the time he took his life he had mind enough to know that the act would probably result in death or bodily injury, and that he committed it with the purpose that it should do so, which latter allegation was duly denied by reply.

Upon the issues so raised the case came to trial, and resulted in a verdict and judgment for the plaintiffs for the amount of the policy.

[1] The first ground relied upon for reversal is that appellant, under the pleadings, should have been given the burden of proof and consequently the closing argument, and a class of cases relied upon in support of this contention wherein the companies defended upon the ground of suicide, and where the issue necessarily was whether or not the decedent had died by his own hand or from accident or casualty. Clearly in those cases it was incumbent upon the company to establish the suicide.

Section 526, Civil Code, provides: "The burthen of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." So that it is manifest that in the class of cases referred to, in the absence of evidence to sustain their allegation of suicide, they would have lost.

But in this case the plaintiffs themselves set up the suicide provision of the policy, and expressly admit that the decedent came to his death by his own hand, and avoid that fact by the further affirmative allegation that he was at the time irresponsible by reason of his mental condition; and these allegations, being denied in the answer, made the only real issue in the case. The additional allegation in the second paragraph of the answer as to the decedent's mental responsibility at the time of the act added nothing to appellant's answer, and made no issue which had not been made by the denial

in the first paragraph, and was, in fact, nothing more than an affirmative denial of the allegations in the petition. Clearly, under this state of the pleadings, if no evidence had been introduced, the plaintiffs, having the affirmative on the question of mental responsibility, would have lost.

[2] The court, upon the main examination of the two sisters of the decedent, who were beneficiaries, declined to permit either to testify to anything which occurred between them and the decedent immediately before his death, or as to how he looked or acted, or anything bearing upon his then mental condition; but, upon the cross-examination of some of the plaintiff's other witnesses, appellant introduced in evidence a written statement made by the witness to the effect that Mrs. Overby, one of the beneficiaries, had told him that the decedent raised up in the bed, reached out his hand, and told her good-bye, and said he was going to kill himself, and that she had made certain other statements bearing upon the mental condition of the decedent immediately before he shot himself. Thereafter the court permitted Mrs. Overby to testify that no such conversation as detailed in the statement occurred, and to state that the decedent at the time looked wild out of his eyes, and that he muttered a few words that she did not understand. The witness did not undertake to detail any conversation with the decedent, for she distinctly said there was none, but was only permitted to say that the alleged conversation referred to in the statement introduced by the defendant did not take place, and that she had not said to any one that it did.

The case of Metropolitan Life Ins. Co. v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770, was an action to recover on a life policy, wherein the company defended on the ground that the insured had died by his own hand. In that case it was held that the wife, who was the beneficiary in the policy, was a competent witness to testify as to the circumstances surrounding her husband at the time of his death, and as to how much mind he had on the day he took his life. See, also, Fidelity & Casualty Co. v. Cooper, 137 Ky. 544, 126 S. W. 111.

[3] It is now the well-recognized rule in this state that such a suicide provision in a policy will be enforced only when the insured, at the time of the self-destruction, had mind enough to know he was taking his life, or that his act would probably so result. This is based upon the idea that the act of one who is so far mentally unbalanced as not to know or realize the inevitable consequences of his act cannot be said to have died by his own hand, but really by accident. Southern Life Ins. Co. v. Boyd, 124 S. W. 333, and authorities there cited.

[4] The contention that there should have been a peremptory instruction given because

the evidence failed to show such mental irresponsibility as would relieve the decedent from the consequences of his own act cannot be sustained. The evidence is convincing that for several days before his death the decedent had acted strangely, and that for the last two days before his death he had locked himself up in his home and refused to permit any one to enter, and that, when his sister finally did enter his room by climbing through the window, he immediately raised himself up in bed and shot himself.

There was ample evidence to sustain the verdict, and, as there is no complaint of the instructions, the judgment is affirmed.

#### UNITED FURNITURE CO. et al. v. WILLS.† (Court of Appeals of Kentucky. May 12, 1914.)

##### 1. MALICIOUS PROSECUTION (§ 21\*)—DEFENSES—ADVICE OF COUNSEL.

Advice of counsel is no defense to an action for malicious prosecution, unless the facts are fully and fairly laid before the counsel, and hence, in a prosecution for maliciously causing the arrest of a purchaser of furniture who offered in payment an order on defendant drawn by a newspaper company with which defendant advertised, advice of counsel is no defense, where defendant did not inform them that there was any dispute over the account, or that the newspaper company claimed that defendant was indebted to it.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40-44; Dec. Dig. § 21.\*]

##### 2. MALICIOUS PROSECUTION (§ 71\*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for maliciously causing plaintiff's arrest for obtaining, under false pretenses, furniture in payment for which plaintiff tendered an order drawn on defendant by a newspaper company with which defendant advertised, evidence of defendant's indebtedness and the authority of the newspaper company to draw such orders held sufficient to go to the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.\*]

##### 3. MALICIOUS PROSECUTION (§ 72\*)—ACTIONS—INSTRUCTIONS—"PROBABLE CAUSE."

In a prosecution for maliciously causing plaintiff's arrest for obtaining, under false pretenses, goods in payment for which plaintiff tendered an order drawn on defendant by a newspaper company, which claimed that defendant was indebted to it for advertising, a charge that probable cause means such cause as would induce a reasonably prudent man to believe that plaintiff was guilty of obtaining the goods under false pretenses is sufficient.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765.]

##### 4. APPEAL AND ERROR (§ 688\*)—REVIEW—RECORD—QUESTIONS PRESENTED.

Complaints of improper argument of counsel cannot be reviewed on appeal when not made part of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by Anna Wills against the United Furniture Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. L. Doolan, of Louisville, for appellants.  
Lawrence S. Leopold, of Louisville, for appellee.

NUNN, J. This was a suit against the appellants the United Furniture Company and R. W. Hardesty by Anna Wills to recover \$5,000 damages for malicious prosecution. The jury returned a verdict for \$500 in her favor.

The appellant Hardesty swore out a warrant, and had her arrested upon a charge of obtaining goods under false pretenses. She was taken from her home and carried through the streets by officers to the police station, and locked up. Bondsmen came to her relief in 15 or 20 minutes, and released her on bail. The next morning her examining trial was had, at which appellants employed attorneys to assist in the prosecution. The examining court dismissed the warrant, and discharged her from custody.

The appellee's husband was an employé of the Anzeiger, a responsible and reputable newspaper of Louisville. The Anzeiger had advertising contracts with the appellant company for the years 1910 and 1911. The contract for 1911 reads as follows:

"Louisville, Ky., Jan. 15, 1911. \$300.00. Louisville Anzeiger Co., Louisville, Ky.: We hereby authorize the insertion of our advertisement to occupy the space of 20 squares in Wed. & Sunday edition, for which we promise to pay three hundred no/100 dollars. This contract to run 1 year. Statement monthly. Unless copy furnished promptly, publisher reserves right to insert card. The Louisville Anzeiger Co. agrees to take \$150.00 in trade. [Signed] United Furniture Co., J. A. Miller, Pres."

It will be noticed that this contract was made for appellant by J. A. Miller, then its president, who was also manager. On July 1, 1911, the appellant Hardesty succeeded Miller.

The practice of the Anzeiger Company was to throw as much trade as it could to its advertisers, and wherever possible pay its employes by giving orders for purchases on its account with them. This explains the provision in the above contract for taking up \$150 of it in trade.

In September, 1912, Mrs. Wills, desiring some furniture, went to the Anzeiger office and requested the name of a dealer with whom the Anzeiger had an account, and, being referred to the appellant, they gave her an order on their printed form reading as follows:

"Louisville Anzeiger Office, Louisville, Ky., Sept. 23, 1912. Messrs. United Furniture

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 19, 1914.

Co.: Please let bearer, Mr. E. G. Wills, have furniture, charge the same to our account, and hand bill for same to the buyer. Louisville Anzeiger Co., per H. B."

She was told the order would be good for \$18, and with it she went to appellant's store and selected \$18.50 worth of furniture. Upon inquiry, she told appellant it would be cash, and asked them to deliver it to her home. Of course appellant understood by this that she intended to pay cash, or at least its equivalent, and that the item was not one for charge, or on installments, and this no doubt affected the prices named for the goods. She did not tell them that payment would be made by this Anzeiger order, and everything in this case indicates that she did not know that it made any difference, for, to her, the order was as good as cash, and many others just like it, issued by the Anzeiger to its other employes, had been accepted and treated as cash by appellant before this.

She was at home when the deliveryman reached there, and, when the furniture was unloaded and set in place, she gave him the order. Knowing that the Anzeiger account against appellant was only \$18, she does not explain why she did not pay the deliveryman the 50 cents in addition to this order when he gave her a receipted bill for \$18.50. Anyhow, when the deliveryman went to the store and handed in the order, appellant's manager, Hardesty, said it was not right, and he would not take it, and sent the deliveryman back to either get the money or the furniture. Mrs. Wills refused to give up the furniture, but told him the order was as good as gold, and offered him the 50 cents additional, which she says she intended to pay him in the first place, and told him to take the order to the Anzeiger office, where it would be made good. Shortly afterwards Hardesty sent another man, his collector, to see Mrs. Wills, with instruction to either get the furniture or the money, and substantially the same conversation ensued as above related. Mrs. Wills then went down to the Anzeiger office, and told Col. Cohn, the Anzeiger owner, what had occurred, and he told her the order was all right, and to keep the furniture. Immediately Hardesty and the Anzeiger people got into communication. Hardesty was informed that the order was all right; but Hardesty insisted that his company did not owe the Anzeiger anything. The Anzeiger people say it was the first time they knew the account was disputed, and the correctness of the account, together with the means used by Hardesty to verify it before he swore out the warrant, are the vital points in this case, for his defense is that he made a full, fair, and complete statement of the whole transaction to his attorneys, and, upon their advice, he swore out the warrant. He swears, as do also his attorneys, that he told them that his company did not owe the Anzeiger one cent, but, on the con-

trary, the Anzeiger was indebted to his company. But he did not tell his attorney that he knew the Anzeiger was claiming a balance of account against his company. So it is clear, if the claim of the Anzeiger is true, Mr. Hardesty did not make to his attorneys either a true or a full statement.

As will be noted above, the advertising contract was made in January, 1911, by a former manager of appellant company. Hardesty took charge July 1st of that year. It is evident from his testimony that no account was left with him of this advertising contract by the former manager. He has no tangible proof to rebut the claim of the Anzeiger; while the Anzeiger account is thoroughly established by its books, and the testimony of its employes in charge thereof. There had never been a complete settlement of the Anzeiger accounts for the year 1911, and, if Hardesty ever knew it, he had overlooked the fact that his company owed the Anzeiger for numerous items of extra printing and advertising. Since these transactions were under the former management of his company, he perhaps was ignorant of them, although he admits that he knew the Anzeiger was claiming a balance against his company. When this order was turned in to him by Mrs. Wills, he conceived the idea that she had entered into a conspiracy with the Anzeiger to fraudulently collect of him an unjust claim, and, she being unwilling to return the furniture, he determined, as he says, on the advice of his counsel, to have her prosecuted for thus defrauding and imposing upon him.

[1, 2] The law is well settled that the advice of counsel, when obtained on a full and true statement of the facts, is a defense to an action like this, however erroneous the advice may be; but, if he has not fully and fairly related the facts to his counsel, then the advice cannot be said to be upon his case, and therefore cannot serve as a shield to him in it. The case of *Gatz v. Harris*, 134 Ky. 550, 121 S. W. 462, involved a similar question, and we there said: "Advice of counsel is not a defense, in an action for malicious prosecution, unless the facts are fully and fairly laid before the counsel. If the real facts are not laid before the counsel, his opinion is no defense to an action for malicious prosecution. *Crawford v. Keyser*, 5 Ky. Law Rep. 694; *Burke v. Rhodes*, 13 Ky. Law Rep. 431; *Anderson v. Columbia Finance & Trust Company*, 50 S. W. 40, 20 Ky. Law Rep. 1790; *Ahrens & Ott Mfg. Co. v. Hoeher*, 106 Ky. 692, 51 S. W. 194, 21 Ky. Law Rep. 299. In addition to this, the advice of counsel will constitute probable cause only when reasonable diligence is used to learn the facts on which the advice of counsel is sought. In the case last referred to the court said: 'He who consults an attorney about a matter affecting a third person ought to use that care which men of

ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith. Of course it is absolutely necessary in questions of this sort that people should act upon the advice of counsel; but they must exercise in doing so reasonable care to get the truth before the counsel."

The proof in the case, we think, thoroughly establishes the account of the Anzeiger against appellant; but, had it been a matter of doubt, there was abundant evidence to submit the question to the jury.

As to whether in this and other regards appellant made a full statement to his attorneys, the court instructed the jury that they should find for the defendants, appellants here, if they believed that, before suing out the writ, Hardesty was advised by his counsel to take the step after he had made to them "a fair, full, and true statement of the facts relating to said charge against the defendant."

[3] Appellants also complain that the court failed to tell the jury what constituted probable cause, and cites the case of Ahrens & Ott v. Hoeher, 106 Ky. 697, 51 S. W. 196, 21 Ky. Law Rep. 299, where the court said: "The court should have instructed the jury that there was probable cause in this case if appellant's agent, when he instituted the criminal proceeding, believed, and had such grounds as would induce a man of ordinary prudence to believe, that appellee had entered into a conspiracy with Link or Zeutalus to get illegally their secret process of enameling."

Placing upon the facts the most favorable construction for appellants, and accepting their theory that there was an effort here between Mrs. Wills and the Anzeiger to procure the furniture in payment of a disputed or unjust account, it leaves but one fact, and a very simple one, to be determined, and that is whether appellant did owe the Anzeiger the \$18. If appellant owed that debt, then they did not have probable cause for suing out the warrant. In this view of the case we think the lower court properly instructed the jury when it told them "probable cause means such cause as would induce a reasonably prudent person to believe that the plaintiff was guilty of the charge of obtaining goods under false pretenses."

[4] Appellants also complain of improper conduct on the part of appellee's counsel in his argument to the jury. This was made one of the grounds for a new trial; but the argument of counsel complained of is not made a part of the bill of exceptions, and we therefore cannot say whether it was prejudicial.

Some other matters of practice, and the introduction of witnesses, and the competency of their evidence is complained of; but we are unable to see that appellant has been

in any wise prejudiced by the rulings of the lower court with respect to them, even if they were erroneous.

On the whole case we think the trial was fair, and the jury's verdict reasonable, and the judgment is therefore affirmed.

## MORGAN v. MORGAN.

(Court of Appeals of Kentucky. May 13, 1914.)

### 1. PRINCIPAL AND SURETY (§ 194\*)—RIGHT OF SURETY TO DEMAND CONTRIBUTION—ESTOPPEL.

While a surety, who misleads his cosurety, preventing him from taking steps against the principal to protect himself from loss, is estopped to claim contribution, this estoppel arises only in case the principal was solvent and the cosurety has lost some advantage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605-623; Dec. Dig. § 194.\*]

### 2. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY—EVIDENCE.

An instruction, in an action by a surety to compel his cosurety to contribute, based on the rights of the sureties in case the principal was solvent, is erroneous, where the principal was insolvent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Whitley County.

Action by Mat H. Morgan against Henry L. Morgan. From a judgment for defendant, plaintiff appeals. Reversed.

R. S. Rose, of Williamsburg, for appellant. Tye & Siler, of Williamsburg, for appellee.

MILLER, J. On April 4, 1910, George Morgan executed his note to Rains for \$505.70, payable eight months thereafter, with the appellant, Mat H. Morgan, and the appellee, Henry L. Morgan, as sureties thereon. In April, 1911, Mat H. Morgan paid the note, and in September, 1912, he instituted this action to recover from Henry L. Morgan, his cosurety, one-half of \$505.70, the amount of the note. The petition alleged, among other things, that George Morgan, the principal, was insolvent continuously from the time he executed the note up to and including the time the suit was brought, in September, 1912.

In the first paragraph of his answer Henry Morgan traversed the allegations of the petition. The second paragraph of the answer pleaded an estoppel by alleging that prior to the payment of the note in question Henry Morgan said to Mat Morgan, the plaintiff, that they should take steps against the principal, George Morgan, to secure themselves from loss as sureties on the note; that thereupon the plaintiff, Mat Morgan, said to the defendant that he, the plaintiff, owed George Morgan a store account for more than \$230, and that he guessed he would have to pay the note in question; that shortly thereafter the plaintiff told the defendant that he, the plaintiff, had paid the note in full with money



belonging to George Morgan, and which he had realized as profits in a timber deal; that between the time the note was paid and the suit was brought the plaintiff had paid to the defendant over \$700 to cover indebtedness due defendant, without making any claim whatever that defendant was indebted to him; that, but for said statements and conduct of the plaintiff, the defendant could and would have taken legal steps against George Morgan, and in that way would have secured himself from loss, but that the plaintiff by his said statements and conduct had caused the defendant to do that which he would not otherwise have done; that plaintiff made said statements for the purpose of having the defendant act thereon; that defendant in good faith relied upon the statements so made by the plaintiff, and that by reason of said acts the plaintiff was estopped from claiming that defendant was indebted to him in any sum by reason of his cosuretyship upon said note.

The court overruled a demurrer to the second paragraph of the answer, and a reply was thereupon filed, making an issue. That issue was submitted to the jury, and, it having found for the defendant, the plaintiff appeals.

It is insisted that, since the second paragraph of the answer alleges that plaintiff paid the \$700 on other matters separate and distinct from the note, it has nothing whatever to do with this case, and is no defense to plaintiff's action, and that the further allegation that defendant would have taken steps against George Morgan, and would have secured himself against loss, without stating what steps he would have taken, or what steps he was thereby induced not to take, is wholly insufficient to constitute a charge of estoppel against the plaintiff. The same criticism is made of the allegation that defendant was misled into doing what he would not otherwise have done, there being no allegation that he would have done any specific thing.

Appellant further contends that, in order for the second paragraph of the answer to be good against the demurrer, it should not only have alleged that he was misled to his prejudice by the statements of the plaintiff to the effect that he owed George Morgan enough to pay the note, but he should further have alleged that George Morgan, the principal in the note, was solvent at the time defendant claims to have refrained from taking action against him, and that it must have alleged facts showing that he could and would have protected himself at the time the alleged misleading statements were made.

[1] These criticisms of the answer are well founded. The only allegation of the second paragraph thereof which amounts to an estoppel against appellant is the statement attributed to him that he had in his hands or possession money belonging to George Morgan sufficient to satisfy the note sued on,

and that he would pay said note out of said sum if appellee would not enforce the collection of the note against George Morgan. But the availability of this plea of estoppel was dependent upon the solvency of George Morgan at the time, since, if George Morgan was insolvent, appellee could not have protected himself by taking legal proceedings against him.

It is conceded that appellant has paid the note, and that appellee has paid nothing thereon. The court instructed the jury to find for the appellant, Mat Morgan, unless it should believe from the evidence that, while George Morgan was solvent, Mat Morgan made the statement to Henry Morgan last above referred to, about paying the debt out of money in his hands belonging to George Morgan, and that Henry Morgan relied upon said statement and failed to prosecute the claim. The instruction is a correct statement of the law, but it was not authorized by either the pleadings or the proof. As above stated, the plea in estoppel was not available, unless it showed the solvency of George Morgan, and in this respect the second paragraph of the answer was insufficient. The demurrer thereto should have been sustained.

[2] Furthermore, there is no proof that George Morgan was solvent at any time after he executed the note sued on; on the contrary, only one witness testifies upon that subject, and he says that George Morgan was insolvent at all times. The instruction was therefore erroneous, since a verdict for the defendant was predicated upon the solvency of George Morgan. Under the proof, which shows beyond question that George Morgan was insolvent at all times, appellee could not have been prejudiced by any statement that induced him to refrain from taking legal steps against George Morgan, since no legal steps could, under the circumstances, have availed him anything.

Under the pleadings and the proof, there should have been a peremptory instruction for the jury to find for the plaintiff; and if, upon another trial, the evidence is the same, the trial court should so rule.

Judgment reversed, for further proceedings consistent with this opinion.

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WHITSON v. AMERICAN BRIDGE CO. OF  
NEW YORK.

(Court of Appeals of Kentucky. May 12, 1914.)

1. MASTER AND SERVANT (§ 276\*)—INJURIES  
TO SERVANT—ACTIONS—EVIDENCE.

In a personal injury action by a bridge carpenter, hurt while carrying ties to the skids where they were fashioned, evidence held insufficient to show that he was injured while performing services outside of the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. MASTER AND SERVANT (§ 107\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A bridge carpenter, who was required to assist in carrying ties to the place where they were fashioned, cannot recover for an injury received when a fellow worker stumbled over a post projecting out of the ground and threw a tie upon him, for, while a master is bound to use ordinary care to furnish his servants a reasonably safe place to work, he is not an insurer, and servants employed out in the open are bound to observe the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by William E. Whitson against the American Bridge Company of New York. From a judgment for defendant, plaintiff appeals. Affirmed.

Taylor & McKee, of Louisville, E. C. Hughes, of Charlestown, Ind., H. W. Phipps, of Jeffersonville, Ind., and Chapeze & Crawford, of Louisville, for appellant. J. H. McChord, and Humphrey, Middleton & Humphrey, all of Louisville, for appellee.

CLAY, C. In this action for damages for personal injuries by plaintiff, William E. Whitson, against defendant, American Bridge Company of New York, the trial court, at the conclusion of plaintiff's evidence, directed a verdict in favor of defendant. Plaintiff appeals.

Plaintiff was injured under the following circumstances: Defendant was engaged in constructing a railroad bridge across the Ohio river between Louisville, Ky., and New Albany, Ind. Plaintiff was in defendant's employ as a carpenter, and had been so engaged for a month or more. On October 24, 1911, the day preceding the accident, he had assisted three other carpenters, Dempsey, Dugan, and Underwood, in making skids on which the railroad ties were to be hewn and shaped for use. The next morning he was engaged for a while in adzing the ties upon the skids. About noon the foreman, Dempsey, directed plaintiff to assist him and the other two carpenters in carrying the ties from a pile in which they were placed to the skids, a distance of from 40 to 60 feet. Two of these ties were carried in safety. About six or eight feet from the nearest skid was the stump of a fence post, about six inches high. In carrying the third tie plaintiff and Dugan were holding the front end, while Dempsey and Underwood were in the rear. In some way Dempsey stumbled over the fence post, thus causing the tie to be thrown against plaintiff's side, and thereby inflicting the injuries of which he complains.

[1] Plaintiff appears to concede that Dempsey, the foreman, while actually engaged in carrying the tie, was a fellow servant of plaintiff, and was not performing any act as vice principal, for the negligent performance of which the master would be liable.

He predicated his case on the failure of defendant to use ordinary care to provide him with a reasonably safe place to work. Some stress is put on the fact that plaintiff was called from his regular duties to perform other duties outside of the scope of his employment. The evidence, however, does not justify this conclusion. It shows that plaintiff, like the others, was a carpenter, and that all these carpenters were called upon to assist, and actually did assist, not only in making the skids, but in carrying the ties to the skids for the purpose of putting them in proper shape. So far as the record shows, the carrying of the ties to the skids was as much a part of the duties of the plaintiff and of the other carpenters as the shaping of the ties after they were placed on the skids. In the absence of evidence to the contrary, it must be assumed that plaintiff, at the time of the accident, was performing a service contemplated by the terms of his employment, and was therefore acting within the scope of his employment.

[2] It is well settled, of course, that the master is under the duty of using ordinary care to furnish his servants a reasonably safe place to work, and that the servant does not assume the risk of dangers arising from the master's failure of duty in this respect, unless he knows of the danger, or it is so obvious and patent as to charge a person of ordinary prudence with notice of it. Ashland, etc., v. Wallace's Adm'r, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. Law Rep. 849; Ky. Freestone Co. v. McGee, 118 Ky. 306, 80 S. W. 1113, 25 Ky. Law Rep. 2211. Following this rule, masters have been held liable for injuries to their servants resulting from failure to light their buildings properly (The Saratoga [D. C.] 87 Fed. 349; H. C. Akeley Lumber Co. v. Rauhen, 58 Fed. 668, 7 C. C. A. 424; Sawyer v. Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260), for negligence in leaving open and unprotected hatchways, trapdoors, etc. (Davies v. Oceanic Steamship Co., 89 Cal. 280, 26 Pac. 827; McDonnell v. I. C. R. R. Co., 105 Iowa, 459, 75 N. W. 336), and for a failure to keep in a safe condition floors, stairways, roofs, ceilings, and the walks or ways about the premises (Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370; Ferris v. Hershheim, 51 La. Ann. 178, 24 South. 771; Engstrom v. Ashland Iron, etc., Co., 87 Wisc. 187, 58 N. W. 241; Sledentop v. Buse, 21 App. Div. 592, 47 N. Y. Supp. 809; U. S. Rolling Stock Co. v. Weir, 96 Ala. 396, 11 South. 436; Powers v. Standard Oil Co., 53 S. C. 358, 31 S. E. 276).

The master, however, is not an insurer of the safety of the servant. He is not required to take precautions against every possible accident, however improbable or unlikely its occurrence. He is only bound to use reasonable care in guarding against such accidents as may be anticipated by a person of

ordinary prudence. Whether or not a place is reasonably safe varies with the character of the work and the circumstances of its performance. A hole or obstruction in the floor of a building might render it unsafe for an employé who had the right to use the floor and to assume that the master had made it reasonably safe, whereas the same hole or obstruction on the ground, where the light was abundant, might not render the premises unsafe for a carpenter whose work was necessarily of such a character as to require him to take notice of those things which were right before his eyes. Thus it will not be contended that the master is under the primary duty to see that every space in the building is covered, or that every obstruction is removed from the pathway of a carpenter engaged in the construction. From the very nature of the work there will be openings through which he may fall, or obstructions with which he may come in contact. If the carpenter is at work on the ground, he may come in contact with a tool box or bench, a step, a fence, or a piece of timber. The master's duty to furnish the carpenter a reasonably safe place to work does not require him to cover up such openings or remove such obstructions which are necessarily incident to the work so that the carpenter cannot fail to see them except by his own neglect. So, too, where the carpenter is engaged in bridge construction, and is at work on the ground carrying and preparing timbers to be used in the bridge, there will necessarily be inequalities in the ground and obstructions in his way to which he cannot close his eyes. Here there was no obstruction in a beaten pathway along which the carpenters were required to go. They simply passed over the rough ground in carrying the tie from the pile to the skids. It would be carrying the safe place doctrine too far to say that, under these circumstances, the master was required to see that every slight depression in the earth was filled; that every tie or other piece of timber was moved out of the way; that every rock was removed; or that every broken fence post was taken up. The obstruction not being concealed, and the work being performed in the broad daylight, the master has a right to assume that the servant will see, and the law imposes upon the servant the duty to see, such obstructions as are open and obvious to any person making use of his own eyes. *Williams v. L. & N. R. R. Co.*, 111 Ky. 822, 64 S. W. 738, 23 Ky. Law Rep. 1124; *Bailey on Master and Servant*, p. 826; *American Tobacco Co. v. Adams*, 137 Ky. 414, 126 S. W. 1067; *Harper v. I. C. R. R. Co.*, 131 Ky. 225, 115 S. W. 198; *Lee v. C. & O. Ry. Co.*, 38 S. W. 509, 18 Ky. Law Rep. 829.

We therefore conclude that the trial court properly instructed the jury to find for the defendant.

Judgment affirmed.

## CHESAPEAKE & O. RY. CO. v. FORD.

(Court of Appeals of Kentucky. May 12, 1914.)

### 1. TRIAL (§ 178\*)—DIRECTED VERDICT.

Upon motion for a peremptory instruction for defendant, plaintiff's evidence, as well as every inference fairly deducible therefrom, is taken to be true.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

### 2. MASTER AND SERVANT (§ 306\*)—MASTER'S LIABILITY—INJURIES TO THIRD PERSONS—WILLFUL ACTS.

The master is liable for the willful and malicious acts of his servants done in the course of the employment and within the scope of the servant's authority, but is not liable for acts outside of the scope of the servant's authority, as where he steps aside to accomplish some purpose of his own.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1230-1232; Dec. Dig. § 306.\*]

### 3. RAILROADS (§ 392\*)—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.

A railroad company was not liable for the act of trainmen in maliciously throwing scalding water upon plaintiff from the engine while he was walking along the right of way; the act not having been performed in the discharge of any duty which the trainmen owed to the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 902-909; Dec. Dig. § 392.\*]

Appeal from Circuit Court, Floyd County.

Action by William Ford against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Worthington, Cochran & Browning, of Maysville, Harkins & Harkins, of Prestonsburg, and F. T. D. Wallace, of Ashland, for appellant. May & May, of Prestonsburg, for appellee.

HANNAH, J. William Ford sued the Chesapeake & Ohio Railway Company in the Floyd circuit court to recover damages for injuries received by him, alleging that, as he was walking along on the defendant company's right of way in a peaceable and orderly manner; and in no way interfering with the servants of the defendant company in the operation of its trains, the servants of said company in charge of one of its locomotives unlawfully and maliciously threw upon the plaintiff hot water through a hose attached to said locomotive, thereby scalding and severely injuring him.

Upon a trial of the action, the jury returned a verdict in favor of the plaintiff in the sum of \$300, and defendant company appeals.

It is contended by appellant that the court erred in overruling its motion to instruct the jury to find a verdict for it, for the reason that the weight of the evidence shows conclusively, it is claimed, that water of sufficiently high temperature to cause the injuries claimed to have been received by the plaintiff could

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not be drawn from the locomotive in such place and manner as to have made it possible for the defendant's servants to have inflicted upon the plaintiff the injuries in question in the manner testified to.

Plaintiff testified that he was part owner of a barber shop at Auxier, a mining town in Floyd county, on defendant's line of railroad, and he lived about a quarter of a mile below Auxier; that he closed his shop about 7:30 p. m. on the night of September 2, 1912, to go to his home; that he was carrying a lighted lantern, and proceeded down a side track some little distance, and then crossed the defendant's main line about 40 feet in front of a freight train which was standing on the main line preparing to start in the direction from which he had come. As he was walking alongside the track, and just as he had passed the cab of the locomotive and had reached a point near the rear end of the tender, he was struck by a stream of water, which knocked him down. He heard some one in the cab say: "Now, damn you, keep off of there." He further testified that they continued to throw this stream of water on him after he was knocked down and while he was down; but, owing to the protection afforded by a rubber coat which he had on, he was scalded only on one leg, which was not covered by the coat. He said that just before he passed the cab of the locomotive one of the trainmen climbed into the cab from the ground. Plaintiff also showed by a witness who came up to him just after the train pulled out that said witness removed plaintiff's shoe and found his left leg severely scalded. He also proved the extent of his injury by the physician who treated the wound.

Defendant company showed by the train crew of the train which was at Auxier about 7:30 p. m. on the night of September 2, 1912, that none of them knew plaintiff or saw him at the time he claimed he was injured; that none of them threw water upon him, or knew anything at all about his being injured. It was also attempted to be shown by the train crew that water hot enough to scald a man and to produce the injuries which plaintiff showed had been received by him could not be drawn from a locomotive in such manner or from such place as would have made it possible for any of the crew to have thrown it upon plaintiff in the manner testified to by him.

[1] Appellant's counsel contends that, upon the weight of the evidence, the court should have directed the jury to find a verdict for it. Upon the motion for peremptory instruction, however, the evidence for plaintiff is admitted to be true, as well as every inference fairly deducible therefrom; and, under his evidence, if the act of throwing the hot water upon him were one for which the law afforded plaintiff a right of action against the employer of the servants who maliciously

injured him, the motion would have been properly overruled.

But the real question involved upon the motion for a peremptory instruction is whether the act of the servants of the railway company in throwing the water upon the plaintiff and thereby injuring him was committed in the course of the employment and within the scope of the authority of such servants.

[2] 1. The master is liable for the willful and malicious acts of his servants where such acts are done in the course of the employment and within the scope of the authority of such servants; but, where the servant does a willful or malicious act while engaged in working for the master, but outside the scope of his authority, as where he steps aside to accomplish some purpose of his own, the master is not liable therefor.

In the case of *Willis v. Maysville & Big Sandy Railroad*, 122 Ky. 658, 92 S. W. 604, 29 Ky. Law Rep. 178, 13 Ann. Cas. 74, a boy standing in the public street in Greenup was struck by a piece of ice kicked by a brakeman from the platform of the caboose of a passing freight train. In that case, the evidence showed that it was the duty of the brakeman to keep the caboose in proper order; and the court held that he was therefore within the scope of his authority in removing the ice from the platform of the caboose, where it constituted an obstruction to the use thereof by the trainmen, and where, by melting, it was likely to render the platform slippery and unsafe; and that, as the servant was acting within the scope of his authority, the plaintiff was entitled to recover.

In the case of *L. & N. v. Eaden*, 122 Ky. 818, 93 S. W. 7, 29 Ky. Law Rep. 365, 6 L. R. A. (N. S.) 581, the plaintiff was standing upon the right of way of the railroad company, and the fireman upon the locomotive of a passing train threw a shovelful of burning coals into her face. In that case, this court held that, as the fireman was engaged in discharging a duty which he owed to his employer in throwing out the coals, if he had knowledge of the presence of the plaintiff by the side of the track, the company would be liable. The court said: "We do not think this case is controlled by the principle enunciated in *L. & N. v. Routt*, 76 S. W. 513, 25 Ky. Law Rep. 887, and *Sullivan v. L. & N.*, 115 Ky. 447, 74 S. W. 171, 24 Ky. Law Rep. 2344, 103 Am. St. Rep. 330. In both of these cases it was distinctly held—and it was the turning point in the opinions—that at the time the injury complained of was inflicted the employees were not in the exercise of any duty they owed to their employers."

In the case of *Sullivan v. L. & N.*, supra, the foreman of a switching crew in the Louisville yards found a torpedo in the tool box on the locomotive. As a prank, he placed it on the track in front of the locomotive, which, passing over it, exploded it, injuring

Sullivan, a member of the crew. It was conceded in that case that the switching crew had no occasion to use torpedoes in its work, and that the use of the torpedo which caused the injury was entirely without the line of the foreman's duty. The injured switchman sued to recover damages for the injury; the lower court peremptorily instructed the jury to find for the defendant company; and, upon appeal, the judgment was affirmed, this court saying: "The best-considered and most numerous authorities do not draw the line at whether the servant is using his master's property when inflicting the injury in question, but whether he is then representing the master in the act and in the scope of his employment. The reason the master is liable at all for the act of his servant is because the servant is acting in that matter in the master's stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by the master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine is too well known to require now the citation of authority to support it. But, where the servant steps aside from the employment, and assumes to act, and does act, solely on his own account, in a matter with which the master has no more connection than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it; for in doing that act, the servant, so called, was absolutely his own master."

In the case of *L. & N. v. Routt*, supra, it was shown that Routt was walking along a path on the right of way of the railroad company, when the fireman upon the locomotive of a passing train purposely and maliciously threw a lump of coal, and struck Routt, and injured him. In reversing a judgment obtained by him, and denying him a recovery, this court said that it would be difficult to imagine a case where the facts more clearly showed that the servant was acting in his own behalf, and in no sense for the master. This, it seems to us, is conclusive of the case at bar.

[3] Here the evidence for the plaintiff shows that the throwing of the scalding water upon plaintiff was done intentionally and maliciously, and there is no evidence or claim by plaintiff that that act was performed by the company's servants in the discharge of any duty which they owed to the master.

In *C. N. O. & T. P. Ry. Co. v. Rue*, 142 Ky. 694, 134 S. W. 1144, 34 L. R. A. (N. S.) 200, it is said: "It goes without saying, although not shown by the evidence, that the train crew had authority to eject passengers from the train and to prevent them from riding thereon; for such authority arose by implication from their being in charge of the

train under employment by appellant, the owner. A freight train does not, as a rule, carry passengers, and any person who rides" thereon "without the consent of those in control of it becomes a trespasser, and may, for that reason, be summarily ejected therefrom, without unreasonable force. \* \* \* But, if the servants in charge of the train in removing the trespasser should use unnecessary or unreasonable force and thereby inflict injury upon him, the master would in such case be liable for the injury, because, the servant being possessed of the authority to remove the trespasser in a proper manner, his wrongful exercise of such authority, resulting in the injury, would bring the act within the scope of his employment."

And so, if the plaintiff in the case at bar had been on the freight train, or attempting to board it, and the railway company's servants, in an effort to prevent his boarding the train, or in an effort to eject him after he had boarded it, had thrown the scalding water upon the plaintiff and thereby injured him, the company would be liable for such act, upon the ground that it was an act performed within the scope of the authority of the servants in question.

But, it is not shown in the record, and the court, in the absence of evidence to that effect, will not presume, that those in charge of a freight train are charged by the company with any duty of driving trespassers off of the right of way. Had such duty been proven, and had the servants of the company, in the discharge of that duty, thrown the hot water upon the plaintiff and thereby injured him, the company would be responsible for the act.

If plaintiff had been in a place where he had a right to be, and it had been the duty of the company's servants upon the locomotive to have thrown the water, and the servants had negligently performed that duty, and thereby injured plaintiff, or if such servants, in the performance of their duty, had intentionally and maliciously thrown hot water upon plaintiff and thereby injured him, the company would be liable, even though plaintiff may have been a trespasser. But there is no claim by the plaintiff that any duty was being performed by the company's servants at the time they threw the hot water upon plaintiff; in fact, all the evidence for plaintiff goes to show, upon the part of such servants, a willful and deliberate departure from the course of their employment, and the performance by them intentionally and willfully of an act wholly without the scope of their authority; and, under this state of fact, the lower court erred in overruling the motion of defendant to direct the jury to find a verdict for it.

The only instruction given by the court for the plaintiff directed the jury to find for plaintiff if they believed from the evidence that plaintiff, "while walking along on the right of way of defendant company in a

peaceable and orderly manner, and not interfering with the company's servants in the operation of the train, was injured by the servants of defendant company wrongfully, unlawfully, and maliciously throwing hot water upon him."

If there had been evidence to authorize an instruction upon the theory that defendant company's servants were acting within the scope of their authority, and such instruction had been given, then the instruction that was given by the court would have been proper if changed so as to direct the jury to find for defendant, instead of plaintiff, if they believed as stated in this instruction.

Judgment reversed.

### HALL et al. v. GLEASON.

(Court of Appeals of Kentucky. May 12, 1914.)

#### 1. CORPORATIONS (§ 368\*)—DIRECTORS—LIABILITY—DISCHARGE OF OBLIGATION—CONTRIBUTION.

Where defendant and the other directors executed a note to obtain a loan for the corporation, and the corporation, being insolvent, defaulted in payment, defendant cannot escape his liability for contribution, where the other directors, out of their personal funds, deposited to the credit of the corporation an amount sufficient to pay the note which was discharged with the corporation's check, for the actual transaction was a payment of the note by the directors, who were in reality only sureties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1509; Dec. Dig. § 368.\*]

#### 2. PRINCIPAL AND SURETY (§ 194\*)—RIGHT TO CONTRIBUTION.

Where sureties, who paid off the obligation of their principal, were given a worthless mortgage, they are entitled to a contribution against a surety who did not pay his share; it appearing that the principal was insolvent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605-623; Dec. Dig. § 194.\*]

Appeal from Circuit Court, Scott County.

Action by Buford Hall and others against William Gleason. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

L. F. Sinclair, of Georgetown, for appellants. James Bradley, of Georgetown, for appellee.

CARROLL, J. In December, 1911, the appellants, Hall, Lancaster, Anderson, Gano, Sublett, and the appellee, Gleason, executed jointly a promissory note to J. B. Graves for \$6,000. Graves brought suit on this note, and in January, 1913, obtained a judgment against the appellants for the principal sum and accrued interest. At the time this suit was brought, Gleason was a nonresident of the state, and for this reason judgment was not taken against him.

Shortly after the judgment was rendered, the appellants, claiming that they had satisfied the judgment, brought this suit against Gleason to recover one-sixth of the amount

that they had paid in satisfaction of the judgment. The suit was brought on the theory that Gleason was jointly and equally bound with them on the note; as they had paid it, he owed them his proportionate part of the amount paid. In an amended petition they averred that the Lancaster Hotel Company was the principal in the debt to Graves, as the money was borrowed for its use and benefit, and that the parties who signed the note were, as between themselves, merely sureties for the hotel company. They further averred that at the time the money was borrowed from Graves, and at all times since, the hotel company was wholly insolvent.

For answer to this suit Gleason admitted the execution of the note, but set up that it was executed under the following conditions: That the Lancaster Hotel Company, a corporation, desired to borrow \$6,000 from Graves, who declined to lend it any money or to accept any note on which the name of this company appeared; that thereupon the appellants and himself, who were stockholders and directors in the corporation and owned all of its stock except 20 shares, executed the note and borrowed the money from Graves, which was deposited in bank to the credit of the hotel company and used by it in discharge of its obligations. He further set up that, of the 350 shares of stock issued by the corporation, Lancaster owned 135, Anderson 100, Hall 25, Gano 25, Sublett 25, and himself 20; that the money was borrowed for the use and benefit of the hotel company, and it was liable to them for the amount of the debt. He therefore denied the right of the appellants to maintain an action against him for the contribution until they had prosecuted the hotel company to insolvency, which had not been done, and further averred that, if any part of the judgment remained unsatisfied after the hotel company had been prosecuted to insolvency, the appellants were only entitled to recover from him such proportion of the amount remaining unsatisfied as the number of shares of stock owned by him bore to the total amount owned by all of them. In other words, that he was only liable for  $\frac{2}{33}$  of the debt. In an amended answer, he denied that the appellants had paid any part of the debt to Graves, and averred that it was paid by the hotel company; that the hotel company borrowed from each of the appellants an equal amount of money aggregating the total amount due on the Graves judgment, and executed and delivered to each of them its promissory note for the amount each of them had advanced to it, and also executed to them a mortgage on its property to secure the payment of the debt; that the money to satisfy the Graves debt was paid by the appellants to the hotel company, and placed in bank to its credit, and Graves was paid the amount of his judgment by a check drawn by the company on the amount so

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

placed to its credit in the bank. Upon this state of facts he denied the right of the appellants to recover anything from him.

The Lancaster Hotel Company filed an answer to the pleading of Gleason, which had been made a cross-petition against it, and averred that the \$6,000 had really been borrowed for its use and benefit, and that the appellants had been compelled to satisfy the judgment. It denied that it borrowed from either of the appellants, or that either of them lent to it, any money for the purpose of satisfying the Graves judgment, but averred that the appellants, when they were called on to satisfy the judgment, had each contributed his share of the amount due, and deposited the total in a bank to the credit of the hotel company, and that the hotel company thereupon drew its check on this deposit, payable to Graves for the full amount of the judgment. It further averred its insolvency at the time the debt was created and at all times subsequent thereto. With reference to the mortgage executed by it to the appellants, it averred that the purpose of the mortgage was to secure them in so far as it could be done, but that it was provided in the mortgage that, in the event Gleason paid his proportion of the debt, the company would execute to him a mortgage of equal dignity and effect with the mortgage given to appellants and on the same property, so that he would be placed on an equal footing with them in the event anything could be realized on the mortgage.

For reply to the answer and amended answer of Gleason, the appellants restated in substance the facts set out in the answer of the hotel company and averred that, at the time the mortgage was executed to them, all the property of every kind and character of the hotel company had previously been mortgaged to secure other indebtedness of the company that far exceeded the value of the property and assets of the company; that, as a matter of fact, the mortgage executed to them was of no value because of the insolvency of the company and the existence of prior mortgages.

To this reply a demurrer was sustained, and, declining to plead further, the petition of the appellants for contribution was dismissed, and they appeal.

[1] Restating the substance of the transaction, it appears that the appellants and the appellee owned all the stock in the hotel company except 20 shares; that it was insolvent, and all of its property had been mortgaged to secure debts largely in excess of the value of its property; that, desiring to assist it, they borrowed from Graves \$6,000 for its use and benefit, and executed to him a note for that amount, upon which he secured judgment against all of them except Gleason; that the appellants, when they came to satisfy the judgment, in place of paying the money directly to Graves, deposited it in a

bank to the credit of the hotel company, and immediately the hotel company gave its check to Graves in satisfaction of the judgment, and thereupon the hotel company executed to the appellants a mortgage on all of its property for the purpose of securing them as well as it could on account of the sum they had paid Graves; that it was stipulated in the mortgage that, in the event Gleason paid his part of the judgment, a mortgage would be executed to him of equal effect and dignity with that executed to the others; that the mortgage executed to the appellants was worthless on account of the insolvency of the hotel company and the existence of prior mortgages on all the property of the hotel company to secure other debts largely in excess of the value of all of its property.

Upon this state of facts it is argued by counsel for Gleason that the appellants have not paid Graves anything; that, after the judgment against them was rendered, they lent a sum of money equal to the amount of the judgment to the hotel company, and it satisfied the Graves judgment, and thereupon executed a mortgage to the appellants to secure them for the sum they had lent to it.

We do not think there is much merit or substance in this defense. Under the facts stated, the mere form of the transaction is not to be regarded as controlling. It would, of course, have been simpler if these appellants had paid Graves directly the money, but the mere circumstance that they paid it to the hotel company, and the hotel company turned it over to Graves, does not, under the facts admitted by the pleadings, change the nature of the transaction. The money was in truth and in fact paid to Graves by them in discharge of the judgment, and the mere circumstance that it happened to be paid through the medium of the hotel company does not in any manner prejudice the rights of the appellants or operate to release Gleason from liability. The parties were merely sureties for the hotel company and handed their principal the money to give to Graves in place of paying it directly to him themselves.

[2] Nor does the fact that they took the mortgage mentioned from the hotel company diminish their right to contribution, as it is averred that the mortgage was worthless, and that it was not taken with any intention of satisfying the liability of the hotel company to them. *Atkinson v. Stewart*, 2 B. Mon. 348. Of course a surety cannot look to a cosurety for contribution until he has paid the debt, and not then, if the principal is solvent, as the insolvency of the principal and the payment of the debt must concur before a right of contribution accrues. *Daniel v. Ballard*, 2 Dana, 296; *Bolling v. Doneghy*, 1 Duv. 221; *Pearson v. Duckham*, 8 Litt. 385; *Poignard v. Vernon*, 1 T. B. Mon. 45. But under the pleadings both of these

prerequisites concurred before the action for contribution was brought.

Concerning the amount for which Gleason is liable, we express no opinion, leaving that to be determined when the case is prepared for trial on the merits; the only question before us on this appeal being the sufficiency of the reply, the truth of which we have treated as confessed by the demurrer.

Wherefore the judgment is reversed, with directions to overrule the demurrer to the reply, and for further proceedings not inconsistent with this opinion.

### KEETON v. SMITH.

(Court of Appeals of Kentucky. May 12, 1914.)

#### 1. SALES (§ 52\*)—ACTIONS—EVIDENCE.

In an action for the purchase price of goods which defendant claimed were sold to his son and not himself, evidence held sufficient to warrant a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

#### 2. APPEAL AND ERROR (§ 1062\*)—REVIEW—HARMLESS ERROR.

Defendant cannot complain of the submission of an issue of defense unsupported by the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

Appeal from Circuit Court, Whitley County.

Action by G. W. Smith against C. H. Keeton. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry C. Gillis, of Williamsburg, for appellant. H. L. Bryant, of Williamsburg, for appellee.

NUNN, J. This is an action in assumpsit for goods sold and delivered. The petition is in the usual form. Appellant answered, traversing all the material allegations, and upon trial the jury found for appellee \$225, the amount claimed.

[1] Appellant, C. H. Keeton, had a son named H. C. Keeton, referred to in the proof as Harry. Harry had been running an ice cream parlor in Williamsburg; his outfit had been sold by the sheriff in the fall of 1909. In the spring of 1910 appellant had in mind a plan to set his son up in business again with an ice cream parlor, and was making inquiry as to where he could find for sale suitable fixtures. Jellico, a nearby town, had gone "dry," and he heard of some bar-room fixtures over there that would answer the purpose. He sent his attorney in company with his son, Harry, to Jellico to inspect them, and received a favorable report. These fixtures belonged to one Brummett, and Brummett was indebted to the appellee Smith, who also lived in Jellico. Under an arrangement that Smith should get the proceeds of the sale of these fixtures for application on his debt, Smith was naturally in-

terested in their sale, and, hearing of the trip of appellant's attorney and son to Jellico, Smith went over to Williamsburg to see appellant about it. According to Smith's testimony, appellant offered to pay \$215, and the trade was practically closed there, if Brummett would agree to that price. Smith returned to Jellico, and, finding that Brummett insisted upon \$225, he called appellant by telephone, and so reported, and appellant replied, "Count that a deal, and ship the stuff." Under these instructions appellee had Brummett crate the stuff, cart it to the Jellico depot, and ship it to the appellant. The bill of lading showed that Brummett shipped the stuff, and from that fact, as well as the circumstances related above about Brummett's indebtedness to Smith, appellant insists that Smith was not the owner of the fixtures, and had no right to sell them. Smith's testimony is undenied that he bought the stuff from Brummett, and credited the debt accordingly, and that Brummett, in making the shipment, acted as his agent. Brummett does not claim the goods, nor the proceeds, and never has, although he surrendered possession of them more than two years before the trial. The theory of appellant's defense is that the goods were sold to his son, H. C. Keeton. From the similarity of appellant's name to that of his son, one might suppose a chance for mistake in identity, but no such question is raised. There is no evidence to show that the goods were sold to the son aside from the fact that the son has them in his possession, and has had practically ever since they were taken from the depot in Williamsburg, nearly two years before the suit was filed. The son does not testify. The father, appellant here, is the only witness in his behalf, and he merely denies the conversations that appellee, Smith, relates over the phone, and when Smith came to Williamsburg. He does not deny sending his attorney over to Jellico with his son to look at the stuff.

Appellant insists that there was no delivery, but we think this is untenable in the face of the fact that the goods were delivered to the carrier, and billed to him. If the jury believed appellee Smith's statement of the sale, then a delivery to the carrier was a delivery to appellant.

[2] Under the proof there was but one issue of fact, and that was whether the goods were sold to the appellant. The court instructed the jury properly on that question, and, although there was no proof of any sale to his son, the court submitted that question also to the jury, and they were told, if they believed the stuff was sold to the son, that they should find for the appellant. If the court on this theory of appellant's defense submitted an instruction to the jury when there was no proof to support it, it was more favorable to appellant than he had any



right to expect. There being but the one question, whether the sale was made to appellant, and the proof conflicting on it, we see no reason to disturb the finding of the jury when that question was fairly submitted to them.

The judgment is therefore affirmed.

# WELCH et al. v. IRVINE et al.†

(Court of Appeals of Kentucky. May 12, 1914.)

## 1. INTOXICATING LIQUORS (§ 40\*)—LOCAL OPTION.

Under the substantially direct provisions of the County Unit Law, enacted in 1906 (Laws 1906, c. 21), as amended by Laws 1912, c. 3, when a majority of the votes in a county in a local option election are cast against the sale of liquor, elections previously held in any city, town, or other subdivision authorizing the sale of intoxicants are annulled, so as to put the entire county under the County Unit Law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.\*]

## 2. INTOXICATING LIQUORS (§ 14\*)—LOCAL OPTION LAW—CONSTITUTIONALITY.

The County Unit Law (Laws 1906, c. 21), as amended by Laws 1912, c. 3, providing that, when an election is held in an entire county, and a majority of the votes cast are against the sale of intoxicants, it shall not be lawful to sell liquor in any part of the county, does not violate Const. § 61, requiring the General Assembly to provide a means for taking the census of the people of any county, city, precinct, etc., as to whether intoxicants shall be sold therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Jessamine County.

Election contest by M. P. Welch and others against W. S. Irvine and others. From a judgment for defendants, contestants appeal. Affirmed.

N. L. Bronaugh and John H. Welch, both of Nicholasville, for appellants. Everett B. Hoover, of Nicholasville, for appellees.

CARROLL, J. In April, 1911, an election was held in the city of Nicholasville to ascertain the will of the people upon the subject whether or not intoxicating liquors should be sold in the city, with the result that a majority voted in favor of the sale. In June, 1913, an election was held in the county of Jessamine, including the city of Nicholasville, to determine whether or not intoxicating liquors should be sold in the county, and at this election a majority of the voters in the county expressed themselves as being opposed to the sale of such liquors, although a majority of the votes in the city were cast in favor of the sale. The result as certified to by the election commissioners was contested by the appellants, who represent those favoring the sale of intoxicating liquors. The contest was dismissed by the contest board, and an appeal prosecuted to the cir-

cuit court. That court also sustained the validity of the election, and, from its judgment, this appeal is prosecuted.

On this appeal the only ground of contest urged relates to the validity of the act of 1906 (Laws 1906, c. 21), as amended by the act of 1912 (Laws 1912, c. 3) known as the County Unit Law, and we have been furnished by counsel for appellants with an able and interesting brief attacking this legislation as violative of the letter, as well as the spirit, of section 61 of the Constitution. If the argument were conceded, the result would be to leave unaffected the election held in the city of Nicholasville in 1911, and to permit it and other cities to control for themselves, independent of the wish of the county as a whole, the subject whether or not intoxicating liquors should be sold in the city.

[1] But under the County Unit Law the county controls all cities, towns, and political subdivisions in the county, and when, at an election held under this law, a majority of the votes in the county are against the sale of liquor, the effect is to annul elections previously held, no matter when, in any city, town, or other subdivision authorizing the sale of intoxicating liquors, and to put the entire county under the operation of the County Unit Law. Or, as expressed in the act: "When an election is held in an entire county and a majority of the legal votes cast at said election are against the sale, barter or loan of spirituous, vinous, malt or other intoxicating liquors, then it shall not be lawful to sell, barter or loan any such liquors in any portion of the county."

[2] The validity of this legislation first came before this court in the case of the Board of Trustees of New Castle v. Scott, 125 Ky. 545, 101 S. W. 944, 30 Ky. Law Rep. 894, and in that case it was expressly held to be within the power of the Legislature to enact a law making the county the controlling unit in elections to regulate the sale of intoxicating liquors. Since then the construction placed by the court in the Scott Case on section 61 of the Constitution has been approved in a number of cases, among which we may notice Eggen v. Offutt, 128 Ky. 314, 108 S. W. 333, 32 Ky. Law Rep. 1350; May v. Ferguson, 135 Ky. 411, 122 S. W. 208; Brown & Proctor v. Hughes, 141 Ky. 695, 133 S. W. 770; Edwards v. Porter, 141 Ky. 315, 132 S. W. 582.

The last deliverance of this court on the subject was in McAuliffe v. Helm, 157 Ky. 626, 163 S. W. 1091. In that case which presented a state of facts identical with this, it was earnestly contended, as in this, that the acts of 1906 and 1912 were violative of section 61 of the Constitution, as well as other sections of that instrument; but we said, in rejecting the argument: "In view, however, of the fact that the principle embodied in the act, and to which objection is now

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 19, 1914.

made, has been repeatedly approved by this court in cases wherein similar statutes have been upheld, we do not now deem it necessary to again go into that question."

This unbroken line of decisions has firmly established the power of the lawmaking department to enact the legislation here assailed, and it would serve no useful purpose to answer the arguments presented by reiterating what has been so often said by this court on this subject. The question sought to be reopened by counsel must be regarded as closed so far as this court is concerned.

The judgment appealed from is affirmed.

**BOREING et al. v. MELCON et al.**

(Court of Appeals of Kentucky. May 14, 1914.)

**1. VENUE (§ 5\*)—ACTION FOR SALE OF LAND.**

Where the joint owners of lands derive their title in some manner other than as heirs of the deceased person, the jurisdiction of an action for the sale of the land and a division of the proceeds, brought under Civ. Code Prac. § 490, subsec. 2, allowing such sale where the property cannot be divided without materially impairing its value, is governed by Civ. Code Prac. § 62, subsec. 3, which provides that actions for the sale of real property under sections 489-498 of the Civil Code of Practice must be brought in the county in which the subject of the action is situated.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. § 5.\*]

**2. PARTITION (§ 43\*)—VENUE OF ACTIONS—STATUTE.**

An action by some of the devisees of land to have the land sold and the proceeds divided, brought under Civ. Code Prac. § 490, subsec. 2, is an action for partition of such land by sale, and must be brought in the county where the personal representative qualified, under Civ. Code Prac. § 66, prescribing the venue of actions for partition of the real estate of a deceased person.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 107-110; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Harlan County.

Action by John R. Boreing and others against Mary L. Melcon and others for the sale of two tracts of land and a division of the proceeds. From a judgment awarding a sale of the first tract, but denying the sale of the second tract, plaintiffs appeal. Affirmed.

Clay & Carter, of Harlan, for appellants. J. S. Forester, of Harlan, for infant appellees. C. C. Williams, of Mt. Vernon, and H. J. Johnson, of London, for other appellees.

HANNAH, J. In 1903 Vincent Boreing died testate, domiciled in Laurel county, and his will was probated, and administrators with the will annexed were appointed and qualified therein.

On May 26, 1913, John R. Boreing, one of the children of Vincent Boreing, and a devisee under his will, instituted this action in

the Harlan circuit court against the other devisees under the will, seeking a sale and division of the proceeds of sale of two certain tracts of land in Harlan county, devised to them by the will of Vincent Boreing, which lands, it is conceded, are indivisible.

The guardian ad litem for two of the defendants, by an answer filed for them, questioned the jurisdiction of the Harlan circuit court to sell the second tract described in the petition and sought to be sold in this action, for the reason that on May 5, 1913, an action had been instituted in the Laurel circuit court by part of the devisees under said will against the other devisees thereunder, seeking the sale and division of the proceeds of the sale of a number of tracts of land situated in eight different counties, among said tracts being the second tract sought to be sold in this action in the Harlan circuit court.

Upon a trial, the chancellor adjudged a sale of the first tract in the petition described, but declined to order a sale of the second tract, which was included in the action instituted in the Laurel circuit court; and from that part of the judgment denying a sale of the second tract, the plaintiffs appeal.

[1] 1. This action is brought under subsection 2 of section 490 of the Civil Code, which permits the sale of real property jointly owned by two or more persons, in an action brought by either, though the plaintiff or defendant be of unsound mind or an infant, where the estate is in possession, and cannot be divided without materially impairing the value thereof, or the value of the plaintiff's interest therein. And, had the joint owners of the lands herein sought to be sold derived their title in some manner other than as heirs or devisees of a deceased person, the venue of the action would undoubtedly be governed and controlled by subsection 3 of section 62 of the Civil Code, which provides that actions for the sale of real property under title 10, c. 14, of the Civil Code (of which title and chapter section 490 is a part), must be brought in the county in which the subject of the action or some part thereof is situated.

[2] But this is an action brought by part against the other devisees under the will to sell the real estate devised under the will and divide the proceeds thereof among said devisees, upon the ground that partition by allotment in kind cannot be had because the property is indivisible. In other words, it is what might be termed an action for partition; but for partition by sale, rather than allotment in kind. An action for the partition of the real estate of a deceased person, under section 66 of the Civil Code, must be brought in the county in which the personal representative qualified. This, of course, refers to allotment in kind. And, if, to obtain an allotment in kind of the real estate of a deceased person, the action therefor

must be instituted in the county where the personal representative qualified, then an action to partition it by a sale and division of the proceeds of sale, upon the ground that the property is indivisible, must also be brought in the county where the personal representative qualified. To hold otherwise would be to say that, if a tract of land so owned were divisible, the action must be brought where the personal representative qualified; but, if not divisible, then the action must be brought in the county where the land is situated. Such is manifestly not the intent of the provisions of the Civil Code.

Nor do we consider the conclusion herein arrived at as being in conflict with *Perkins v. McCarley*, 97 Ky. 43, 29 S. W. 867, cited by appellant. In that case the testator died in Lincoln county, his administrator qualified therein, and his estate was settled, and all of the real property disposed of by the devisees, except one tract of land situated in Garrard county. Thereafter an action was instituted in the Garrard circuit court by part against the other joint owners of that tract of land to sell it and divide the proceeds among them; it being alleged that to partition it would materially impair its value. The court held that such action could be brought in Garrard county, as if the joint owners had not derived title under a will.

The case of *Phalan v. Louisville Safety Vault & Trust Co.*, 88 Ky. 24, 10 S. W. 10, 10 Ky. Law Rep. 663, is practically on all fours with the case at bar. In that case suit was instituted in the Louisville chancery court by part against the other heirs of one Sutfield, seeking the sale of lands owned jointly by them in Louisville, and in Henry, Oldham, and Hardin counties. The court said: "The only question is: Had the chancery court of Louisville jurisdiction of the entire realty, with the power to sell the land in Henry county [a part being in Oldham]? We think the subject of the action was the division of the proceeds of the land between the heirs on the ground that no allotment in kind could be made without impairing the value of each interest; that no step could have been taken in but one jurisdiction so as to give complete relief. In that jurisdiction the ancestor died, the children all lived, and much of the real estate was located; it was the jurisdiction to order the partition, and none other could have made the allotment. If so, we perceive no reason why the petition was not properly filed in the Louisville chancery court, setting forth the fact that no division could be made without impairing the value of the property, and asking a sale for reinvestment. The Code provides, concerning real property, that: 'Actions must be brought in the county in which the subject of the action or some part thereof is situated.' Now, the subject of the action here is the partition of the lands or its proceeds be-

tween these heirs, or rather a sale, as no division could be had without impairing the value of each child's interest; a part of the subject of the action being within the jurisdiction in which the relief is sought by the plaintiff against others equally interested. The jurisdiction was properly entertained, and it was not necessary for this guardian to have instituted separate suits in Hardin, Henry, and Jefferson counties, alleging the same state of facts in order to a division of the estate."

We think this the correct rule. A sale and division of the proceeds of sale, being merely a form of partition, and permissible when allotment in kind would result in impairing the value of the shares, where the parties claim as devisees, the action for sale and division of the proceeds of sale of property so owned, is governed by the same provision as to venue as an action for allotment in kind.

The Laurel circuit court, therefore, has exclusive jurisdiction of actions to sell the lands devised by Vincent Boreing and to divide the proceeds of such sales among the devisees; and the chancellor, in the case at bar, in the Harlan circuit court, properly declined to order a sale of the second tract in the petition described.

The Harlan circuit court had no jurisdiction to sell the first tract, but there was no plea to the jurisdiction of the court in respect to that tract, and only the plaintiff appeals from the judgment.

Hence the judgment is affirmed.

#### VINCENT v. HAYCRAFT.

(Court of Appeals of Kentucky. May 13, 1914.)

##### 1. LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF TIMBER—OWNERSHIP OF MAST.

Though a conveyance of land reserved to the grantor all of the timber thereon, which included beech trees, with the right to remove it within seven years, mast which grew on the beech trees and ripened and fell to the ground within that time belonged to the grantee, and not to the owner of the timber; the reservation contemplating the timber itself and not its incidental fruits.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

##### 2. LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF TIMBER.

A sale or reservation of timber to be cut and removed within a specified time conveys or reserves only so much thereof as may be cut and removed within that time.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

Appeal from Circuit Court, Edmonson County.

Action by S. R. Haycraft against Roscoe Vincent. From a judgment for plaintiff, defendant appeals. Affirmed.

M. M. Logan and Ora E. Hazelip, both of Frankfort, and Grider & Logan, of Brownsville, for appellant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CLAY, C. On March 31, 1908, Gillis Vincent conveyed to S. R. Haycraft a tract of land containing about 35 acres. The deed contained the following reservation: "The party of the first part reserves all timber upon the land herein conveyed with the free and unobstructed right to cut and remove same for the final period of seven years from this date." On July 20, 1911, Gillis Vincent sold and conveyed to Roscoe Vincent the timber growing upon the land which he had previously sold to Haycraft. On April 29, 1912, Haycraft sold and conveyed the land to Roscoe Vincent; the deed containing a provision to the effect that Haycraft was to have the use and possession of the land until January 1, 1913. The timber on the land consisted principally of beech trees. In the year 1912 there grew upon these trees a very large amount of mast, which is chiefly valuable as a food for hogs. The beech mast ripened and fell on the ground in the months of October and November.

[1] The question is: Who is the owner of the beech mast—Roscoe Vincent, who had acquired title to both the timber and the land, or Haycraft, who had retained the use and possession of the land until January 1, 1913? The court below held that the mast belonged to Haycraft. Roscoe Vincent appeals.

The argument for Vincent is, in brief, as follows: The reservation of the timber was a reservation of an interest in the land. Haycraft never acquired any title whatever to the timber. Therefore, when he reserved the use and possession of the land, he reserved only the title which he then had. The reservation of the timber carried with it the reservation of the fruit of the timber. Having no title to the timber Haycraft could in no way acquire title to the fruit of the timber. In this connection it is insisted that the case is not unlike that of a fruit tree overhanging the premises of another, in which event it is generally held that the fruit belongs to the owner of the soil on which the tree is growing, and not to him on whose soil the fruit happens to fall. *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 646; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Hickey v. Michigan Central R. R. Co.*, 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621.

It may be conceded that it was the purpose of Haycraft to reserve until the following January 1st whatever estate he had in the land by virtue of his original deed, and that the case is precisely the same as if the question were between him and his grantor, Gillis Vincent. It may also be conceded that mast is as much the fruit of the beech tree as the

acorn is of the oak, the chestnut of the chestnut tree, or the walnut of the walnut tree. *Bullen v. Denning*, 5 Barn. & C. 842; *United States v. Nordlinger*, 121 Fed. 690, 58 C. C. A. 438. The case, however, is not similar to that of fruit growing on the land of one landowner and falling on the land of another. In the latter case the landowner on whose soil the fruit falls has no interest in the adjoining land of which the tree is a part. Nor do we think the case is exactly like that of the reservation of an orchard or of certain fruit trees. The sole purpose of reserving an orchard or certain fruit trees would be to reserve the fruit, for fruit trees are valuable for the fruit alone. After all, we think the case turns on the intention of the parties in reserving the timber. Manifestly, the main purpose of the reservation was the timber itself, and not the incidental fruits of the timber.

[2] It is the general rule that a sale or reservation of timber, to be cut and removed within a specified time, is a sale or reservation of only so much as may be cut and removed within that time. *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246; 25 Cyc. 1551, 1552; *Jackson v. Hardin*, 87 S. W. 1119, 27 Ky. Law Rep. 1110; *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122, 27 Ky. Law Rep. 838. Therefore the removal of the timber within the time specified is an element necessary to the completion of the title. Here the original grantor, Gillis Vincent, during the time that the title to the timber was in him, and thereafter the grantee of the timber, Roscoe Vincent, had the right at any time before the expiration of seven years to cut and remove the timber in question. Therefore, while the use and possession of the land were reserved by Haycraft, Roscoe Vincent had a right to go upon the land and cut and remove the timber. In doing this he had the right to take away anything that was a constituent part of the timber. This carried with it the right to take the mast so long as it was on the trees. When, however, the mast became ripe and fell on the ground, it was no longer a part of the timber, and the right to cut and remove the timber did not carry with it the independent right to go on the premises and carry away the fallen mast. That being true, we conclude that the retention of the use and possession of the land until the following January 1st gave to Haycraft the right to appropriate to his own use the ripened mast which had fallen on the ground during the months of October and November.

Judgment affirmed.

## HIRAM BLOW STAVE CO.'S TRUSTEE v. PADUCAH COOPERAGE CO.

(Court of Appeals of Kentucky. May 18, 1914.)

## 1. EVIDENCE (§ 461\*)—PAROL EVIDENCE—ASSIGNMENTS OF NEGOTIABLE INSTRUMENTS.

Where a corporation and a firm under the same management became bankrupt, and the trustee of the bankrupt corporation brought suit on a draft given to the firm by a debtor thereof, on the theory that the corporation at the time of the filing of the petition in bankruptcy was the owner of the draft under an assignment made by the firm, and the debtor relied on a settlement with the trustee of the firm, which included the draft, and fraud on the part of the firm, evidence of the settlement and the fact that the draft was included therein was admissible, notwithstanding the written assignment of the draft.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.\*]

## 2. BANKRUPTCY (§ 303\*)—SETTLEMENTS—EVIDENCE—QUESTION FOR JURY.

In an action by the trustee in bankruptcy of a corporation on a draft by a debtor of a firm under the same management and also adjudged a bankrupt, evidence held to show a complete settlement between the trustee in bankruptcy of the firm and the debtor, which settlement included the draft, defeating a recovery thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

## 3. APPEAL AND ERROR (§ 1006\*)—VERDICT—CONCLUSIVENESS.

Where two juries rendered the same verdict on the same evidence, which was conflicting, the last verdict would not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.\*]

Appeal from Circuit Court, McCracken County.

Action by the Hiram Blow Stave Company's trustee in bankruptcy against the Paducah Cooperage Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Campbell & Campbell and J. D. Mocquot, all of Paducah, for appellant. Berry & Grassham, of Paducah, for appellee.

SETTLE, J. Prior to November 29, 1911, the Hiram Blow Stave Company, a Tennessee corporation, was engaged for several years in the manufacture and sale of staves in that state; its chief office being in the city of Nashville. At the same time there was doing business in the same state a copartnership, styled Hiram Blow & Co.; V. J. Blow being a member of the firm and also a leading stockholder in and officer of the Hiram Blow Stave Company. The corporation and copartnership occupied the same office and were both under the same management. The firm, Hiram Blow & Co., had large business dealings in Tennessee and other states in staves, stave timber, and equipment. In the fall of 1911 both the corporation and copartnership became insolvent and were thrown into bankruptcy. The Hiram Blow Stave Company was adjudged a bankrupt in a federal court

of Tennessee on the 29th day of November, 1911, and the firm, Hiram Blow & Co., was adjudged a bankrupt in the same court on the 23d of December, 1911. William L. Tally was elected trustee in bankruptcy of the Hiram Blow Stave Company, and H. B. Carter, J. T. Howell, and John Early trustees in bankruptcy of Hiram Blow & Co.

Prior to the bankruptcy of Hiram Blow & Co. it had large dealings with the appellee, Paducah Cooperage Company, a Kentucky corporation engaged in the stave and timber business in the city of Paducah, and at the time it went into bankruptcy held large claims against the latter. One of the obligations of the Paducah Cooperage Company to Hiram Blow & Co. was a draft of \$902.30, dated September 22, 1911, and due 90 days thereafter. On the 6th day of March, 1913, the appellant, William L. Tally, trustee in bankruptcy of the Hiram Blow Stave Company, brought suit upon this draft against the appellee, Paducah Cooperage Company, in the McCracken circuit court, alleging in the petition that the Hiram Blow Stave Company, at the time of filing its petition in bankruptcy and of being adjudged a bankrupt, was the owner and in possession of the draft under and by virtue of a sale and assignment thereof, made to it by Hiram Blow & Co. September 22, 1911, and that thereafter the draft, with other assets of the Hiram Blow Stave Company, went into the hands of the appellant, Tally, its trustee in bankruptcy. The prayer of the petition asked judgment against the Paducah Cooperage Company for the amount of the draft, with interest from its date, and the costs of the action.

The answer of the appellee, Paducah Cooperage Company, denied that the Hiram Blow Stave Company had ever been the owner or holder of the draft, or that it had been assigned to it by Hiram Blow & Co., and also denied that the appellant, Tally, as trustee in bankruptcy of the Hiram Blow Stave Company, was entitled to recover of it the amount of the draft or any part thereof. It was further alleged in the answer that on January 26, 1912, the appellee through its manager, W. F. Paxton, made with Hiram Blow & Co., through its trustees in bankruptcy, a full and complete settlement of all matters of account between appellee and Hiram Blow & Co., in which settlement appellee compromised with and paid to the trustees in bankruptcy of Hiram Blow & Co. its entire indebtedness to them; that the draft of \$902.30 in controversy was one of the items of indebtedness included in the settlement and then paid by appellee, which draft was then produced by and was in the possession of the trustees in bankruptcy of Hiram Blow & Co. as an asset of the bankrupt estate, but through mistake or oversight it was left by appellee in the possession of the trustees in bankruptcy of Hiram Blow & Co. Further

averments of the answer as to the subsequent possession of the draft by the appellant, Talley, trustee in bankruptcy of the Hiram Blow Stave Company, will better appear from the following excerpt copied therefrom:

"Defendant further states: That after this settlement was had between this defendant and the trustees of Hiram Blow & Co., in which settlement this draft was paid and satisfied, the said trustees of Hiram Blow & Co. fraudulently and without consideration of any kind paid to them or paid to anybody by the Hiram Blow Stave Company, procured the indorsement by Hiram Blow & Co., by Charles A. McQuay, cashier, over to the Hiram Blow Stave Company, and the said Hiram Blow Stave Company, although now the pretended owner and holder of said draft, never paid to Hiram Blow & Co., or to anybody, anything for said draft, but received same and took same under this fraudulent assignment, and by reason thereof it has no interest in said draft and is not entitled to maintain this action by its trustee in bankruptcy. That at the time said draft was turned over to the Hiram Blow Stave Company and came into its possession, the Hiram Blow Stave Company knew that said draft had been settled in the adjustment of accounts between this defendant and Hiram Blow & Co., and knew that said draft had by mistake or oversight been left in the possession of Hiram Blow & Co."

The affirmative matter of the answer was controverted by reply. Thereafter a jury trial resulted, and a verdict was returned in behalf of appellee. But at the same term the circuit court granted appellant a new trial. At a subsequent term a second trial resulted in a verdict in behalf of appellee, and, the circuit court having overruled appellant's second motion for a new trial, he has appealed.

The grounds urged for reversal are: First, that the circuit court erred in permitting incompetent evidence to go to the jury over his objection; second, that the verdict of the jury and the judgment of the court were contrary to law and not sustained by the evidence.

[1] The evidence complained of is that of appellee's manager, W. F. Paxton, with respect to the settlement made by him for appellee with the trustees in bankruptcy of Hiram Blow & Co., and particularly that part of his testimony as to the production at that time of the draft and its payment by appellee. The contention as to the incompetency of this evidence rests upon the theory that the writing appearing on the back of the draft over the signature of Hiram Blow & Co., of date September 22, 1911, constituted an assignment of it to the Hiram Blow Stave Company as of that date, and there being nothing further appearing upon the draft showing its reassignment by the Hiram Blow Stave Company to Hiram Blow

& Co. before the former went into bankruptcy, it must be treated as the property of the Hiram Blow Stave Company when it was adjudged a bankrupt, and appellant, as its trustee, came into possession of its assets; therefore, that any evidence of an act done or statement made by a trustee or any representative of Hiram Blow & Co., at the time of the settlement between them and appellee, with respect to the ownership of the draft or its inclusion in such settlement, should not have been allowed to prevent a recovery upon the draft by the assignee thereof. In support of this contention we are cited to numerous decisions holding, in effect, that, while admissions made by the holder of a negotiable instrument, before transfer thereof, are competent evidence against one to whom it is transferred after maturity, declarations made by a former holder of a negotiable instrument after it has been transferred by him are incompetent as against a subsequent holder. The defect underlying this contention is that it ignores a material part of the defense interposed by appellee's answer, which is that there was never, in fact, an actual assignment or delivery of the draft by Hiram Blow & Co. to the Hiram Blow Stave Company, but that the indorsement on the instrument, by which it is claimed it was assigned, was fraudulently made, and therefore never transferred the title to the draft to the Hiram Blow Stave Company. If there was any evidence introduced on the trial that conduced to support this defense, it should have gone to the jury as well as the evidence of payment, that they might determine whether the draft, at the time of the settlement in question, was the property of the trustees in bankruptcy of Hiram Blow & Co., because owned by that company at the time it was adjudged a bankrupt, and, if so, whether it was taken into account in the settlement and then paid. In other words, appellee made the defense that the draft was never the property of the Hiram Blow Stave Company, but that the title thereto continued and remained in Hiram Blow & Co. until it was adjudged a bankrupt, by virtue of which adjudication it passed to its trustees, with whom the settlement for appellee was made. On this view of the case the authorities relied on by appellant are not in the way of appellee's defense.

[2] It appears from the testimony of Paxton, appellee's manager, that at the time of the settlement made by him for appellee with the trustees in bankruptcy of Hiram Blow & Co. the draft of \$902.30 was in the possession of the trustees in bankruptcy of that company, and was then produced by Charles A. McQuay, who had been cashier and treasurer of Hiram Blow & Co., and was admittedly acting in that capacity for its trustees in bankruptcy at the time of the settlement, and in charge of the books and accounts that had formerly belonged to the bankrupt

partnership. According to the testimony of Paxton, during the settlement McQuay, in the presence of H. B. Carter, one of the trustees of Hiram Blow & Co., produced the draft of \$902.30, and in doing so said: "We have this on hand, and were unable to use it, and we are mighty glad of it, because you had a mighty hard time down there, and anything that helps you in this matter we are glad to see." In addition, Paxton testified that a writing was used in that settlement by the trustees of Hiram Blow & Co., containing a detailed statement of the various items of indebtedness owing by appellee to Hiram Blow & Co., the last item in which statement was the draft in question, and that the entire indebtedness, including this draft, was paid and discharged by appellee in that settlement. A copy of this paper was identified and made a part of the testimony of Paxton, and we do not find in the record that its genuineness or correctness is denied or questioned by any other witness testifying in the case.

There was, then, evidence on the trial, furnished by the testimony of Paxton, supported by the paper referred to, that the trustees of Hiram Blow & Co. were in possession and claiming to be the owners of the draft at the time of the settlement, and that the draft was an item of indebtedness from appellee to Hiram Blow & Co. included in that settlement and then paid, along with all other items of indebtedness owing to that company by it. If, as thus shown by the evidence in appellee's behalf, the trustees in bankruptcy of Hiram Blow & Co. were, at the time of their settlement with appellee, in possession of the draft, represented that Hiram Blow & Co. had been unable to use it, and included it in the statement of appellee's indebtedness to that company, which was then discharged, the jury had the right to conclude that such possession of the draft by the trustees, and its inclusion in the settlement made by them with appellee, conducted to prove their ownership of it, and sustain the averment of the answer that the alleged previous assignment of the draft by Hiram Blow & Co. to the Hiram Blow Stave Company was a fraudulent device on the part of Hiram Blow & Co. to compel its payment by appellee the second time.

It is true that one of the trustees, H. B. Carter, and Charles A. McQuay both testified that the draft of \$902.30 was not included in the settlement made by the trustees of Hiram Blow & Co. with appellee, and also testified that it had, as of September 22, 1911, been assigned by Hiram Blow & Co. to the Hiram Blow Stave Company; but we do not find from the testimony of either of them any specific denial of what Paxton said as to McQuay's producing the draft at the time of the settlement and what he then said with reference to the inability of Hiram Blow & Co. to use it. It is further to be remarked

that the assignment appearing on the draft above the signature of Hiram Blow & Co. gives support to the testimony of Carter and McQuay that it had been assigned by Hiram Blow & Co. to the Hiram Blow Stave Company as of the date mentioned in the assignment. But this support is no greater than that given the testimony of Paxton as to the production at the settlement of the draft by McQuay and its inclusion in the settlement, by the paper furnished Paxton by the trustees of the latter.

We find in the deposition of H. B. Carter certain statements with reference to the business methods of Hiram Blow & Co. and the Hiram Blow Stave Company, which may serve to explain the object of the assignment of the draft by the former to the latter. Carter had been connected with both concerns before their bankruptcy, and, according to his testimony, the partnership of Hiram Blow & Co. was all the time largely indebted to the Hiram Blow Stave Company and it was the custom between them for Hiram Blow & Co. to assign and turn over to the Hiram Blow Stave Company its drafts, to be discounted by the latter wherever it had sufficient credit for that purpose; that an attempt was made by the Hiram Blow Stave Company to discount the draft sued on and others pursuant to this method, but, being unable to do so, it returned this draft to the office at Nashville occupied by Hiram Blow & Co. and the Hiram Blow Stave Company jointly. While the testimony of Carter does not go to the extent of saying that upon the failure of the Hiram Blow Stave Company to discount the draft it was returned to Hiram Blow & Co., that such was probably the case is shown by the possession of the draft at the time of the settlement by McQuay, cashier and bookkeeper of the trustees in bankruptcy of Hiram Blow & Co., and his statement, made at the time of producing it, that Hiram Blow & Co. had been unable to use it, for which reason it was charged to appellee and accounted for in the settlement then made. Moreover, the paper showing appellee's indebtedness to Hiram Blow & Co. contains a list of several other drafts drawn on appellee by Hiram Blow & Co. and accepted by it, which, after being assigned to the Hiram Blow Stave Company by Hiram Blow & Co., were returned to that company by the Hiram Blow Stave Company.

The fact that all the indebtedness due Hiram Blow & Co. from appellee was discharged by the terms of the settlement made between the latter and the trustees of the former January 26, 1912, is not denied by appellant or controverted by the testimony of Carter or McQuay. The contradiction of appellee's witness Paxton by Carter and McQuay is as to the ownership of the draft at the time of the settlement, and whether it was then paid by appellee; the testimony of Paxton, supported by McQuay's production of the

draft at the settlement and the paper then furnished him by the trustees, being to the effect that the draft belonged to the trustees in bankruptcy of Hiram Blow & Co. and was charged to and paid by appellee in the settlement, and that of Carter and McQuay that it was, at the time of the settlement, the property of the trustee in bankruptcy of the Hiram Blow Stave Company, and was not paid by appellee at that time or at all.

[3] It was, however, the province of the jury to accept the testimony of Paxton, and reject that of Carter and McQuay; and, this having been done by two juries, we are not disposed, in the light of the record presented, to question the correctness of either verdict, or to disturb the one last returned.

In view of the character of the defense interposed, there is no ground for our holding that the trial court erred in admitting the testimony of Paxton as to what was said and done by Carter and McQuay as representatives of Hiram Blow & Co., with respect to the draft sued on, at the time of the settlement and when they were in possession of the draft. The issues presented by the pleadings and proof were fairly submitted to the jury by the instructions of the court, which were as follows:

"Instruction No. 1. You will find for the plaintiff in the sum of \$902.30, with interest from December 21, 1911, unless you shall believe from the evidence that the draft sued on and in controversy in this case was in possession of the trustees of Hiram Blow & Co., and they were the owners thereof at the time defendant, Paducah Cooperage Company, through W. F. Paxton, made a settlement of the difference between said Paducah Cooperage Company and Hiram Blow & Co., and that after said settlement said draft was fraudulently transferred or delivered by said trustee, or by his authority, to the Hiram Blow Stave Company, in which event, and if you shall so believe, then the law is for the defendant, and you will so find.

"Instruction No. 2. But if you believe from the evidence that said draft was in good faith assigned and transferred to Hiram Blow Stave Company for value and in good faith, before said settlement was made, and that said Hiram Blow Stave Company, or its trustee in bankruptcy, was then the owner of said draft, then you cannot find for the defendant, but should find for the plaintiff."

Judgment affirmed.

BRANHAM'S ADM'R v. BUCKLEY et al.  
(Court of Appeals of Kentucky. May 14, 1914.)

1. APPEAL AND ERROR (§ 216\*)—QUESTIONS IN TRIAL COURT—REQUEST FOR INSTRUCTIONS—NECESSITY.

Where plaintiff charged defendant with negligence in operating a boiler and also in maintaining it, but did not offer a written instruction on the latter ground of negligence, he

could not complain of the failure of the court to instruct the jury on that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627, 628, 629, 630-641, 660, 662-676; Dec. Dig. § 216.\*]

2. NEGLIGENCE (§ 32\*)—DEGREE OF CARE REQUIRED—DUTY TO LICENSEE.

Where a boy who had brought corn to a mill to be ground was invited by the proprietor to go into the boiler room and warm himself, the proprietor owed him a duty to use reasonable care to keep the premises in a safe condition, but was not an insurer of the boy's safety.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

3. STEAM (§ 6\*)—EXPLOSION—NEGLIGENCE—PRESUMPTION.

Where the defendant owed the plaintiff's intestate only the duty to exercise ordinary care to prevent injury, the fact of the explosion of a boiler creates no presumption of negligence.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.\*]

4. APPEAL AND ERROR (§ 216\*)—REQUESTS FOR INSTRUCTION—NECESSITY—RES IPSA LOQUITUR.

Where plaintiff requests no instruction on the doctrine of *res ipsa loquitur*, he cannot complain of the failure of the court to give such instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627, 628, 629, 630-641, 660, 662-676; Dec. Dig. § 216.\*]

5. STEAM (§ 6\*)—EXPLOSIONS—ACTIONS—SUFFICIENCY OF EVIDENCE—CASE OF BOILER.

In an action for the death of a boy who was killed by a boiler explosion at a mill where he had gone with corn to be ground, where defendant denied negligence in maintaining and operating the boiler as charged in the complaint, a verdict for defendant held not to be flagrantly against the evidence.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Pike County.

Action by Albert Branham's administrator against J. K. Buckley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. S. Cline, of Pikeville, for appellant.  
York & Johnson, of Pikeville, for appellees.

HANNAH, J. Appellees, J. K. Buckley and Thomas Buckley, operated a steam grist-mill in Pike county, to which the residents of the neighborhood would take corn to have it ground into meal; the owners of the mill taking a certain proportion of the corn as payment for the grinding thereof. Albert Branham, a boy of about 14 years of age, on November 18, 1911, went to appellees' mill with some corn for the purpose of having it ground into meal; and, while at the mill waiting for it, he went into the boiler room for the purpose of warming himself, and was standing near the fire box when he was injured by steam and hot water thrown upon him by an explosion of the boiler, so that he died within 48 hours thereafter. His administrator instituted this action against appellees to recover damages for his death, and upon a trial the jury found a verdict for the defendants. Plaintiff appeals.



[1] 1. It is contended by appellant that the court failed to instruct the jury properly.

Two grounds of negligence were charged in the petition: (1) Negligence in the operation of the boiler; that is, that the defendants permitted it to become dry, and thereby caused the crown sheet to tear loose from the bolts which held it. And (2) negligence in maintaining the boiler in safe condition; it being alleged that the boiler was in a defective and dangerous condition, and that it was so known to be by the defendants.

Plaintiff introduced some proof tending to show that the defendants permitted the water in the boiler to become very low, and that Thomas Buckley, one of the defendants, then started the injector to forcing cold water into the boiler, thereby causing the crown sheet to give down. And, upon cross-examination of the defendant Thomas Buckley, plaintiff also showed that the only explanation Buckley could give of the accident was that the bolts securing the crown sheet had "failed to be bradded good." Another witness for defendants, upon cross-examination, testified that the pressure of 95 pounds, which defendants claimed and testified was all that the boiler was carrying at the time of the accident, would not cause the crown sheet to give down unless it was defectively secured. The court instructed the jury upon the issue of negligence in the operation of the boiler, but did not instruct upon negligence in maintaining the boiler in a reasonably safe condition; and, because of the court's failure to instruct upon the latter issue, appellant complains. Appellant offered an instruction upon the theory of negligence in the operation of the boiler, and, in lieu of the instruction so offered, the court gave an instruction upon that issue; but no instruction was offered upon the theory of negligence in maintaining the boiler in a reasonably safe condition as to structural defects, and appellant therefore cannot complain of the failure of the court to instruct thereon. In civil actions, it is not reversible error for the court to fail to give an instruction on any particular issue unless requested so to do. *L. H. & St. L. Ry. Co. v. Roberts*, 144 Ky. 820, 139 S. W. 1073. And the instruction requested must be offered in writing. *Bell's Adm'r v. Louisville Ry. Co.*, 148 Ky. 189, 146 S. W. 383. The instruction that was given by the court being correct, and plaintiff having failed to ask an instruction upon the theory of negligence in maintaining the boiler in a reasonably safe condition, failure of the court to instruct upon the whole law of the case was not error.

[2] 2. Appellant also contends that the rule *res ipsa loquitur* here applies, and that the court should have instructed the jury that the mere fact of the bursting of the boiler was *prima facie* evidence of negligence upon

the part of the defendants, and that they should find for plaintiff unless they believed from the evidence that defendants exercised the highest degree of care in the operation of the boiler and in maintaining it in safe condition. The evidence for plaintiff shows that his business at the mill did not require the decedent to be at the immediate place at which he was injured, but that he went from the millroom or place where he had deposited his corn, to the place where he was injured, upon invitation or suggestion of the defendants, for the purpose of warming himself. The owner or occupant of premises, who induces others to come thereon by invitation, express or implied, owes them the duty of using reasonable or ordinary care to keep the premises in a safe condition; but he is not an insurer of the safety of such persons. *Anderson & Nelson Distilleries Co. v. Hair*, 103 Ky. 196, 44 S. W. 658, 19 Ky. Law Rep. 1822. See, also, 29 Cyc. 454.

[3] And, where the defendant owes plaintiff no duty other than the exercise of ordinary care to prevent injury, the fact of an explosion of a steam boiler creates no presumption of negligence. 36 Cyc. 1265; *Veith v. Hope Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613.

[4] Moreover, plaintiff asked no instruction of this kind; hence, cannot complain of the failure to give it.

[5] 3. Finally, appellant complains that the verdict is contrary to the evidence. Thomas Buckley, one of the defendants, testified that, at the time the crown sheet gave down, the boiler was two-thirds full of water; that he was carrying only 95 pounds of steam pressure; and that he did not know what caused the crown sheet to give down. The evidence for plaintiff tended to show that Buckley had permitted the boiler to become dry, and then started the injector, forcing cold water into the boiler and thereby causing it to burst. The evidence was conflicting; but we cannot say that the verdict is flagrantly against the evidence. The jury evidently felt some doubt as to the exact cause of the accident; and, having in mind the fact that there is a general disposition among men to preserve their property, and among the operators of steam boilers to preserve their own lives, and that ordinarily these motives will secure that degree of care which the defendants were charged with under the law, the jury doubtless believed that the injuries to plaintiff's intestate were occasioned, not as plaintiff contends, by negligence of the defendants, but rather by one of those unfortunate casualties which ordinary care and prudence will not always prevent.

Judgment affirmed.

## GUEST et al. v. FOSTER et al.

(Court of Appeals of Kentucky. May 14, 1914.)

## 1 APPEAL AND ERROR (§ 268\*)—QUESTIONS REVIEWABLE—EXCEPTIONS.

An appeal by complainant from a judgment overruling defendants' exceptions to a report of sale is unavailable where complainant filed no exceptions to the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1565, 1568-1571; Dec. Dig. § 268.\*]

## 2 JUDICIAL SALES (§ 81\*)—VALIDITY—EVIDENCE.

Where, on exceptions to a report of sale of land under a judgment directing a sale in bulk, there were witnesses who testified that the property could have been sold to better advantage if part of it had been divided into town lots and the lots sold separately, and that the land was worth about \$15,000, while other witnesses testified that there was very little demand for town lots and that, considering the condition of the land and the location of the buildings thereon, it was not susceptible of advantageous division, and no offer was made to pay more for the land than it brought at the sale, the sale was properly confirmed, though the price paid was only \$8,000.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 81.\*]

## 3. JUDICIAL SALES (§ 13\*)—MANNER OF SALE—STATUTORY PROVISIONS.

Civ. Code Prac. § 694, declaring that before ordering a sale the court must be satisfied by the pleadings, by agreement of the parties, by affidavits filed, or by report of commissioners, whether the property can be divided without materially impairing its value, and may cause it to be divided, does not require that the court, before directing a sale of land in bulk or directing its division, shall have before it an agreement of the parties, affidavits, or the report of commissioners; but the court may, from an inspection of the pleadings, determine how the land shall be sold.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 37; Dec. Dig. § 13.\*]

## 4. JUDICIAL SALES (§ 13\*)—MANNER OF SALE—STATUTORY PROVISIONS.

It is not essential that the petition should expressly aver whether the real estate is or is not divisible to authorize the court to order a sale as a whole or direct its division.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 37; Dec. Dig. § 13.\*]

## 5. JUDICIAL SALES (§ 81\*)—SALE IN PARCELS—STATUTORY PROVISIONS.

Where the court orders a sale of land as a whole to satisfy a debt, and it appears on exceptions to the report of sale that the land was susceptible of division and that the owner is prejudiced by the failure to order a division or to order a sale in different parcels, the exceptions to the report of sale must be sustained, provided the property was sold at a grossly inadequate price.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 81.\*]

## 6. JUDICIAL SALES (§ 37\*)—SALE OF LAND AS A WHOLE—ERROR OF COURT.

The error of the court in ordering a sale of land as a whole to satisfy a debt, when it should have been sold in parcels, may be cured, on the hearing of exceptions to the report of sale, by setting aside the sale, if made at a grossly inadequate price, though the commis-

sioner, in making the sale, followed the judgment.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 75; Dec. Dig. § 37.\*]

## 7. JUDICIAL SALES (§ 37\*)—SALE OF LAND AS A WHOLE—ERROR OF COURT.

The error of the court in directing a sale of land as a whole to satisfy a debt, when it should have been sold in parcels, is not ground for setting aside the sale where the owner was not prejudiced.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 75; Dec. Dig. § 37.\*]

## 8. JUDICIAL SALES (§ 37\*)—TERMS OF SALE—STATUTORY PROVISIONS.

The error in requiring a purchaser of land, ordered sold to pay a debt, to make a cash deposit at the time of purchase, while Code, § 696, requires the court to fix on reasonable credits, was harmless where the owner was not prejudiced thereby, as no person was prevented from bidding because of the requirement.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 75; Dec. Dig. § 37.\*]

## 9. JUDICIAL SALES (§ 36\*)—TERMS OF SALE—STATUTORY PROVISIONS.

A provision, in a judgment directing a sale of land, that the sale shall be on credit and that the purchaser shall execute a bond for the price or pay the price in cash, and may pay the price at any time before maturity, is not prejudicial to the owner, because such matters are optional with the purchaser.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 74; Dec. Dig. § 36.\*]

## Appeal from Circuit Court, Lincoln County.

Action by the Citizens' Trust Company against Anna F. Guest and husband, in which the Commonwealth Life Insurance Company came in by cross-petition. There was a judgment ordering a sale of land, and from a judgment overruling exceptions to the report of sale to John F. Foster, Anna F. Guest and husband and the Citizens' Trust Company appeal. Affirmed.

J. B. Paxton, of Stanford, and Robt. Harding, of Danville, for appellants Guests. Flexner & Gordon, of Louisville, for appellant Citizens' Trust Co. Burnett, Batson & Cary, of Louisville, for Commonwealth Life Ins. Co. P. McRoberts, of Stanford, for Foster.

CARROLL, J. The Citizens' Trust Company brought suit to enforce the collection of a promissory note for \$4,500, executed to it by Anna F. Guest and her husband and the trustee of Mrs. Guest, and to have a tract of land containing 169 acres, upon which there was a mortgage to secure the payment of the note, sold to satisfy the debt. There was a prior mortgage on the land for something over \$6,000, given to the Commonwealth Life Insurance Company, and this company came in by cross-petition and asked for personal judgment and a sale of the land to satisfy its debt. There was no averment in either the petition or the cross-petition as to the divisibility or indivisibility of the land. These pleadings merely asked that the land be sold and that out of the proceeds of sale the debts be paid. The Guests entered their appear-

ance to the action, and, following this, there was a personal judgment against them for the amounts due to each of the companies, amounting in the aggregate to more than \$11,000. The judgment, which also directed a sale of the land, set out "that it could not be divided without materially impairing its value," and also contained this provision: "Said property to be sold on a credit of six, twelve and eighteen months, and the purchaser shall be required to execute bond with good surety for equal parts of the purchase money, and a lien shall be retained on the property as additional security. A deposit of \$200 shall be required upon the purchase price of said property at the time of sale. Privilege is given to the purchaser to pay the purchase price in cash without executing bonds, or to pay the purchase money at any time before maturity." Under this judgment the land, after being appraised for \$11,865, was offered for sale, when John B. Foster became the purchaser at the price of \$8,000, and executed bonds for equal installments of the purchase price, due in 6, 12, and 18 months. He also paid the commissioner in cash \$200. To this report of sale, the Guests filed exceptions, asking that the sale be set aside: (1) Because there was no allegation in the pleadings or agreement of parties or affidavits or report of a commissioner showing whether or not the land could be divided without materially impairing its value, and it was averred that it could be divided without materially impairing its value and would sell for a much better price if sold in parcels than as a whole; (2) because the judgment required a deposit of \$200 to be made by the purchaser and gave the purchaser the privilege of paying the purchase money in cash or at any time before maturity; and (3) because the price at which the property was sold was inadequate.

[1] On these exceptions the court heard evidence offered by both the Guests and the purchaser, Foster, and from the judgment overruling the exceptions the Guests and the Citizens' Trust Company appeal. The appeal, however, of the Citizens' Trust Company does not avail it anything, as it did not file any exceptions to the report of sale. So that the only matter to be considered on the record before us is whether the court erred in overruling the exceptions filed by the Guests.

[2] On the trial of these exceptions, several witnesses were introduced by the exceptors as well as by the purchaser, and it appears from their evidence that this land fronts on the main street of Crab Orchard, a sixth-class town, for a distance of about 1,800 feet, and then runs back probably a mile in a kind of oblong square, and that the dwelling house and improvements are situated near the street, and the best of the land is that part fronting on the street. The witnesses for the Guests testified that the land could have been sold to better advantage if the front had been divided into town lots and these lots sold

separately and the remainder of the land sold as a body, or if it had been divided into two tracts, it being, according to their opinion, susceptible of advantageous division. They further said that the land was worth about \$15,000.

Other witnesses testified, and the weight of the evidence shows that there was very little demand for town lots in Crab Orchard, and that, considering the situation and condition of the land and the location of the buildings, it was not susceptible of advantageous division, and it could be and was sold to as good if not better advantage as a whole than if divided into two tracts or partly into town lots, and brought at the sale a fair price and as much as it was reasonably worth. It might also be noticed that no offer was made on the hearing of the exceptions by any person to pay more for the land than it brought at the public sale.

A careful reading of the evidence heard on the exceptions satisfies us, as it did the lower court, that the land was not susceptible of advantageous division and brought at the sale a fair and reasonable price; at any rate, it is very clear that the sale was not at a grossly inadequate price.

[3] But notwithstanding this conclusion on the evidence, it is insisted that the exceptions should have been sustained, because section 694 of the Code was not observed in ordering the sale. So much of this section as is pertinent reads as follows: "Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value; and may cause it to be divided, with suitable avenues, streets, lanes or alleys; or without any of them."

Neither the petition nor the cross-petition contained any reference to whether the land could be divided without materially impairing its value, and it does not appear that before entering the judgment there was any agreement of the parties or affidavits or report of a commissioner showing whether the land could be divided without materially impairing its value, or that it would be more advantageous to sell it as a whole. The judgment, however, recited that the land could not be divided without materially impairing its value, and directed that it be sold as a whole. As directed by the Code, the court, before entering a judgment ordering the sale of land, should be advised in the manner provided by the Code concerning the divisibility or indivisibility of the land, and after being so advised should direct the land to be sold in such a manner as would be most advantageous to the parties interested in the sale. It is not, however, required that the court, before directing a sale of the land as a whole or directing its di-

vision, should have before it an agreement of the parties, or affidavits, or the report of commissioners, as the court may from an inspection of the pleadings determine how the land should be sold. Thus it was said in *McFarland v. Garnett*, 8 S. W. 17, 10 Ky. Law Rep. 91: "Section 694 of the Civil Code, which directs that 'before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of parties, by affidavits filed, or by a report of a commissioner, whether or not the property can be divided without materially impairing its value,' does not require an allegation in the pleadings to the effect that the property is divisible or indivisible. Nor is it indispensable that the fact as to the divisibility or indivisibility of the property should appear, by the agreement of the parties, by affidavits, or a report of a commissioner, before ordering a sale of the property; but the court may satisfy itself, from the character of the boundary or the number of acres in the tract, as described in the pleadings, that a division of the property can be had, without materially impairing its value. This is all that is required."

[4, 5] Nor is it essential that the petition should expressly aver whether the property is or is not divisible. *Sears v. Henry*, 13 Bush, 413; *Cockrill v. Mize*, 12 S. W. 1040, 11 Ky. Law Rep. 637; *Lucy v. Hopkins*, 13 S. W. 518, 11 Ky. Law Rep. 907. If, however, the court should order a sale of the land as a whole, and it appeared on exceptions to the report of sale that the land was susceptible of division and that the owner was prejudiced by the failure of the court to order a division or to order it sold in two or more different parcels, the exceptions to the report of sale should be sustained, if it further appeared that the property was sold at a grossly inadequate price, although the commissioner making the sale may have followed accurately the judgment. It was so decided in *Vanmeter v. Vanmeter*, 88 Ky. 448, 11 S. W. 80, 289, 10 Ky. Law Rep. 906. In that case it appears from the opinion that the judgment directed the sale of the land as a whole, to the prejudice of the owner, when it was susceptible of advantageous division; but, as the commissioner followed the judgment in making the sale, the question was raised whether or not the error of the judgment in directing a sale of the whole when it should have directed a division, and sale could be reached by exceptions to the commissioner's report of sale, and the court said: "The terms and the manner of the sale being regulated by statute, the court should correct the error before confirmation, if objections are interposed and an injury results to the debtor. It is not an erroneous judgment merely, over which the court has no control, but an error as to the manner of sale that the court has control over until

after confirmation. \* \* \* And while he cannot, at his mere will, set aside a sale, although he may believe that his decision is wrong on the merits, yet when the manner of sale is irregular, although authorized by the chancellor, it being a matter over which he has complete control, notwithstanding the judgment, if the rights of the debtor are prejudiced by it, he should see that justice is done him. The Code, requiring a division of the land when it can be made so as to prevent the sacrifice complained of in this case, not being followed by the commissioner or by the court, is such an irregularity, connected with the inadequacy of price, as will require the sale to be disregarded." To the same effect are *Gleason v. Ky. Title Co.*, 78 S. W. 170, 25 Ky. Law Rep. 1546; *Underwood v. Cartwright*, 47 S. W. 580, 20 Ky. Law Rep. 809.

[6] So that upon the authority of these cases it may be regarded as settled that, where the court commits an error to the serious prejudice of the owner in ordering a sale of land as a whole when it should have been sold in parcels or have been divided, the court may cure this error on the hearing of exceptions to the commissioner's report of sale, by setting aside the sale if the sale was at a grossly inadequate price, although the commissioner, in making the sale, may have followed the terms of the judgment. This practice seems to have been adopted in the *Vanmeter* and other cases for the purpose of relieving the owner from the hardship occasioned by the error in the judgment, and it would seem that, when exceptions are sustained for this reason, the court should, in ordering another sale, so modify the judgment as to direct the commissioner to divide the land or sell it in parcels, as the conditions seem to require.

[7] This practice, however, will not be indulged unless it appears that the owner was prejudiced by the sale of the land as a whole. The mere error of the court in ordering a sale as a whole when the land should have been divided or sold in parcels will not avail when the rights of the owner have not been prejudiced.

Applying now these views to the facts of this case as they appear in the record, we find that the error, if any, committed by the court in ordering the land sold as a whole, did not prejudice the rights of the owner, and, in considering exceptions to a report of sale, the rule generally applied by this court in other cases that only errors prejudicial to the substantial rights of the complaining party will be available will be observed. The judgment of the lower court in overruling or sustaining exceptions will not be interfered with unless it appears that the interests of the complaining party have been prejudicially affected by the judgment appealed from. If on the exceptions the evidence had been sufficient to satisfy the lower court that

the rights of the owner were prejudiced by the manner in which the land was sold, we have no doubt that the court would have set aside the sale; but, as the evidence did not show that the rights of the owner were prejudiced, there was of course no reason for setting aside the sale on this ground.

[8] It is further urged that error was committed by the court in directing a cash payment by the purchaser of \$200. Section 696 of the Code provides in part: "Every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than three months for personal, nor six months for real property. \* \* \*" And a failure to follow this requirement of the Code and order a sale of land for cash or on a shorter time than six months will constitute reversible error, as was held in *McKensie v. Salyer*, 43 S. W. 450, 19 Ky. Law Rep. 1414, and *Luttrell v. Wells*, 97 Ky. 84, 30 S. W. 10, 16 Ky. Law Rep. 812. But this error was harmless, because there is no evidence that the interest of the owner was prejudiced by the requirement that the purchaser should deposit \$200. No person was prevented from bidding on account of the requirement that this cash deposit should be made.

[9] That part of the judgment, giving the purchaser the option of paying in cash or at any time before maturity of the bonds the full amount of the purchase money, was manifestly not prejudicial to the owner or any one else, as it was entirely optional with the purchaser to execute bonds or pay in cash or pay the bonds before maturity. The judgment did not require him to pay cash or pay the bonds before maturity.

Upon the whole case the judgment should be affirmed, and it is so ordered.

#### THOMPSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 14, 1914.)

##### 1. STATUTES (§ 118\*)—TITLE—SUFFICIENCY.

The title of Act March 26, 1908 (Laws 1908, c. 13), entitled "An act to appropriate money for the benefit of the Houses of Reform, to provide funds to pay the existing deficit, and to make improvements at the Houses of Reform," is not sufficiently broad, within Const. § 51, declaring that no law shall relate to more than one subject, which shall be expressed in the title, to justify provisions in the body of the act for the confinement of juvenile offenders in the Houses of Reform, subject to provisions governing parol of penitentiary inmates, and such provisions are invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.\*]

##### 2. STATUTES (§ 105\*)—TITLE—CONSTITUTIONAL PROVISIONS.

The purpose of Const. § 51, providing that no law shall relate to more than one subject, which shall be expressed in the title, is to enable persons reading the title of an act to obtain a general idea of what the act will contain, and members of the Legislature and the public may assume that the act contains no legisla-

tion not embraced in a general way within the subject expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.\*]

Appeal from Circuit Court, Jefferson County; Criminal, Common Law, and Equity Division.

James Thompson was convicted of robbery, and he appeals. Affirmed.

Logan N. Rock, of Louisville, for appellant. Jas. Garnett, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant, under an indictment charging him with the crime of robbery, was found guilty by a jury. After the verdict was returned, and before sentence was passed or judgment entered, the appellant filed his affidavit, showing that he was then only 19 years of age, and moved the court to adjudge that he be confined in the state Reform School at Lexington for the time, and in the manner provided by the act of March 26, 1908 (Laws 1908, c. 13), now section 2095a, subsection 19a, of the Kentucky Statutes. The court overruled his motion, and committed him for a period of from 2 to 10 years in the State Reformatory at Frankfort.

The only question submitted on this appeal is the validity of so much of the act of 1908 as relates to the commitment of minor convicts to the House of Reform. The trial court ruled that so much of the act as is here under consideration was unconstitutional, because the act did not conform to section 51 of the Constitution, reading as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

[1] The title of the act of 1908 reads: "An act to appropriate money for the benefit of the Houses of Reform, to provide funds to pay the existing deficit and to make improvements at the Houses of Reform." Following the preamble setting out the reasons why a deficit existed and the necessity for additional funds to erect new buildings and equip them, the act, in sections 1-12, appropriates various sums of money for specific equipment and improvements, and provides how the money so appropriated shall be expended.

Section 13 reads: "That any and all juvenile or first offenders of the age of 21 years or under committing any crime whereby punishment in the State Prison or School of Reform is contemplated, shall be sentenced by court of jurisdiction to the House of Reform, and commitment and method of conveying said offenders thereto shall be the same as to State Penitentiaries."

Section 14 reads:

"All inmates so sentenced to House of Reform in lieu of State Penitentiary shall be subject to the same parole provisions as govern parole of penitentiary inmates.

"Any inmate so sentenced who may be incorrigible, or whose contact with the other inmates may be detrimental, may by the order of board of commissioners be transferred to a State Penitentiary.

"Courts of jurisdiction shall fix an indeterminate sentence for minor offenders which shall keep such offenders in confinement until they have reached the age of 21 years, but such offenders by reason of good conduct, industry and obedience to rules of the institution may be earlier discharged or paroled by board of commissioners."

It will be observed that sections 1-12, inclusive, are germane to the subject-matter of the title, but that sections 13 and 14 have not the remotest connection with the title. There is not a word in the title from which any person could infer that the act contained the subject-matter of sections 13 or 14.

There has never come under our notice an act of the Legislature that disregards so thoroughly section 51 of the Constitution as does the legislation contained in these sections. If the validity of these sections should be sustained, so much of section 51 as declares that "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title," would have no meaning or effect whatever, and the Legislature would be at liberty to incorporate in any act, under any title, any number of subjects and any legislation, without reference to whether it was germane to or expressed in the title or not. The title of this act, and the first 12 sections, relate exclusively to the appropriation of money for the benefit of the Houses of Reform, while sections 13 and 14 are devoted entirely to the treatment and punishment of offenders against the law who are under 21 years of age, and it is very evident that, as originally introduced, the act only contained 12 sections, and that while the act was on its passage, sections 13 or 14 were added without giving any thought to the title of the act or to the incongruity between these sections and the title or other sections. It is also manifest that sections 13 and 14 can be eliminated from the act without interfering with or affecting in any manner the subject-matter of the other sections; and, when this can be done, the rule, as laid down in *Wiemer v. Com'r's Sinking Fund of Louisville*, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523, is: "That when a subject foreign to the title is introduced into the body of an act, if it is so separate and distinct from the remainder of the subject-matter of the legislation that it may be omitted without affecting the otherwise valid portions, then the unconstitutional part will be omitted and the remainder allowed to stand. Such is the case here. Sec-

tion 2 has no natural connection with the remainder of the act. Its omission leaves a valid and complete statute; and therefore we hold that section 2 is invalid for the reason given, but the remainder of the statute is constitutional." To the same effect are *Jones v. Thompson*, 12 Bush, 394; *Fuqua v. Mullen*, 13 Bush, 467; *Brown v. Moss*, 126 Ky. 833, 105 S. W. 139, 31 Ky. Law Rep. 1288.

It is suggested in argument that, as the title of the act relates to the Houses of Reform, it was permissible, under section 51 of the Constitution, to insert in the body of the act sections containing subject-matter that related in any manner to the Houses of Reform; and, taking this proposition as a basis, it is urged that, as sections 13 and 14 have some relation to the Houses of Reform, they do not offend the Constitution. We have considered many cases in which legislation was assailed on the ground that it was violative of section 51 of the Constitution, and it has often been written that where the title expresses with reasonable certainty the subject-matter of the act, or the subject-matter of the act may, by liberal construction, be said to be expressed in the title, the legislation will be upheld. Or, as said in *Hyser v. Commonwealth*, 116 Ky. 410, 76 S. W. 174, 25 Ky. Law Rep. 608: "This court has repeatedly announced, in effect, that no provision of a statute directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of section 51 of the Constitution." To the same effect are *Eastern Ky. Coal Lands Corp. v. Commonwealth*, 127 Ky. 667, 106 S. W. 260, 32 Ky. Law Rep. 129; *Id.*, 127 Ky. 667, 108 S. W. 1138, 33 Ky. Law Rep. 49; *Phillips v. Covington & Cincinnati Bridge Co.*, 2 Metc. 219. So that if the title of this act had read, "An act in relation to," or, "An act concerning the Houses of Reform," then the title would have given notice to every person interested that the body of the act treated of matters generally relating to or concerning the Houses of Reform, and would have allowed much latitude in the subject-matter of the act. *Conley v. Commonwealth*, 98 Ky. 125, 32 S. W. 285, 17 Ky. Law Rep. 678; *Hoke v. Commonwealth*, 79 Ky. 567; *Burnside v. Lincoln Co. Court*, 86 Ky. 423, 6 S. W. 276, 9 Ky. Law Rep. 635; *Collins v. Henderson*, 11 Bush, 74; *Commonwealth v. Bailey*, 81 Ky. 395.

But in no instance has this rule been extended so as to legalize legislation that departs so radically from the title of the act as do the sections here under consideration. Here the title of the act limits the scope of the legislation to the appropriation of money for the benefit of the Houses of Reform, and this limitation in the title reasonably and naturally conveyed the meaning that the body of the act was confined to the appropriation of money and no other subject.

[2] The purpose of the constitutional pro-

vision was to enable persons reading the title of an act to get a general idea of what the act treated of or contained, and it has come to be a recognized legislative practice for members and others interested in legislation to read the title of acts and gather therefrom, in a general way at least, the subject-matter of the act, and under the authority of this constitutional provision members of the Legislature, as well as the public interested in legislation, have the right to rely on the title as indicating the subject-matter of the act and to assume that the act contains no legislation that is not embraced in a general way by the subject expressed in the title. But if it were allowable to insert sections in an act entirely foreign to the scope of the legislation as expressed in the title, the purpose of the Constitution would be entirely defeated, and much legislation would be enacted that the members would not have approved had they known that it was contained in the act.

The defect in the title of this act is very similar to the defect in the title of an act considered in *Board of Trustees v. Tate*, 155 Ky. 296, 159 S. W. 777. In that case the title of the act read, "An act to empower the board of trustees of graded schools operating under special charters, known as Special Act Schools, to levy a tax for maintenance," while in the body of the act, after authorizing graded schools known as Special Act Schools to levy a tax for maintenance, the act further provided that "all other graded schools of this commonwealth" should be authorized to levy a tax for maintenance, and it was held that the body of the act was limited by the title to Special Act Schools, and that so much of the act as authorized all other graded schools to levy the tax was void as violative of section 51 of the Constitution.

In *Henderson Bridge Company v. Alves*, 122 Ky. 46, 90 S. W. 995, 28 Ky. Law Rep. 994, the act under consideration was entitled "An act concerning the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second class," while in the body of the act the Legislature extended its provisions to embrace cities of the third class, and it was held that so much of the act as undertook to legislate concerning third class cities was outside the scope of the title, and therefore void.

The case we have cannot be distinguished from these two cases, and, being confident that these cases correctly interpret the meaning and purpose of section 51, they are controlling authority in support of the judgment appealed from.

It might further be noticed that in *Washington v. Commonwealth*, 143 Ky. 602, 136 S. W. 1041, *Calico v. Commonwealth*, 145 Ky. 641, 140 S. W. 1036, *Henson v. Commonwealth*, 148 Ky. 631, 147 S. W. 399, and *Black*

*v. Commonwealth*, 154 Ky. 144, 156 S. W. 1043, we had occasion to construe sections 13 and 14, now section 2095a, subsection 19a, of the Kentucky Statutes, but the attention of the court was not directed in any of these cases to the question presented on this appeal; consequently no reference was made to the validity of these sections, as their validity was not called in question so that under these circumstances these cases cannot be considered as pertinent in determining the question raised in this case.

We think the lower court correctly held that so much of the act as is included in sections 13 and 14, now section 2095a, subsection 19a, of the Kentucky Statutes, was violative of section 51 of the Constitution, and therefore void.

It follows from this that the judgment of the lower court should be affirmed; and it is so ordered.

#### OHIO VALLEY RY. CO. v. COPLEY.

(Court of Appeals of Kentucky. May 15, 1914.)

##### 1. MASTER AND SERVANT (§§ 101, 102\*)—OBLIGATION OF MASTER—SAFE APPLIANCES—SIMPLE TOOLS.

The rule that a master must exercise reasonable care to provide reasonably safe appliances for his servants does not apply where the appliances furnished are of a simple nature, easily understood, and in which defects, if any, can be readily observed by the servant, and it is only in cases of appliances which are recognized as being in their nature dangerous to servants that the master owes the duty of looking out for the safety of the servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

##### 2. MASTER AND SERVANT (§ 107\*)—OBLIGATION OF MASTER—SAFE APPLIANCES—SIMPLE TOOLS.

A T-rail cutter used to cut rivets holding sheets of steel is a simple tool, and an employé versed in the use of ordinary tools may not recover for an injury sustained by a sliver flying from the cutter.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

##### 3. MASTER AND SERVANT (§ 185\*)—INJURY TO SERVANT—FELLOW SERVANT.

An employer is not liable for injuries to an employé caused by a sliver flying from a T-rail cutter used to cut the heads from rivets holding sheets of steel, where the cutter was selected by a fellow servant from among a number of cutters supplied by the employer, for it was the duty of the fellow servant to inspect the cutter selected.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

Appeal from Circuit Court, Boyd County.  
Action by Thomas Copley against the Ohio Valley Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

George B. Martin, of Catlettsburg, for appellant. Dinkle & Prichard and D. M. Howerton, all of Catlettsburg, for appellee.

**MILLER, J.** The appellee Thomas Copley was injured while in the service of the appellant. He was engaged in stripping coal bumpers, which was effected by cutting the heads from the steel rivets that held sheets of steel in the form of a coal bumper. Two tools were used in this work, an ordinary sledge hammer and a steel T-rail cutter; the latter being a wedge-shaped tool, sharp at one end, with a head on the other. The cutter was about two inches broad, and 6 or 8 inches long, and had a handle from 18 to 24 inches long, attached to the center of the cutter. Copley was holding the sharp edge of the cutter against a rivet, while his fellow workman, Walters, struck it with the sledge; and while so engaged a small sliver of steel flew from the head of the cutter, striking appellee on the back of the hand, and inflicting the injury for which he sued. The case was based upon the allegation that the appellant was negligent in failing to furnish appellee with a steel cutter that was reasonably safe for the purpose for which it was used. The answer contains a traverse, and pleads contributory negligence and assumed risk upon the part of the plaintiff. The trial court having overruled appellant's motion for a peremptory instruction, the jury returned a verdict for \$72 for lost time, and \$128 for pain and suffering; and from a judgment based upon that verdict the defendant appeals.

There was no proof of contributory negligence.

[1, 2] Appellant's argument for a reversal is confined to the single proposition, that its motion for a peremptory instruction should have been sustained; and this contention assumes that the proof shows appellant was not negligent, and sustains the plea of assumed risk upon the part of the appellee.

The proof shows that the head of the steel cutter was burred or battered from use, and that it had a rough or ragged edge. Copley had never used a cutter or done work of this character before the occasion mentioned, and says he did not know it was unsafe or dangerous. When he and Walters were directed by the foreman to cut the rivets, Walters procured the cutter; and Copley testified he did not examine it until after the accident had happened, although he had been holding it in his hand and working with it for an hour or more. Appellant had several cutters of this character, and the one used upon the occasion mentioned had been selected by Walters, who testified that the rough edges could have been removed by grinding the head on an emery stone. Furthermore, Copley and Walters took turns in the work by which each would alternately hold the cutter, while the other used the sledge. Neither Copley nor Walters made any complaint that the cutter was dangerous or unfit for the work, and there is no evidence that appellant's boss, or its other servants, had any intimation or suspicion that it was defective,

beyond the fact that the top was battered, as above stated, if that be considered a defect. Neither was it shown that appellant's boss directed Walters or Copley to take any particular cutter; on the contrary, Walters said he had taken the cutter from the other tools and had hidden it so he could retain it for his own work, and that he took it from its hiding place the morning of the accident, after he had been directed to cut the rivets.

This case is quite similar to *Langhorn v. Wiley*, 91 S. W. 255, 28 Ky. Law Rep. 1186, where the plaintiff was injured while using a T-rail cutter of precisely the same pattern as that used by Copley, in splitting rock. While Wiley was holding the cutter and his fellow laborer struck it with a sledge, a small piece of the cutter or sledge flew off and struck Wiley on the arm, severely injuring him. He brought his action upon the ground that the tools furnished by the defendant were not safe, proper, or sufficient for the purpose, which fact it was alleged was not known to Wiley, but was known to the defendant. In that case, however, this court directed a peremptory instruction for the defendant, and in doing so it said: "There is no evidence whatever in the record that either the sledge or T-rail cutter were defective, nor that any latent defects in them, if any, could by the exercise of ordinary care have been discovered. In fact, the testimony showed that the T-rail cutter was made of the best quality of steel, tempered for the purpose of using it in cutting steel rails, that the sledge was the kind in general use, and that the tools were practically new. Nor is there any evidence that these tools were not reasonably safe for the purpose in which they were being used. It is true that generally a small tool called a 'wedge' was used in splitting rock, and the T-rail cutter for cutting rails, although the T-rail cutter was sometimes used in place of the wedge in splitting rock. The mere fact that the small wedge was in more general use in splitting rock than the T-rail cutter is not in and of itself sufficient to hold the master liable, upon the ground that the tools furnished were not reasonably safe. The master is only obliged to furnish the servant with tools and appliances that are reasonably safe." As authority for its ruling in the *Wiley* Case, the court quoted as follows from *Vissman v. Southern Ry. Co.*, 89 S. W. 502, 28 Ky. Law Rep. 429, 2 L. R. A. (N. S.) 469: "While this court has repeatedly announced, and yet holds to the rule, that it is the duty of the master to use ordinary care to provide the servant with reasonably safe tools, material, and place for the work required of him, it has never been carried to the extent of holding him liable for defects in tools, material, or place of work that no sort of inspection on his part could have discovered, for he is not bound to make the tools, material, or place of work absolutely safe, or to insure those engaged in his service against the ordi-



nary risks incident to the nature of the employment."

It is said, moreover, that this case comes within what is known as the "common" or "simple" tool rule, which exempts the master from liability where the instrument or tool, the defect in which is the cause of the injury, is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto. The "common" tool rule may be said to be a relaxation of the general rule, which makes it the duty of a master to exercise reasonable care to provide reasonably safe tools and appliances for his servants, since the general rule has no application where the tools and appliances furnished are of a simple nature, easily understood, and in which the defects, if any, can be easily and readily observed by the servant.

The "common" tool rule was recognized by this court in *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 41, 181 S. W. 1080, 40 L. R. A. (N. S.) 837, where Fork's hand was injured by the imperfect handle of a shovel he was using in loading coal into a car. In holding that Fork could not recover, we said: "We think we may properly put this case upon the ground that the tool furnished to appellee, as well as the use to which he put it, was so simple, and the place it was being used so free from danger, that he should not be allowed to recover for the injury sustained, assuming that it was caused by the defect in the handle. It must be recognized by every one that the rule of safe tools and appliances should not be extended to every tool and every appliance that is used by laborers and servants in the ordinary everyday affairs of life. There are few persons in employments of any kind who do not at some time or in some way use implements or tools (using these words in their broadest sense) in the performance of their duties or services. Some of these tools and implements are of the simplest character and are used in the simplest way, and in the performance of labor or service that is free from danger. There is nothing complicated about many of them, and their nature is such that any person of ordinary intelligence can at once use them without instructions or assistance." It is only in cases of machinery and appliances which are recognized as being in their nature dangerous to employes using them, or working in proximity to them, that the employer owes the duty to the employe of looking out for his safety. *Lynn v. Glucose Sugar Refining Co.*, 128 Iowa, 501, 104 N. W. 577. Many cases in which the simple tool rule has been applied are collected in the note to *Parker v. W. C. Wood Lumber Co.*, 98 Miss. 750, 54 South. 252, 40 L. R. A. (N. S.) 833. See, also, *Mercer v. Atlantic Coast Line R. Co.*, 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002, with note. The same rule has been applied and recovery denied where

the servant has been injured by slivers of iron or steel flying from hammers, chisels, punches, etc. See *Lynn v. Glucose Sugar Ref. Co.*, 128 Iowa, 501, 104 N. W. 577 (hammer); *Atchison, T. & S. F. R. Co. v. Weikal*, 73 Kan. 763, 84 Pac. 720 (chisel); *Gillaspie v. United Iron Works*, 76 Kan. 70, 90 Pac. 760 ("set" used as buffer); *Golden v. Ellis*, 104 Me. 177, 71 Atl. 649 (hammer); *Dompier v. Lewis*, 131 Mich. 144, 91 N. W. 152 (hammer); *Koschman v. Ash*, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 873 (common sledge or hammer); *Rahm v. Chicago, R. I. & P. R. Co.*, 129 Mo. App. 679, 108 S. W. 570 (bolt-punch hammer); *Campbell v. T. A. Gillespie Co.*, 69 N. J. Law, 279, 55 Atl. 276 (driftpin); *Demato v. Hudson County Gas Co.*, 74 N. J. Law, 793, 67 Atl. 28 (chisel); *Martin v. Highland Park Mfg. Co.*, 128 N. C. 284, 38 S. E. 876, 83 Am. St. Rep. 671 (hammer); *Meyer v. Ladewig*, 130 Wis. 566, 110 N. W. 419, 13 L. R. A. (N. S.) 684 (hammer); *L'Houx v. Union Construction Co.*, 107 Me. 101, 77 Atl. 636, 30 L. R. A. (N. S.) 800 (hammer and chisel). In *Duncan v. Gernert Bros. Lumber Co.*, 87 S. W. 762, 27 Ky. Law Rep. 1089, Duncan, the employe, sought to recover damages for an injury received in falling from a ladder, which was too short to enable him to do his work while standing upon the ladder. That fact, however, being clearly apparent to Duncan, this court held he could not recover. See, also, *Jones v. L. & N. R. R. Co.*, 95 Ky. 576, 26 S. W. 590, 16 Ky. Law Rep. 132, and *Flaig v. Andrews Steel Co.*, 141 Ky. 397, 132 S. W. 1015.

Narrowing the discussion to the particular cases in which a servant has been injured, in the use of chisels, punches, and similar tools, we find many cases in which the "simple" tool rule has been applied. In *Cincinnati, H. & D. R. R. Co. v. Phinney*, 38 Ind. App. 546, 77 N. E. 296, it was held that the master was not liable for an injury to an experienced adult employe resulting from the flying of a sliver of iron from a punch when struck by a hammer, where its obviously battered condition rendered such occurrence probable. In *Fordyce v. Stafford*, 57 Ark. 503, 22 S. W. 161, it was held that an experienced railroad man, who, while standing on a rail to steady it for a coemploye who was cutting it with a chisel, was struck by a splinter from the chisel or from the rail, and he had taken the chisel, which was obviously battered, with other tools, from the tool box each morning, and returned it at night, and, by the exercise of ordinary care might have known of its condition, must be considered to have assumed the risk incident to its use. In *Baker v. Western & A. R. R. Co.*, 68 Ga. 690, it was held that the plaintiff could not recover for injuries caused by a small piece of iron or steel flying from the stroke of a heavy hammer upon a cleaver in cutting an iron rail, where he was aware that the cleaver was battered

down and the edges of the hammer were broken and its surface uneven, although the cleaver was the only one he could find which was sharp enough to do the work. Again, in *Banks v. Schofield's Sons Co.*, 126 Ga. 667, 55 S. E. 939, it was held that a petition which alleged the defendant employed the plaintiff, who was 38 years of age, to dress off the rough edges of the iron on the truck frame of an engine, and furnished him, for that purpose, an iron chisel which was old, worn, and much too short for the work; that while plaintiff was using this chisel a piece of steel flew therefrom and injured his eye; that the defendant was negligent in not furnishing the plaintiff with a safe tool with which to work; that the chisel was old and worn, and the plaintiff on account of his unskillfulness did not know of the danger of using the same in his work; and that the deficiency in the tool and its weakness, and its liability to break in its condition, were known to the defendant, or could have been ascertained or discovered by the use of ordinary care on its part—did not state a cause of action. Again, in *Hefferen v. Northern Pacific R. Co.*, 45 Minn. 471, 48 N. W. 1, 526, it was held that where the employes were accustomed to select their own tools from a supply kept by the employer, who kept a tool repairer in the shops whose business it was to repair the tools, the employer was not liable for an injury caused by the breaking of a piece of steel from the head of a side set which plaintiff and a fellow workman were using in cutting off the heads of rivets, where the battered condition of the side set was the ordinary result of use; that it was immaterial that the selection of the tool was made by the employé with whom plaintiff was working, where the defective condition was apparent to the plaintiff; and that, although plaintiff was about 17 years of age, his experience of 2½ years in various employments about the shop was sufficient to warrant the court in holding that he assumed the risk. And in *Buchanan v. Rome W. & O. R. Co.*, 10 N. Y. St. Rep. 326, it was held that an employé who used a chisel, knowing its head to be battered, assumed the risk arising from its use in its dangerous condition. See, also, *Houston & T. C. R. Co. v. Conrad*, 62 Tex. 627.

The reason for exempting the master from liability in cases of this character rests upon the fact, well known to everybody, that deterioration being the necessary result of using a chisel, punch, cutter, and similar tools for the purposes for which they are intended the duty of inspection and repair in such a case is incidental to the duty of the employes who use the tool in their common employment. The ordinary use of such a tool neces-

sarily batters it, although that fact does not necessarily make it an unsafe tool.

[3] And, in the case at bar, clearly appellant is not responsible to the appellee for the failure of Walters, his fellow servant, to perform the duty of inspection when he selected the cutter from among the other tools. *Demato v. Hudson County Gas Co.*, 74 N. J. Law, 793, 67 Atl. 28.

From this uniform line of decisions, it is apparent that the case before us comes within the "simple" tool rule above announced, and that appellant's motion for a peremptory instruction should have been sustained. We do not mean to say, however, that the "simple" tool rule would apply in a case where the tool is defective, and that fact is known to the master, and unknown to the servant. In such a case the master would be liable. It was expressly so held in *Mergenthaler-Horton Basket Co. v. Taylor*, 90 S. W. 968, 28 Ky. Law Rep. 924, where a servant was injured while using a defective monkey-wrench, a simple tool; the defect thereof, however, being known to the master and not known to the servant. See, also, *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671. Likewise, in *Crilley v. New Amsterdam Gas Co.*, 106 App. Div. 127, 94 N. Y. Supp. 102, where the evidence showed that plaintiff was injured by being struck in the eye by a silver from a chisel which he was using in cutting off the heads of rivets; that he had made complaint of the breaking of chisels theretofore furnished him, whereupon the foreman brought him the chisel which caused the injury, and assured him it was all right, and upon examination before using it, so far as plaintiff could discover, it appeared to be all right; that the cause of its breaking was the fact that it was made of coarse-grain steel which was not suitable for the purpose on account of its tendency to silver; and that the chisel was made by the defendant's blacksmith, of steel furnished by the defendant—it was held that the granting of a nonsuit was erroneous. This ruling was based upon the fact that the master was liable because, having manufactured the defective chisel, it necessarily knew, or could have known by the exercise of ordinary care, that the chisel was defective.

In the case at bar, however, Copley was 50 years old; had worked about three years in a coal mine; had worked also as a brakeman and a section hand upon a railroad; had worked upon a steamboat; had used a drill in drilling stones; thus showing that he was a man well versed in the use of all ordinary tools, and with the experience that comes to a general utility man. There are no features in his case which take it out of the "simple" tool rule.

Judgment reversed.

**RIALTO CO. v. MINER. (No. 13,335.)**

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied April 24, 1914.)

**1. STATUTES (§§ 281, 289\*)—PLEADING AND EVIDENCE—FOREIGN STATUTES.**

Parties relying upon the statutes of another state and the decisions construing them must plead them and give them in evidence.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 380, 381, 389, 390; Dec. Dig. §§ 281, 289.\*]

**2. STATUTES (§ 289\*)—PLEADING AND EVIDENCE—FOREIGN STATUTES.**

By the written law of another state is not meant the statements of text-writers or the decisions of courts, but, when a foreign law has received a local construction, judicial decisions and law writers may be consulted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.\*]

**3. STATUTES (§ 289\*)—EXPERT TESTIMONY—LAW OF ANOTHER STATE.**

The statements of text-writers and the decisions of courts may be used with the evidence of experts to enlighten the court in ascertaining the meaning of the law of another state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.\*]

**4. CORPORATIONS (§ 514\*)—ACTION BY—PLEA OF "NUL TIEL CORPORATION"—DISTINCT FROM PLEA "ULTRA VIRES."**

A plea that plaintiff corporation is not a corporation either de jure or de facto, and consequently not entitled to sue, is not a plea of ultra vires, which assumes an incorporation either de jure or de facto and a misuse of or departure from a franchise, but is a plea of nul tiel corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2032-2081; Dec. Dig. § 514.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7145, 7146.]

**5. CORPORATIONS (§ 28\*)—INCORPORATION AND EXISTENCE—"DE FACTO CORPORATION."**

A corporation is a de facto corporation where there is a law authorizing such a corporation and where it has attempted to organize under it and is transacting business in a corporate name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 28, 70; Dec. Dig. § 28.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1841-1843.]

**6. CORPORATIONS (§ 633\*)—FOREIGN CORPORATIONS—EVIDENCE OF INCORPORATION.**

Plaintiff, an Illinois corporation, was incorporated, subsequently changed its name, increased its capital, and enlarged its specification of objects, all in compliance with Hurd's Rev. St. Ill. 1909, c. 32, §§ 1-5, 50, 51, as shown by the certificates of the secretary of state, and carried on its business in Chicago for over 22 years. Its specification of enlarged objects declared that they were the securing or erection of a building to contain suitable or proper vaults and safes for the storage and protection of property and to carry on therein the business of storing and caring for property and to do all things incident to the management of such building, which business and the acquisition or erection of property therefor would be legal. Illinois decisions and expert testimony were in evidence to the effect that incorporation to acquire and hold real estate was prohibited. *Held*, that the clause in the specification as to the acquisition of a building did not

control, but that it sufficiently stated an object for which a corporation might have been lawfully formed under the Illinois statutes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2503; Dec. Dig. § 633.\*]

**7. CORPORATIONS (§ 661\*)—FOREIGN CORPORATION—ACTION.**

An Illinois corporation, authorized as such to make a lease of offices in a building in Chicago, on breach of the terms thereof was entitled to maintain its action in this state against the lessee, a citizen of, and found in, the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563-2567; Dec. Dig. § 661.\*]

**8. CORPORATIONS (§ 659\*)—CORPORATE EXISTENCE—ESTOPPEL TO DENY.**

A lessee dealing with his lessor as a foreign corporation and exhibiting a counterclaim or demand against it, when sued in this state for arrears of rent, may not challenge the lessor's corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2561, 2562; Dec. Dig. § 659.\*]

**9. LANDLORD AND TENANT (§ 233\*)—ACTION FOR RENT—QUESTION FOR JURY—COUNTERCLAIM.**

In an action for rent, where the lessee counterclaimed for the value of furniture taken from the offices without its consent, *held*, on the evidence, that the trial court committed no error in directing a verdict against the lessee on his counterclaim.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 49, 940-944; Dec. Dig. § 233.\*]

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Action by the Rialto Company against F. J. Miner, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Frumberg, A. R. Russell, and M. G. Reynolds, all of St. Louis, for appellant. Robert & Robert, Jones, Hocker, Hawes & Angert, and Geo. F. Haid, all of St. Louis, for respondent.

**REYNOLDS, P. J.** This is an action by plaintiff, alleged to be a corporation duly organized and existing under the laws of the state of Illinois, to recover five months' rent claimed to be due under and by virtue of a lease executed by plaintiff as lessor, to the defendant, lessee, the lease covering certain rooms in a building owned by plaintiff in the city of Chicago, the lease dated March 9, 1908, annual rental \$2,610, \$217.50 payable monthly in advance on the first day of each month. Alleging that the defendant lessee had paid the rent under the lease until November 1, 1909, but had made default in payments for the remaining five months of the term, judgment is demanded for the amount.

The answer, for a first defense, denies that plaintiff is a corporation duly organized and existing under the laws of the state of Illinois, and denies that it is a corporation at all, alleging that the statutes of Illinois prohibit a corporation from acquiring and holding real estate, and that it is contrary to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

laws and public policy of that state to permit a corporation to be organized for the purpose of leasing specified real estate for a long term of years upon which to erect buildings for tenants, and that a corporation attempted to be organized for such purposes has no valid, legal existence; that the promoters of the plaintiff corporation, seeking to evade the law and the public policy of the state of Illinois, organized the plaintiff company for the avowed purpose of securing or erecting a building to contain suitable and proper vaults and safes for the storage and protection of property and to do all things incident to the management of the building; that the avowed object of the plaintiff company was not to conduct a safety deposit vault business and that the company or alleged corporation did not at any time, and never has at any time, attempted in good faith to exercise any corporate functions properly belonging to deposit or safety vault companies, or any other functions not prohibited by the laws of the state of Illinois; that plaintiff is neither a corporation *de jure* nor *de facto* and has not the power to sue in this or any other court, and that by reason of the facts above stated the lease set up was and is null and void and directly contravenes and is in violation of the statutes of the state of Illinois and against the public policy of that state.

"Defendant for his further answer herein says that he leased the premises herein referred to for the purpose of operating and conducting a brokerage and commission business," in Chicago; that about the beginning of the lease he moved into the offices or rooms in the building, furnished them with certain articles, enumerating them, of which articles defendant avers he was lawfully possessed as of his own property and which were of the value of \$1,500; that on or about May 25th, 1906, defendant quit his brokerage and commission business in the offices, closed the offices, turned the keys over to plaintiff and left the furniture and fixtures in the premises; that when defendant surrendered the keys of the offices to plaintiff it was agreed between plaintiff and defendant that the furniture and fixtures were to remain in the premises and be in the care and custody of plaintiff during the remainder of the term of the lease and that plaintiff would not permit or cause the property to be removed or molested during the term of the lease without the written consent of defendant but, disregarding its duties plaintiff suffered and permitted the furniture and fixtures to be removed from the offices and from its care and custody during the term of the lease without the knowledge or written consent of defendant and wholly without his authority, and that the property thereby passed from the control of and was lost to defendant, to his damage in the sum of \$1,500, for which sum he demands judgment against plaintiff. This answer was duly verified by defendant, and a

general denial, by way of reply, filed by plaintiff.

The cause came on for trial before the court and a jury and under the direction of the court the jury returned a verdict for plaintiff for the amount of the rental and interest and against defendant on his counterclaim and judgment was entered accordingly. Interposing a motion for new trial and excepting to that being overruled, defendant has duly perfected his appeal to this court.

The errors assigned are to the action of the court in peremptorily instructing the jury to return a verdict for plaintiff on its cause of action and to return a verdict against defendant on his counterclaim.

At the trial of the cause plaintiff introduced and read in evidence several sections from chapter 32 (Hurd's Ed. 1909), Revised Statutes Illinois, relating to corporations for pecuniary profit.

Section 1 of that chapter provides that corporations may be formed in the manner provided by the act "for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money."

Section 2 provides for the manner of obtaining the license, which is that whenever any number of persons not less than three, nor more than seven, shall propose to form a corporation under the act, they shall make a statement to that effect under their hands and duly acknowledged before some officer in the manner provided for the acknowledgments of deeds, setting forth the name of the proposed corporation, the object for which it is to be formed, its capital stock, the number of shares of which such stock shall consist, the location of the principal office and the duration of the corporation not to exceed 99 years, which statement shall be filed in the office of the secretary of state. If the object for which the corporation is proposed to be organized is clearly and definitely stated, "and is a lawful object," the secretary of state shall thereupon issue to such persons a license as commissioners to open books for subscription to the capital stock of the corporation at such times and places as they may determine. Upon the filing of any statement with the secretary of state for the purpose of obtaining a license to incorporate, he may propound such interrogatories as he shall deem necessary to ascertain the true object.

The third section provides that after the capital stock shall be fully subscribed, the commissioners shall convene a meeting of the subscribers for the purpose of electing directors or managers and the transaction of such other business as shall come before them.

The fourth section provides that the commissioners shall make a full report of their proceedings, "which report shall be sworn to by at least a majority of the commissioners and shall be filed in the office of the secre-

tary of state. The secretary of state shall thereupon issue a certificate of the complete organization of the corporation, making a part thereof a copy of all the papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of state, and the same shall be recorded in a book for that purpose, in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of the said copy, the corporation shall be deemed fully organized and may proceed to business."

Section 5 provides that "corporations formed under this act shall be bodies corporate and politic for the period for which they are organized; may sue and be sued; may have a common seal, which they may alter or renew at pleasure; may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation."

Section 50 of the same chapter provides: "That whenever the board of directors, managers or trustees of any corporation existing by virtue of any general or special law of this state, or any corporation hereafter organized by virtue of any law of this state, may desire to change the name, to change the place of business, to enlarge or change the object for which such corporation was formed, to increase or decrease the capital stock [they may call a special meeting of the stockholders of such corporation], for the purpose of submitting to a vote of such stockholders, \* \* \* the question of such change of name, change of place of business, enlargement or change of the object for which such corporation was formed, increase or decrease of capital stock." It is also provided that no alteration or change shall be made by virtue of this section to embrace any object that might not have been lawfully embraced in the statement and license issued before the organization of such corporation as provided in section 2 of the act.

Section 51 provides for the manner of calling the meeting for the above purpose, section 52 provides for the manner of voting at the meeting, and section 53 provides that if at any meeting held as specified, it shall appear that the propositions submitted have been adopted by a vote of two-thirds of all the voters represented by the whole of the stock of the corporation, a certificate thereof, verified by the affidavit of the president, and under seal of the corporation, shall be filed in the office of the secretary of state, and with the recorder of deeds of the proper county, and that upon the filing of this certificate the changes proposed and voted for at such meeting will be and are "hereby declared accomplished in accordance with said vote of the stockholders."

These are the pertinent sections of the

chapter which were introduced and read in evidence by plaintiff. In addition to these plaintiff introduced and read in evidence certain decisions of the Supreme Court and one decision of an appellate court of the state of Illinois, as follows: *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. 528; *Springer v. Chicago Real Estate Loan & Trust Co.*, 202 Ill. 17, 66 N. E. 850; *Hayden v. Hayden*, 241 Ill. 183, 89 N. E. 347; *Dauchy Iron Works v. Gunder*, 150 Ill. App. 604. It also introduced the lease, which is in the ordinary form of lease and with a further covenant "that all personal property in the demised premises shall be at the risk of the lessee only; and if the whole, or any part thereof, shall be lost or destroyed or damaged by fire, water or otherwise, or by the leakage or bursting of water pipes, or by steam-heating apparatus, or in any other way or manner, no part of said loss or damage is to be charged to, or borne by the lessor, its successors or assigns, in any case whatever." Oral evidence of occupation of the premises, demand and failure to pay rent was also introduced by plaintiff.

Defendant introduced evidence of the value of the furniture and that it had been removed without his consent, and also evidence which it is claimed tended to show that the furniture had been removed with the knowledge and consent of plaintiff. We will refer to this hereafter.

[1] It has been the uniform holding of our courts that parties relying upon the statutes of a sister state must plead and give them in evidence. Neither party here pleaded any statute of the state of Illinois, but as the statutes above set out are relied upon and were treated as properly in evidence by both parties, and as each party relies upon them in their arguments before us, we have concluded to pass over the defect in the pleading and to determine the case upon the theory upon which it was tried and is presented to us by the several counsel. The statutes as well as the decisions relied upon should not only have been given in evidence but should have been pleaded. *McDonald v. Bankers Life Ass'n*, 154 Mo. 618, loc. cit. 628, 55 S. W. 999, and authorities there cited. Failing that we would be obliged to treat this case as resting upon our own law, to do which would put defendant out of court on his main defense, for tested by our law and decisions, that defense would not stand.

[2, 3] Our statutes provide for the introduction and receipt in evidence of the printed statutes and decisions of other states. (Revised Statutes 1909, sections 6281 and 6332.) It is to be assumed, however, that they have been properly pleaded. It has been said by our Supreme Court in *Charlotte v. Chouteau*, 25 Mo. 465, loc. cit. 476, in treating of the admission in evidence of the written law of other states, and of the duty of the court to construe that law, "We do not mean by the written law the statements

of text writers or the decisions of courts; but these may be used with the evidence of experts to enlighten the court in expounding the foreign law; for, when a foreign law has received a local construction, judicial decisions and law writers may be consulted, and professional witnesses may be examined for the purpose of ascertaining its meaning." With this rule in mind we have endeavored to ascertain the construction placed by the Illinois courts upon their law as touching the corporate existence of the plaintiff here, and the right to attack that collaterally.

[4] It is claimed that plaintiff is not a corporation either *de jure* or *de facto* and consequently not entitled to sue in this or any other court, and that the lease entered into between it and defendant is of no validity. This is not a plea of *ultra vires* but a plea of *nul tiel corporation*. It would seem that the plea of *ultra vires* should have no place here, for that plea assumes an incorporation, either *de jure* or *de facto*, and a misuse of or departure from a franchise. This distinction has not always been kept in mind, courts often discussing and determining cases pretty much on the same line, whether the plea is *ultra vires* or *nul tiel corporation*.

Here corporate existence is denied. There is no pretense that the lease was not executed between the parties; nor is there a denial of its terms, nor of the non-payment of the rent for the months involved. In point of fact defendant admits the lease executed between him and plaintiff; his counterclaim endeavors to partially off-set the rents by reason of a breach of an agreement between him and plaintiff to take care of and safely keep property which he avers he had in the demised premises, this agreement growing out of the relation of landlord and tenant under the lease.

[5, 6] So we come squarely to the question as to whether plaintiff is a corporation *de facto* or *de jure* under the laws of the state of Illinois, and as such having power to make this lease, or for that matter make any contracts. It is not pretended that if the corporation is a lawful one the execution of the lease was *ultra vires*.

It is earnestly insisted by learned counsel for appellant, on the authority of *Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 87 N. E. 167, that plaintiff is not either a *de jure* or *de facto* corporation. The opinion of the Supreme Court of Illinois in that case, approving as it does a decision of the appellate court in *Chicago Open Board of Trade v. Imperial Building Co.*, 136 Ill. App. 606, is the strongest authority cited in support of the contention of the learned counsel for appellant. There *Cook on Corporations*, § 234 (see 6th Ed.), is quoted as defining a *de facto* corporation thus: "The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made

an effort to organize under the law and is transacting business in a corporate name." (Italics ours.) It may be added that it is also said at section 232 of the same treatise, that "In general, a party contracting to pay money to a corporation, or to transfer property to it as a corporation, cannot avoid the obligation of that contract by alleging the fact that the corporation was not duly incorporated, if it be proved that such a corporation *might have been organized under the statutes*, and that the supposed corporation attempted to so organize and proceeded to transact business." (Italics ours.)

Applying the first definition as above, the Illinois Supreme Court held that the appellant there, plaintiff below, was not a *de facto* corporation. The object for which the corporation was formed, as stated in the certificate in the *Imperial Building Company Case*, was to lease for a term of years, not to exceed 99 years, certain lots "for the purpose of erecting thereon a building for the accommodation of tenants, to make leases, collect rents and do all things incident to the management of said property." The court held that a corporation cannot be organized under the Illinois laws for the acquisition of real estate, erecting a building thereon, and renting to tenants as a mere investment; that acquiring the lease for 99 years is acquiring real estate. Quoting section 234 from *Cook on Corporations*, as above, as to a corporation *de facto*, it is held that the plaintiff is not a corporation *de facto*; nor is it one *de jure*, for its stated object is illegal, and that the lessee of such a corporation, in such a proceeding as then before the court, could attack that existence.

That the plaintiff here was duly incorporated and that its subsequent change of name, increase of its capital and enlarged specification of the objects, were all done in compliance with the laws of the state of Illinois, is clear, in fact is not contested. The contention of learned counsel for appellant turns on the proposition that it not only does not appear that this plaintiff "might have been organized" under the statutes but that it affirmatively appears that its proposed objects were unlawful; that the object stated is an unlawful object, under the laws of Illinois governing the creation of corporations, and the attempted incorporation a nullity.

We come then to the real point of inquiry, that is, the stated object of this corporation. As set out in the original articles, it is "to secure or erect a building to contain suitable and proper vaults and safes for the storage and protection of property and to do all things incident to the management of said building." This original certificate was filed in the office of the secretary of state of Illinois on October 21st, 1884, and the secretary of state certifies under his hand and the Great Seal of the State, that it was duly signed and acknowledged for the organiza-

tion of the Chicago Deposit Vault Company "under and in accordance with the provisions of an act concerning corporations," that being the act, pertinent sections of which we have above set out. It is further stated in this certificate of the secretary of state that a license had been issued to persons named as commissioners to open books for the subscription to the capital stock "of said company," and that the commissioners had, on March 26th, 1885, filed in the office of the secretary of state a report of their proceedings had by them under the license theretofore issued by the secretary of state. Whereupon the secretary of state under date of March 26th, 1885, still under the "Great Seal of the State," certifies "I \* \* \* Secretary of the State of Illinois, by virtue of the powers vested in me by the laws, do hereby certify that the said, The Chicago Deposit Vault Company, is a legally organized corporation under the laws of this state." Follows in due time the certificate of the secretary of state, again under the "Great Seal of the State," that on January 9th, 1888, the Chicago Deposit Vault Company, had filed a certificate attached, of increase of stock, increasing it from \$500,000 to \$600,000. Then follows a certificate of the secretary of state, still under the "Great Seal of the State," that on July 30th, 1895, the Chicago Deposit Vault Company had filed copy attached, a certificate of change of name and enlargement of objects of the company. That attached certificate sets out that at a special meeting of the stockholders of the Chicago Deposit Vault Company, held at its office on the 13th of July, 1895, it was voted by the requisite vote of two-thirds of all the votes represented by the whole stock "of said corporation" to change the name "of said corporation" to "The Rialto Company," and also to enlarge or change the objects for which such corporation was formed so the same should be and read as follows: The objects for which it is formed is to secure or erect a building to contain suitable or proper vaults and safes for the storage and protection of property and to carry on therein the business of storing and caring for property and to do all things incident to the management of said building. So far as the certificates of the officer of the state are concerned, there can be no question but that they are all according to law, and that this plaintiff is a corporation de jure, provided its objects are legal. There is no defect whatsoever in the matter of its original incorporation, increase of stock, change of name and enlargement of objects.

It must be admitted that the statement of the objects is rather awkward. But we hold that it is sufficiently stated to constitute them objects for which a corporation may be lawfully formed in Illinois. In other words it is such a corporation as "might have been organized under the statute." It pro-

posed to secure or erect a building to contain suitable and proper vaults and safes for the storage and protection of property and to carry on therein the business of storing and caring for property." That the acquisition and erection of a building was placed before a statement of the business which was to be carried on therein, does not have the effect of making that object paramount to the carrying on of that particular business. The original name, "Chicago Deposit Vault" is not without significant suggestion of the primary object. Corporations do not usually select names foreign to their main object. As we understand the argument of the learned counsel for appellant, they concede that if this statement had been that the proposed corporation was to be organized with the object of storing and protecting property and for that purpose to acquire or erect a building, it would have stated a lawful object, although it was unnecessary to have stated this latter, inasmuch as the law allowed it to hold real estate without setting that out in the certificate as an object, when to hold real estate was necessary for carrying on the object. Their argument is that setting out that the acquisition of a building as an object and setting it out first, controls, and that the rest merely sets out the use. We are unable to see that stating the object as here brings about that result. The clause as to acquiring real estate may be entirely eliminated and a lawful object still remains. It will be observed that the object stated in the Imperial Building Co. Case, supra, is essentially different from that before us. That presented a real estate investment, pure and simple; nothing else. This presents a lawful business as an object—the "storage and protection of property," maintaining "suitable and proper vaults and safes." So we do not think that the Imperial Building Co. Case is analogous or decisive of the case before us. Even in that case it is said (238 Ill. loc. cit. 113, 87 N. E. 171): "We are not to be understood as holding appellee (defendant below) is not liable in any event for use and occupation of appellant's premises, for we are of the opinion if it occupied them under an agreement to pay rent, a liability was created which may be enforced in some appropriate proceeding, but it cannot be enforced in this suit." The Imperial Building Co. Case arose on a judgment for rent, entered against defendant under a power in the lease. The lessee made a motion to vacate that judgment and the case came before the Supreme Court on the validity of the judgment. That involved the validity of the lease, the action being on and under the lease, and the Supreme Court held that the body making the lease, not having any corporate existence, could not make the lease. That being so, and not stopping to examine into the practice acts of Illinois, we can only say we are at a loss to understand how the

rental or value of the occupation could be recovered in any other form of action.

Referring to the Illinois decisions which were introduced in evidence by plaintiff here, in *Rector v. Hartford Deposit Co.*, supra, the trial court had refused to give an instruction to the effect "that the plea of ultra vires may be successfully interposed in a collateral proceeding where the corporation is alleged to have performed an act which it was not, under any circumstances, authorized to perform, but that where the act is one which at most is but a mere abuse or excessive use of the general power conferred upon the corporation by its charter such plea cannot be successfully interposed, because the question of ultra vires can in such cases be raised only in a direct proceeding by the state to oust the corporation of its usurped powers." The Supreme Court held (190 Ill. loc. cit. 387, 60 N. E. 530) that the proposition presented the correct legal doctrine. "That the appellee (plaintiff company) possessed ample power to acquire real property and construct a building thereon for the purpose of transacting therein the legitimate business of the corporation is beyond the range of debate. Nor is the contrary contended, but the insistence is that under the guise of erecting a building for corporate purposes the appellee company purposely constructed a much larger building than its business required, containing many rooms intended to be rented to others for offices and business purposes, among them the basement rooms contracted to be leased to the appellant, and that in so doing it designedly exceeded its corporate powers. The position of appellant therefore is, that the appellee corporation has flagrantly abused its general power to acquire real estate and construct a building thereon. Conceding that position to be correct, we do not think it can be availed of as a defense in an action brought by the corporation to recover rent contracted to be paid for the use of one of the rooms of the building." Moreover, it was in evidence in that case that the building erected consisted of 14 stories; that it contained the demised premises in the basement rented to the appellee, eight stores on the ground floor and over 100 suites of offices on the upper floors, the only "safety deposit vaults" erected or operated by plaintiff consisting of a small vault upon the fourth floor of the building constructed in one end of one of the private offices used by the company for its officers and agents. With these facts, however, in the case, the Supreme Court of Illinois held as above; that the existence of the corporation was not open to collateral attack.

In *Springer v. Chicago Real Estate Loan & Trust Co.*, supra, *Rector v. Hartford Deposit Co.*, supra, is affirmed, the court saying that the corporation plaintiff has power to own and hold real estate for some purposes, and

whether it exceeded its power in accepting the conveyance to the premises described in the lease, can only be brought into question by a proceeding instituted in behalf of the state.

In *Hayden v. Hayden*, supra, as well as in *Dauchy Iron Works v. Gunder*, supra, the above cases are followed. The latter case by the same appellate court in which the *Imperial Building Co.* Case had been determined. See 136 Ill. App. 606.

We have referred to the laws of Illinois concerning the mode of incorporating these companies and to the certificates of incorporation granted by the secretary of state to this plaintiff. It is clear that all the forms of law were observed in its original incorporation and in the subsequent changes. It is to be borne in mind that we have before us a corporation of a sister state, certified by the proper officer, under the Great Seal of the State, to be a lawful corporation, with a lawful object. We are asked to declare it void when for over 22 years, so far as appears by the record or anything before us in the case, it has been carrying on business and conducting its operations as a corporation at the home of its creation, under the sanction, presumably under the eyes, of the officers of the state and under a law that specifically provides for the ascertainment of the true objects of the corporation by the secretary of state before he issues any certificate of incorporation. It is not out of place to add that while not in evidence, section 193 of this same chapter 32, under which this corporation is incorporated, requires it to file annually, reports of its condition with the secretary of state, failure to do which entails a heavy penalty. In the light of all these, we are not prepared to say that this corporation has no valid existence, either de facto or de jure, under the laws of the state of Illinois.

[7, 8] In *Wells Co. v. Gastonia Cotton Mfg. Co.*, 190 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003, the Supreme Court of the United States held, among other things, that the plaintiff having become in law a corporation when its charter was approved and the Great Seal of the State affixed thereto, it was entitled as such corporation to sue in the United States Circuit Court as a citizen of Mississippi; that the United States Court would not inquire into the validity of its corporate existence; that if the organization of the company as a corporation was tainted with fraud, it was for the state, by appropriate proceedings to annul the charter. It is true that there the court held that subscription to and payment of the authorized capital was not a prerequisite to incorporation, but it is instructive as to the credit to be given to the acts of state officers. Here, under the most solemn forms of law and on the judgment of the proper officer of the state of Illi-



nois, plaintiff is certified to be a duly incorporated body of that commonwealth. Those officers have certified that plaintiff is a corporation organized and existing under the laws of the state of Illinois. As such it was authorized to enter into this lease, and on the violation of the terms thereof, is entitled to maintain its action in this state against this defendant, a citizen of and found in this state. It may be further said that dealing with plaintiff as a corporation, exhibiting a counterclaim or demand against it, arising out of this transaction, it hardly lies in the mouth of defendant to challenge the corporate existence of plaintiff. The learned trial court therefore committed no error in directing a verdict for plaintiff on its cause of action.

It is suggested that plaintiff did not carry on the business of a safety deposit company; that all the safety vaults it had were in the several offices. That may be, but that was very much the situation in Rector v. Hartford Deposit Co., supra. There it was held that this did not vitiate the franchise of the corporation.

[9] Nor did the trial court commit error in directing a verdict for plaintiff and against defendant on defendant's counterclaim. That counterclaim was supported by no substantial testimony in the case. It is true that the defendant testified that the furniture was taken out of his offices without his knowledge or consent, testified to its value, and there was evidence that an employé of plaintiff had signed a ticket allowing some of it, what pieces or of what value does not appear, to be taken down in the elevators. There is no proof that defendant surrendered the keys before the end of the term. Nor does it appear when the furniture was removed. Defendant's own evidence tends to show that it was removed before the end of the term and while defendant still was in possession of the rooms under his lease. The lease expressly exempted plaintiff from responsibility for any furniture while in the office, and the proof of a subsequent agreement to look after it was too vague and unsubstantial to impose any duty on plaintiff. There was evidence that the furniture was removed by persons connected with defendant himself and no evidence that plaintiff or any one authorized by it, had participated in or even assented to the removal. The learned trial court committed no error in taking that from the jury. "Where the evidence is of that character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and his prerogative to interfere before submission to the jury and direct a verdict for the defendant." *Hite v. Metropolitan Street Ry. Co.*, 130 Mo. 132, loc. cit. 141, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; *Fuchs v. City of St. Louis*, 167 Mo. 620,

loc. cit. 631, 67 S. W. 610, 57 L. R. A. 136; *Furber v. Kansas City Bolt & Nut Co.*, 185 Mo. 301, loc. cit. 311, 84 S. W. 890.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

GABBERT et al. v. EVANS. (No. 1195.)

(Springfield Court of Appeals. Missouri.

April 7, 1914. Rehearing Denied

May 12, 1914.)

1. FRAUDS, STATUTE OF (§ 23\*)—ORIGINAL OR COLLATERAL PROMISE.

Where an executrix who was the sole beneficiary of the estate individually employed attorneys to defend against a claim against the estate, her promise to pay them was not a promise to answer for an existing or previously incurred debt of the estate, but an original promise, not required to be in writing by Rev. St. 1909, § 2783, providing that no action shall be brought to charge any executor or administrator upon any special promise to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

2. APPEAL AND ERROR (§ 933\*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

On an appeal from an order granting a new trial, it could not be assumed that the court set aside the verdict as against the weight of the evidence, in the absence of any showing that it did, in order to apply the rule that the discretion reposed in trial courts in determining the weight of the evidence on such motions will be rarely interfered with.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

3. APPEAL AND ERROR (§ 854\*)—REVIEW—APPEAL FROM ORDER GRANTING NEW TRIAL.

A party relying on some valid ground for sustaining a motion for a new trial other than that specified by the trial court must discover and point out such ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

4. ATTORNEY AND CLIENT (§ 129\*)—NEGLECT IN TRIAL OF CAUSE.

Whether a defendant should introduce evidence on his own behalf or submit the case on plaintiff's evidence depends so largely on sound judgment applied to the particular facts that whether attorneys for a defendant were negligent in failing to introduce evidence could not be determined, where all the facts and the whole situation as it presented itself to such attorneys were not before the court.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 284-291; Dec. Dig. § 129.\*]

5. ATTORNEY AND CLIENT (§ 86\*)—REPRESENTATION OF CLIENT BY ATTORNEY—AUTHORITY OF ATTORNEY.

In an attorneys' action for compensation, defended on the ground of negligence, defendant was bound by the statement of her counsel during the trial that the only negligence complained of was the failure of such attorneys to

perfect an appeal in the action in which they appeared for her.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155-160; Dec. Dig. § 86.\*]

**8. ATTORNEY AND CLIENT (§ 107\*)—NEGLIGENCE—DEGREE OF SKILL REQUIRED.**

Attorneys were bound to use, in the trial of a cause in which they were employed, the professional knowledge and diligence which members of the legal profession ordinarily possess, and were liable for lack of ordinary skill and diligence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 218; Dec. Dig. § 107.\*]

**7. ATTORNEY AND CLIENT (§ 161\*)—COMPENSATION—DEFENSES—NEGLIGENCE.**

An attorney cannot recover for services which are of no value to his client because of his lack of ordinary skill or diligence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 359; Dec. Dig. § 161.\*]

**8. ATTORNEY AND CLIENT (§ 167\*)—ACTIONS—QUESTION OF LAW OR FACT.**

In attorneys' action for compensation, defended on the ground of negligence, where the only question was as to the sufficiency of an affidavit for appeal prepared by such attorneys, the question of negligence or want of skill was one of law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. § 167.\*]

**9. EVIDENCE (§ 508\*)—ACTIONS—QUESTION OF LAW OR FACT.**

Whether an act, as the filing of an insufficient affidavit for appeal, shows want of ordinary professional skill is a question for the jury on expert evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. § 508.\*]

**10. ATTORNEY AND CLIENT (§ 161\*)—COMPENSATION—DEFENSES—NEGLIGENCE.**

To render an attorney liable for damages or defeat a recovery for his services on the ground of negligence or want of professional skill, the alleged act of negligence must work injury and loss to the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 359; Dec. Dig. § 161.\*]

**11. ATTORNEY AND CLIENT (§ 166\*)—ACTIONS—BURDEN OF PROOF.**

In attorneys' action for compensation, defended on the ground of negligence, it was incumbent on the client to establish the fact that the attorneys' negligence worked injury and loss to her.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. § 166.\*]

**12. ATTORNEY AND CLIENT (§ 161\*)—COMPENSATION—DEFENSES—NEGLIGENCE.**

The filing by attorneys of an insufficient affidavit for an appeal did not defeat a recovery for their services, where their client consulted and employed a new attorney, and had abundant time thereafter to have the judgment reviewed by writ of error, but, instead, compromised and settled it.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 359; Dec. Dig. § 161.\*]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Lewis C. Gabbert and another, copartners, against Alabama C. Evans. From an order granting a new trial after a verdict for plaintiffs, they appeal. Reversed and remanded, with directions.

J. W. McAntire, of Joplin, for appellants. Edward E. Sapp, of Galena, Kan., and H. W. Currey, of Webb City, for respondent.

**STURGIS, J.** In this case the defendant is resisting the payment of an attorney fee and personal expenses, alleged to be due to plaintiffs, a firm of St. Joseph lawyers, in defending a suit originating in the probate court of Atchison county, Mo. The plaintiffs claim that defendant, who was executrix of the estate of W. W. Hudgens, deceased, employed them to defend a claim for \$2,000, presented against said estate by J. W. Young, agreeing to pay plaintiffs a fee of \$500 and the necessary personal expenses of plaintiffs in attending court, etc., in connection therewith. The answer sets up that defendant did not contract personally with plaintiffs but only on behalf of the Hudgens estate, in her capacity as executrix; that such fee was by the contract to be contingent on plaintiffs' success in defending against said claim; and that plaintiffs were negligent in defending against said claim, and did not use that professional knowledge and skill which they as attorneys were required to use in conducting such defense, resulting in losing the case, and having the claim allowed against the estate for \$1,500 on appeal and trial in the circuit court, and in compromise of which defendant, as executrix, was compelled to pay \$900. The amount of plaintiffs' fee is not in dispute.

[1] After the evidence was all in, the court submitted the case to the jury on the issues of whether the employment of plaintiffs was contingent or absolute, and whether by defendant individually or as executrix on behalf of the estate. The evidence on these points was conflicting, and the jury found for plaintiffs in the sum of \$501 on instructions free from error, and of which defendant makes no serious complaint. There is only one point in connection with these defenses that needs mention, which is that, as plaintiffs' employment was in behalf of the estate, it is contended that any promise by defendant to pay same personally is an agreement within the statute of frauds, and must be in writing under the first clause of section 2783, R. S. 1909. This promise, however, as thus resolved by the jury, is not a promise by an executor to answer for an existing or previously incurred debt of the estate, but is an original promise by the defendant, who, it is shown, was the sole beneficiary of the estate; and such agreement is not within the statute. *George & Lowe v. Williams*, 58 Mo. App. 138, 140; *Steele v. Order of Pyramids*, 125 Mo. App. 680, 682, 103 S. W. 108.

The trial court instructed the jury that there was no sufficient evidence to constitute a defense on the ground of negligence of plaintiffs in the performance of their duties as attorneys in defending the case in which

they were employed. After the return of the verdict for plaintiffs on the issues submitted, the trial court sustained defendant's motion for new trial, specifying as the reason for so doing that the court erred in withdrawing the defense of negligence from the jury, and refusing to give instructions relating to such defense. It is from this order that plaintiffs have appealed.

[2, 3] The defendant invokes the doctrine that this court, in determining whether the trial court properly granted a new trial, is not confined to the ground or grounds specified by the court for so doing, but must inquire into all the grounds mentioned in the motion therefor and sustain the court's action, if any such grounds are found sufficient. *Barr v. Hays*, 172 Mo. App. 591, 599, 155 S. W. 1095, and the cases there cited. It is suggested that the motion for new trial ought to be sustained on the ground that the verdict is against the weight of the evidence on the issues submitted to the jury, and, since appellate courts rarely interfere with the discretion reposed in trial courts in determining the weight of the evidence on such motions, we should not do so here. This assumes that the trial court did weigh the evidence and exercise its discretion; while there is nothing in this record to indicate that it did so. This court does not set aside verdicts as against the weight of the evidence, and, in the absence of some showing that the trial court did so, we cannot assume that it did. *Richter v. Railroad*, 145 Mo. App. 1, 6, 129 S. W. 1055; *Barr v. Hays*, 172 Mo. App. 591, 601, 155 S. W. 1095; *Roney v. Organ* (Mo. App.) 161 S. W. 868, 869. Moreover, where a party relies on some valid ground for sustaining the motion other than that specified by the court, he must discover and point out such ground, and that has not been done here. *Crawford v. Stock Yards Co.*, 215 Mo. 394, 402, 114 S. W. 1057; *Roney v. Organ*, *supra*. It follows, therefore, that if the action of the trial court in granting the new trial is to be sustained at all, it must be on the ground set forth in the record, to wit: In withdrawing the question of plaintiffs' negligence from the jury, and not submitting the same on instructions asked by defendant.

[4] There are several acts of negligence or want of professional skill specified in the answer and hinted at in defendant's evidence. The case of *Young v. Estate of Hudgens*, in the defense of which plaintiffs were employed, was tried in the probate court of Atchison county and again on appeal in the circuit court. Defendant claims, that plaintiffs were negligent in not putting in evidence then at hand on the trial in the probate court, but, instead, rested the case on the evidence introduced by claimant. As to whether a defendant should introduce evidence on his behalf or submit the case on the weakness of plaintiff's evidence is one de-

pending largely on sound judgment applied to the particular facts, and is often difficult of solution. Without knowing all the facts and the whole situation as it presented itself to plaintiffs as attorneys for the estate, no person, much less an average juror, could say whether or not a failure to introduce such evidence showed negligence or want of professional skill. Such facts and situation were not before the jury, nor are they in this record. When the case was tried in the circuit court, it would seem that plaintiffs yielded to defendant's insistence that the evidence on their side be introduced, and it was introduced with the result that a verdict larger by \$500 than that in the probate court was rendered there. This would indicate that plaintiffs' judgment was sound in this matter.

[5] However that may be, we are relieved of considering any matter tending to show negligence or want of professional skill of plaintiffs in the conduct of that suit other than the one matter of failing to file a sufficient affidavit for appeal from the judgment for \$1,500, rendered against the estate in the circuit court. During the progress of the trial of the present case, defendant, by her attorney (which, by the way, she might think was negligence on his part), distinctly informed the court that the only negligence complained of was the failure to perfect the appeal. Thereafter the case proceeded on that theory, and it needs no citation of authorities to show that defendant must be held to the same theory here.

Attending to this point, the evidence is that plaintiffs, without any particular instructions from defendant as to appealing the case of *Young v. Estate of Hudgens* from the circuit court to the Kansas City Court of Appeals, prepared and filed for that purpose the following affidavit for appeal:

"State of Missouri, County of Buchanan—  
ss.: Comes now Lewis C. Gabbert, the agent of the above-named Ala Evans, the executrix of the above-named estate, and for and on behalf of said defendant, makes this affidavit for an appeal to the Kansas City Court of Appeals from the decision of the court overruling defendant's motion for new trial, and, after being duly sworn, upon his oath states that this appeal is not made for vexation or delay, but because the affiant believes the appellant is aggrieved by the judgment and decision of the court. [Signed] Lewis C. Gabbert. "Subscribed and sworn to," etc.

It is conceded that every other step, inclusive of taking proper steps to file a bill of exceptions, necessary to have the case properly reviewed by the Kansas City Court of Appeals was duly and properly taken; but it is claimed that this affidavit is so defective that it conferred no jurisdiction on the appellate court.

[6, 7] We are inclined to think that, as the affidavit asks for an appeal from the decision

of the court overruling the motion for new trial, instead of from the final judgment and decision of the court, the affidavit is not sufficient to take the case to the Court of Appeals, and, without so holding, we shall so treat it. We will also agree that plaintiffs' contract of employment required them to bring to and use in the trial of *Young v. Estate of Hudgens* the professional knowledge and diligence which members of the legal profession ordinarily possess (4 Cyc. 956), or, as it is expressed in *Citizens' Loan Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320: "An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken." As defining, to an extent, what is the ordinary professional knowledge which ought to be possessed by a practicing lawyer, it is said, in 4 Cyc. 965: "An attorney must be acquainted with the statutes and the settled rules of law and practice in the courts prevailing in the locality wherein he practices, and is responsible for loss to his client resulting from ignorance thereof. But an error of judgment upon a controverted point of law does not render him liable for damages resulting from such error."

Respondent's counsel say that the leading case on the subject of the duties of an attorney and his liability for negligence is *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; but that case holds that an attorney is only liable for *gross* negligence, as do many other cases. See *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; *Hillegass v. Bender*, 78 Ind. 225, 227. It is held, however, in *Gambert v. Hart*, 44 Cal. 542, 552, that the weight of authority is that an attorney is liable for lack of *ordinary* skill and diligence, and such, we think, should be the law. See 4 Cyc. 957. It is certainly good law to say that, when the services of an attorney are of no avail to the client on account of his lack of ordinary skill or diligence, he should not be allowed to collect pay for such services. *Hinckley v. Krug*, 4 Cal. Unrep. Cas. 208, 34 Pac. 118; *Armin v. Loomis*, 82 Wis. 86, 51 N. W. 1097.

[8, 9] We also think that, as the only question of negligence in this case is the sufficiency of the affidavit for appeal, there is no disputed question of fact to be solved by a jury, and, under such circumstances, the question of negligence or want of skill is one of law. "In actions of this character against attorneys, the rule is well settled that when the facts are ascertained, the question of negligence or want of skill is a question of law for the court. But there is a considerable conflict in the authorities as to the degree of diligence and skill to which an attorney shall be holden, and for which

the law implies that he contracts with his client." *Gambert v. Hart*, 44 Cal. 542, 552. See, also, *Seefeld v. Railroad*, 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168; 5 Thompson on Negligence, § 6698. We also think that it is a question for the jury, on expert evidence only, whether a certain act, as the filing of an affidavit for appeal in the form here shown, shows that a lawyer is not possessed of ordinary professional skill. *State ex rel. v. Seavey & Flarsheim*, 137 Mo. App. 1, 10, 119 S. W. 17. This but follows the general rule that, where the facts are admitted, the question of negligence is one for the court. *Tarwater v. Railroad*, 42 Mo. 193; *Yarnall v. Railroad*, 75 Mo. 576, 583. It might have relieved the trial court and this court also of some difficulty to have left the question of the sufficiency of this affidavit for appeal to a jury. Learned counsel differ on that question, and it is not free from difficulty with us. The question, however, must be one of law for the court were it necessary to be decided. It would seem, also, that the question of negligence or not is one of such doubt as to come within the rule that an error of judgment upon a controverted point of law does not render an attorney liable for damages resulting therefrom. 4 Cyc. 965; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. In *Hillegass v. Bender*, 78 Ind. 225, 226, the court said: "A lawyer is not liable for every mistake. He is not liable for a mistake committed in matters where the law is doubtful and uncertain. 'God forbid,' said Abbott, C. J., 'that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law.'"

[10-12] We think this case should be disposed of on the proposition of law that, in order to render an attorney liable for damages, or to defeat a recovery for his services, on the ground of negligence or want of professional skill, it must be shown that the alleged act of negligence worked injury and loss to the client, and that it is incumbent on the client to establish this fact. *Seefeld v. Railroad*, 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168; *Nave v. Baird*, 12 Ind. 318; *Harter v. Morris*, 18 Ohio St. 492; *Jackson v. Clopton*, 66 Ala. 29; 5 Thompson on Negligence, § 6698. There is nothing in this record to show that any error was committed in the trial of the case of *Young v. Estate of Hudgens* warranting a reversal thereof by the Court of Appeals had the appeal been perfected. On the contrary, the record shows that Judge Ramsey, an attorney of Rockport, Mo., who, under defendant's employ, assisted plaintiffs in the trial of that case both in the probate and circuit courts, advised this defendant that there was no error warranting an appeal. But, aside from this, a writ of error would have been just as effective in having the case reviewed by the Court of Appeals as a direct appeal. Section 2043, R. S. 1909; *Chinn v. Davis*, 21 Mo. App. 363,

371. While a writ of error is denominated a new suit, and an appeal is a continuation of the former suit, yet, for all practical purposes, the one is as effective in having errors of the trial court corrected by an appellate court as the other. It is the common practice in the appellate courts of this state, when appeals fall for any reason, or even on dismissing same voluntarily, to at once bring the case up by writ of error. The only answer to this suggested by the defendant is that plaintiffs failed to advise her of her right to take the case up on writ of error. The evidence, however, shows that the judgment of the Young Case was compromised and settled within three or four months after its rendition. It further appears that defendant, as so often happens, when she lost the case in the trial court, became dissatisfied with her attorneys, the plaintiffs, and straightway consulted and employed a new attorney to advise her in the further conduct of the cause, and that he negotiated and arranged the compromise. The defendant practically ceased to communicate with or to ask or take advice from plaintiffs. She had abundant time to sue out a writ of error, and no doubt her new attorney advised her of such right to do so, if she was really advised that a review of the case by an appellate court would avail her anything, and desired to pursue that remedy, of which evidence is lacking.

The cause will therefore be reversed and remanded, with directions to set aside the order granting a new trial, and to enter judgment for plaintiffs on the verdict.

ROBERTSON, P. J., and FARRINGTON, J., concur.

#### STATE v. FITCH. (No. 1304.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

#### 1. CRIMINAL LAW (§ 1134\*) — APPEAL — QUESTIONS REVIEWABLE.

Though no argument has been made in the case for either party, and though no brief has been submitted, the court on appeal must examine the record and ascertain whether there is any reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 8056, 3067-3071; Dec. Dig. § 1134.\*]

#### 2. WITNESSES (§ 337\*)—IMPEACHMENT—GENERAL REPUTATION.

Where accused, charged with violating the local option law, testified in his own behalf, evidence of his reputation for violating the local option law was admissible, and inquiries directed to his reputation to a time shortly prior to the date of the offense charged were proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.\*]

Appeal from Criminal Court, Greene County; Arch. A. Johnson, Judge.

W. D. Fitch was convicted of violating the local option law, and he appeals. Affirmed.

ROBERTSON, P. J. The defendant was convicted of violating the local option law, and has appealed.

[1] No argument has been made of this case in behalf of either party; neither has any brief been submitted. It is our duty, however, to examine the record carefully and ascertain if there is any reversible error in the case. It is made the duty of the prosecuting attorney, under section 1007, Revised Statutes of 1909, to appear here and aid us in the discharge of our duty in this behalf. This has not been done, although the above section authorizes the printing of briefs and records at the expense of the county.

[2] The defendant complains in his motion for a new trial that the court erred in admitting testimony of three witnesses as to his general reputation for violating the local option law, and not restricting the time of such testimony to the time of the trial. A witness for the state was asked, upon direct examination, whether or not he was acquainted with defendant's general reputation in the community where this offense was charged to have been committed for violating the local option law, and he stated that he was. This was objected to by the defendant, unless restricted to the time of the trial, and the objection was sustained. Then the prosecuting attorney asked the witness if he knew defendant's general reputation in this regard from January to March, 1913, to which the defendant objected, because the time was not fixed as of the time of the trial. The objection was overruled, defendant excepted, and the witness answered that he was, and that it was bad. The offense was charged to have been committed March 17, 1913. The trial was had August 19, 1913, and the defendant testified in his own behalf. It is proper to show the reputation of the defendant in prosecutions of this character for violating the local option law. State v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; State v. Christopher, 134 Mo. App. 6, 114 S. W. 549. There is no reason for holding that the court erred in not confining the testimony as to defendant's reputation in this regard to the date of the trial. The inquiries in behalf of the state were not allowed to extend to an unreasonably remote past; neither should they have been confined to the date of the trial. The inquiries were directed to a time shortly prior to the date when the offense was charged to have been committed, and tended to characterize the defendant's conduct at that time.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**MASSEY v. SECURITY TRUST CO.**

(No. 1159.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

**1. APPEAL AND ERROR (§§ 792, 794\*)—RECORD—DISMISSAL—RULES OF COURT.**

Where there are no abstracts or briefs on file in the court on appeal at the time set for hearing, the case is governed by court rule 21 (123 S. W. vii), providing that the appeal shall be dismissed, unless continued, when the case is called for hearing and no abstracts or briefs are on file, and not by rule 25, relating to motions to affirm or dismiss on five days' notice to the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3137-3166; Dec. Dig. §§ 792, 794.\*]

**2. APPEAL AND ERROR (§ 818\*)—FAILURE TO FILE RECORD IN TIME—CERTIFICATE OF TRIAL JUDGE—CONCLUSIVENESS.**

The court on appeal, which has once continued and reset a case for hearing on the certificate of the trial judge, under Rev. St. 1909, § 2029, as amended by Laws 1911, p. 139, that the bill of exceptions could not be filed within the statutory time because of the inability of the court stenographer to prepare a transcript within the time, has discretionary power to grant or deny a second continuance on a like certificate of the trial judge; and, where the facts show that the failure to file the abstract and briefs at the proper time was due to the negligence of appellant, a further continuance will not be granted, but the case will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3199; Dec. Dig. § 818.\*]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Frank R. Massey against the Security Trust Company. From a judgment for defendant, plaintiff appeals. Dismissed.

Williams & Galt, of Springfield, for appellant. Barbour & McDavid, of Springfield, for respondent.

**PER CURIAM.** This case was tried at the September term, 1912, of the Greene county circuit court. The motion for new trial was continued and heard and overruled at the January term, 1913, thereof, and an appeal granted to this court on April 26, 1913. On September 6, 1913, a transcript of the judgment and order granting the appeal was filed in this court and the case regularly docketed for hearing at the October term, 1913. The case was then continued by agreement of the parties to the March term, 1914, and docketed for hearing in this court on March 3, 1914. The appeal is by the short form, and, under rule 12 of this court, the appellant was required to serve a copy on respondent and file his abstracts of the record in this court 30 days before said date of hearing. Instead of so doing, he filed on February 11, 1914, a certificate of the trial judge, under the provisions of section 2029, R. S. 1909, as amended (Laws of 1911, p. 189), stating that the bill of exceptions in this cause could not be filed within the time al-

lowed by said statute as amended, for the reason the court stenographer has failed to prepare a transcript of the evidence within said time, having more work than he has been able to keep up with. Accepting said certificate as being mandatory on this court (Curtis v. Sexton, 252 Mo. 221, 244, 159 S. W. 512), we made an order on said date, February 11, 1914, resetting the case for hearing on April 9, 1914. When the case was called for hearing on April 9th, no abstracts of the record or briefs were on file, but a second certificate of the trial judge, under date of March 24, 1914, was presented, again certifying that the bill of exceptions could not be allowed and filed within the time allowed by section 2029, R. S. 1909, as amended, for the reason that the court stenographer has been unable to prepare his transcript of the evidence within such time. It is conceded that no bill of exceptions has yet been filed in the trial court. It is also shown that a transcript of the evidence in this case would be short, not requiring over two or three days to make the same. Under this state of facts, the appellant is demanding that the case be continued to the October term, 1914, of this court, and the respondent is demanding that we dismiss the appeal under rule 21 of this court (123 S. W. vii).

[1] As no abstracts or briefs are on file here, and this case cannot now be heard on its merits, it is apparent that it is not a case requiring a motion for affirmance or to dismiss the appeal, notice of the filing of which must be given to the adverse party at least five days before filing same under rule 25 of this court (123 S. W. viii). This is plainly a case for the application of our rule 21, which provides that the appeal shall be dismissed, unless continued at respondent's option, when the case is called for hearing and no abstracts of the record or briefs are on file. In such cases the court acts of its own motion. Our rule 25, relating to motions to affirm or dismiss on five days' notice to the adverse party, seems to have reference more particularly to cases arising under section 2047, R. S. 1909, where appellant fails to get the case in this court at all at the return term of the appeal by either the long or short method, and respondent brings the case here on a certificate of the clerk and a motion to affirm based thereon, and is applicable, perhaps, to cases where abstracts and briefs are on file, and the case is apparently ready for hearing on the merits, but respondent seeks a dismissal of the appeal on account of some past dereliction of appellant as to time of serving and filing abstracts, etc. In this respect this case differs from *Erwin v. Telephone Co.*, 173 Mo. App. 608, 158 S. W. 913, cited by appellant, and other like cases, for in that case, when same was called for hearing, the appeal was perfected in this court, the abstracts and briefs were on file, and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case apparently ready for hearing on the merits; but respondent was asking that the judgment be affirmed or that the appeal be dismissed on account of alleged previous dereliction of appellant as to time of perfecting the appeal and filing abstracts and briefs. In this case it is not an alternative of dismissing the appeal for previous, but now cured, defaults of appellant or hearing the case on the merits, but the alternative is of dismissing the appeal because the case is not ready for hearing on the merits or continuing it to another term of this court so as to permit appellant to get his case ready for hearing.

[2] Appellant asserts that the second (and we presume the same would be true of the third or fourth) certificate of the trial judge as to the inability to file the bill of exceptions is mandatory on this court and leaves no discretion with us as to continuing the case. In this connection it is proper to say that the trial court's stenographer has filed an affidavit for each of the parties, showing that appellant did not request or order a transcript of the evidence until in January, 1914, a year after the motion for new trial was overruled in the trial court, and nine months after the appeal was granted; and that such stenographer would have had abundant time to have made the transcript had it been ordered in a reasonable time after the appeal was granted. Such affidavits further say that the stenographer has not had time to make the transcript since the order was given in January, 1914, on account of his court being in session and the many previous orders for transcripts. We also take notice that appeals in several cases, tried in the same court after the appeal was granted in this case, have been heard on abstracts and briefs at this term of our court. There can therefore be no question but that the delay in filing the bill of exceptions, and the consequent delay in filing abstracts and briefs in this case, is due to appellant's negligence and delay in not ordering a transcript of the evidence made until nine months after the appeal was granted. It is also apparent that to reset the case a month or six weeks later at this term would do no good, as the bill of exceptions is not yet prepared. To continue it to the next term of this court means that a decision cannot be had on the appeal for 2 years after the case was tried and 18 months after the appeal was granted. While this and the other appellate courts liberally interpret the statutes and court rules so as to favor the hearing of cases on the merits where justice can be done, we must also be mindful that the law's delay is a crying evil and that delayed justice is often not justice. Respondent's rights are just as sacred as appellant's.

We need not discuss the question as to the first certificate of the trial judge under amended section 2029, Laws of 1911, p. 189,

being mandatory on us, since we have so acted. Of course, the trial judge ought not to grant such certificate except on investigation and good cause shown. We then reset the case, and the second certificate of the trial judge was not filed here until some time after the appellant's abstracts and briefs were due to be filed. There is some force in respondent's suggestion that the proper practice would require that, where the certificate of the trial judge is filed in lieu of the abstracts and briefs and as an excuse therefor, the same should be filed within the time required for so doing; but, in any event, we think that where this court has once continued or reset a case on the certificate of the trial judge as to inability to file the bill of exceptions, and appellant is again in default, it is discretionary with us, on the facts then presented, whether we will grant a further continuance or not. There is nothing in this legislative act indicating that a second certificate of the trial judge is mandatory on this court, though the same might properly be filed as advisory. A contrary ruling would make our docket, otherwise clear, dependent on the various courts of the 44 counties of our district.

It is therefore ordered that the appeal herein be dismissed.

#### TEAGUE v. CLEMONS. (No. 1059.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

##### 1. FENCES (§ 25\*)—CONDITION—INJURIES TO ANIMALS—LIABILITY.

Where a horse, turned loose to graze in a field separated from defendant's land by a partition fence, was injured by a strand of barbed wire stretched from the corner post of the fence, entirely on defendant's land, there could be no recovery for the injuries, it not appearing that the wire was anywhere near a highway, and it appearing that the horse was on defendant's land when injured.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 50, 51; Dec. Dig. § 25.\*]

##### 2. FENCES (§ 25\*)—NEGLECTANCE (§ 36\*)—INJURIES TO ANIMALS—LIABILITY.

The owner of an animal which strays upon the common, and is thereby a technical trespasser, cannot recover damages from the owner of the land, where the animal is injured by reason of a barbed wire fence, placed thereon by the landowner, not so closely located to a highway that persons or animals might, by a misstep, be injured.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 50, 51; Dec. Dig. § 25;\* Negligence, Dec. Dig. § 36.\*]

Appeal from Circuit Court, Taney County; John T. Moore, Judge.

Action by F. M. Teague against Charles Clemons. Judgment for plaintiff, and defendant appeals. Reversed.

C. B. Sharp and R. C. Ford, both of Forsyth, for appellant. G. B. Wilson, of Ava, and D. F. McConkey, of Forsyth, for respondent.

FARRINGTON, J. Plaintiff recovered a judgment for \$40 against the defendant in the circuit court of Taney county on an amended petition, in which he alleged that on May 17, 1911, he was the owner of a gray work horse of the value of \$75, and that while said horse was running at large on the range and common near the plaintiff's farm and premises, it run into and against an unlawful, dangerous, and carelessly constructed fence, to wit, a fence composed of a single barbed wire tensely stretched through the range and woods, that the fence was carelessly constructed, erected, and built by the defendant, inclosing defendant's land and premises near where said horse was at large, and that by reason of coming in contact with said wire the horse was injured and blemished, and rendered unfit for service for a period of three months, requiring time and money in properly treating and caring for the wound. The defendant filed a general demurrer to the petition, which was overruled. So far as the record before us shows, no answer whatever was filed, but the case was tried as though a general denial had been filed. This is quite immaterial, as, under the view we take of the case, the plaintiff neither pleaded nor proved a cause of action against the defendant.

[1] The evidence shows that the plaintiff was working in a field which was separated by a partition fence from the land (which was woods and pasture) of the defendant, and that he instructed one of his boys to turn the horse loose with the harness on to graze while they were working. It appears that, beginning at the corner post of the fence dividing the land of plaintiff and defendant, some time a year or more before May 17, 1911, the defendant had caused to be stretched a one-strand barbed wire fence entirely on his land, the same being fastened by staples to the trees and forming an inclosure in which the defendant sometimes turned his horses and stock at night. The horse owned by plaintiff, while grazing, run into this wire, which, as before stated, was entirely located on defendant's land, and received the injuries sued for. The petition fails to allege, and the evidence fails to show, that this wire was anywhere near a highway, and the evidence fully discloses that the horse, when injured, was not traveling along any highway or roadway, but was grazing on the land of the defendant. There is no allegation or proof that the wire was stretched by defendant for any malicious purpose.

[2] The foregoing statement is sufficient, under the law of this state, to decide the case. It has been expressly held, beginning with the case of *Hughes v. Railroad*, 66 Mo. 325, that the owner of an animal which strays upon the common, and is thereby a technical trespasser, cannot recover damages from the owner of the land, where the horse or other animal is injured by reason of fences, holes, struc-

tures, or anything placed on the land by the landowner, where such fence or hole or structure is not so closely located to a highway that persons or animals passing along might, by a misstep, be injured. See *Turner v. Thomas*, 71 Mo. 596; *Foster v. Swope*, 41 Mo. App. 137; *Barney v. Railway Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; *Colvin v. Sutherland*, 32 Mo. App. 77; *Wilt v. Coughlin* (Mo. App.) 161 S. W. 888. Some of these cases are relied upon by the respondent, but it will be seen that all hold to the statement of the law herein announced, and, in those cases where damages were recovered, it was owing to the proximity of the fence or hole or structure to a highway or roadway. Respondent cites the case of *Gooch v. Bowyer*, 62 Mo. App. 206. It will be noted that in that case the plaintiff turned his horse in his own pasture, and was permitted to recover because the defendant had stretched a strand of barbed wire along a division line on plaintiff's side, and the question in the case was simply one of contributory negligence, and the opinion in no way sustains the contentions of the respondent here.

The plaintiff failed entirely to make out a case. Both the demurrer to the petition and the demurrer to the evidence were well taken.

The judgment is reversed.

ROBERTSON, P. J., and STURGIS, J., concur.

#### STATE v. SPARKS. (No. 1189.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

#### 1. CRIMINAL LAW (§ 1020½\*)—APPELLATE JURISDICTION—CONSENT OF PARTIES.

The Court of Appeals must determine the question of its jurisdiction on appeal, though the prosecuting attorney and accused's counsel both request the transfer of the case to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2577; Dec. Dig. § 1020½.\*]

#### 2. CRIMINAL LAW (§ 1019\*)—JURISDICTION—APPEALS IN CRIMINAL CASES.

Where an indictment for a felony includes a misdemeanor, the grade of the offense of which accused is convicted determines whether an appeal is within the jurisdiction of the Court of Appeals as a misdemeanor case, or within that of the Supreme Court as a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1019.\*]

#### 3. CRIMINAL LAW (§ 1020\*)—JURISDICTION—APPEALS IN CRIMINAL CASES.

One charged with a violation of Rev. St. 1909, § 4382, by breaking the lawful custody of an officer having him in charge before conviction for grand larceny, is charged with a felony, and the jurisdiction of an appeal from a conviction, followed by a sentence of six months in the county jail, is in the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.\*]



Appeal from Circuit Court, Bollinger County; Peter H. Huck, Judge.

Asa Sparks was convicted of crime, and he appeals. Case transferred to the Supreme Court.

Wm. M. Morgan and J. W. Caldwell, both of Marble Hill, for appellant. Homer F. Williams, Pros. Atty., of Marble Hill, for the State.

**STURGIS, J.** The defendant was granted an appeal to this court from a judgment of conviction under an indictment based on section 4382, R. S. 1909, charging him with breaking the lawful custody of an officer having him in charge, before conviction, for violation of a penal statute. The criminal charge under which defendant was arrested and was being held for trial at the time he is now charged with breaking the lawful custody of the sheriff of Bollinger county, Mo., is that of grand larceny. The defendant was convicted and sentenced to six months in the county jail.

[1] The prosecuting attorney has filed a motion in this court to have the cause transferred to the Supreme Court, on the ground of our lack of jurisdiction of this appeal. The attorneys for defendant consent to this motion, but we must nevertheless inquire into the question of jurisdiction, as such question is in no wise determined by consent.

[2, 3] It will readily be seen that the offense with which defendant is charged is a felony; i. e., one for which the defendant *may* be punished by a penitentiary sentence. Under the decision of the Supreme Court in *State v. Woodson*, 248 Mo. 705, 154 S. W. 705, there seems to be an impression that the question to what court the appeal shall be granted is dependent on the result of the trial, rather than the nature of the offense charged. This is true only to a limited extent. The *Woodson* Case in no manner overrules the long line of cases holding that, where the offense charged is a felony, and the defendant is convicted of such felony, it remains a felony for the purposes of an appeal, although the punishment assessed is a fine or jail sentence. *State ex rel. v. Foster*, 187 Mo. 590, 603, 86 S. W. 245; *State v. Melton*, 117 Mo. 618, 23 S. W. 889; *State v. Melton*, 53 Mo. App. 646; *State v. Herrick*, 158 Mo. App. 487, 139 S. W. 258; *State v. Zinn*, 141 Mo. 329, 42 S. W. 938; *State v. Gilmore*, 28 Mo. App. 561. In the *Woodson* Case, *supra*, the Supreme Court merely held that in a certain class of cases, like assaults and larceny, our statute makes an indictment for a felony also include a charge of a misdemeanor; as, for instance, an indictment for felonious assault includes a charge of common assault, a misdemeanor, and an indictment for grand larceny, a felony, includes a charge of petit larceny, a misdemeanor. See sections 4903 and

4904, R. S. 1909. In such cases the jury may convict of either grade of the offense, as warranted by the evidence, and the grade of the offense on which the jury does convict determines the jurisdiction of this or the Supreme Court on appeal. *State v. Greenspan*, 137 Mo. 149, 88 S. W. 582. To this extent only the *Woodson* Case, *supra*, overrules *State v. McMahl*, 214 Mo. 310, 113 S. W. 1071, *State v. Wilson*, 230 Mo. 647, 132 S. W. 238, and 140 Mo. App. 726, 126 S. W. 996, and *State v. McGovern*, 159 Mo. App. 134, 139 S. W. 231, in each of which cases the defendant was charged with a felonious assault, but convicted of a common assault, a misdemeanor. See, on this point, *State v. Clayton*, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565, and *State ex rel. v. Foster*, 187 Mo. 590, 86 S. W. 245. In the present case there is no degree or grade of the offense charged reducing same to a misdemeanor; and the defendant was not convicted of a misdemeanor, but of a felony, regardless of the punishment inflicted. The jurisdiction of the appeal is therefore in the Supreme Court, and the cause is transferred to such court accordingly.

ROBERTSON, P. J., and FARRINGTON, J., concur.

**BURROWS v. LIKES. (No. 1255.)**  
(Springfield Court of Appeals. Missouri.  
May 1, 1914.)

**1. TRIAL (§ 143\*)—QUESTION FOR JURY—EVIDENCE—TESTIMONY OF PARTY.**

The testimony of plaintiff makes a case for the jury, however much the testimony has been contradicted by other witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 843; Dec. Dig. § 143.\*]

**2. TRIAL (§ 191\*)—INJURY TO SERVANT—NEGLECT—INSTRUCTIONS—ASSUMPTION OF FACT.**

An instruction, in an action for injuries to an employé, which assumes that the employer was negligent in failing to provide the employé with a platform on which to stand while at work, or in failing to provide guard rails to prevent the employé from slipping, or in failing to provide sufficient light, is erroneous, as taking from the jury the question of the employer's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**3. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

An instruction, in action for injuries to the employé, which assumed that it was practical for the employer to have made a platform and to have erected a guard rail thereon was erroneous, where the evidence on the issue was conflicting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**4. TRIAL (§ 251\*)—INJURY TO SERVANT—NEGLECT—INSTRUCTIONS—APPLICABILITY.**

Where an employé suing for a personal injury did not claim that it was negligence for the employer to fail to do one of three things specified, provided one or two of such things were supplied, an instruction requiring the do-

ing of all the things to prevent the employer being charged with negligence was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**5. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—QUESTION FOR JURY—NEGLIGENCE.**

Where an employé suing for a personal injury charged that the employer was negligent in not maintaining a platform, properly guarded, and suitable lights, an instruction requiring a finding that the employer furnished a reasonably safe place to work and available lights to prevent a recovery was erroneous; for, if the employer furnished a safe place to work, he performed his entire duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**6. APPEAL AND ERROR (§ 1060\*)—TRIAL (§ 108½\*)—HARMLESS ERROR—EXAMINATIONS OF JURORS—REFERENCE TO INSURANCE.**

Though ordinarily the asking of jurors on their examination if they are interested in a surety company is improper, as giving the jurors information that a surety company is liable for any judgment that may be rendered, yet, where a surety company was a local one, and had a large number of stockholders and employes in and about the town where the case was tried, it was not reversible error to permit the attorney for plaintiff, suing for a personal injury, to ask the jurors whether they were in the employ of or stockholders in the company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060; \* Trial, Dec. Dig. § 108½.\*]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by Charles Burrows against J. C. Likes. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Samp Jennings, J. T. Craig and Jno. P. McCammon, all of Springfield, for appellant. E. G. Wadlow and Neville & Gorman, all of Springfield, for respondent.

**STURGIS, J.** The plaintiff sues for personal injuries resulting in his thumb having to be amputated, and alleged to have been received while working for defendant, who, as contractor, was constructing and excavating for certain septic tanks connected with the sewage system of Springfield, Mo. The petition alleges that, while working for defendant at the work of excavating for these tanks, he was directed to keep the water out of these pits by pumping same out with a hand pump provided for that purpose. The negligence assigned is: "First, that defendant negligently and carelessly failed to provide plaintiff with a platform upon which to stand while using and adjusting said pump; second, that defendant negligently and carelessly failed to provide guard rails or other barriers to prevent defendant from falling into said pits while at work, as aforesaid; third, that defendant negligently and carelessly failed to provide sufficient lights or any lights for plaintiff's use while working in and about said pumps and pits, as aforesaid." The answer controverted the fact of plain-

tiff being injured at the time and in the manner alleged, denies defendant's negligence, and pleads contributory negligence and assumption of risk by plaintiff, and that plaintiff had been settled with and paid for all the injuries received.

[1] This latter allegation of the answer refers to the fact that plaintiff had received injuries, about a month previous to the injuries now sued for, by having this same thumb caught and crushed in some cogwheels, while working for defendant at this same general work. It is conceded that this former injury was settled for in full, and defendant denied that plaintiff received distinctly any new injury, but claimed that the amputation of the thumb was caused by the injury received from the cogwheels; such injury having reached to the bone, and being aggravated somewhat by plaintiff working and using his thumb before same had healed. While there is much evidence to this effect, the plaintiff testified positively that his former injury had become nearly well, and that on the night of August 8, 1912, he was again injured by reason of slipping and falling while trying to lift the hand pump, and that this pump then fell on his thumb, crushing it between the pump and a piece of timber or stake driven in the ground to keep the pump in place. This question was submitted to the jury, under instructions to find for defendant, unless the plaintiff received the new injury at the time and in the manner alleged, and to allow nothing for the previous injury received from the cogwheels. While defendant urges that a demurrer should have been sustained to the evidence, we must hold that plaintiff's statement in his own behalf, however much it was contradicted by other witnesses, furnishes some evidence to make this a question for the jury.

[2] Stated most strongly for plaintiff, the evidence shows that he was working at night with a helper, who became sick about midnight, and quit working, leaving plaintiff to continue the work alone; that part of plaintiff's duties was to keep the water pumped out of the large pits, dug in the ground some 15 to 20 feet deep, so that same would be dry in the morning for the workmen to commence working in the same; that plaintiff used a hand pump weighing about 60 pounds, with a hose attached, which he moved from one pit to the other in pumping water from same; that the pump was fastened to a heavy board 2 inches thick, 10 inches wide and about 4 feet long; that this set on the bank some 2 feet back from the edge of the pit, and was fastened down and held in place by stakes driven in the ground, the hose going over the edge of the pit and down to the bottom. It is conceded that the pump merely set on the ground, and that no platform, other than the one board to which the pump was attached, was provided, and that

no guard rail was erected around the pit, or between it and the pump. The plaintiff testified, though this was contradicted, that no lights were provided or available for his use, except some red lanterns, and that these were of no value in giving light to work by; that he had complained and requested lights to be provided, and that same were promised, but had not yet been furnished when he was injured. Plaintiff's version of the accident is that about 2 o'clock in the morning, his helper being sick and gone, the night being dark, and having no lights, the ground being wet and slippery from recent rain, he attempted to lift the pump to move it to the other pit, slipped and fell, grabbed hold of one of the posts driven in the ground to hold the pump in place, and that the pump fell on his sore thumb, crushing it against this stake. His thumb was amputated six days later. The defendant's evidence tended to show that it was not practical to make any platform for this pump or erect a guard rail while digging the pits in the manner the work had to be done.

On this state of facts, the court gave the jury the following instruction, which is the principal instruction in the case: "The court instructs the jury that, if you find and believe from the evidence that on or about the 8th day of August, 1912, plaintiff was employed by defendant, and that, while so employed, plaintiff was ordered by defendant to use a certain hand pump in and about certain pits, and you further find that defendant negligently and carelessly failed to provide plaintiff with a platform upon which to stand while using or adjusting said pump, or negligently and carelessly failed to provide guard rails or other barriers to prevent plaintiff from falling into said pits while at work as aforesaid, or negligently and carelessly failed to provide sufficient lights for the use of plaintiff while he was working in and about said pump or pits as aforesaid, and that, while in the exercise of ordinary care, and while so working, and by reason of any negligence and carelessness of defendant, as aforesaid, if you find from the evidence defendant was so negligent and careless, plaintiff slipped and fell into the edge of one of said pits, causing said pump to fall onto and injure his right thumb so that it was necessary to amputate same, then you will find the issues in favor of the plaintiff, and assess his damages in such sum as you believe from the evidence will reasonably compensate him for such injuries, not to exceed the sum of \$4,000."

This instruction is erroneous, and makes a reversal of the case necessary for two reasons: First, the instruction assumes that it was negligence for the defendant not to have made a platform, erected a guard rail, or furnished lights in doing this work; it assumes that plaintiff was not furnished a safe place to work in the absence of these things being done. A jury reading this instruction

must have understood that the law required defendant to do one or more or all of these things and that a failure to do so was negligence; in fact, the jury must have understood that the only thing they were required to do was to determine whether defendant had done these things; if he had not, he was guilty of negligence. This is just such an instruction as would properly be given in a negligence case against a railroad for failure to ring the bell or sound the whistle on approaching a public crossing; a failure to do which is negligence, as a matter of law. Here, however, the court could not assume that a failure to do any or all the things mentioned would be negligence. The defendant was required to furnish a reasonably safe place for the servant to work in, but, at most, it was a question for the jury to say whether the place was reasonably safe without these things being done, or which, if any, of them were necessary to be done in order to make the place a reasonably safe one in which to work.

[3] The instruction also assumes that it was practical to have made a platform for a movable pump like this, and erect a guard rail between it and the pit in doing this work, while there is evidence to the contrary. In *Abbott v. Mining Co.*, 112 Mo. App. 550, 556, 87 S. W. 110, 111, in speaking of a similar instruction, the court said: "It assumed that it was negligence in defendant not to timber the mine, when there was evidence tending to show that at the place where plaintiff was at work it was not practical to do so. It should have contained some expression which would permit the jury to say whether it should have been timbered at that place. The action is not based on the statute requiring mineowners to furnish timbers, and the question whether the mine could have been rendered safe and the injury avoided by the use of timbers must be determined without regard to that statute." It should, however, need no citation of authorities to show that it is error for an instruction to assume as true a controverted and material fact in a case.

[4] In the next place, the plaintiff does not claim that it would be negligence in defendant to fail to do one of the three things mentioned, to wit, build a platform, erect guard rails, or furnish lights, provided one or both the other things were done. Yet the instruction is susceptible of being understood as requiring all of these things being done and that a failure to do any one of them would constitute negligence, even if the others were done. The instruction is in the alternative, and says that the failure to do one or the other is negligence. Such is the ruling on similar instructions in *Turner v. Railroad*, 78 Mo. 578; *Halferty v. Railroad*, 82 Mo. 90, 97; and *Braddy v. Railroad*, 47 Mo. App. 519, 521. As the evidence clearly showed that defendant had not made a platform and had not erected a guard rail, an

instruction that a failure to do either one of these things constituted negligence practically amounted to a peremptory instruction to find for plaintiff.

It is uncertain, under the evidence as presented in this record, whether a failure to erect a guard rail had anything to do with the accident. The only purpose of a guard rail would be to prevent plaintiff or other employes from falling into the pits. As we understand it, the plaintiff might have slipped and fallen by reason of the slippery ground around the pump, and might have done this regardless of any guard rail, which could only have served the purpose of preventing his going into the pit. He might have fallen with the pump on his thumb by reason of the darkness and slippery ground had the pit been miles away.

[5] As before stated, the plaintiff's theory of the case evidently is that plaintiff's place of work was rendered dangerous only because of the absence of all the three things mentioned as tending to make the place reasonably safe. The absence of the platform and guard rail was conceded, though their absence was properly proven, and is important, as showing the necessity of having available lights. The whole question of negligence turns on the absence of available lights: (1) Whether lights were necessary to make the place a reasonably safe one in which to work, absence of a platform and guard rail being shown; and (2) whether defendant had on hand suitable, available lights which could have been used by plaintiff. Plaintiff's second instruction correctly confines the issue to this one element of absence of lights. The instructions asked by defendant should not have been modified by the court so as to require the finding that defendant furnished a reasonably safe place to work *and also* available lights, for the reason that, if defendant furnished a safe place to work, that is all that is required, and the jury might properly find, and this was the theory of the case, that furnishing suitable lights would of itself make the place reasonably safe. The modified instructions imply that something more than a safe place to work was required, and that something more than suitable lights was required to make the place reasonably safe. The instructions on this phase of the case should be to the effect that it was defendant's duty to furnish a reasonably safe place to work, and, if the place where plaintiff was required to work was not reasonably safe without lights, and the furnishing of lights would make it safe, then it was defendant's duty to furnish same, etc.

[6] Error is also assigned on the court's refusal to sustain an objection and discharge the panel of jurors because of plaintiff's asking the jurors on their voir dire examination if any of them were in the employ of or stockholders in the Southern Surety Company for the Missouri Fidelity & Casualty

Company. It is claimed that the purpose of this was to covertly convey to the jury the information that an insurance company was back of defendant, and would have to pay whatever judgment might be obtained. The answer is that one of these companies is a local company, and had a large number of stockholders and employes in and about Springfield, where the case was being tried, and that plaintiff had a right to know the relation of the jurors to a real party in interest. *Meyer v. Mfg. Co.*, 67 Mo. App. 389, 391. Under the peculiar facts of this case, and especially with reference to the local company, these questions may have been proper and asked in good faith. The trial court was in a better position to know this than we are. Courts should, however, be very careful in permitting, and counsel should refrain from asking, such questions, except when the facts of a particular case might necessitate the same in obtaining proper information in challenging the jury. The mere asking of such a question is generally equivalent to giving direct information that an insurance company is obligated to take care of any judgment that may be rendered, and the giving of such information is so irrelevant and prejudicial as to not only warrant the court in sustaining an objection, but in discharging the jury, because of the mere asking same. *Gore v. Brockman*, 138 Mo. App. 231, 119 S. W. 1082; *Trent v. Printing Co.*, 141 Mo. App. 437, 126 S. W. 238; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Manigold v. Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Fuller Co. v. Darragh*, 101 Ill. App. 664. Ordinarily the chance that some juror might have an interest in, or be an employe of, an insurance company interested in the result of the trial is so remote that the asking of such questions is no more than an indirect means of improperly informing the jurors of such company's interest, and would evidently be asked for no other purpose. Any information proper for an attorney in making his challenge can usually be obtained in other ways, as by inquiring as to the occupation and business of jurors, etc. The court should be prompt in checking any attempt to use the privilege of ascertaining the qualifications of jurors as a mere cloak to impart improper and prejudicial facts to prospective jurors. As before stated, we do not hold this to be reversible error in the present case, but have made these remarks lest this opinion be construed as approving the asking of similar questions in other cases on the ground that attorneys have a right to be informed as to the occupation and business interests of jurors in making their challenges.

For the errors heretofore pointed out, this case will be reversed and remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

**HAMMAK v. FRIEND.** (No. 1243.)  
(Springfield Court of Appeals. Missouri. May 1, 1914.)

**1. BROKERS (§ 54\*)—COMPENSATION—WHEN EARNED.**

One employed to procure a purchaser of real estate, who procures a purchaser, ready, willing, and able to purchase on the owner's terms, has earned his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

**2. BROKERS (§ 48\*)—COMPENSATION—WHEN EARNED.**

Where an owner employing an agent to procure a purchaser did not procure a binding contract with the purchaser obtained by the agent, but had an opportunity to do so through the agent's efforts, the owner could not by reason thereof defeat the agent's claim to compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. § 48.\*]

**3. FRAUDS, STATUTE OF (§ 49\*)—PAROL CONTRACTS OF EMPLOYMENT.**

A parol contract of employment for no definite time is not within the statute of frauds (Rev. St. 1909, § 2783).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 74; Dec. Dig. § 49.\*]

**4. FRAUDS, STATUTE OF (§ 129\*)—PERFORMANCE—PROMISE.**

Where an owner who had orally employed an agent to procure a purchaser recognized the agent's relation to the transaction just before and at the time of the consummation of the deal, the right of the agent to compensation could not be defeated under the statute of frauds (Rev. St. 1909, § 2783).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by Ben L. Hammack against Hiram Friend. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Barrett and G. Purd Hays, both of Ozark, and G. A. Watson, of Springfield, for appellant. Tom R. Moore and S. E. Bronson, both of Ozark, and Gideon & West, of Springfield, for respondent.

**ROBERTSON, P. J.** The defendant appeals from a judgment of \$300 against him based on the verdict of the jury in favor of the plaintiff on account of a commission due plaintiff for obtaining a purchaser for land belonging to the defendant. In June, 1910, the plaintiff, having then moved to the neighborhood in Christian county where the land is located and being desirous of purchasing land, went to look at the defendant's premises, but, not being able to buy at the price asked, \$9,000, bought another tract near by and told the defendant that he had a relative who wanted to move there and who might buy the defendant's property. The relative that he then had in mind did not make the purchase, but plaintiff got into correspondence with another relative, who became interested in the property, and who finally came to that neighborhood, and in August,

1912, stayed all night with the plaintiff, and thereafter, in company with plaintiff, went and examined the defendant's land, which he then priced at \$12,000. The defendant told the plaintiff on several occasions that he would pay him a commission if he would find a buyer for the property. A witness testified that in February or March, 1912, the defendant inquired of him if he had seen the plaintiff, stating that if he did to tell him he wanted to see him, as he had promised to sell his place to his relatives when they came. Plaintiff's relative did not purchase on his first examination of the land, but thereafter, having talked with plaintiff considerably about it, in November, 1912, he and the plaintiff went to the defendant's home a second time, and at that time this purchaser agreed to buy the property and the defendant agreed to sell it for \$11,000. The agreement thus having been reached, the parties went to a bank in Ozark, where a deed was executed by the defendant to the purchaser and left in the bank. At the time the transaction was had in the bank, \$1,000 was paid by the purchaser, who then also agreed to pay \$5,000 of an incumbrance on the land, and a memorandum was made on an envelope in which the deed was placed as to the time and terms of paying the balance of the purchase price and the delivery of the deed to the purchaser. The purchaser thereafter paid the defendant \$2,000 more cash on the purchase price. But by a subsequent arrangement entered into between the defendant and the purchaser, other land was taken by the latter. The testimony tended to prove that the purchaser was worth from \$15,000 to \$20,000 at the time of his transactions with the defendant.

[1, 2] During the progress of the trial and in the motion for a new trial the defendant raised several objections concerning the binding effect of the contract entered into between the purchaser and the defendant at the bank; but, in view of the disposition we shall make of the case, these objections are immaterial. When the plaintiff produced to the defendant a purchaser ready, willing, and able to purchase on the defendant's terms, he had discharged his obligation and was entitled to his commission. *Gwynnup v. Sibert*, 106 Mo. App. 709, 712, 80 S. W. 589; *Bird v. Blackwell*, 135 Mo. App. 23, 27, 115 S. W. 487; *Finch v. Guardian Trust Co.*, 92 Mo. App. 263, 271; *Gelatt v. Ridge*, 117 Mo. 553, 560, 23 S. W. 882, 38 Am. St. Rep. 683; *Morgan v. Keller*, 194 Mo. 663, 679, 92 S. W. 75. If the defendant did not procure a contract which would be binding upon the purchaser, he had an opportunity to do so, brought about by the plaintiff's efforts, and on account of defendant's failure in this regard he cannot defeat plaintiff's claim. See authorities last above cited.

[3, 4] The defendant insists that the contract relied upon by the plaintiff was barred

by the statute of frauds (section 2788, Revised Statutes of 1909), because under the arrangement made in 1910 the contract was not to be performed within one year. We must rule against this insistence as the contract, being for no definite time, was not within the statute. *Matthews v. Wallace*, 104 Mo. App. 96, 98, 78 S. W. 296. The defendant also overlooks the fact that even though the original contract was barred by the statute of frauds, or if no contract had in fact been made at that time, yet there is evidence showing that the defendant just before and at the consummation of his deal with the purchaser recognized the plaintiff's relation to the transaction. He accepted the terms offered by the purchaser produced by the plaintiff and should be required to pay the plaintiff's reasonable charge therefor. The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

GOULD v. GIBSON (WINDLE et al., Garnishees). (No. 1082.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

1. GARNISHMENT (§ 158\*)—PLEADINGS—SUFFICIENCY.

The answer of plaintiff in garnishment, to the answers of the garnishees averring that they neither owed the principal defendant anything nor had in their possession any of his property, which alleged that the garnishees had certain property in their possession of the principal defendant, consisting of certain personalty of a specified value, and which described in detail each piece of property which plaintiff claimed the principal defendant fraudulently conveyed to the garnishee, sufficiently advised the garnishees of the issues.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 288-297; Dec. Dig. § 158.\*]

2. DIVORCE (§ 332\*)—FOREIGN JUDGMENT—ACTIONS—JURISDICTION.

A petition in an action by a wife, obtaining in a sister state a judgment of divorce with alimony, which alleges that the husband had paid only a small part of the alimony, and had fraudulently conveyed his property, and had been out of the sister state for several years, and had during that time contributed nothing for the support of the children, awarded the wife, conferred on the court jurisdiction to inquire as to the duty of the husband under the laws of the sister state to support the children, irrespective of the fact that their custody had been awarded to the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 843; Dec. Dig. § 332.\*]

3. DIVORCE (§ 332\*)—FOREIGN JUDGMENT—ACTIONS—ENFORCEMENT.

A provision, in a foreign judgment of divorce with an allowance for the support of the children, awarded to the wife, that the allowance shall be paid to the clerk of the district court does not deprive the wife of her right to enforce the duty of the husband to support the children, by setting up the facts and obtaining a judgment for the amount due her, where the husband left the sister state and failed to provide for his children.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 843; Dec. Dig. § 332.\*]

4. FRAUDULENT CONVEYANCES (§ 295\*)—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that a judgment debtor fraudulently conveyed his property to garnishees, so as to support a judgment against the garnishees in favor of the judgment creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Nannie Gould against James H. Gibson, in which W. B. and N. E. Windle appeared as garnishees. From a judgment against the garnishees, they appeal. Affirmed.

Walden & Andrews, of Joplin, for appellants. Fred B. Wheeler, of Pittsburg, Kan., and John B. Cole, of Joplin, for respondent.

ROBERTSON, P. J. Plaintiff obtained a divorce from the defendant in the district court of Kansas, the custody of the children, and a judgment for alimony, and also an allowance of \$800 per year, to be paid by the defendant to the clerk of the court. A portion of this allowance remaining unpaid, she brought suit thereon in the circuit court of Jasper county, in this state, and obtained judgment for \$1,150. Execution was issued, and on November 8, 1910, the garnishees were served with summons, and at the January term, 1911, within the time required by law, plaintiff filed and exhibited her interrogatories, to which the garnishees answered that they neither owed the defendant anything nor had in their possession any of his property. They also alleged in their answer, evidently anticipating trouble, that the judgment on which the execution issued was void and had been satisfied. To this answer the plaintiff filed a denial, setting up that they had certain property in their possession belonging to the defendant, consisting of horses, buggies, harness, and other property, of the value of \$2,000, which had been fraudulently conveyed and delivered to them for the purpose and with the intent on the part of the garnishees and the defendant of hindering and delaying the plaintiff in the collection of her claim. A jury was waived, and the issues thus made were submitted to the court, resulting in a judgment for the plaintiff, from which the garnishees have appealed.

[1] The appellants urge upon us that the denial filed by the plaintiff to the answer to the interrogatories is insufficient to advise garnishees of the particular issues of fact which they were expected to meet. This point we rule against the appellants, for the reason that the denial is full and explicit as to the charge above noted; the plaintiff itemizing and describing in detail each piece of property which she claimed that the defendant had fraudulently conveyed to the garnishees.

[2] The garnishees are also insisting here that the judgment of the circuit court based on the Kansas judgment is void, for the reason that the Jasper county circuit court had no jurisdiction to enter judgment thereon. The Kansas judgment relative to the amount required to be paid by the defendant for the support and maintenance of the children required that it be paid to the clerk of the district court where the judgment was rendered, and required it to be paid in quarterly installments, aggregating the sum of \$300 per year. A sufficient length of time had elapsed when the Jasper county judgment was entered to equal the sum then therein found due under the Kansas judgment.

[3] The allegations of the plaintiff in her petition filed in the Jasper county circuit court were to the effect that the defendant had paid only a small portion of the allowance for the children, that he had secreted and fraudulently conveyed his property, that he had been out of the state of Kansas for several years, and that during that time he had contributed nothing to the support of the children. The allegations of the plaintiff's petition were such as to justify the Jasper county circuit court in inquiring into all of the facts and circumstances relative to the duty of the defendant under the laws of Kansas to support and maintain the children, irrespective of the fact that their custody was awarded to the mother; and we must presume, in the absence of proof, that it was found that such an amount as is stated in the judgment was legally due the plaintiff. The fact that the judgment of the district court of Kansas provided that the money should be paid to the clerk of the district court, the defendant having left the state and failing to provide for his children, could not deprive the plaintiff of her right to resort to the only other available method of enforcing this support by coming into this jurisdiction, setting up the facts, and obtaining a judgment here for the amount due her.

[4] The testimony tends to prove that the garnishees and the defendant had been acquaintances for a number of years, that the defendant had worked for garnishees several times, and that shortly before the service of the summons upon the garnishees in this case they claim to have purchased a livery stock from the defendant a few blocks from the place where garnishees were engaged in a similar business, and that the stock so claimed to have been purchased from defendant was left at the same place in charge of the defendant. The testimony as to the actual transaction which resulted in the purchase of the property by the garnishees, as they claim, furnishes many suspicious circumstances, and sufficient evidence to justify the holding of the trial court. Shortly prior to this alleged sale to garnishees, the defendant had given a man named Thompson

a chattel mortgage, ostensibly to secure \$1,050, but, as disclosed by some of the testimony, for the express purpose on his part of covering up the property and defrauding his wife. When the garnishees claim to have purchased this property, they say they paid \$500 in cash and took into consideration some property and certain indebtedness of the defendant to them, although neither they nor the defendant were able to give any satisfactory explanation as to the amount which the defendant owed them. Neither did they manifest any concern as to the chattel mortgage held by Thompson, nor make any definite arrangements for its release, and, so far as the record discloses, it has not yet been released. The testimony also tended strongly to prove that the value of the property so claimed to be purchased by garnishees of defendant was almost, if not quite, \$2,000.

A great deal more might be said of the transaction between the garnishees and the defendant, but sufficient has been disclosed to justify our refusal to disturb the holding of the trial court.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

#### STATE v. FAITH. (No. 1273.)

(Springfield Court of Appeals. Missouri.  
May 1, 1914.)

#### 1. HIGHWAYS (§ 77\*)—VACATION—STATUTORY PROCEEDINGS—JURISDICTION OF COURT.

Under Rev. St. 1909, § 10444, providing that, where one desires to cultivate land through which a county road runs, he may on petition obtain permission to change the road, and that, on satisfactory proof that the change is equally convenient to the public, the county court may make an order accordingly, the county court ordering a change has jurisdiction to impose conditions before the change shall become effective, and may provide what proof will satisfy it that the conditions imposed have been complied with before the order will become effective.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 263-276; Dec. Dig. § 77.\*]

#### 2. HIGHWAYS (§ 76\*)—ESTABLISHMENT—VACATION—STATUTORY METHODS.

The public has a vested interest in a public highway, and it cannot be vacated, except in the methods prescribed by Rev. St. 1909, §§ 10444, 10445.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 256; Dec. Dig. § 76.\*]

#### 3. CRIMINAL LAW (§ 429\*)—RECORDS OF COURTS—PAROL EVIDENCE.

The county court speaks only by its records, and its proceedings cannot be proved by parol.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1018, 1020; Dec. Dig. § 429.\*]

#### 4. HIGHWAYS (§ 163\*)—OBSTRUCTIONS—CRIMINAL RESPONSIBILITY.

One who obstructs a public road after petitioning for a change therein, but before the order of vacation has become effective, is guilty

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of obstructing a highway, in violation of Rev. St. 1909, § 10533.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 444-446; Dec. Dig. § 163.\*]

**5. HIGHWAYS (§ 163\*)—OBSTRUCTIONS—INTENTION—MATERIALITY.**

The intention with which one obstructs a highway, in violation of Rev. St. 1909, § 10533, is immaterial.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 444-446; Dec. Dig. § 163.\*]

**6. CRIMINAL LAW (§ 1087\*)—APPEAL—RECORD.**

A criminal case cannot be brought up to the court on appeal in the short form authorized by Rev. St. 1909, § 2048, which is applicable to civil cases only, but sections 5308, 5309, providing for appeals in criminal cases, must be followed, and a criminal case can only be brought up by a full transcript of the record certified by the clerk of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Robert Faith was convicted of obstructing a public highway, and he appeals. Affirmed.

J. T. Moore and A. W. Curry, both of Lebanon, for appellant. Harry S. Brown, Pros. Atty., and I. W. Mayfield & Son, all of Lebanon, for the State.

FARRINGTON, J. This is a criminal prosecution of the appellant upon an information based on section 10533, R. S. 1909, charging that he "unlawfully, willfully, and knowingly" obstructed a public road and highway on June 12, 1913, and continued to maintain such obstruction across the road, the obstruction being a fence, which road had been laid out and established as a legal road and traveled by the public for more than ten years prior to the alleged obstruction. At the trial, the defendant admitted the obstruction and sought to justify or excuse his act by attempting to show that the county court had by its order changed the road from the place where it was alleged to be obstructed, and that one of the county judges had told him to maintain his fence. The jury found the defendant guilty as charged, and assessed his punishment at a fine of \$5. Defendant during the trial duly saved exceptions to the action of the court in overruling certain objections made by him to evidence, and saved exceptions to the action of the court in rejecting certain evidence offered by him. Upon this appeal we are asked to consider those exceptions, and determine the sufficiency of the order made by the county court.

The state introduced the record of the county court which disclosed that the road obstructed was a duly established road. In Road Record A appeared the following entry: "Wednesday, February 8th, 1911, third day of regular term. Now on this day comes R. Blickensderfer, county highway engineer, and makes report on a proposed change of public road petitioned for by R. L. Faith et

al., said change to be 30 feet wide, to run as follows: Commencing in the municipal township of Gasconade at the  $\frac{1}{4}$  corner on the north line of the N. E.  $\frac{1}{4}$  of Sec. 17, Twp. 32, R. 13, thence south 3,620 links to intersection of Lynchburg road, and whereas the following parties have given their right of way, Samuel Pendergraft, a strip 15 feet wide off the west side of the E.  $\frac{1}{2}$ , N. E.  $\frac{1}{4}$ , 17—32—13. Robert Faith a strip 15 feet wide off the E. side W.  $\frac{1}{2}$ , N. E. 17—32—13. Therefore it is ordered by the court that the above proposed change be granted, provided petitioners make out the new road in as good traveling condition as the old road, subject to the approval of the co. surveyor and when opened for travel and accepted as per above conditions that part of old road in section 17 to be vacated and that the clerk certify a copy of this record to the road overseer wherein said change is located."

The state proved that a report was made to the county court by A. T. Ford, highway engineer, dated February 8, 1912, informing the court that the proposed new road was not in as good shape as the original road, and that some one had fenced the original road. This evidence was objected to because the defendant claims the county court had granted the change and was without jurisdiction to impose a condition.

On November 14, 1912, the county court, acting in this matter, found by an entry of record that the condition specified in the order opening said road had not been complied with, and ordered the highway engineer to serve notice on the defendant herein to remove the obstruction in the old road, the introduction of which order in evidence was objected to for the reason that the county court had no jurisdiction to grant a conditional change, and for the further reason that it applied to another road. On November 25, 1912, the county highway engineer in writing notified the defendant herein to remove the fence at once. Defendant objected to the offer of proof of this notice for the reason that a change in the road had been granted and that the rescinding of the same was unauthorized. On December 5, 1912, the highway engineer reported to the county court that he had again gone over the proposed change, and that the defendant had not complied with the condition.

The defendant testified as follows: That he got up a petition to change the Lebanon and Plato road; that he got the change made; that he fenced up the old road, went to clearing it up and planting it in corn, and that no objection was made for 12 months after it was fenced up; that he had raised two crops of corn on it, and that there was a crop on it at the time he was testifying; that he fenced it up because he wanted to make a farm out of it and because Judge Wilson told him to do it; that he acted under the instructions of the county court and did everything the court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



required him to do; that he did not know the change had been granted with any condition; that, after the trouble came up, he went to Judge Wilson to know what to do; that he had never seen the record in the county court changing the road and knew nothing about it; that he just did what the court told him to do; and that he went ahead and fenced up the road because the court told him he had done all he could do.

Defendant then offered a letter, which was rejected. It purported to have been written by D. E. Brundage, was dated at Lebanon, Mo., April 13, 1912, and was written on a letter head on which appeared in print, "D. E. Brundage, County Highway Engineer," and was addressed to M. W. Eagan, Pine Creek, Mo., who, the evidence shows, was a road overseer. In this letter Brundage informed Eagan that he had looked over the roads entering into the Faith controversy, expressed a doubt as to whether they could require Faith to open the old road, intimated that if they could it would put the old road back in the branch bed, and stated that a part of the road had been cut out and was better than the average; that Faith had agreed to make some changes; that "we will not proceed as Mr. Ford instructed you but will leave Mr. Faith's fence where it is"; and in closing the letter: "The best thing we can do is to accept the compromise and take Mr. Faith's offer to improve the Nebo part of the road." Defendant also offered to prove that he compromised the matter with the county highway engineer, and that, two years after the trouble came up, he went to the county court in session, and that the presiding judge told him to go on. He further offered to prove that the new road was in better condition than the old, and that the county court told him the change had been allowed.

[1] We think the whole question in this case is solved by a construction of section 10444, R. S. 1909, which provides that, where a person wishes to cultivate or inclose land through which a county road runs, he may on petition with proper notice, and at his own expense, obtain permission to turn said road on his own land or the land of another person consenting thereto, and that the county court shall appoint the highway engineer to view the same and make certain reports to the court, and that it shall order the change, and that, upon satisfactory proof that such change is equally convenient to travelers, the court shall make an order vacating the abandoned road and cause the report thereof to be recorded.

The evidence discloses clearly that the petition to the county court contemplated a change under the section of the statute just referred to, and that the county court in this instance acted thereon, and that it did order the change. It went further and provided the kind of proof that would satisfy it that the condition had been complied with, to wit, by a report to that effect from the county

highway engineer, and this is as far as the record entries of the county court ever went, so far as the trial record before us shows. The county court never made the order vacating the part of the old road covered by the petition. It is argued by the defendant that the court had no power to make this conditional order. The statute clearly gives this power; and it is a wise provision, because, were it left to the parties desiring the change to say when the road was in the condition required, the rights of the public would often be imposed upon. Changing the road under section 10444, R. S. 1909, affects only public interest and does not involve private rights. *Howe v. Callaway*, 119 Mo. App. 251, 95 S. W. 974.

[2] It is admitted that the obstructed public road was a legally established highway, and, this being true, the public had a vested interest therein, and the only way the county court may act, so that the public shall lose its rights in such a highway, is by following the requirements of the statute. There are but two methods set out in the statutes by which a county court may vacate a road, one as provided in section 10444, and the other as provided in section 10445, R. S. 1909. That the public has a vested interest in highways has often been held in this state. See *State v. Culver*, 65 Mo. 607, 27 Am. Rep. 295; *State v. Walters*, 69 Mo. 463; *Hannibal & St. J. R. Co. v. Totman*, 149 Mo. 657, 51 S. W. 412; *Zimmerman v. Snowden*, 88 Mo. 218; *State v. Wells*, 70 Mo. 635.

[3] The order vacating the road on which the obstruction was placed was never made, and the defendant is held to a knowledge of the requirements of the statute. County courts speak only by their records, and their proceedings cannot be proven by extrinsic evidence. *Maupin v. Franklin County*, 67 Mo. 327; *Harkreader v. Vernon County*, 216 Mo. loc. cit. 706, 116 S. W. 523; *Davidson v. Real Estate & Inv. Co.*, 228 Mo. loc. cit. 29, 125 S. W. 1143, 136 Am. St. Rep. 615. And therefore the defendant's offer to show what the county judges said to him, or what the county highway engineer said to him or to some one else, was entirely improper and incompetent. The road that defendant obstructed was a legal highway, and its use remained vested in the public until an order vacating the same should be made. This is the plain written law in the statute, and all must be held to know it.

[4] This being a public road, and defendant having obstructed it, he is clearly amenable to the law as prescribed in section 10533, R. S. 1909.

[5] The defendant contends that the trial court erred in excluding the evidence that defendant offered, because such evidence would tend to show his intent in closing the old road. It has been held, however, in the case of *State v. Wells*, 70 Mo. 635, 638, that: "It makes not the slightest difference in this case whether the defendant had any knowl-

edge of the fact that the road was legally established or not. The offense with which he was charged is a misdemeanor, and, in that class of offenses, the intent which prompts the act possesses no significance." As to the character of evidence necessary to the proof of the establishment of a county road and the proceedings of a county court, the opinion in the case of *State v. Parsons*, 53 Mo. App. 135, may be looked to.

The evidence in this case shows clearly that the land over which defendant's fence was constructed was a public highway. The road could be vacated only by an order of the county court entered of record. This the defendant failed to show. Until such order was made, the old road continued to be a public highway.

The strongest case supporting defendant's view that we have been able to find is that of *State v. White*, 96 Mo. App. 34, 69 S. W. 684, where a corporation had obstructed a highway, and it was held that the president of the corporation, who was not present, and had no knowledge whatever of the incident, could not be held under this statute for obstructing a highway, but holds that, if defendant had personally participated in the wrongful act, it would be immaterial whether or not he knew that the alleged public road was legally such, citing *State v. Wells*, 70 Mo. 635.

Defendant in his brief assumes that the county court was acting under sections 10433 to 10437 inclusive, R. S. 1909. As to this he is in error, because the change contemplated, as shown by orders made on defendant's petition to the county court, amply demonstrate that the road was not to be changed as provided in those sections at the expense of the county, but was to be changed under section 10444, R. S. 1909.

Finding no error, the judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

STURGIS, J. [6] I concur in the result reached in this case for another reason: The appeal is brought here in the manner commonly known as the short form under section 2048, R. S. 1909, applicable to civil cases. There was filed in this court in due time a certified copy of the judgment and order granting the appeal. No other part of the record has been certified to this court by the clerk of the trial court. This record merely discloses that the defendant entered a plea of not guilty, was tried by a jury, who returned a verdict finding him guilty and assessing his punishment at a fine of \$5, and that thereafter an affidavit for appeal was sustained and the appeal granted to this court. The appellant has filed in this court what is termed an abstract of the record, made up in the same manner as applicable to civil cases. This abstract shows the information, omitting what are termed "formal

parts," and condensed statements as to other parts of the record proper. It also states that a bill of exceptions was duly filed, and sets out an abstract of the same, inclusive of the evidence introduced, the instructions given and refused by the court, the motion for new trial, and the taking of the appeal. In short, the abstract is such as would be proper in a civil case, and would be taken by this court as sufficient, unless the same was challenged or an additional abstract filed in this court by the opposite party.

A criminal case cannot be brought to this court on appeal in this manner. It was held in *Golden City v. Hall*, 68 Mo. App. 627, that the provisions of section 2253, R. S. 1889, now section 2048, R. S. 1909, providing for appeals in civil cases being brought to this court by filing a certified copy of the judgment and order granting the appeal, and thereafter filing printed abstracts of the record in lieu of a perfect transcript, are not applicable to criminal cases. A reading of sections 5308 and 5309, R. S. 1909, providing for appeals in criminal cases, shows that an appeal in a criminal case can only be brought to this court by a full transcript of the record, certified by the clerk of the trial court. We cannot, therefore, review this case and pass on the alleged errors on the printed abstract of the record.

It has often been held that it is the duty of this court in a criminal case, where a transcript of the record has been filed here in the time prescribed by statute, to examine such record for errors and render judgment thereon without any abstracts, statements, or briefs being filed. *State v. Davidson*, 73 Mo. 428; *State v. Miles*, 174 Mo. App. 181, 156 S. W. 758; *State v. Rhodes*, 35 Mo. App. 360, 364. This court, however, can only review such matters as are shown by the transcript certified by the clerk of the trial court. There is nothing before this court, therefore, except the judgment and order granting the appeal, and these are free from error. There is nothing in the record before us to show that the court in granting the appeal made any order operating as a stay of proceedings, and it therefore became the duty of the appellant to see that the transcript was made out, certified, and filed in this court. Such is the construction given to sections 5308 and 5309, R. S. 1909, in *Caldwell v. Hawkins*, 46 Mo. 263; *State v. Caldwell*, 21 Mo. App. 645; and *State v. Dempsey*, 168 Mo. App. 298, 300, 153 S. W. 1064. What is said in the last-cited case about filing abstracts of the record is said arguendo and in no wise means that an abstract of the record may take the place of a full transcript certified by the clerk of the trial court. The appellant, therefore, has failed to bring his case before this court in the manner required for appeals in criminal cases, and, as the duty devolves on him to have this done, none of the errors complained of by him are properly before this court for review. In this we all agree.

## SMITH v. CAIN et al. (No. 1207.)

(Springfield Court of Appeals. Missouri. May 1, 1914.)

**1. PARTNERSHIP (§ 216\*)—ACTIONS—EVIDENCE.**  
In an action against several defendants, plaintiff may prove that they are partners, though he does not allege a partnership.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 409, 412, 416-418; Dec. Dig. § 216.\*]

**2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.**

Where plaintiff, seeking to recover on the theory that defendants were partners, testified that the transactions relied on were had with only two of the several defendants and the jury found that the two were not liable, error in excluding evidence that the other defendants were liable as partners was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by W. H. Smith, doing business as the W. H. Smith Machinery Company, against R. M. Cain and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. R. Lively and A. G. Young, both of Webb City, for appellant. A. M. Baird, of Cartersville, and Allen McReynolds, of Cartage, for respondents.

**ROBERTSON, P. J.** The plaintiff filed his account in the justice's court against R. M. Cain & Co., upon which summons was issued, naming all of said defendants. The defendants appeared and filed an affidavit denying the partnership. A trial was had in the justice's court, an appeal taken to the circuit court and a trial there before a jury resulted in a verdict and judgment for the defendants, from which the plaintiff has appealed.

The plaintiff was engaged in the business of renting pumps, boilers, and other machinery, and he proved that the defendants, Cain and Blankenship, personally rented of him certain machinery, including a pump and boiler for which they agreed to pay him so much per month and to return them to his place of business when they got through with them. During the time they were using the pump and boiler and while they were yet in the possession of the defendants, an option to purchase was given to a party by the defendants on the mine where the boiler and pump were located, which the party afterwards exercised and purchased the mine. The plaintiff claims that there was no arrangement made with his consent whereby he released these parties from the payment of the rent thereon. The defendants claim arrangements were made with the plaintiff whereby the machinery should be left with the party who had purchased the mine, that they should be relieved from any further payment of rent thereon, and that they there-

upon settled and paid the plaintiff all that was then due him from them. This payment the plaintiff concedes, but claims that he did not accept their surrender of the property to the party who had purchased their mine as a surrender to him under the lease and that he did not release them from further liability thereunder.

[1] The principal error complained of by the plaintiff is as to the action of the trial court in refusing to admit any testimony of the partnership of defendants because there was no allegation in the statement filed that the defendants were partners.

The only testimony admitted by the court in behalf of the plaintiff to establish his claim against the defendants was the testimony as to what was said and done by the defendants Cain and Blankenship. The plaintiff testified that he had transacted the business with no one except Blankenship and Cain. However, during the course of the trial the plaintiff undertook to prove that the other defendants were partners in the enterprise where the pump and boiler were being used, and that they were operating under the firm name of R. M. Cain & Co., in which name the contract was signed; but the court refused to admit the testimony on the ground that: "You can't prove a partnership and recover on the strength of partnership unless you plead it. You can't do it in the justice court either, without alleging it." The plaintiff, however, did succeed in getting in testimony which tended to, if it did not conclusively, prove that the defendants were partners. Even the defendant who made the affidavit denying the partnership was on the stand and admitted that he was a partner, although at the close of all of the testimony the court, evidently on the theory announced in the above ruling, instructed the jury under the pleadings and evidence to return a verdict for all of the defendants except Cain and Blankenship, and thereupon hypothetically submitted their liability to the jury.

It has long since been settled by numerous decisions of our appellate courts that in an action against several defendants it is not essential to allege a partnership in order to be entitled to offer testimony tending to prove it, for the reason that such question is a matter of evidence. *Gates v. Watson*, 54 Mo. 585; *Fellow v. Jernigan*, 68 Mo. 434; *Stix v. Mathews*, 63 Mo. 371, 374; *Alcorn v. Railroad*, 108 Mo. 81, 92, 18 S. W. 188; *Anstee v. Ober*, 26 Mo. App. 665, 667; *Lowe v. Electric Springs Co.*, 47 Mo. App. 426, 430.

The trial judge was, no doubt, misled by the case of *Jones v. Tuller*, 38 Mo. 363, cited and relied upon here by the respondent to sustain the court's ruling, but that case has been distinguished by the *Gates Case*, cited above, which evidently the trial judge did not see, and is readily distinguished from the case at bar on the ground that no one should

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

presume that R. M. Cain & Co. was a corporation, since, where a corporation contains the name of individuals, it must further contain some word designating the business of the corporation. Section 2978, Revised Statutes 1909. The defendants also appeared in the case, and, so far as the record discloses, voluntarily treated the action as one against them as partners.

[2] It does not, however, follow that this case should be reversed and remanded for a new trial, because the plaintiff himself testified, as above noted, that all of the transactions involved in this case were had with Cain and Blankenship. Hence the liability must attach to the other defendants solely by reason of these transactions. The court did properly submit to the jury the question of the liability of Cain and Blankenship, and the jury found that they were not liable. Therefore it necessarily follows that the other defendants are not liable, and no error was committed by excluding the question of their liability from the consideration of the jury. Had the plaintiff prevailed in this suit, then he would have had grounds for complaint of the court's ruling. The jury having settled the questions of fact adversely to the plaintiff, we are powerless to disturb the judgment in the absence of prejudicial error.

Affirmed.

FARRINGTON and STURGIS, JJ., concur.

**L. & A. SCHARFF DISTILLING CO. v.  
SPRINGFIELD COAL, ICE &  
TRANSFER CO. (No. 1174.)**

(Springfield Court of Appeals. Missouri. May 1, 1914.)

**1. CONTRACTS (§ 54\*)—CONSIDERATION.**

An agreement by defendant, who misappropriated a barrel of whisky sold and shipped by plaintiff to a third person, to pay plaintiff the amount of its claim against the third person, was not supported by a consideration unless plaintiff has released the third person and he had released defendant on account of its wrongful misappropriation of the whisky.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 238-239, 242, 243, 251, 254, 255, 291-315; Dec. Dig. § 54.\*]

**2. NOVATION (§ 6\*)—CONSIDERATION.**

To make defendant, who wrongfully delivered a barrel of whisky which plaintiff had shipped to a third person, responsible to plaintiff for the value of the whisky, plaintiff must have discharged the third person as its creditor and accepted defendant instead; since otherwise the third person would receive no consideration for defendant's release.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6; Dec. Dig. § 6.\*]

**3. NOVATION (§ 5\*)—ESSENTIALS.**

To constitute a novation, the creditor, debtor, and the third person must all agree that the original debtor be released and the third person substituted in his stead.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

**4. NOVATION (§ 12\*)—PRESUMPTION.**

Novation is not presumed, but must be clearly established.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.\*]

Appeal from Circuit Court, Greene County; Arch. A. Johnson, Judge.

Action by the L. & A. Scharff Distilling Company against the Springfield Coal, Ice & Transfer Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Williams & Galt, of Springfield, for appellant. Neville & Gorman, of Springfield, for respondent.

ROBERTSON, P. J. This action was brought before a justice of the peace in Greene county upon a statement in two counts there filed; the first alleging that the defendant without leave and wrongfully took a barrel of whisky belonging to the plaintiff which it had not returned, to plaintiff's damage in the sum of \$90.48, and the second count alleging that plaintiff was entitled to the immediate possession of the whisky which came into possession of the defendant, who then and there unlawfully converted it to its own use and disposed of the same, to plaintiff's damage in said sum. After a trial in the justice of the peace court, an appeal was taken to the circuit court, where plaintiff took an involuntary nonsuit with leave to move to set same aside. Within due time the motion was filed, overruled, and an appeal taken by the plaintiff.

The facts in this case, as developed by the testimony, are that the plaintiff, whose place of business is in St. Louis, shipped via the Frisco Railroad a barrel of whisky consigned to Brashears & Murphy at Springfield, who were to pay the freight. Upon the arrival of said shipment at Springfield, the defendant, being engaged in the transfer business at that place, hauled the barrel to the saloon of J. C. Peters; but before the mistake was discovered Peters had sold a large portion of the contents of the barrel. Soon after the discovery of this mistake, a representative of the plaintiff appeared upon the scene, and he and Murphy, of the firm of Brashears & Murphy, went to and had an interview with Mr. Eaton, who was connected with the defendant company. The testimony is that Mr. Eaton agreed to pay for the barrel of whisky.

[1, 2] We shall assume that Mr. Eaton had full authority to and did speak for the defendant and that defendant agreed to pay plaintiff for the value of its whisky. There is no testimony in the entire record, however, that the plaintiff released Brashears & Murphy, to whom it had sold and delivered the whisky, a delivery to the railroad being a delivery to them, or that Brashears & Murphy released the defendant. The situation thus developed by the testimony is that the shipment of the whisky was made to Brashears & Murphy,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and consequently, when it arrived in Springfield and the defendant wrongfully delivered it to a third party, the only claim then existing against the defendant was in behalf of Brashears & Murphy, the then owners of the whisky. Brashears & Murphy owed the plaintiff for the whisky. The defendant owed the plaintiff nothing. The defendant received no consideration for its agreement to pay the plaintiff the amount of its claim against Brashears & Murphy unless Brashears & Murphy released the defendant on account of the wrongful delivery of the whisky. *Greene v. Musson*, 169 Mo. App. 680, 684, 155 S. W. 849. Further, in order to fix the liability of the defendant, it was essential that the plaintiff should have discharged Brashears & Murphy as its creditor and accepted the defendant in their stead (*Davis v. Dunn*, 121 Mo. App. 490, 494, 97 S. W. 226); otherwise, Brashears & Murphy would receive no consideration for their release of the defendant.

[3, 4] In order to constitute a novation, the creditor and the debtor and the third person must all agree that the original debtor be released and the third person be substituted in his stead. *Babbitt v. Railroad*, 149 Mo. App. 439, 455, 130 S. W. 364; *Leckie v. Bennett*, 160 Mo. App. 145, 159, 141 S. W. 706. Novation is never presumed, but must be clearly established. See cases last above cited.

The trial court, under the testimony, properly refused to set aside the involuntary nonsuit, and therefore the judgment is affirmed.

STURGIS, J., concurs. FARRINGTON, J., not sitting.

FARRIS et al. v. SMITHPETER et al.  
(No. 1266.)

(Springfield Court of Appeals. Missouri. May 5, 1914.)

1. COSTS (§ 273\*)—COLLECTION—ENJOINING ENFORCEMENT OF FEE BILLS.

In analogy to the rule that an injunction will not issue against an execution issued from another court, an injunction will not lie to restrain a sheriff from enforcing a fee bill alleged to be void.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1037-1039; Dec. Dig. § 273.\*]

2. COSTS (§ 273\*)—FEES—COLLECTION—REMEDIES—"FEE BILL."

A "fee bill" is the proper process to collect fees due to officers and witnesses against a party for whom services are rendered.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1037-1039; Dec. Dig. § 273.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2707.]

3. EXEMPTIONS (§ 108\*)—LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.

Exemptions are allowed to a fee bill debtor the same as to an execution debtor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 129; Dec. Dig. § 108.\*]

4. COSTS (§ 273\*)—COLLECTION—FEE BILL—MOTIONS TO QUASH.

A motion to quash a fee bill or levy thereunder may be filed in vacation as well as in term time, in view of Rev. St. 1909, § 2244, authorizing proceedings before the issuing judge to quash execution.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1037-1039; Dec. Dig. § 273.\*]

5. EXECUTION (§ 171\*)—ADEQUACY OF LEGAL REMEDY.

An injunction is not the proper remedy to enjoin a threatened sale of personalty under execution or other process, if there is no judgment on which to base the process; the legal remedy being adequate.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by J. W. Farris and another against Albert Smithpeter and another. From a judgment for plaintiffs, defendants appeal. Reversed.

R. S. Phillips, of Marshfield, and Watson & Page, of Springfield, for appellants. J. W. Farris, of Lebanon, for respondents.

STURGIS, J. This is a suit to enjoin the defendant Hufft, who is sheriff of Laclede county, from enforcing against plaintiffs a fee bill issued by the clerk of the circuit court of Greene county, Mo., in a suit lately pending in such last-named court, wherein one Simpson was plaintiff and Bantley defendant. The other defendant, Smithpeter, is the person at whose instance the fee bill was issued and who is urging its collection. The grounds of plaintiffs' liability for the costs covered by the fee bill is that they became sureties on a cost bond for plaintiff in the *Simpson v. Bantley* Case while same was pending in the Laclede county circuit court, where it originated, and went thence to Greene county on a change of venue. The present plaintiffs succeeded in getting both a temporary and perpetual injunction in the Laclede circuit court restraining the collection of this fee bill issued out of the circuit court of Greene county. The final judgment granting the perpetual injunction was rendered after defendants' demurrer to the petition was overruled, and defendants refused to plead further. Defendants' demurrer alleged and they stood on the grounds: (a) That plaintiffs' petition states and shows that the execution (fee bill) which they seek to enjoin was issued out of another court of like jurisdiction with the one in which the injunctive remedy is sought, and that the circuit court of one county has no authority or power to enjoin the process of a like court of another county; and (b) that the petition shows that plaintiffs have an adequate remedy at law.

[1] The court erred in overruling this demurrer. Our Supreme Court, in the early case of *Pettus v. Elgin*, 11 Mo. 411, ruled that an injunction cannot issue from one

court to enjoin an execution issued from another. In that case an execution issued from St. Charles county to the sheriff of St. Louis county, and an action was brought in the latter county to enjoin its enforcement. The Supreme Court held that the facts showed that the execution ought to be enjoined, but said: "The circumstance that the process was in the hands of the sheriff of St. Louis county gave the circuit court of that county no control of the writ by injunction, sale, or otherwise. As to that process, the sheriff of St. Louis county was an officer of the circuit court of St. Charles county; it emanating from that court. One court cannot interfere with the process of another. The application for relief should have been made to the circuit court of St. Charles county. The decree will be reversed, and the bill dismissed." Such has been the law of this state ever since that decision, if not before, and it has been the basis of a long line of cases holding that every court has exclusive control over its own process, and that no other court has any right or power to interfere with or control the same, whether by injunction, motion to quash the writ, motion to quash the levy thereunder, or in any other manner whatever. Any relief against the process of a court must be applied for in the forum issuing it. *McDonald v. Tiemann*, 17 Mo. 603; *Nelson v. Brown*, 28 Mo. 13, 19; *Keyte v. Plemmons*, 28 Mo. 104; *Mellier v. Bartlett*, 89 Mo. 134, 137, 1 S. W. 220; *Scrutchfield v. Sauter*, 119 Mo. 615, 621, 24 S. W. 137; *Bank v. Poole*, 160 Mo. App. 133, 141, 141 S. W. 729; *Norman v. Eastburn*, 230 Mo. 168, 188, 130 S. W. 276. These decisions have for their basis sections 2244 and 2516, R. S. 1909, which fix the forum for all such relief and, in part, point out the proper remedies.

The reason for the rule just stated is to maintain comity between courts and prevent conflicts of jurisdiction (*Bank v. Poole*, 160 Mo. App. 133, 142, 141 S. W. 729), and both the rule and reason is well stated in *Mellier v. Bartlett*, supra, as follows: "The principles which are at the foundation of the cases before cited are that each court has the sole control of its process, and that the sheriff of the county to which the execution is sent is, as to that writ, the officer of the court from which the writ emanated. We cannot see any substantial ground for the distinction pressed upon our consideration. The circuit court of Butler county had no more power to quash the levy than it had to quash the execution. Any other conclusion must lead to much inconvenience and confusion. The law allows executions to be issued from the court of one county to the sheriff of another, and the party has his remedy in the court from which the process is issued; and it is no hardship that he should be obliged to go to that court for relief because of any abuse of the writ."

Plaintiffs concede the correctness of this ruling, as applied to executions, but seem to think that such rule ought not to be applied to fee bills. No reason for the distinction is pointed out, and we think none exists. It will be noted that the courts in many of the cases above cited do not confine the rule to executions but apply same to process and writs in general. It is said in *Scrutchfield v. Sauter*, supra, that: "The statute does not confine the proceedings for obtaining relief to the defendant in the judgment, but 'any person against whose property an execution or order of sale shall be issued' is entitled to the remedy afforded by the statute, and is also confined to the forum provided." Section 10690, R. S. 1909, expressly provides that fee bills shall issue to sheriffs, who shall collect the same, "and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution."

[2] A fee bill is the proper process to collect fees in favor of officers and witnesses against the party for whom the services are rendered (*Hoover v. Railroad*, 115 Mo. 77, 21 S. W. 1076), and that case quotes from *Newkirk v. Chapron*, 17 Ill. 344, 353, holding that a fee bill "becomes, for this purpose, like an execution against the cost debtor."

[3] Exemptions are allowed to a fee bill debtor the same as to an execution debtor. *State ex rel. v. Emmerson*, 74 Mo. 607. It is apparent, therefore, that the same remedies by motion to quash the writ or to quash a levy thereunder, or by injunction in a proper case, is open to one whose property is wrongfully seized or is threatened to be taken under a fee bill, as in case of an execution, and that the remedy must be had in the court from which such fee bill issued. *Wilson v. Geitz*, 75 Mo. App. 11, is a motion to quash a levy under a fee bill.

[4] For aught that is stated in this petition, the plaintiffs have an adequate remedy by a motion to quash the fee bill or any levy thereunder, which motion may be filed in vacation of the Greene county circuit court, as well as in term time. Section 2244, R. S. 1909; *Mellier v. Bartlett*, 89 Mo. 134, 137, 1 S. W. 220; *Parker v. Railroad*, 44 Mo. 415, 419; *Heuring v. Williams*, 65 Mo. 446.

[5] It has also been ruled that there is an adequate remedy at law, and injunction is not the proper remedy where the sale of personal property is threatened under execution or other process, based on a void judgment; and this would certainly be so where there is no judgment whatever on which to base the same. *Howlett v. Turner*, 93 Mo. App.

20, 24; *St. Louis & S. F. R. Co. v. Lowder*, 138 Mo. 533, 39 S. W. 799, 60 Am. St. Rep. 565; *Missouri, K. & E. Ry. Co. v. Hoereth*, 144 Mo. 136, 148, 45 S. W. 1085; *Ostmann v. Frey*, 148 Mo. App. 284, 287, 128 S. W. 257; *State ex rel. v. Brown*, 172 Mo. 374, 381, 72 S. W. 640. A fee bill does not need a judgment for its basis, but it does need a proper taxation of costs. The present petition alleges that the obligation for costs signed by plaintiffs never left Laclede county, was never filed in, or accompanied the transcript of the case to, Greene county; that no judgment was rendered or taxation of costs had, or could be had, against these sureties in that court, though the case there has been finally determined. And, to make the matter doubly certain, the petition further alleges: "And the said clerk had no authority in law to issue a fee bill against these plaintiffs, and the writ under which the said defendants are proceeding is a void writ and gives to said sheriff no legal authority to levy upon

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and sell the property of these plaintiffs." It is not alleged that defendant was threatening to levy on real estate and by sale cast a cloud on the title, or that any levy or sale would cause a multiplicity of suits or afford other distinctive grounds for injunctive relief. The judgment rendered only enjoins the enforcement of the fee bill then in the hands of the sheriff and does not enjoin any judgment, or taxation, or collection, of costs in the future, or by other process. For aught that appears here, the sheriff was merely threatening to levy on some personal property and sell same under a fee bill, alleged to be utterly void, as shown by the records of the court issuing the same; and, under the authorities cited, injunction is not the proper remedy.

The judgment of the trial court will therefore be reversed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

**AMARILLO NAT. LIFE INS. CO. v.  
BROWN. (No. 551.)**

(Court of Civil Appeals of Texas. Amarillo. March 7, 1914. On Motion for Rehearing, April 25, 1914. On Second Motion for Rehearing, May 9, 1914.)

**1. INSURANCE (§ 665\*)—LIFE INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE—PAYMENT OF PREMIUMS.**

In an action on a life policy, defended on the ground that the first premium was not paid, so as to put the policy into effect, evidence held to sustain a finding that the company intended to extend credit for the premium to its general agent and to permit him to extend credit thereafter to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

**2. INSURANCE (§ 291\*)—LIFE INSURANCE—HEALTH OF INSURED—FORFEITURE OF POLICY.**

If insured was given credit for the first premium before he became in bad health, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.\*]

**3. INSURANCE (§ 136\*)—LIFE INSURANCE—DELIVERY.**

The retention of the policy by the local agent receiving it for delivery, at insured's request, was some evidence on the question of delivery to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.\*]

**4. INSURANCE (§ 109\*)—LIFE INSURANCE—CUSTODY OF POLICY.**

The local agent of a life insurance company could become the custodian of the policy for insured, notwithstanding his agency for the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 133; Dec. Dig. § 109.\*]

**5. INSURANCE (§ 93\*)—LIFE INSURANCE—UNAUTHORIZED ACT OF AGENT.**

Though insurance agents violate the instructions of the company in taking policies, the company is liable if the act is performed within the apparent scope of the agent's authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 123; Dec. Dig. § 93.\*]

**6. INSURANCE (§ 141\*)—LIFE INSURANCE—APPLICATION BY INSURED—ESTOPPEL TO DENY.**

An application for a 15-year endowment policy was rejected, but the general office prepared and forwarded to the general agent an application, with a corresponding policy, identical with that rejected, except that the term of the policy was 10 years and the premiums were greater. After holding the policy for some time, the general agent directed the local agent, who had an office with him, to ask insured if he wanted the policy, and the local agent called insured on the telephone and stated that the reason they had not sent the policy to him by mail was because it was for 10 years, instead of 15 years, and would cost somewhat more, when insured said, "That is all right; keep it for me until I come down," and stated that he would make the additional premium all right, after which the agent placed the policy with his private papers at a bank. Nothing was said in the conversation about insured signing any other application. Insured never signed the application for the second policy, and never had the second policy in his possession, and died shortly

thereafter. *Held*, that the company, as well as the local agent, was estopped from claiming in a suit on the policy that the 10-year policy was ineffectual, because no application was made therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.\*]

**7. INSURANCE (§ 87\*)—LIFE INSURANCE—ACTS OF AGENT—RESPONSIBILITY OF COMPANY.**

An insurance company is responsible for the acts and declarations of their local agents within the scope of their employment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 116, 121; Dec. Dig. § 87.\*]

**8. INSURANCE (§ 602\*)—LIFE INSURANCE—PAYMENT OF POLICY—PENALTIES FOR NON-PAYMENT.**

The statute providing for damages and attorneys' fees for refusal to pay an insurance policy within the time specified in the statute if liability thereon be established, is constitutional.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.\*]

**9. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

An instruction in an action on a life policy that the jury should find as "attorney's fees \$—" was harmless to defendant, though irregular, in absence of a showing that the jury found improperly on the item of attorneys' fees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**10. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error in admitting evidence of a telephone conversation between a witness and decedent was harmless, where another witness testified for appellant that the former witness told him the same thing after decedent's death.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**11. INSURANCE (§ 654½\*)—LIFE INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.**

In an action on a life policy, claimed by the company not to have become effectual because of failure to pay the premium while insured was in good health, evidence that insured was a man of considerable wealth was material on the question whether the agent extended credit to him for the premium as claimed by plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1674, 1686; Dec. Dig. § 654½.\*]

**12. INSURANCE (§ 187\*)—LIFE INSURANCE—PAYMENT OF PREMIUMS—CREDIT—NOTE.**

Rev. St. 1911, art. 4741, prohibits the issuance of life policies, unless the contract provides that all premiums shall be payable in advance to the home office, or an agent, on delivery of the receipt signed by one or more of the officers designated in the policy, and provides that the policy and application shall constitute the entire contract. Article 4964 prohibits discrimination between persons insured of equal life expectation in the amount of premiums charged, and prohibits companies or their agents from making any agreement other than expressed in the policy, under the penalty of criminal prosecution and a forfeiture of authority to do business. *Held*, that the statutes did not make a policy void, where the company extended credit and received another's obligation as payment of the first premium due, instead of cash payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 399-401; Dec. Dig. § 187.\*]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.



Action by Martha A. Brown against the Amarillo National Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Madden, Trulove & Kimbrough, of Amarillo, and Roscoe Wilson, of Lubbock, for appellant. Ed. J. Hamner and Geo. T. Wilson, both of Sweetwater, for appellee.

HENDRICKS, J. In accordance with appellant's brief, this suit is one by Martha Brown, the surviving wife of Willis B. Brown, against the Amarillo National Life Insurance Company, the appellant, to recover \$5,000 principal, with interest and 12 per cent. damages, and \$1,000 attorney's fees, claimed to be due upon a certain policy alleged to have been issued and delivered to her husband, Willis B. Brown, insuring his life in said sum of \$5,000. Prior to the time the policy in suit was written, Brown executed an application for a 15-year endowment policy, which required the payment of 15 annual premiums of \$427.05, in which application, as well as the substituted application, hereinafter explained, the following provisions are found:

"I hereby agree as follows: (1) That if this application is accepted the policy issued hereunder shall not take effect until the first premium shall have been paid to and accepted by the company or its authorized agent, and said policy delivered to and accepted by me, and all during my continuance and while I am in good health. \* \* \*

(6) That only the officers of the company at the home office can accept or reject this or any application, and that no knowledge of any person and no statement made or given by or to any person shall bind the company or in any manner affect its rights, unless such knowledge and statement are set forth in writing in this application. \* \* \*

"What Constitutes a Contract. This policy and the application therefor, taken together, constitute the entire contract, and the same cannot be waived or altered, or its conditions waived or extended in any respect, except by the written agreement of the company signed by the president or secretary, whose authority will not be delegated."

The general officers of the insurance company rejected the application for a 15-year endowment policy and canceled the same, reissuing another application prepared by said company with the questions and answers, including the date, identical with the first application, except the difference in the amount of the premium and the term of the policy applied for. The company at Amarillo prepared the policy sued upon, which was also the same as the policy applied for, except an increased premium of about \$200, and was a 10-year endowment, instead of a 15-year, and mailed said substituted documents to its agents, Wellborn Bros., at Snyder, Tex., on April 26, 1911, in-

structing them as hereinafter indicated in this opinion.

The appellant insists in this cause that the policy issued did not take effect because the first premium had not been paid to and accepted by the company or its authorized agent in accordance with the provision first quoted. The evidence in this case discloses that the policy was dated back to the time of the original application, and that the company was relying upon the original answers in said application, when it prepared the substituted application, which was never signed by Brown.

Mr. G. J. Brothers, the secretary of the insurance company, testified that on account of some additional information with reference to the insured the application committee were not willing to issue and deliver the policy on the 15-year endowment plan, but were willing to issue the policy which was executed by the company on the 10-year endowment plan, and hence canceled the original application. The confidential report, demanded by the insurance company and accompanying the first application forwarded by the agent, in this case, reads: "If no settlement has been made for the first premium, state how and when it is expected to be made." The answer appended to this question was, "October 1, 1911," and which confidential report was in the papers of the insurance company in this cause, and when the substituted policy, with the substituted application was forwarded by the insurance company to the agents, there were no instructions to make the first payment upon the new policy in cash or in any different manner from that called for in the confidential report. Mr. Brothers testified: "We sent that policy, No. 982, out of our office according to the rules and customs of our company, and then charged Mr. Wellborn up with the amount of the premium on the policy due the company, subject to a credit if that policy was returned. \* \* \* It was the practice of the company to leave the matter of delivery with the agent and simply hold him responsible according to the terms of the policy and the written contract (meaning an indemnity contract executed by the agent and sureties, payable to the company), without specifying the time when he should make delivery of the policy and that was the practice observed in this case."

It is true that he said that the matter of charging the agent with the amount of the premium on the policy "was just a matter of keeping a record of the transaction," but we are inclined to think the testimony clearly indicates a credit extended to the agent for the amount of the premium. Wellborn said: "\* \* \* When I sent the Brown application, I notified the company I had taken his note because that was my practice." This notification was probably the question and answer in the confidential re-

port. He further said: "In my dealings with the company there was not any specified rule in respect to the first premium received by me on policies as to how often I should have a settlement with them. I would make my collections along when they were due, and deposit them, and send them the deposit slip, and sometimes it would be two months, and sometimes three months, and sometimes longer." This testimony was not rebutted; but, as far as the testimony of Brothers traveled in the same direction, Wellborn's testimony in this respect as to the practice of the company was corroborated and confirmed.

Nelson, the subordinate agent, who was connected with this transaction, had his office with Mr. Wellborn, and each had access to the correspondence of the other; Mr. Wellborn being what is termed in this record as a "general agent" for the business of the insurance company. These parties kept their books separately, but worked with each other with reference to the solicitation of insurance. Mr. Wellborn said, in regard to the credit extended to Brown: "It was my business that I let him have the policy on credit, because I was responsible to the company. \* \* \* In fact, if he had asked me for credit for a year's time, I would have given it, and paid it myself." The record shows that Brown was a man of considerable wealth, having ample means and resources.

Bearing in mind the foregoing testimony, taken in connection with subsequent testimony referred to in this opinion, we cite the case of *Elkins v. Susquehanna Mutual Fire Ins. Co.*, by the Supreme Court of Pennsylvania, 113 Pa. 386, 6 Atl. 224, the syllabus of which fairly reflects the holding of the court: "It is competent for a fire insurance company to waive a condition in its policy that the company should not be liable \* \* \* until the premium is actually paid; and where the course of business between the company and one of its agents tends to show that the company was accustomed to substitute the personal liability of the agent for premiums received in the place of the security which the suspension clause in the policy afforded, \* \* \* the case should be submitted to the jury." Also see the case of *Kilborn v. Prudential Insurance Co.*, 99 Minn. 176, 108 N. W. 861.

The Supreme Court of the United States, in the case of *Knickerbocker Insurance Company v. Norton*, 96 U. S. 234, 24 L. Ed. 691, in speaking of this matter said: "That it" (meaning the insurance company) did authorize its agents to take notes, instead of money, for premiums, is perfectly evident, from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period it allowed them to give an indulgence

of 90 days; after that of 60 days; then 30 days. It is vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instrument."

The Iowa Supreme Court, in the case of *Kimbrow v. New York Life Insurance Co.*, 108 N. W. 1025, 12 L. R. A. (N. S.) 427, referred to in this opinion upon another point, in commenting upon this particular matter, said: "\* \* \* It was a common practice, known to and approved by the company, for agents to take such notes payable to themselves, and charge themselves therewith in their agency accounts, the company holding the agents responsible as for a cash collection. \* \* \* The giving of the note instead of cash in advance by the applicant will not invalidate the insurance, if the contract be otherwise complete"—citing and using the same cases as authority on this same point as used by us above.

In the case of *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 848, 62 S. E. 1064, 128 Am. St. Rep. 989, it is said: "In this case, the special agent, Ayres, had given the bond of a guaranty company to make good all that might be due by him to the insurance company; and it appears from the evidence of the general agent that it was a practice, known to and approved by the company, for agents to take such notes, payable to themselves, and charge themselves therewith in their agency account, the company holding the agent responsible as for a cash collection." And practically to the same effect is the case of *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 902, by the Supreme Court of Colorado.

[1, 2] While the evidence does tend to show that Wellborn remitted to the insurance company when he made his collections, and in the particular instance as to the Brown policy, he credited the collection in the bank to the insurance company; but it is also reasonably and fairly persuasive that the company intended to extend the credit to Wellborn, and to permit him to extend credit to the insured, and the evidence is without contradiction that when the telephone communications between Nelson and Brown occurred, hereinafter disclosed, the latter was in good health. And as the Supreme Court of South Carolina expressed it, in the case of *Dargan v. Equitable Life Assur. Soc.*, 71 S. C. 360, 51 S. E. 126: "If there was a constructive delivery upon credit for the premium at any moment before the insured became in bad health, the subsequent illness of the insured could not change the status, or defeat a recovery upon the policy; certainly if the insured died within the period of the probable credit."

[3] This case is also authority for the proposition that, if the local agent receiving it for delivery retained the custody of

the policy by the request of the insured, that was some evidence to go to the jury on the question of delivery. "If, therefore, the agent of the defendant, after notifying the insured that he had the policy for delivery, received instructions from the insured to hold the policy for the insured, and so held the policy, there was evidence of a constructive delivery of the policy to the insured while in good health"—meaning, of course, as applicable to the facts in that case, which upon the distinct point is rather applicable to the facts here. We are not citing the above cases as wholly applicable on account of a total similitude of the facts, but think the facts are sufficiently similar, superinducing the principles enunciated, to make them pertinent; and as said by the Supreme Court of Virginia, in the Hairston Case, supra, 108 Va. 852, 62 S. E. 1065, 1066, 128 Am. St. Rep. 989: "Our view is \* \* \* that the policy was in effect in this case (unless defeated upon other grounds), because the company, through its general agent, knew of all that had taken place between the special agent and the insured, and because, under the circumstances of the case, and in accordance with the practice of the company, there had been, as between the applicant and the company, a payment of the premium before the policy was delivered."

It is true that Wellborn indicates that the Brown application was the beginning of his individual connection with the company referable to his general agency; but the testimony is quite susceptible of the construction that in some capacity, or associated with another, he had had dealings with the company and understood its custom and manner of conducting its business in this respect, and his particular individual agency lasted for several months subsequent to the time of his appointment. Though the subordinate agent, Nelson, sustained in a sense a direct relationship to the company as to its business by virtue of his contract with the company, however, it cannot be said, considering the record here, that his acts connected with the transaction effectuating this policy are referable to the special agency. He was also acting for Wellborn, who was acting for the company; and if Nelson's acts in connection with the transaction, if they had been performed by Wellborn, would have bound the company, they are not the less binding on the company because manifested by Nelson where he touched the matter.

[4] Neither are we able to agree with appellant that Nelson, being an agent of the company, was unable to become the custodian of the insured as to the particular policy. *Phoenix Assurance Co. of London v. McAuthor*, 116 Ala. 659, 22 South. 908, 67 Am. St. Rep. 154; *Young v. St. Paul Fire & Marine Ins. Co.*, 68 S. C. 387, 47 S. E. 682.

Upon the matter of waiver of the payment of the premium, appellant insists that the

following statute (Rev. St. 1911, art. 4968, c. 15, tit. 71) is applicable: "Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company \* \* \* be regarded as the agent of the company, and not the agent of the insured, but such agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy." As applicable to the immediate question under discussion as to a waiver by the soliciting agent of the payment of the premium in cash, we hold, being bound by the verdict of the jury upon the evidence, that the company itself had waived the payment, and that the agent had the authority to extend the credit as he did.

However, the question remains, and, as we view the cause, it is the important issue in the case: Did the insurance company and the insured make a contract when the company's agent had the telephone conversation hereafter mentioned, and the company refused to issue the 15-year endowment policy upon the original application of the insured, and substituted a 10-year endowment with an increased premium upon a new application prepared by the company, in every respect a duplicate of the original application, except a difference in the term and premium, with instructions to Wellborn in accordance with the following letter, dated April 28, 1911: "Inclosed I hand you policy No. 982, on the life of Willis B. Brown. This you will note is a ten-year endowment G. C. policy, instead of a fifteen-year endowment G. C. policy, as applied for. The application committee made this change, because of the reports received in regard to applicant's habits. We trust that you will have no difficulty in delivering this policy, and inclose herewith new application to be signed in the event you deliver this policy."

Condensed from appellant's brief, which is a fair presentation of the record, the evidence discloses that Brown during this time resided about 40 miles from Snyder. When Wellborn took the first or original application for a 15-pay policy on March 21, 1911, he accepted from Brown a note made payable to himself for \$427.05, due October 1, 1911, understood between them to be the first premium payment on the policy as applied for. Before the insurance company's letter quoted above reached Snyder, inclosing the new policy and the application, Wellborn had gone to Dallas on account of sickness, and the letter mentioned was opened by the subordinate agent, W. W. Nelson, who sometimes worked with Wellborn in the insurance business, having a desk in the latter's office in Snyder, and having charge of the office when Wellborn was away. Nelson "pigeonholed" the new application and policy until Mr. Wellborn returned from Dallas, the former then reporting to the latter that the policy

was there, and thereupon Wellborn instructed Nelson "to phone Mr. Boly Brown and state to him the difference in the price and find out what he wanted to do." "Nelson reported to Wellborn the next day that he had done as requested, and that Mr. Brown said: 'It was all right. He would be down in a couple of weeks and get it.' Nelson says that on or about the 2d or 3d day of June, 1911, at the instance of Wellborn, he had a conversation over the phone with Brown, as follows: 'I told Mr. Brown that we had his policy, and that it had been there quite a good while, and that we could not keep it any longer; that we either had to return it or deliver it, and if he didn't want it we would have to send it back; that he told me to keep it for him until he came down. I told Mr. Brown that the reason we had not sent the policy by mail was because it was not the kind he applied for; that it was a ten-year instead of a fifteen-year, and would cost about \$200 more a year, and he said, "That is all right; keep it for me until I come down." In regard to paying the additional premium he said, "I will make that all right with you when I come down." In that conversation I didn't say anything to Mr. Brown about signing any other or additional application. In that conversation he said he would be down in about two weeks. After the conversation I took the policy out of the office and put it with my private papers.'"

The evidence further discloses that he placed the same in a private receptacle of his at a certain bank. The conversation of Nelson with Brown over the telephone was upon the previous Saturday before the death of Brown on the following Wednesday. Brown never signed the application and never had the manual possession of the policy. The note to Wellborn including the additional premium called for in the new policy, was paid to Wellborn after Brown's death.

[5] On consideration of the decisions, and in tracing the progress of the law upon the subject, there is indicated a development of a doctrine in the nature of equitable estoppel where, though agents violate the instructions of their principals, the latter are liable if the act is performed within the apparent scope of the authority, which is tantamount to actual authority. A simplification of the status of this case, if we view it correctly, may to some extent tend to its solution. If the proper officer at the home office, having the authority to deliver the policy, had telephoned Brown the same communication Wellborn did, or that Nelson did for Wellborn, and Brown had answered in the same manner he replied to Nelson, and the particular officer delivered it to some bank, assuming that he was so instructed by Brown, with the understanding that Brown would arrange for the premium when he came to Amarillo, and the latter suffered an accidental death the following day, would the company have

been liable? If the officer mentioned had neglected to inform Brown, through inadvertence or otherwise, that the president of the company had instructed him not to deliver the policy until the substituted application was signed by Brown, would the company have the right to say to the beneficiary, "There is no contract; the minds of the parties never met." To extend the illustration: If Brown had stepped to the counter of the particular officer, and upon inquiry it was explained to him that the policy was the same as the one applied for, except that it was a 10-year endowment instead of a 15-year, and the annual premium was \$600 instead of \$400, and Brown had said, "All right," and had actually paid the \$600 in cash, and in descending the steps had broken his neck; would the company have the right to say to the beneficiary: "The president prepared a new application, with instructions to procure its execution upon delivery of the policy, and the contract was never completed. Brown's first application was rejected, and the delivering officer had no power to deliver it, except upon private instructions of the president of the company requiring the execution of a new application, and Brown was notified by the policy that the application and the policy constituted the entire contract, and as Brown never signed the substituted application, and as he was bound to know that the new policy delivered to him was a mere counter proposition, the minds of the parties never met upon what the company intended to offer and the policy was never, in law, delivered."

In a case where the company's agent had prepared an application for the insured, signed by the latter, and the question was asked as to other insurance, and the written answer was, "No other," and the insured had \$10,000 of co-operative insurance, which the agent, although informed, did not regard as insurance, the Supreme Court of the United States said: "His act (meaning the agent's) in writing the answer, which is alleged to be untrue, was under the circumstances the act of the company. If he had applied in person to the home office for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak (the soliciting agent), and the company, by its principal officer, having authority in the premises, had then written the answer, 'None,' it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had under like circumstances between the insured" and the agent of the company." *Continental Ins. Co. v. Chamberlain*, 132 U. S. 311, 10 Sup. Ct. 87, 33 L. Ed. 341.

We believe that a critical analysis of the cause of *Kimbrow v. New York Life Ins. Co.*,

108 N. W. 1025, 12 L. R. A. (N. S.) 427, by the Supreme Court of Iowa, sustains this view when the status of the facts of that case is correctly weighed and balanced. The applicant, Kimbro, when he signed the application for insurance, executed his note for the first premium to the local agent of the insurance company. The company, on receipt of the application, concluded not to issue the policy applied for, but forwarded to the agent a different policy to be submitted to Kimbro. The soliciting agent made no mention of the change in the policy, but simply communicated to Kimbro through the mail of the receipt of the policy, stating in substance that he had been apprehensive that Kimbro might be rejected, but was pleased to say that the policy had arrived, and that he would call upon Kimbro the next pay day and deliver the same to him. The company, in mailing this policy to the soliciting agent, called the latter's attention to the change in the policy, directing him to submit the same to Kimbro, with proper explanations, for acceptance, if found satisfactory, which, as stated, the agent failed to do. The agent and Kimbro had an agreement for credit with reference to the payment of the premium, and the latter was entirely innocent of the company's declination of the former application, and was immediately taken sick and died before the maturity of the credit. The court in effect held that from the forwarding of the application, and the communication by the agent to Kimbro that the policy had been received, the applicant had the right to assume that his application was accepted as proposed and that the contract was closed; the agent having the apparent authority to notify the insured his proposition was accepted and to deliver the policy. The Supreme Court of Iowa said: "That agent was its [the company's] representative, not only to receive and forward the application, but was also its representative expressly authorized to complete the negotiations and deliver the policy which the appellant prepared and returned for the applicant's acceptance. He was the only medium through whom the business between the contracting parties was carried on. Within the scope of that employment, his hand was the appellant's hand, his voice was its voice, and his promises and assurances were the promises and assurances of his principal, notwithstanding any undisclosed instructions or limitations existing in his contract of employment."

It was alleged in that case by the company that the instruction with reference to the new policy and the rejection of the application was never carried out by the agent, and that Kimbro never consented to receive or accept the substituted policy, and no contract of insurance was ever consummated or agreed upon. The beneficiary replied that the company was estopped by the acts of its agent to deny the existence of the contract

or the company's liability thereon. The Supreme Court of Iowa, in the Kimbro Case, supra, in adopting the language of the Supreme Court of Kansas in the case of Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986, further said: "It is argued that these statements were by an agent whose powers were limited and special, and that the company was not bound by them. \* \* \* It was the custom of the company to deliver policies on accepted applications through its local agents, and also through them to return premiums paid on applications which it rejected. This qualified the agent to impart information in respect to those things which were to be done by him. The giving of information in respect to a thing which, when to be done, the company would intrust to him to do, came within the scope of his authority."

Of course, as illustrated by the cases cited by appellant, Insurance Company v. Young, 23 Wall. 85, 23 L. Ed. 152, and Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 82, 52 C. C. A. 676, where the applications, or proposals for insurance, have been rejected by the insurer, and the latter makes counter propositions in the nature of different policies, which were never accepted in reality by the insured, the original applications are extinct. Necessarily the applicant for insurance could not recover upon the old application, as it was never accepted by the company; and the recovery upon the new policies, or counter propositions, is equally fatal, as the same were never accepted by the insured. The element entering into the case here is however entirely lacking in the cases cited.

[8] We think the pleadings of appellee, the charge of the court, and the evidence sustain the case in accordance with the doctrine stated; if we are correct in our conception of this doctrine as applicable to the cause, the original application being in every respect conformable to the policy stated, except as to the difference mentioned, and the conduct of the parties preventing assertion by the insurance company that it had not made the contract, the provision of the contract, that the application and policy constituted the entire contract, is fulfilled; the conduct of the company is an implied assertion that the new policy is based upon the old application, with the change indicated in the new policy, and Brown, if he had read the new policy, would necessarily conclude that, as a natural inference; the company had led him to believe it. And if the company would be estopped from saying that the policy had no application as a part of the contract, Brown would be equally bound upon the old application, and equally estopped.

[7] The Supreme Court of the United States, in the case of Union Ins. Co. v. Wilkinson, 13 Wall. 235, 20 L. Ed. 623, said: "The powers of the agent are *prima facie* coextensive with the business intrusted to

his care, and will not be narrowed by limitations not communicated to the person with whom he deals. \* \* \* An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal"—the clearest enunciation of the doctrine of implied power we have been able to find. See *Morrison v. Ins. Co.*, 69 Tex. 353, 6 S. W. 608, 609, 5 Am. St. Rep. 63; *Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024; *Ins. Co. v. Griffin*, 59 Tex. 513, 514.

We do not think the statutes quoted would apply to a case as evidenced by this record, and the main charge of the court, with the requested charges submitted by the court, we think, upon the whole, presented the real issues in the case, at least to the extent of not being subject to the complaints made.

[8] The constitutionality of the statute, providing for damages and attorney's fees, in the event of liability and the refusal to pay the policy within the time specified in the statute, is concluded by the Supreme Court of the United States in the case of *Fidelity Mutual Life Ins. Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 929. The only evidence in the case in regard to the reasonableness of the attorney's fees placed the amount at \$1,000, with the predicate laid as to the amount of work and the value of the same in cases of like character and based upon the experience of the witness.

[9] We do not believe that the court arbitrarily fixed the amount in the charge, but charged the jury to find as attorney's fees \$——; of course, an irregular presentation of the matter. The jury, however, had discretion as to amount, as it was not fixed by the court; but we are inclined to think the jury found properly upon the only proof offered. No special charge was requested on this point, and we are not advised as to how any injury could have resulted, or an improper verdict was produced by the irregularity.

[10] The complaint as to the admission of testimony in one instance is cured by one of appellant's requested charges; in another, the modification to the bill of exceptions appended by the court clearly makes the testimony admissible; in another instance, the cases of *Insurance Co. v. Eastman*, 95 Tex. 37, 64 S. W. 863, and *Nat. State Bank v. Ricketts* (Civ. App.) 152 S. W. 648, 649, exhibit the admissibility of the testimony; and as to a portion of Nelson's testimony, with reference to what occurred between Nelson and Brown in the telephone conversation, Mr. Smith, at one time the general manager of the company, and a witness in its behalf, testified that Nelson told him the same thing after the death of Brown, which was in conformity with Nelson's testimony upon the trial.

We have attempted to carefully consider the assignments of the appellant in this

cause, and conclude upon the whole that the judgment of the trial court should be in all things affirmed, overruling all assignments not specifically mentioned.

Affirmed.

HUFF, C. J., not sitting.

On Motion for Rehearing.

HENDRICKS, J. In this cause the record is susceptible of the construction that Wellborn Bros. were the general agents of the insurance company. The contract between them in writing was signed by them as general agents, and provided that the appellant had appointed "said second party as its general agents"; and considering the territory embraced in said contract, with the power delegated to them to appoint subordinate agents, and the absence of any evidence contradictory of such an inference, justifies the conclusion that their relation to the company was of such capacity.

The record indicates that a confidential statement was made on a blank form furnished by the company, and we clearly think by this form, with the answers thereto, in connection with the testimony of Mr. Brothers, the secretary of the company, and Mr. Wellborn, the general agent, and Nelson, the subordinate agent, that it was contemplated by the company that its agents might take notes for premiums or extend credit to applicants for policies for the purpose of obtaining insurance. It did indicate that notes were taken at agents' risk, but the company also desired a description of the same, and indicated that no cash might be paid at all, by the question to the agent, "Have you received any cash?" And the further recitation by the company in this confidential statement indicates that a settlement for the first premium may be made in a different manner than that of a cash payment, as follows: "If no settlement has been made for first premium, state how and when it is expected to be made." In this instance, the statement of the agent was, as to the settlement of the first premium for the insurance first applied for by the applicant, Brown, that the settlement for the first premium would be made the 1st day of October, 1911; and Mr. Brothers, the secretary of the appellant testified: "We issued this policy in suit on the original confidential report," etc.

The appellant seems to be seriously insistent in this matter that we erred in concluding that the evidence supported the jury's verdict in regard to the extension of credit to Wellborn by the company and the power of the latter to extend credit to Brown for the premium. Unless for some legal reason the power could not be exercised by the company, upon the theory in support of the jury's verdict, the evidence was amply sufficient. As expressed by the Supreme Court of Massachusetts, however, in a fire insurance cause, upon partly a similar state

of facts (*White v. Conn. Ins. Co.*, 120 Mass. 332): "It is a fair inference, from all this, that the duly authorized agent of the company [in this case a general agent dealing with a subordinate representative] had accepted the individual credit of Hunt as a payment of the required premium. It is not a question of waiver, by parol agreement, of an express stipulation in a written contract, within the cases cited by the defendant. It is rather a compliance with the condition required to give validity to the policy, within a large class of cases in which it is held sufficient. *Taylor v. Merchants' Ins. Co.*, 9 How. 390-402 [13 L. Ed. 187]; *Miller v. Life Ins. Co.*, 12 Wall. 285-308 [20 L. Ed. 398]; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460 [84 Am. Dec. 213]; *Sheldon v. Connecticut Life Ins. Co.*, 25 Conn. 207 [85 Am. Dec. 565]; *Bouton v. American Life Ins. Co.*, 25 Conn. 542." The following additional authorities, in certain portions of the different opinions, are distinctly upon the point: *Fidelity & Casualty Co. of N. Y. v. Willey* (C. C. A. 3d Cir.) 80 Fed. 499, 25 C. C. A. 593; *Miss. Valley Life Ins. Co. v. Neyland*, 72 Ky. (9 Bush) 435-437; *Wytheville Insurance & Banking Co. v. Telger*, 90 Va. 277, 18 S. E. 196; *Lebanon Mutual Ins. Co. v. Hoover*, 113 Pa. 591, 8 Atl. 164, 57 Am. Rep. 511.

Appellant asserts that the evidence totally fails to justify our statement to the effect that Nelson, the subordinate agent, reported to Wellborn the next day that he had notified Mr. Brown over the telephone, in regard to the policy and the disposition to be made of the same, and reported to Mr. Wellborn that "Mr. Brown said it was all right; he would be down in a couple of weeks and get it." We accepted this statement from page 17 of the appellant's brief, verified by us from the statement of facts, and there is no contradictory statement in the brief of the inference and the fact stated. We are now referred to the record that this is not true on account of certain testimony, but in reading all the testimony closely we are clearly of opinion that it was a matter entirely for the jury.

[11] Appellant says that the finding that Brown "was a man of considerable wealth, having ample means and resources," is wholly immaterial. It is clearly material on the question of extension of credit.

Appellant again insists that the following statement (as quoted by it) is also error: "The note to Wellborn included the additional premium called for in the new policy, was paid to Wellborn after Brown's death." This court did not find the fact attempted to be quoted by appellant; it found that "the note to Wellborn, including the additional premium called for in the new policy, was paid to Wellborn after Brown's death," which is a distinct and different finding from that asserted by appellant.

Appellant also assigns that the court erred

"in that part of the opinion \* \* \* which seeks to analyze and apply a rule of law as laid down in the case of *Kimbrow v. Insurance Company*, 99 Minn. 176, 108 N. W. 861, \* \* \* because in that case there was nothing to be done by the insured except to receive the policy and the agent to deliver the policy. In fact, the company had delivered the policy when it mailed it." The wrong page number of the *Kimbrow* Case was given in a portion of the opinion, and the *Kilborn* Case, 99 Minn. 176, 108 N. W. 861, was cited upon another point in a different portion of the opinion, and which holds the principle with reference to the mailing of the policy when the contract is fully executed and consummated. The *Kimbrow* Case (Iowa) 108 N. W. 1025, 12 L. R. A. (N. S.) 421, attempted to be analyzed in our main opinion, was cited by us upon the question of implied power of the agent to consummate the contract of insurance, notwithstanding the secret instructions with reference to the signature by the insured to the new application requested by the company in its letter to the agent; and in support of the doctrine we further cite the following cases: *Life Ins. Co. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 696; *Insurance Co. v. Berwald* (Civ. App.) 72 S. W. 438; *Woodman v. Carrington*, 41 Tex. Civ. App. 29, 90 S. W. 923; *Insurance Co. v. Calvert* (Civ. App.) 100 S. W. 1035; *Ins. Co. v. Bowen* (Civ. App.) 102 S. W. 167; *Insurance Co. v. Owens* (Civ. App.) 130 S. W. 963; *Insurance Co. v. Ellis* (Civ. App.) 137 S. W. 187.

We conclude that Wellborn, or Nelson, in his stead, intended to deliver the policy when the telephone conversation occurred upon Brown's acceptance, after an explanation made to him of the difference in the term, and the difference in the premium, between the policy applied for by him and the one forwarded by the company. The new application to be signed by Brown, as stated in the original opinion, was the same as the old application for the 15-year endowment—the inquiries being the same, and the answers of Brown adopted by the company. When Nelson explained this difference, without any statement with reference to any new application to be signed, with the only change as indicated, and Brown accepted the policy as changed, we think the minds of the parties met, and the policy and the old application constituted the contract. When the company, upon the application, rejected the 15-year endowment and reduced it to a 10-year endowment, Mr. Brothers, the secretary of the company, indorsed the old application, "Reissued, see No. 982," which latter was the number of the new policy.

[12] We do not think that the statutes on insurance avoid a policy where the company extends credit and receives an obligation of another as payment of the first premium, instead of cash. Article 4741, R. S. 1911, says that no policy of life insurance shall be is-

sued or delivered in this state unless the contract shall contain a provision substantially that all premiums shall be payable in advance, either at the home office of the company or to an agent of the company upon a delivery of the receipt signed by one or more of the officers who are designated in the policy, and required a further provision in the policy that the policy, or policy and application, shall constitute the entire contract between the parties. These provisions were in this policy. Article 4954 is a provision aimed at the prevention of insurance companies discriminating between insured of the same class and of equal expectation of life in the amount of payment of the premiums to be charged for such insurance; also stating that life insurance companies, or their agents, shall not make any contract of insurance or agreement other than as expressed in the policy issued thereon, providing for a punitive penalty by criminal prosecution and an additional penalty of forfeiture of its certificates of authority to do business in the state.

We are not prone to believe that the provisions of the statutes were intended to prevent an extension of credit, where insurance companies thought it expedient to do so, in payment of premiums for such contracts. The statutes do not say that all premiums shall be payable in advance "in cash," either at the home office or to the agent of the company, and in the business world extensions of credit are equivalent to cash. We are not inclined to think that these statutes contemplated a well-known method pursued by insurance companies was to be prohibited to them in the conduct of their business.

Again, if we are mistaken in this view, it is noted that article 4954, in prescribing that an insurance company or agent thereof shall not make a contract other than as expressed in the policy, does not declare that the policy of insurance shall be void. Article 4954 is in substance the same as the statutes of several states, prohibiting discrimination and rebates and containing the same clause with reference to the company, or the agent thereof, making only that contract of insurance as expressed in the policy, and the tendency and swing of the decisions, in so far as the question of rebate is concerned (the other question we are not able to find decided), is against the proposition that the policy is void. *McNaughton v. Des Moines Life Ins. Co.*, 140 Wis. 214, 122 N. W. 785; *Laun v. Pac. Mutual Life Ins. Co.*, 131 Wis. 555, 111 N. W. 660, 9 L. R. A. (N. S.) 1204; *Rideout v. Mars*, 99 Miss. 199, 54 South. 801, 35 L. R. A. (N. S.) 485, Ann. Cas. 1913D, 770.

Again, if we concede that the statute is a prohibition of the making of a contract for the payment of a premium by an obligation instead of by cash, the question, however, is akin to the principle applied by the Supreme

Court of the United States, in construing Revised Statutes, § 5137 (U. S. Comp. St. 1901, p. 8460), an act of Congress which forbids a national bank to loan money upon real estate as security. It is not necessary to cite the repeated holdings of the Supreme Court of the United States with reference to this statute. As applicable here, however, the Supreme Court in the case of *National Bank v. Whitney*, 103 U. S. 99, 28 L. Ed. 443, said: "The statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."

Motion for rehearing overruled.

HUFF, C. J., not sitting.

### STATE EXCHANGE BANK v. SMITH. (No. 7065.)

(Court of Civil Appeals of Texas. Dallas.  
March 14, 1914. On Rehearing,  
April 11, 1914.)

#### 1. CHATTEL MORTGAGES (§ 173\*)—CLAIMS BY THIRD PERSON—ATTACHMENT—RIGHT OF ACTION.

A chattel mortgagee out of possession, but entitled to possession at the time of the levy of an attachment in an action by a third person against the mortgagor, may maintain the statutory action for the trial of the right of property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.\*]

#### 2. CHATTEL MORTGAGES (§ 161\*)—NONPAYMENT OF DEBT AT MATURITY—RIGHT OF MORTGAGEE.

A chattel mortgage, which provides that in case of default in the payment of the notes at maturity, or in case the mortgagor shall violate any of the conditions of the mortgage, etc., the mortgagee shall have the right to immediate possession of the chattels and to foreclose the mortgage, gives to the mortgagee the right to immediate possession for nonpayment of the notes at maturity.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 282-285; Dec. Dig. § 161.\*]

#### 3. CHATTEL MORTGAGES (§ 173\*)—CLAIMS OF THIRD PERSONS—RIGHTS OF NONRESIDENT.

A nonresident chattel mortgagee, out of possession, but entitled to possession at the time of the levy of an attachment on the mortgaged chattels in an action by a third person against the mortgagor, may maintain, though a nonresident, the statutory action for the trial of the right of property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.\*]

#### 4. CHATTEL MORTGAGES (§ 173\*)—RIGHTS OF CLAIMANTS—ESTOPPEL.

A chattel mortgagee who fails to take immediate possession of the chattels on the nonpayment of the debt at maturity, and who accepts partial payments or the written consent on a compromise with the mortgagor of the indebtedness, after the levy of an attachment,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to take possession of the property in controversy when released from the levy, is not thereby estopped from maintaining the statutory action for the trial of the right of the property attached in an action by a third person against the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.\*]

On Rehearing.

**5. APPEAL AND ERROR (§ 1177\*)—DISPOSITION OF CASE ON APPEAL—REMAND FOR TRIAL.**

Where the record on appeal from a judgment shows that it was rendered on admissions made for purposes only of hearing a motion for judgment, the court on reversing the judgment must remand because the case was not fully developed in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.\*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Action in attachment by P. P. Smith against Acklin Brothers, in which the State Exchange Bank appeared and claimed the property under a mortgage. From a judgment for plaintiff, the State Exchange Bank appeals. Reversed and remanded for new trial.

Will Hancock, of Waxahachie, and Ledbetter, Stuart & Bell, of Oklahoma City, Okl., for appellant. Supple & Harding, of Waxahachie, for appellee.

**TALBOT, J.** This is a suit for the trial of the right of property. On December 18, 1912, appellee, P. P. Smith, instituted suit in the district court of Ellis county, Tex., against Acklin Bros., to recover \$1,504.25 and costs of suit, and caused a writ of attachment to issue in said suit, which was levied by the sheriff of Ellis county, Tex., upon five horses, three sets of harness, and four wagons, valued by said sheriff at \$1,300. Appellant, State Exchange Bank, presented to said sheriff its claimant's bond and affidavit, both executed in accordance with law, and said sheriff turned over said property to appellant. On February 25, 1913, the bank filed its issues claiming said property under and by virtue of a certain chattel mortgage, executed by Acklin Bros., dated May 9, 1912, original of which mortgage was duly filed and registered in the office of the county clerk of Ellis county, on May 13, 1912; said mortgage being executed to secure payment of two notes, executed by Acklin Bros. to appellant, both dated March 9, 1912, and bearing interest at the rate of 10 per cent. per annum from maturity, one note being for the principal sum of \$4,000, due on May 23, 1912, the other being for the principal sum of \$6,661.25, and due on August 9, 1912, each of said notes being executed for money actually loaned and advanced by claimant to and for use and benefit of said Acklin Bros. In said issues it was alleged: That at the date of levy of said writ of attach-

ment both of said notes were past due, and that said note for the sum of \$4,000 was wholly unpaid, except that the interest had been paid up to December 1, 1912, and that said note for the sum of \$6,661.25 was entitled to the following credits: (1) Interest to December 9, 1912; and (2) the following sums paid on principal on the following dates: (a) \$661.25 on July 8, 1912; (b) \$1,153.20 on July 9, 1912; (c) \$671.54 on October 7, 1912; (d) \$825 on December 9, 1912—all of said payments made on said principal, being made out of proceeds of sale of part of the property described in said chattel mortgage. That, at date of levy of said writ of attachment, there was justly due and owing appellant on said \$4,000 note the sum of \$4,000, with interest from December 1, 1912, at 10 per cent. per annum, and on the \$6,661.25 note, the sum of \$3,350.26, with interest thereon from December 9, 1912, at 10 per cent. per annum. That in said chattel mortgage it is provided that in case default be made in payment of said notes, or either of them, at maturity, then the mortgagee in said mortgage should have the right to immediate possession of the property described in said mortgage and the right to take immediate possession of same. That at the time of levy of said writ of attachment appellee had actual and constructive notice of said mortgage and said notes. That on account of the facts that said notes were both past due and unpaid, and that under said mortgage claimant had the right to immediate possession of said property, and the right to take immediate possession of same, and on account of the further fact that appellee had both actual and constructive notice of said mortgage and said notes, said property was not subject to the levy of said writ of attachment. On said March 14, 1913, appellee filed his issues, alleging the institution of said suit against Acklin Bros., in the district court of Ellis county, on December 18, 1912, the levy of said writ of attachment on the property described in said claimant's bond and affidavit, and the execution and delivery to said sheriff by this claimant and appellant of said claimant's oath and bond, and further alleging that on February 25, 1913, in said suit brought by appellee against Acklin Bros., judgment was rendered for appellee for debt therein sued on, and attachment lien, aforesaid, was duly foreclosed on said property, subject to proceedings herein, and further alleging that appellant and claimant was not entitled to maintain this suit to try the right of property; and that said property was, at the date of the levy of said writ of attachment, subject to said levy. Appellee prayed for judgment according to law. On March 14, 1913, appellee filed his motion for judgment against appellant and claimant on the facts stated in said tender of issues, for the reason that it appears from said tender

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of issues that claimant and appellant was not in possession of said property described in claim bond at the date of levy of the writ of attachment, but was a mere lienholder, as shown by the copy of said mortgage attached to said issues. On March 28, 1913, the said motion for judgment was sustained by the court, to which action of the court the claimant excepted. Judgment was then rendered by the court in favor of appellee and against appellant as principal and said Southwestern Surety Insurance Company, as surety, on said claim bond for \$1,425, with interest at 6 per cent. per annum from December 31, 1912, and the further sum of \$142.50, as damages, and all costs. From the judgment rendered appellant appealed.

[1] The material allegations of the appellant's pleadings were established by the evidence, and the controlling question presented for decision is whether a mortgagee out of possession, but who is entitled to the immediate possession of personal property, may maintain our statutory action for the trial of the right of property. A careful reading of the decisions of our appellate courts upon the subject leads us to the conclusion that the question must be answered in the affirmative. It is unquestionably the settled law of this state that the action cannot be maintained by one not in the actual possession of personal property, nor entitled to such possession of the same, at the date of the levy of an execution or attachment upon it; but it seems equally well settled that the owner, or one who is entitled to the immediate possession of property levied upon, may make claim and have his right thereto adjudicated under the state statutes for the trial of the right of property. *Willis & Bro. v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Steiner v. Anderson*, 130 S. W. 262; *Jones v. Lawrence*, 151 S. W. 584. In *Willis & Bro. v. Thompson*, supra, the cases prior thereto in which it was held that one not in the actual possession of the property, nor entitled to the same, at the date of the levy, cannot resort to the statutory method of the trial of the rights of property, for the purpose of having determined the priority of the liens, are reviewed, and it is said: "These decisions proceed upon the grounds that in such cases the claimant, having no title to the property nor present fixed right to the actual possession thereof, but only a lien thereon as a mere security for his debt, is not entitled to claim and recover the property itself, nor to prevent its seizure by other creditors upon legal process which under the law would be subordinate to his prior lien or security. If that be endangered under such circumstances, or if he desires to enforce his superior claim on the property as a security, he can appeal to the equity powers of the court in either contingency for the appropriate relief." But the learned judge who wrote the opinion in that case for our Supreme

Court proceeds as follows: "Manifestly, this reasoning does not apply when the claimant is either the owner of the property or entitled to its immediate possession or enjoyment. We have been unable to find anything in the statute that would exclude the right to assert the claim in the statutory mode in either of such contingencies. The claimant is not required to swear that he is the owner of the property, or was in the actual possession thereof at the time of the levy; but he must show that his claim is 'made in good faith,' and must further 'establish his right to the property' itself, otherwise his claim will be without any legal foundation. \* \* \* It seems to us that the purpose of the statute is to secure not only a speedy method of determining the real ownership of the property, but also the right to the immediate possession, use, or enjoyment of the property when the claimant is entitled to this against even the true owner." To the same effect are the cases of *Steiner v. Anderson*, and *Jones v. Lawrence*, cited above. In the first of these cases it is distinctly held that a person need not have been in the physical possession of the property in order to avail himself of this remedy. On the contrary, it is said: "The right to immediate possession is sufficient." In the second case it is said: "A claimant in the trial of the right of property is entitled to judgment, when the evidence shows that he was in the rightful possession of the property, and that such possession has been disturbed by the levy of the writ, or that he was rightfully entitled to such possession, and that he has been deprived of the exercise of such right by such levy." These decisions are in accord with our views and definitely settle the question. The cases cited by appellee are distinguishable in their facts from the instant case and are not at variance with them.

[2] The contention that appellant was not, by the terms of his mortgage, entitled to the immediate possession of the property in controversy at the time of the levy of the writ of attachment upon it, is not tenable. The mortgage contains the following provision: "And it is expressly agreed by said parties hereto, that in case default be made in the payment of said note, or any or either of them, at maturity, or in case said mortgagors shall violate or commit a breach of any one or more of the foregoing express conditions of this mortgage, or if the said mortgagors shall further incumber or attempt to remove, secrete or conceal, said property or any part thereof, or if from any cause the mortgagee shall feel they are unsafe or insecure, then and in that event said notes and each and all of them, and the whole of said mortgage debt shall at the option of said mortgagee, and without assigning any reasons therefor, become immediately due and payable, and said mortgagee shall have the right to immediate

possession of said mortgaged property, and the right to take immediate possession of the same and to foreclose their mortgage to satisfy the whole of said mortgage debt and interest and cost of foreclosure." Clearly, upon the happening of either of the contingencies here enumerated, appellee was entitled to the immediate possession of the property described in the mortgage, for the purpose of applying the proceeds to be derived from a sale thereof to the payment of the debt thereby secured, and the undisputed evidence shows that all of said indebtedness was past due and the greater part thereof unpaid at the date of the levy of the writ of attachment. These facts, beyond all question, gave appellant the right of possession of said property, and the court erred in rendering judgment against it.

[3] The fact that appellant was a nonresident does not alter the case. As such, it was entitled to the same rights and remedies as it would have been entitled to had its domicile been located in this state.

[4] Nor was the appellant estopped from availing itself of the remedy afforded by our statute for the trial of the right of property, because it failed to take immediate possession of the property covered by the mortgage upon the maturity of the indebtedness secured by said mortgage, the acceptance of partial payments on said indebtedness, or the written consent upon a compromise and settlement with the mortgagor of its said indebtedness, after the levy of the writ of attachment to take possession of the property in controversy, whenever it should be released from said levy. Evidently, these matters were not intended to, and did not in any sense, affect the rights of the parties as fixed by the terms of the mortgage, and cannot be seized upon and successfully invoked as an acknowledgment on the part of appellant of the superior right of the officer levying the writ of attachment to the possession of the property attached.

The questions raised by the other assignments need not be considered and passed upon; for it results from what we have said that in the opinion of this court appellant, according to the undisputed evidence, was entitled, regardless of any other issue in the case, to recover. Hence it becomes our duty under the statute, the case having been fully developed, to render in this court such judgment as should have been rendered in the district court. It is therefore ordered that the judgment of the court below be reversed and that judgment be here rendered in favor of appellant.

Reversed and rendered.

On Rehearing.

[5] It is pointed out in appellee's motion for a rehearing that, among others, his pleadings tendered the following issues: (1) That the indebtedness claimed by appellant against

Acklin Bros. was fictitious and without consideration; (2) that the mortgage set up in this suit, securing the payment of said indebtedness, and upon the terms of which appellant bases his right to recover, was made for the fraudulent purpose of hindering, delaying, and defrauding appellee in the collection of his debt; (3) that if the said indebtedness ever existed it had been paid and satisfied before the levy of appellee's writ of attachment upon the property described in appellant's said mortgage, and that the appellant and the said Acklin Bros., were colluding and confederating together to suppress and conceal the fact of such payment. There appears to have been no evidence offered on either of these issues, and in view of the trial court's action it became wholly unnecessary to offer any. As shown in the original opinion, the court sustained a motion made by appellee for judgment in his favor on the facts stated in appellant's tender of issues because it appeared therefrom that appellant was not in possession of the property in controversy when appellee's writ of attachment was levied upon the same, but was merely a lienholder. In connection with the presentation and hearing of this motion of appellee, the proof necessary to enable the court to enter judgment in accordance with his announced views of the law was made; but, as stated, no evidence bearing upon the above-stated issues was introduced or tendered. It is recited in what purports to be a statement of facts sent to this court, and which contains certain admissions made at the hearing of appellee's motion for judgment, that it was understood that said admissions were made for the purposes of said hearing only, and were not binding on either party on any other hearing or trial. In this state of the record we were in error in stating in our original opinion that the case had been fully developed in the trial court, and in rendering judgment in this court for appellant. It is true the record discloses that a demurrer to that portion of appellee's pleadings setting up that appellant's indebtedness against Acklin Bros. was without consideration was sustained by the court, evidently on the ground that the pleading was not verified by oath, but the plea of payment remained, and upon another trial appellee would have the right to introduce evidence in support thereof. Besides, were the case simply remanded for a new trial appellee would have an opportunity to amend his plea of no consideration to support the indebtedness claimed against Acklin Bros. If it be said that the record fails to disclose that leave to amend was asked, the reply may be made that, as appellee's motion for judgment on the facts stated by appellant in his tender of issues was sustained, no necessity therefor existed. But, however this may be, appellee is entitled to be heard on his said plea of payment and contends that we erred in rendering judg-

ment for appellant. In this contention we concur, and our action in rendering judgment in favor of appellant will be set aside and the cause remanded for a new trial.

**GOOD v. TEXAS & P. RY. CO. et al.**  
(No. 291.)

(Court of Civil Appeals of Texas. El Paso.  
March 26, 1914. On Rehearing, May  
7, 1914.)

**1. CARRIERS (§ 228\*)—SIMILAR TRANSACTIONS  
—NECESSITY OF SHOWING SIMILARITY OF  
CONDITIONS.**

In an action against carriers for damages to a shipment of cattle which they claimed were due to plaintiff's negligence in unloading and dipping the cattle under the quarantine regulations and in their handling and treatment incident to the dipping, evidence that, when they were unloaded, a number of other cattle of like ages were placed with those in question, and thereafter handled, dipped, and shipped alike, and that none of such other cattle were injured, was properly excluded, where it was not shown that such other cattle were in the same physical condition as those in question, and it was not sufficient to merely show that they were the same or similar ages, or that they were all steer cattle.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

**2. EVIDENCE (§ 43\*)—JUDICIAL NOTICE—JUDICIAL RECORDS.**

The Court of Civil Appeals will take judicial notice of the opinion and record on a former appeal of the same action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

**3. WITNESSES (§ 373\*)—IMPEACHMENT—NECESSITY OF LAYING FOUNDATION.**

Where an expert witness was not interrogated as to what he was to be paid for attending court, evidence could not be introduced, after he had testified and left the county, that he was paid in connection with his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1200; Dec. Dig. § 373.\*]

**4. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Where practically all of defendants' witnesses were questioned and testified as to the compensation which they were to receive for their time and expense for attending the trial, the exclusion of testimony that an expert witness not so interrogated was paid for testifying was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**5. TRIAL (§ 296\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

Where an instruction was not on the weight of the evidence, or misleading when read in connection with the general charge, the giving thereof was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718, 715, 716, 718; Dec. Dig. § 296.\*]

**6. TRIAL (§ 194\*)—ACTIONS FOR INJURIES TO LIVE STOCK—INSTRUCTIONS.**

In an action for injuries to a shipment of cattle, where it appeared that the cattle were unloaded and dipped under the quarantine regulations under the control and charge of the shipper, who by contract waived any damage from the handling and dipping, and that he

accompanied the cattle under a contract to look after them, and was in as favorable a position as the carriers to know of any acts of negligence, an instruction that the carriers owed no duty to deliver the cattle in good condition, but were only responsible for negligence, was not objectionable as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 448-454, 456-466; Dec. Dig. § 194.\*]

**7. TRIAL (§ 256\*)—INSTRUCTIONS—NECESSITY OF REQUESTS.**

Where any error in the charge was one of omission and not of commission, a charge correcting the omission should have been requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**8. APPEAL AND ERROR (§ 699\*)—RECORD—MATTERS PRESENTED FOR REVIEW.**

Where appellees requested charge No. 12 was indorsed by the trial judge, "Given after the court had prepared and read to the jury its principal charge," while charge No. 13 was indorsed, "Refused after main charge prepared and read to the jury, and after special charge No. 12 had been requested and refused," any alleged error in charge No. 12 would not be reviewed, as it could not be told whether that charge was given or refused, and if appellant desired it reviewed, he should have corrected the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2028-2930; Dec. Dig. § 699.\*]

**9. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—CURE BY VERDICT.**

A judgment would not be reversed for error in the instructions rendered harmless by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**10. TRIAL (§ 260\*)—INSTRUCTIONS COVERED BY THOSE GIVEN.**

It was not error to refuse an instruction fully covered by the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**11. CARRIERS (§ 230\*)—ACTIONS FOR INJURIES TO LIVE STOCK—INSTRUCTIONS.**

In an action against carriers for injuries to a shipment of cattle, where it appeared that plaintiff accompanied the shipment and had ample opportunity to observe any acts of negligence, and there was no evidence of any latent injuries to any of the cattle, an instruction that the damages need not become manifest on the line of the railway company causing them, it being sufficient if the damages were caused by the negligence of the railway company, was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

Appeal from District Court, Midland County; S. J. Isaacs, Judge.

Action by E. C. Good against the Texas & Pacific Railway Company, the Houston & Texas Central Railroad Company, and another. From a judgment for the defendants named, plaintiff appeals. Affirmed.

See, also, 151 S. W. 617.

A. S. Hawkins, of Phoenix, Ariz., Earl Anderson, of Midland, Gross, Allen & Gross, of Mineral Wells, and Galloway & Whitaker, of

El Paso, for appellant. Douthit & Smith, of Sweetwater, Jno. B. Howard, of Midland, W. L. Hall, of Dallas, and Baker, Botts, Parker & Garwood, of Houston, for appellees.

MCKENZIE, J. This suit was instituted in the district court of Midland county by appellant to recover of the Houston, East & West Texas Railway Company and the appellees, Houston & Texas Central Railroad Company and Texas & Pacific Railway Company, certain damages growing out of a shipment of cattle from Humble, Tex., to Monahans, Tex., over said lines of road. This is the second appeal of the case. See *Texas & Pacific Ry. Co. v. Good*, 151 S. W. 617. On the former appeal a judgment in favor of the Houston, East & West Texas Railway Company was affirmed. As negligence on the part of the appellee Houston & Texas Central Railroad Company, appellant alleged a delay of four hours at Houston, and rough handling between Houston and Ft. Worth, also a delay at Ft. Worth of three hours; that because of such negligence said cattle were crippled, bruised, and rendered less able to stand the remainder of their journey. As negligence on the part of the Texas & Pacific Railway Company, appellant alleged a delay at Ft. Worth of four hours and rough handling between Ft. Worth and Monahans; that by reason of the negligence of the defendants 128 head of said cattle died, and about 100 head were badly injured. Each of the appellees answered by general denial, and specially as follows: (1) That it was agreed appellant should feed, water, load and reload said cattle, which he failed to do; (2) the clause in the shipping contract, limiting liability to each defendant's line of road; (3) that said cattle were shipped from below the quarantine line, and had to be dipped in accordance with the quarantine regulations in a preparation authorized by the state and federal authorities; that said cattle were poor and thin when shipped; that same were unloaded and dipped twice in arsenic solution, thereby causing the alleged injury; (4) that between the two dippings of said cattle, they were held at Sweetwater for about 10 days without feed and upon insufficient grass to sustain them, causing said cattle to become poor and weak, and unable to stand the dipping; (5) that immediately after the said cattle were dipped the second time, and on a hot day, they were driven to the pens and loaded for shipment, causing them to become injured—all of which was pleaded as contributory negligence on appellant's part, and as the proximate cause of said injuries. By way of reply to said answers, appellant denied generally and specially the acts charged against him as contributory negligence, and pleaded that said cattle were delivered to the defendants in good shipping condition, and that if the dip killed any of said cattle, it was on account of the previous negligence on the part of the appellees which

rendered said cattle less able to undergo said dipping process; that defendant Texas & Pacific Railway Company undertook to load said cattle at Sweetwater, and in loading them its employees unduly roughly handled and mistreated said cattle, thereby injuring them and augmenting the damage. From a verdict and judgment in favor of the defendants, Houston & Texas Central Railroad Company and Texas & Pacific Railway Company, the plaintiff appeals.

[1] The first assignment of error complains of the action of the trial court in excluding testimony to the effect that after the alleged damaged cattle had arrived at Sweetwater they were placed in a nearby pasture; that on the same day 160 head of other cattle of like ages were turned in the same pasture and mixed therewith; that after all of the cattle, as mixed, were held in the pasture together, were fed, watered, dipped, handled, and shipped alike until they arrived at plaintiff's ranch at Monahans; and that none of the 160 head were injured or had died. It is contended by appellant that the evidence was admissible to negative the appellees' defense to the effect that the solution in which the cattle were dipped was too strong, and that the handling and treatment which the cattle received prior to and incident to their being dipped in said solution was the cause of the injury and death of said cattle, and not the dipping. The trial court qualified the bill of exceptions upon which the assignment of error is predicated, to the effect that at the time the evidence was offered, it had not been shown that the 160 head of cattle were in the same condition as were the cattle in controversy. It is apparent that the evidence was offered for the sake of comparison, to show that the 160 head of cattle did not die from the dipping process, nor from their handling during the dipping period. To make the evidence admissible for the sake of comparison, it was incumbent upon appellant to first show that the cattle in question were of the same physical condition as were the 160 head which it is claimed did not die, and to merely show that the cattle were the same or similar ages, or that they were steer cattle, would not be sufficient.

[2] Plaintiff's testimony on this and the former trial is to the effect that the Humble shipment which involve the cattle in question arrived in Sweetwater in bad condition, i. e., they were crippled, bruised, and showed to be in a weak condition physically; while on the former trial, as shown by the former opinion, *supra*, and by the record of the former appeal, of which we take judicial notice, his testimony was to the effect that the Navasota shipment, out of which the 160 head of cattle were taken, arrived in Sweetwater in good condition. It is apparent, then, from the plaintiff's testimony, that the two bunches of cattle were not of the same physical condition, and it would have been improper to have permitted the testimony to

have gone to the jury for the sake of comparison, without first showing that their condition was practically the same. Other testimony in the record shows that the 160 head of cattle were mixed with the Humble shipment and were fed, watered, pastured, and dipped alike, and were mixed indiscriminately in the same cars when shipped to Monahans without injury, which would indicate that they were stronger cattle. Because of this testimony also, the error in refusing to admit the testimony complained of would become harmless. The assignment of error is therefore overruled.

[3, 4] The second assignment of error complains of the action of the trial court in excluding testimony to the effect that, after the witness Dr. Harry Grafke had testified in behalf of appellees, he was paid a sum of money at the instance of the defendant, in connection with his testimony upon the trial. The bill of exception, as approved, contains an explanation by the trial court to the effect that the witness, when on the stand, was not interrogated about what he was to receive for his time in attendance upon the court, and had no opportunity to explain, and, further, that at the time plaintiffs offered to prove that the witness Grafke received compensation for his attendance upon court, he had left the county. The testimony of this witness shows him to be a veterinary surgeon in the employ of the government, located at Big Springs, and that he testified as an expert as to the effect of the arsenic dip upon the cattle, and nowhere was he questioned as to compensation which he was to receive for his attendance upon the court as a witness. The record discloses the fact that practically all of the appellees' witnesses on the trial were questioned as to the amount of compensation which they were to receive for their time and expense for attending the trial, and in each instance the witness detailed to the jury that he was to receive compensation for his time and expense. We are of the opinion that the exclusion of the testimony in this instance could not have in any manner affected the verdict of the jury. Plaintiff's purpose, no doubt, in introducing the testimony was to show the interest or bias of the witness, and it is well settled that, in order to warrant the introduction of such testimony, the proper predicate must be first laid by interrogating the witness concerning the specific matters by which it is proposed to impeach the witness. The witness in this instance had testified and had left the county, and, from the explanation attached to the bill of exceptions, would not have had an opportunity to explain. The assignment of error is therefore overruled. *Weir v. McGee*, 25 Tex. Supp. 20; *Railway Company v. Durrett*, 24 Tex. Civ. App. 103, 58 S. W. 187; *Railway Company v. La Prelle*, 22 Tex. Civ. App. 593, 55 S. W. 125.

The third assignment of error complains

of the tenth paragraph of the charge to the jury as being upon the weight of the evidence, and in assuming negligence on the part of appellant with reference to dipping, driving, and loading the cattle. It is our opinion that the charge merely presents, in an affirmative manner, the appellees' defenses. The same charge, with certain features eliminated, to prevent confusion and misunderstanding on the part of the jury, was before this court on a former appeal. We have carefully examined the paragraph complained of, and are of opinion that appellant's criticism is not well founded. The assignment of error is therefore overruled.

The fourth assignment of error complains of the eleventh paragraph of the charge to the jury as being upon the weight of the evidence, and that it prevents the jury from applying the doctrine of proximate cause, also that it conflicts with a former paragraph of the charge defining proximate cause, and also because it contravenes the law of concurring cause as applicable to the facts of the case. We have examined the court's charge to the jury, and are of the opinion that it presents most favorably for appellant the vital issues made by the pleadings and the evidence. We fail to find any conflict which would in any manner have possibly misled the jury, and we do not think it is upon the weight of the evidence. The assignment of error is therefore overruled.

[5] The fifth assignment of error complains of the action of the trial court in giving the following special charge upon the request of appellees: "You are charged that a mere showing of delay in the movement of live stock is not sufficient to make the defendants liable therefor without a showing by the plaintiff that such delay is due to the negligence of the defendants." Under this assignment it is urged by appellant that the charge is upon the weight of the evidence. We are of opinion that the charge, when read in connection with the general charge, is not subject to the criticism urged, and that the jury could not possibly have been misled thereby. The assignment is therefore overruled.

[6] The sixth assignment of error complains of the action of the trial court in giving to the jury appellees' special requested charge as follows: "You are charged that the defendant owed no duty to the plaintiff to deliver his cattle to him in good condition, and would only be responsible for negligence in the handling of said cattle as defined." It is urged that the charge is upon the weight of the evidence; that it placed undue emphasis upon the term "negligence," and unduly limited the duty of defendants as common carriers. We are of opinion that the objections urged are not well taken. The pleadings and the evidence show that the cattle were shipped under written contract, were unloaded and dipped at Sweetwater, during which time the cattle were in

the control and charge of the appellant, he having waived any damage resulting from the handling and dipping during said time. It is further shown by the contract and the evidence that the owner accompanied the cattle under contract to look after them while they were being transported, and was in as favorable a position as were the carriers to know of any negligence or acts of negligence which would have resulted in any injury to the cattle while they were being transported. The assignment of error is therefore overruled.

[7] Appellees object to the consideration of the seventh assignment of error, which complains of the action of the trial court in giving to the jury the seventh requested special charge, because the charge, as copied in the assignment, is different from that which appears in the record as having been given to the jury. The charge as same appears in the record is not subject to the criticism urged. If any error, however, by virtue of this charge, it appears to be one of omission and not of commission, and it was the appellant's duty to have requested a charge which would have corrected the omission. The assignment of error is therefore overruled.

[8] Appellees object to the consideration of the eighth assignment of error. The assignment complains of the action of the trial court in giving appellees' requested special charge No. 12. There appears on this requested charge the following indorsement, signed by the trial judge: "Given, after the court had prepared and read to the jury its principal charge." On appellees' requested special charge No. 13, which also appears in the record, there is indorsed and signed by the trial judge the following: "Refused after main charge prepared and read to the jury, and after special charge No. 12 had been requested and refused." It is readily seen, from the foregoing statement as to the condition of the record, that serious doubt exists as to whether either of the charges referred to was given. To say that No. 12 was given would be to ignore the solemn statement of the trial court as shown by the indorsement on No. 13 that No. 12 was refused. In other words, to give consideration of the assignment of error, we would be required to first determine whether charge No. 12 was in fact given to the jury. This would necessarily involve this court in the determination of a serious issue of fact upon a matter of direct and positive conflict, as shown by the two indorsements above indicated. The two indorsements were evidently made as a single transaction while in the trial of the same cause, pertaining to the charge to the jury, each of which, when weighed from the standpoint of determining as to whether charge No. 12 was given or refused, seems to be equally binding and of the same probative force. It is not incumbent upon this court to decide issues of fact, and we have grave

doubts if the assignment can properly be considered in this state of the record. To resort to a process of construction or reasoning by which the court might possibly give consideration to the assignment of error based upon giving charge No. 12, or by assuming that charge No. 12 was in fact actually given to the jury, would not in any manner relieve the situation of the doubt as to whether or not, as an actual fact, charge No. 12 was given or refused; and, after resorting to the rules of construction, as same would apply perhaps to the legal effect of a written instrument, we would still be in doubt as to whether the trial court did or did not give to the jury charge No. 12. At best we could only enter the realm of speculation, or resort to fickle chance, which so often misleads. The conflicting indorsements were no doubt made through mistake, and it occurs to us that it was the duty of the appellant to so guard the record as to avoid such mistakes. When mistakes are made, it is his duty, in proper time, to have the record so corrected as to make it speak the truth as to the proceeding upon the trial. However, it is the opinion of the court that, had charge No. 12 been given to the jury, when considered in connection with the main charge, it would present no reversible error.

[9] Appellant's ninth assignment of error, which complains of the action of the trial court in giving appellees' requested charge No. 14, is overruled. The jury's verdict being in favor of appellees renders any error by giving the charge harmless. The court, however, is of the opinion that the charge as given was not erroneous.

What we have said in disposing of the ninth assignment of error is equally applicable in making disposition of the tenth assignment of error.

[10, 11] Appellant's eleventh assignment of error, which complains of the action of the trial court in refusing to give to the jury appellant's requested special charge No. 2, which reads as follows: "The damages, if any, need not become manifest on the line of the railway company causing such damage, if any; it being sufficient if such damage was caused by the negligent act, if any, of such railway company"—is overruled. We are of the opinion that no reversible error was committed by the refusal to give the charge, in that the matter is fully covered by the main charge. Besides, the evidence is undisputed that the appellant accompanied the shipment of cattle and had ample opportunity to observe any acts of negligence on the part of the appellees, which caused or would cause any damage to said shipment, and no evidence is called to our attention by which it is shown that there were any latent injuries to any of said cattle by which the charge became material as an issue in the case. The assignment of error is therefore overruled.

This is the second appeal of the case. On

the former appeal appellees were appellants, and they urged in that appeal many objections to the charge of the court as then given. The appellee on the former appeal is now the appellant in this appeal. In the former appeal appellant defended the charge as given. The charges, for the most part, involved in this appeal are very much like the ones involved in the former appeal, with many of the objectionable features eliminated, as was required by the opinion of this court on the former appeal. We are of the opinion that no error has been shown whereby the cause should again be reversed and remanded for a new trial, and that the judgment should be affirmed; and it is so ordered.

**Affirmed.**

#### On Rehearing.

In the original opinion appears the following: "Other testimony in the record shows that the 160 head of cattle were mixed with the Humble shipment, and were fed, watered, pastured, and dipped alike, and were mixed indiscriminately in the same cars when shipped to Monahans, without injury, which would indicate that they were stronger cattle." Our attention is directed to the fact that the record fails to disclose that any witness testified that the 160 head arrived in Monahans "without injury." We, therefore, make the correction to conform with the record. The statement otherwise is in conformity with the record, and shall stand. The correction, as made, does not change our opinion, or the views therein expressed in overruling appellant's first assignment of error.

The motion for rehearing is overruled.

#### HARLE et al. v. HARLE. (No. 7034.)

(Court of Civil Appeals of Texas. Dallas.  
April 11, 1914. Rehearings Denied May 2, 1914.)

#### 1. ADVERSE POSSESSION (§ 115\*)—SUFFICIENCY OF EVIDENCE.

In trespass to try title in which defendant claimed by adverse possession, evidence held at most to raise the issue of a conditional parcel gift to such defendant from his father, and not to raise the issue of adverse possession by defendant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.\*]

#### 2. ADVERSE POSSESSION (§ 60\*)—HOSTILE ENTRY.

One who enters upon land which he is entitled to acquire conditionally in acknowledgment of the superior right of another cannot claim by adverse possession, unless he meanwhile obtains a superior outstanding title, or repudiates the title under which he entered and gives its owner notice that he is claiming adversely to him.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. § 60.\*]

#### 8. HOMESTEAD (§ 119\*)—CONVEYANCE BY HUSBAND—CONSENT OF WIFE.

In view of Const. art. 16, § 50, providing that a married man shall not sell the homestead without his wife's consent, given in the manner prescribed by law, title to the homestead could only pass by deed acknowledged by the wife apart from her husband; Rev. St. 1911, art. 1115, so requiring.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 210-214; Dec. Dig. § 119.\*]

#### 4. ADOPTION (§ 23\*)—INHERITANCE THROUGH ADOPTED CHILDREN—DESCENDANTS OF ADOPTED CHILD—"DESCENDANT."

Rev. St. 1911, art. 2469, provides that in the event of either spouse dying intestate with children surviving, the community property shall go, one-half to the survivor and one-half to such child or children, or their descendants. Rev. St. 1911, art. 1, permits any person wishing to adopt another as his "legal heir" to do so by filing a statement in the manner provided, and article 2 provides that such statement, signed, acknowledged, and recorded, shall entitle "the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him," and article 5 provides that the child or children so adopted shall have the same rights as against the person or persons adopting the child for support and maintenance, and for proper humane treatment, as a child has by law against lawful parents. Held, that the children of an adopted child inherit in the same manner as the descendants of a natural child, so that an adopted child's children become "descendants" of a child of intestate so as to take under article 2469.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 42; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2014-2017; vol. 8, p. 7635.]

#### 5. ADOPTION (§ 1\*)—AT COMMON LAW.

Adoption was unknown at common law.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 15; Dec. Dig. § 1.\*]

#### 6. ADOPTION (§ 3\*)—CONSTRUCTION—ORDINARY MEANING OF LANGUAGE.

The legislative intention in enacting the adoption statutes should be determined by giving to the words therein their ordinary meaning.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.\*]

#### 7. ADOPTION (§ 3\*)—EFFECT OF STATUTES.

Since adoption did not exist at common law, the adoption statutes (Rev. St. 1911, arts. 1-8), ingrafted upon the law of the state the provisions of the civil law on the subject, as well as its construction of the law thereon.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.\*]

#### 8. PARTITION (§ 5\*)—ACT OF PARTIES.

Where land was deeded jointly to two persons upon consideration that each would pay his proportionate part of the purchase price, the subsequent division of the land by such grantees in that proportion, each agreeing to pay his part of the price, which was done, was a valid partition, binding upon the parties and their heirs.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 13-17; Dec. Dig. § 5.\*]

Error to District Court, Navarro County; H. B. Daviss, Judge.

Trespass to try title by Nathan Harle against Bruff Harle, Freeman Slaughter, and John Harle, in which Wash McGriff, Nathan Slaughter, and others intervened. Judgment for Nathan Slaughter and others, interven-



ers, for John Harle, and for plaintiff, for certain amounts of land, and Bruff Harle and others bring error. Affirmed in part, and reversed and rendered in part.

W. W. Ballew, of Corsicana, for plaintiffs in error. McClellan & Prince and H. S. Melear, all of Corsicana, for defendant in error.

RASBURY, J. Nathan Harle sued Freeman Slaughter, John Harle, and Bruff Harle in trespass to try title to recover 160 acres of land in Navarro county. Freeman Slaughter by his answer claimed 40 acres of the tract, alleging that that amount had been set aside to him by agreement at the time the land was acquired jointly by him and Nathan Harle, and that he paid for that part of the tract and Harle the balance. John Harle by his answers claimed 60 acres of the land under deed from Nathan Harle and wife, and disclaimed as to the balance. Bruff Harle by his answer claimed 31.5 acres of the land by parol gift from Nathan Harle and wife, his father and stepmother, into possession of which he immediately entered, and upon which he had made valuable improvements, and of which he had been in actual, adverse, and peaceable possession for more than 10 years, exercising exclusive ownership and possession thereof and paying taxes thereon. He also claimed the land as an advancement by his father and stepmother in consideration of his having contributed largely to their support and to the purchase money of the land. He also attacked the deed from Nathan Harle to John Harle, which included the land claimed by him, on the ground that same had been obtained in fraud and by undue influence exercised by John Harle over his father and stepmother. Wash McGriff, the surviving husband, and several children of Mary Ann Harle, the adopted daughter of Gracie Ann Harle, deceased wife of Nathan Harle, intervened in the suit, alleging the death of Gracie Ann Harle prior to the institution of the suit, and that by reason thereof they were entitled to recover the entire community interest of Gracie Ann Harle in said land. Nathan Slaughter and others intervened in the suit alleging they were the children of Freeman and Amanda Slaughter, their mother being formerly Amanda Harle, a daughter of Nathan Harle by his first wife, and claimed the 40 acres of Freeman Slaughter, referred to in his pleading, and claimed also an additional 31.5 acres set aside to them under an agreement between their father, Freeman Slaughter, and their grandfather, Nathan Harle, and his wife.

The several interests in the land being urged as we have briefly but substantially stated, the testimony was developed and supports, in substance, the following conclusions: On March 22, 1879, A. G. Sloan and wife conveyed jointly to Nathan Harle and Freeman Slaughter the 160 acres of land involv-

ed in this suit. After Harle and Slaughter had gone into possession of the land, it was agreed that Harle should have and pay for three-fourths thereof and Slaughter for one-fourth, and that the land should be partitioned in that proportion. Pursuant to this agreement the land was partitioned, 40 acres being set off to Slaughter and 120 acres to Harle. Both Harle and Slaughter were at the time married, and both of them, in accordance with the agreement with their wives, went into possession of the lands agreed upon, Harle paying three-fourths and Slaughter one-fourth of the consideration recited in the joint deed. Harle and wife went upon and occupied the 120 acres as their homestead, and were occupying same as their homestead at the time the rights of the various parties to portions thereof are claimed to have accrued. In like manner did Freeman Slaughter and his wife occupy the 40 acres until June 21, 1894, when Slaughter's wife divorced him, and the possession and use of the land was awarded her along with the custody of the children. Subsequently she died, and the 40 acres were re-occupied by Slaughter. Nathan Harle was married twice. By his first wife he had three children, Bruff, John, and Amanda. By the second wife he had no children. The 160 acres were acquired by him and Freeman Slaughter after he married his second wife, Gracie Ann. His daughter, Amanda, married Freeman Slaughter, but died prior to the institution of this suit, leaving surviving her her husband, Freeman Slaughter, and several children, who are parties to the suit and designated as the Slaughter heirs. After the purchase of the land Nathan Harle's wife adopted Mary Ann Richardson, known thereafter as Mary Ann Harle, complying in that respect with the provisions of the adoption statutes. The adopted child married Wash McGriff, whom she bore three children, who are parties to this suit, being designated as the McGriffs. Nathan Harle's wife was dead at the time this suit was filed, as was also her adopted daughter, Gracie Ann Harle McGriff, the latter having died before her adoptive mother. The foregoing facts are undisputed.

There was testimony by Bruff Harle and other witnesses tending to show that in the early part of 1898 T. H. Bonner, at the request of Nathan Harle, surveyed the 120 acres of land belonging to him, setting same off in four approximately equal tracts, he and his wife agreeing at the time that one tract should go to Bruff Harle, one to John Harle, the other two tracts to go, one to the children of Mary Ann Harle McGriff, the other to Amanda Harle Slaughter's children, upon the death of Nathan and Gracie Ann Harle, Bruff Harle's testimony in relation to his rights at that time being, in effect, that his father pointed out the land, saying for him to take it and use it, and if what was left was not sufficient to afford a living for Nathan and

his wife, they would call on the part apportioned to Bruff for that purpose, and to the arrangement Bruff assented. The testimony of these witnesses further tended to show that Bruff Harle was living on the land prior to the survey under an agreement that he should have the land as a gift, in consideration of contributing to the support and maintenance of Nathan Harle and his wife, and had ever since that time been in adverse possession of the land, cultivating it and paying taxes thereon. Nathan Harle denied the setting aside of the land, his explanation being that the land surveyed at a time when he contemplated making a will disposing of the land, and denied in toto the claim of Bruff Harle that the land had been given him as an advancement, etc., and claimed that he never surrendered control or possession of the land. We conclude as a fact that Nathan Harle did not surrender control or possession of the land. He further testified, in reference to Bruff's claim of advancement and gift, that Bruff Harle not only had not contributed to his support, but when called upon to do so had refused specifically to do so. In June, 1909, after the survey of the land, and after Bruff Harle claims he went in possession of the land under an agreement to contribute to the support and maintenance of his father and stepmother, the latter two conveyed 60 acres of the 120 to their son, John Harle, which included the land claimed by Bruff Harle.

At the conclusion of the evidence the court instructed a verdict for Freeman Slaughter and his children against all other parties to the suit for the 40 acres claimed by Freeman Slaughter, to be used by him during his lifetime against any claims of his children; for John Harle for the 60 acres deeded to him by his father and stepmother against all parties to the suit, and for Nathan Harle for the remaining 60 acres against all the other parties to said suit. Upon the verdict so directed judgment was entered accordingly, from which this appeal is taken by Bruff Harle, the McGriffs, and the Slaughters. No appeal was taken by Freeman Slaughter. No attack is made on appeal against the judgment in favor of John Harle, who recovered the 60 acres acquired by the deed from his parents.

[1, 2] It is first urged by counsel for Bruff Harle that the court erred in withdrawing the case from the jury and instructing verdict against him, for the reason that the testimony without dispute showed that he had been in exclusive, adverse, and peaceable possession of the land for more than 12 years prior to the institution of the suit, and for that reason entitled to a judgment therefor. We conclude, as between Bruff Harle and Nathan Harle, his father, that the testimony at most raises the issue of a conditional parol gift. When he entered upon the land, it was by his own admissions an entry under executory contract, since the effect of the evidence

under one theory is to establish a holding under promise to contribute to the support of his parents, and under the other a holding subordinate to Harle's right to claim the land if he should need it. Accordingly, the action of the district judge in refusing to submit the questions of fact arising under the statute of limitation as pleaded by Bruff Harle was correct, since one who enters upon lands which he is entitled to acquire conditionally in acknowledgment of the superior right or title thereto of another cannot urge possession so secured, unless he has in the meanwhile come into a superior outstanding title, under the statutes of limitation, unless and until he shows a repudiation of the title under which he entered and puts the owner of such title upon notice that he is claiming the land adversely thereto. *Bombarger v. Morrow*, 61 Tex. 417; *Flanagan v. Pearson*, 61 Tex. 302; *O'Connor v. Dykes*, 29 S. W. 920; *Robinson v. Bazoon*, 79 Tex. 524, 15 S. W. 585; *Smith v. Lee*, 82 Tex. 124, 17 S. W. 598; *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640. While the pleading of Bruff Harle asserts a completed parol gift, and while the testimony raised the issue of a conditional parol gift, as we have said, neither the pleading nor proof shows a repudiation of the contract under which he entered the lands, and hence the rule stated applies in all respects, and it became immaterial on the question of limitation what the jury may have considered the facts to be concerning the period of time Bruff Harle had been in possession of the land, since his possession was not in law adverse.

[3] It is next urged on behalf of Bruff Harle, aside from the contention that he acquired the land by limitation, that the court should have submitted to the jury the issue of a completed unconditional parol gift of the lands, since that issue was raised by the evidence. Conceding for the purpose of determining the issue presented that the evidence raised the issue, although we think it did not, we conclude nevertheless that the court correctly withdrew the case from the jury for the reason that it appears without contradiction that the lands alleged to have been donated were at the time the homestead in fact of Nathan Harle and his wife, Grace Ann, and, known to be such by Bruff Harle. Being the homestead, the lands could not be conveyed by parol gift, since title to the homestead can only be passed by deed acknowledged by the wife separately and apart from her husband, in the manner provided by the Constitution and statutes of this state and the construction placed thereon by our appellate courts. Const. art. 16, § 50; Rev. Stats. 1911, art. 1115; *Stallings v. Hallam*, 89 Tex. 431, 35 S. W. 2; *Robert v. Ezell*, 11 Tex. Civ. App. 176, 32 S. W. 362; *Morris v. Wells*, 27 Tex. Civ. App. 363, 66 S. W. 248.

[4] It is next urged in behalf of the McGriffs that the court also erred in directing a verdict adverse to them. As we have said,

the McGriffs were the children of Mary Ann McGriff, the adopted child of Gracie Ann Harle, who had a community interest of one-half in the land in dispute, and who died intestate, and childless, never having borne children, and having survived her adopted child. We conclude the court did err in the respect complained of, because we are of opinion that under our statutes regulating adoption and those regulating the descent of community property, and the construction that ought to be placed thereon, the children of an adopted child inherit in the same manner that the descendants of a natural child inherit. Article 2469, R. S. 1911, provides that in event of the death of either spouse intestate, with children surviving, the community property shall go, one-half to the survivor, and one-half to such child or children or their descendants. The question at once arises whether an adopted child, in contemplation of the statutes of descent and distribution and those of adoption, becomes in contemplation of law a natural child, so that such adopted child's children become "descendants" of a child of the intestate, and are permitted to inherit under the article cited instead of their deceased parent. Counsel have cited no case in point decided by the appellate courts of this state, nor have we been able to find one. Practically no help from the adoption statute can be had, since it provides that one may, on compliance with the formalities therein enumerated, adopt a "legal heir," and that the person so adopted shall have "all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him," save that such adopted child may inherit only one-fourth of the estate of the adopting person, if such adopting person at the time or thereafter have "a child begotten in lawful wedlock." Articles 1, 2, R. S. 1911.

[5, 6] Reference to the rules in force concerning adoption prior to the adoption of the common law in this state affords no assistance in the interpretation of the statute, since the present statute and the one by authority of which Mary Ann McGriff was adopted was enacted after the act by which the common law of England became the rule of decision in this state, when not "inconsistent" with the Constitution and laws of this state. Article 5492, R. S. 1911. Besides, adoption was unknown to the common law; and, when the Legislature passed the present statute conferring the right on any person to adopt an "heir," a common-law rule of decision or interpretation was impossible, since there was no such rule at common law, and had there been one, it would not have been applicable in toto if "inconsistent" with the statutes of adoption passed by the Legislature. So it results, it occurs to us, that in construing the statute we shall resort to the ordinary principles of construction in determining the effect of the statute. In many of the states both the statute authorizing adop-

tion and the statute of descent control and restrict the rights of those adopted, but, subject to such modifications, there is singular uniformity in the enunciation of the general rules by all the courts. In reference to the construction to be placed on such statutes, an accepted authority says that "the authorities unite in affirming that for all purposes of inheritance from the adoptive parent the adopted child becomes and is the lawful child of such adoptive parent save in so far as the statute authorizing the adoption may otherwise provide. Such inheritable right does not conflict with the statute of descents, for the statute in regard to adoption points out who are to be considered children within the meaning of the statute of descents, nor with the right of the adoptive parent to dispose of his property by will. However, as against an adopted child, the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession, according to nature, which has prevailed from time immemorial." 1 Cyc. 981. We assume that the strict construction contended for by the writer just quoted has reference of course to a compliance with the formalities prescribed by the statute, and not in reference to the rights of the adopted person when legally adopted. For in construing the rights of the child when formally adopted, the intention of the Legislature in the enactment of the statute should be determined by importing to the words therein their ordinary signification and common meaning.

[7] The case of *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372, is the only case that has, to any considerable extent, construed the adoption statutes, and in that case the point at issue here was not involved. However, in our opinion, it is persuasive of our view that, "if an adopted child dies during the life of its adopting parent, leaving children, such children are for most, if not for all, purposes regarded as natural grandchildren of the adopting parent, and entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parent's death." 1 R. C. L. 614. In *Eckford v. Knox*, supra, it is said, in effect, that the designation of the adopted child as "legal heir" has no significance since, strictly speaking, there is no such thing as the heir of a living person, and that the use of the term, "legal heir," means simply that if the person so designated is living at the death of the adopting party he shall become entitled to an interest in all his property of which he shall die intestate. Hence no restricted meaning may be placed upon the words legal heir. On the contrary, the words must be held to mean that which will most likely promote the evident purpose of the statute. It is also further said in that case that an adopted heir

may not be postponed in his right of inheritance to others who are not themselves heirs, and that he can be disinherited only in such manner as any lawfully begotten heir may be, and that he stands as to his right of inheritance on the same plane with children born in lawful wedlock, save as to the restriction in the amount he may inherit, and that such views derive strength from the general rules governing adoption wherever it prevails. It is further said in that case that our statute imports the civil law of adoption into our jurisprudence with modifications. This we think may not be intelligently refuted, since the right of adoption did not exist at common law, and the result of the passage of the statute was to ingraft upon our jurisprudence that feature of the civil law and the construction placed upon it by the civilians. And while not passing upon the issue involved in the instant case, Mr. Chief Justice Willie, in the opinion, in order to sustain the right of inheritance of a living adopted child, as a natural child, approvingly refers to the rule of the civilians that the one adopted stood in the relation of child to his adopter, "and his children became the grandchildren of such person." The culminating conclusion of law just quoted from the Eckford-Knox Case seems to us conclusive of the issue. The rule stated seems to be the one in force in most of the states of the Union.

A case much in point with the instant case is *Power et al. v. Hafley*, 85 Ky. 671, 4 S. W. 683. Kentucky, at the time Hafley desired to adopt one Sylvania Floyd, had no statute authorizing the adoption of a person, and applied to the Legislature for authority to do so. The Legislature passed an act which, in effect, permitted Hafley to adopt Sylvania "as his legal heir," and permitting her to take and hold the estate of Hafley "by descent \* \* \* in as full and complete a manner as if she was his lawful child." By way of comparison with the quoted act of the Kentucky Legislature, our statutes provide that one adopted under its terms shall be entitled "to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him," and by subsequent article 5 that he shall have the same rights against the person adopting him for support and maintenance and proper and humane treatment "as a child has by law against lawful parents." Thus it will be seen there is no substantial difference in the enactments. Sylvania died before her adoptive father, leaving children, and after the death of the adoptive father the contention was that her children could not inherit through their mother, since Sylvania's right to inherit was personal and died with her. In disposing of the contention the court said: "The common law made no provision for adopting children. Hence we get no light from that law to guide us in the present investigation. Most of the

states of the Union have within the last few years enacted general laws providing for the adoption of children, and making them the legal heirs of the adopting parents through the courts. Of course, the laws of these states are not uniform in substance; the laws of each more or less limit and restrict the legal status of the adopting parent and the adopted child; and, while the reported adjudications of these states construing the adopting statutes are sparse, yet they nearly all agree in fixing the legal status of the adopted child as follows: That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parents, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And, when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacity, including that of inheritance of a natural child, and is under the same duties. See *Humphries v. Davis*, 100 Ind. 290 [50 Am. Rep. 788]; *Wagner v. Varner*, 50 Iowa, 532; *Barnes v. Allen*, 25 Ind. 222; *Burrage v. Briggs*, 120 Mass. 103; *Ross v. Ross*, 129 Mass. 243 [37 Am. Rep. 321]. By the request of Frederick Hafley, the Legislature, by the act supra, made Sylvania his legal heir, and invested her with as full capacity to take and hold his estate by descent as if she was his natural child. Thus was her legal status fixed by a law operating directly upon her and Hafley, and which contained no restrictions or limitations whatever. She was made a full legal heir, and was put precisely upon the same footing, so far as taking and holding Hafley's property by descent was concerned, of a natural child. So it would seem to follow as a logical sequence that the children of Sylvania, she having died before Hafley, take, under our laws of descent, as her direct representatives. As before stated, the common law made no provision in reference to adopting children; but the civil law made ample provision in that regard; and, presuming that the Legislature, in passing the act supra, and subsequently passing a general law upon the same subject, had in view the principles of the civil law, we have therefore deemed it proper to consult the principles of that law in arriving at the construction we have given said act. By that law (the civil) the adopted child was 'assimilated in many points to a son born in lawful matrimony.' The adopted child retained all of the family rights resulting from its birth, and there was secured to it all of the family rights procured by the adoption. See *Sander's Justinian*, 103, 105, 107. Also, in the case of *Vidal v. Commagere*, 13 La. Ann. 519, it is said that by the civil law the effect

of adoption was such 'that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person.' So, taking the logical sequence of the language of the act supra, aided, as it is, by the principles of the civil law, the conclusion is inevitable that the appellants are the legal grandchildren of Frederick Harle, and as such are entitled to share in the distribution of his estate under our laws of descent."

We concur in the conclusion reached in the case from which we have quoted that it is the act of adoption that fixes the status of the adopted child, and that the effect of adoption under our statute is to constitute the one adopted the child of the adopting person in the same manner, as said in *Eckford v. Knox*, supra, "as if she had been his child born in lawful wedlock, subject only to the limitations contained in the proviso to article 2." Then if the act of adoption fixed the status of the adopted child as one "born in lawful wedlock," it would follow as a consequence that the children of such child would, as her descendants, be entitled to receive, from the estate of the adoptive parent dying intestate, in the same manner and to the same extent the adopted child would have taken had she survived the adoptive parent.

Nor do we think the construction we have placed upon the statutes of adoption is, as argued, in conflict with article 2469, R. S. 1911, which directs that upon dissolution of the marriage relation by death, one-half of the community property shall descend to the child or children, if living, of the deceased intestate spouse or their descendants. "Child" has reference as much to adopted child as to natural child. If only natural child was meant, the adoption of an heir would be futile, since the effect would be to destroy the adoption statutes in toto, and because, under such construction it could be said that, the descent of community property being confined to natural children, it could not be diverted by the provisions of the adoption statutes, even during the life of the one adopted. The fact that both acts are in existence emphasizes the conclusion that it was intended that an adopted person should be considered as a natural child, and inherit as such as restricted by the act. It is true that it was held in *Burgess v. Hargrove*, 64 Tex. 110, in construing the old provision directing the descent of the community property, that "child" did not include grandchild. It was to meet such construction that the act was subsequently amended as it now reads so as to include child or children or their descendants. But it cannot be deduced from the holding that "child" does not include grandchild that it also does not include adopted child. Further, we think the holding in that case is beside the issue involved here, and throws no light on the question,

and decides only that the first degree of consanguinity does not include, as matter of law, the second any more than it does the third.

In view of what we have said, we conclude that when Gracie Ann Harle adopted Mary Ann as provided by law, she became, for all purposes of inheritance, a natural child, and that her descendants were entitled to inherit the entire interest of Gracie Ann in the community property of Gracie Ann and Nathan Harle, since Gracie Ann had no child when she adopted Mary Ann, nor was such child born prior to her death.

[8] It is next urged in behalf of the Slaughter children that the court erred in directing verdict against them. As we have recited, these parties were the children of Amanda Harle Slaughter, who was Nathan Harle's daughter by his first wife. Nathan Harle acquired the land after Amanda Slaughter's mother died, and after he married his second wife, and Amanda's children therefore have no inheritable interest in the land only through their grandfather, Nathan Harle. The error urged, however, arises upon the holding by the district judge that there was a lawful partition and division between Freeman Slaughter and Nathan Harle of the land deeded to them jointly. The land was as matter of fact deeded to Harle and Freeman Slaughter jointly, as we have shown at another place, but it was not disputed by either; on the contrary, it was stated by both to be a fact that there was a division and partition of the land, three-fourths being set off to Harle, and one-fourth to Slaughter, each agreeing to pay for same in that proportion, which was done. Each went into actual possession of the portion awarded him with his family, and have since occupied same. Such a partition and division of lands deeded jointly to two grantees, upon consideration that each will pay that proportion of the purchase money that his part of the land bears thereto, is a valid and effective partition, and may not be subsequently attacked by his children, if such division was acted upon, and the purchase price agreed on paid by both parties and possession of the respective tracts of land so set off taken by each, as was done in the instant case. *Cagle v. Tucker*, 14 Tex. Civ. App. 316, 37 S. W. 180. Hence any issue dependent for its force on the invalidity of such division and partition becomes immaterial under our holding that the partition was effective, and a discussion thereof unnecessary.

With our holding that the evidence without dispute establishes a division and partition of the 160 acres between Freeman Slaughter and Nathan Harle, it becomes unnecessary to discuss seriatim the several remaining assignments of the Slaughters, since the same raise issues similar to those raised by *Bruff Harle*, and which we have decided adversely to the contention of the Slaughters.

The judgment of the trial court is affirmed, in all respects, save as to the McGriffs. As to them the judgment of the lower court is reversed, and judgment here rendered for said heirs, directing that said heirs recover of Nathan Harle an undivided one-half interest in the 60 acres of land awarded to said Nathan Harle by the court below, subject to the right of said Harle to possession and occupancy of said land as a homestead during his life time.

Affirmed in part and reversed and rendered in part.

### TEXAS POWER & LIGHT CO. v. BURGER. (No. 7115.)

(Court of Civil Appeals of Texas, Dallas.  
April 11, 1914. Rehearing Denied  
May 9, 1914.)

#### 1. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé while assisting in setting an electric light pole, evidence held to support a finding of actionable negligence for the failure of the employer to furnish reasonably safe appliances and a sufficient number of competent employés to do the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

#### 2. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an employé, acting under orders of the vice principal, who directed the work, neither did nor omitted to do anything which could contribute to an accident resulting in injury to him, the issue of contributory negligence was not in the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 3. MASTER AND SERVANT (§ 185\*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where plaintiff and his coemployés worked under the direct orders of the foreman and the coemployés did what the foreman directed them to do, an injury sustained by plaintiff in consequence thereof was caused by an act of the employer, who could not escape liability on the ground that the negligence was that of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

#### 4. TRIAL (§ 145\*)—ISSUES—WITHDRAWAL.

The failure of the court to submit to the jury an issue raised by the pleadings amounts to a withdrawal thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.\*]

#### 5. MASTER AND SERVANT (§ 298\*)—INJURY TO SERVANT—EVIDENCE.

An employé, sustaining a personal injury negligently inflicted, cannot recover for injuries sustained in a prior accident; and, unless the jury can determine what portion of the injuries were occasioned by the negligence complained of, and what portion was occasioned by the prior accident, there can be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 298.\*]

#### 6. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries to plaintiff while assisting his coemployés in setting an

electric light pole, the court made the test of actionable negligence to depend on whether the employer had exercised reasonable care in selecting the tools and instrumentalities, and not whether he should have selected and used another system of placing the pole in position, refusal to charge that the jury could not consider, as a ground of negligence, the fact that another system was not used was not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

#### 7. MASTER AND SERVANT (§§ 101, 102\*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

The right of an employer to conduct his own business in his own way is limited by his duty to exercise reasonable care to furnish reasonably safe appliances and place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 8. TRIAL (§ 105\*)—INSTRUCTIONS—SUBMISSION OF INCOMPETENT TESTIMONY.

Where inadmissible testimony was received without objection, and there was no motion to strike it out, refusal to charge that the jury should not consider the testimony was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.\*]

#### 9. APPEAL AND ERROR (§ 690\*)—RECORD—MATTERS TO BE SHOWN—MATERIALITY OF EXCLUDED EVIDENCE.

Where, in an action for personal injuries, in which it was in issue whether plaintiff had fully recovered from a prior accident, and evidence of statements of physicians advising an operation was excluded, the record on appeal does not disclose whether the advice was based on necessity created by the prior injury or by the injury sued for, the materiality of the evidence not being shown, its admissibility cannot be decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.\*]

#### 10. EVIDENCE (§ 317\*)—HEARSAY EVIDENCE.

The testimony of one as to what physicians had stated to him or in his presence as to the advisability of an operation on him was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by C. O. Burger against the Texas Power & Light Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry P. Lawther, of Dallas, and Collins & Cummings, of Hillsboro, for appellant. Wear & Frazier, of Hillsboro, for appellee.

TALBOT, J. On July 27, 1912, while appellee and others as employés of appellant were engaged in lifting and setting an electric light pole in the city of Hillsboro, Tex., appellee was seriously injured. The work was done with the assistance of pike poles, and what was called a "crutch" or "jenny." The pike poles were about 2 inches in diameter and about 12 or 14 feet in length. In one end of them there was fitted a sharp iron spike. When the pole was raised to about the height of the men's heads, or a

little higher, the men using the pike poles struck the iron spikes into the electric light pole, and, grasping the pike pole with their hands, pushed said light pole upward. As the electric light pole was thus being raised, the man with the jenny would slide it down so that the pole at intervals could rest upon it, and the men engaged in raising it with the pike poles could rest. The crutch or jenny was principally of wood constructed with a cross at the top. The crotch of the cross was lined with an iron band in the shape of a half moon or crescent. Sharp teeth protrude from the bottom, and from the upper end of the cross. When the pole being raised fits into the crotch of the jenny, the sharp teeth thereof stick into the wood and keep the pole from slipping or turning. On the occasion in question, there were four men using pike poles, one to guide and place the jenny, and one who stood at the hole to keep a board in place, which prevented the butt end of the electric light pole from slipping past the hole, and which caused it to slide into the hole when raised to a sufficient height. The pole being raised when appellee was hurt was the largest and heaviest pole that he was ever called upon to assist in raising. He had been in the employ of the appellant for some time before this, but the poles he had theretofore been required to aid in raising were smaller and lighter poles, probably not over 25 or 30 feet long. At the time appellee was injured Hall Calhoun, appellant's foreman, who had authority to employ and discharge men, was present, and controlled and directed appellee and the other employes in the work they were then doing. The jenny furnished by appellant and being used in raising the pole when appellee was injured was too small. The pole would not fit down into the crotch of the cross, so as to be caught and held by the teeth in the bottom thereof, and hence the cross and the teeth could not perform the functions for which they were created. The evidence also warrants the conclusion that one of the pike poles, but not the one being used by appellee, was equipped with a loose pike or spike, which, when the man handling it went to change his hold and shift it to another place, would remain sticking in the pole, and would have to be shaken out. This caused delay, and kept the strain on the appellee and other men an undue length of time. In addition to this, one of the men using a pike pole had sore hands, each of them being blistered, which was known to appellant's foreman, Calhoun, before appellee was hurt, but unknown to appellee until afterwards. When the pole had been raised to an angle of about 45 degrees and just ready for the last push upwards by which it would go down into the hole, it twisted and swerved, and an undue amount of its weight was thrown on appellee, causing him to be injured in part at least as alleged in his petition.

Appellee had received an injury some years before this, from which he suffered very much, as he has from the injury complained of in this suit. He had, however, at the time of the present injury, seemingly recovered from his former injury. He had been doing for a long time, intervening between the first and second injury, the hardest and heaviest kind of work, requiring great lifting and straining, without complaint, and was before the injury here complained of, far above men of average strength. The grounds of negligence alleged are: (1) Failure of appellant to furnish appellee a reasonably safe place to work; (2) failure to furnish reasonably safe tools and implements with which to perform the work being done when appellee was injured; (3) in requiring and directing appellee to raise the electric light pole by the means employed; (4) in not furnishing a sufficient number of competent men to perform the work of raising the pole by the means and manner required with safety; (5) that one of appellee's collaborators had sore hands, and was not, by reason thereof, physically fit to give proper assistance in raising the pole. The defenses pleaded are: (1) General and special demurrers; (2) general denial; (3) negligence of fellow servant; (4) that at the time of the alleged accident, on July 27, 1912, the plaintiff was not physically sound, but, on the contrary, was a cripple, having long prior thereto, to wit, on the 17th day of December, 1909, received serious and permanent injuries to his spine and hip, resulting in a curvature of his spine, severe pains and convulsions, and paralysis of his left leg, etc., which were the same identical injuries of which the plaintiff now complained, and which were due to the injury received in December, 1909, and not due to any fault or negligence of said defendant on the occasion in question; (5) contributory negligence; (6) assumed risk; (7) that the injury, if any, received by the plaintiff July 27, 1912, was the result of an accident. A trial by jury resulted in a verdict and judgment in favor of the appellee for the sum of \$3,000, and appellant appealed.

At the threshold of this appeal we are confronted with a motion made by appellee to strike out certain portions of appellant's brief, because the same are not in compliance with the rules. This motion, especially for the reason that we have concluded the case ought to be affirmed, will be overruled.

[1] Appellant's assignments of error from the first to the fifth, inclusive, complain respectively of the court's refusal to peremptorily instruct the jury to return a verdict in its favor; in charging the jury that it was appellant's duty to exercise ordinary care to furnish, while appellee was engaged in the work he was doing when hurt, reasonably safe tools and implements with which to perform that work; and in submitting to the

jury as grounds of negligence upon which appellee might recover: (1) The failure of appellant to furnish reasonably safe pike poles and raising crutch or jenny with which to perform the work in which appellee was engaged when injured; (2) the failure of appellant to exercise ordinary care to furnish appellee with assistants of sufficient number and competency to do the work he was doing when hurt with reasonable safety to himself; and (3) the direction of appellee and his collaborators by J. H. Calhoun, appellant's vice principal, to raise and place in position the electric light pole as alleged in appellee's petition, in the manner in which it was raised. The proposition urged under these assignments, aside from a number of abstract propositions of law which we deem it unnecessary to state, is to the effect that the evidence fails to show that the injury to appellee was directly and proximately caused, either, by the defective pike pole or jenny, the failure of the appellant to furnish the plaintiff assistants of sufficient number and competency to do the work assigned him, or by the appellant's negligent manner of raising the electric light pole. We think there was no error in the submission of these issues. The evidence was sufficient to warrant a finding that either act of commission or omission referred to in the court's charge, and upon the existence of which a verdict in favor of appellee was authorized, was the proximate cause of appellee's injury.

C. O. Burger testified for himself: "I had never before handled a pole like this one, a 45-foot pole. I had raised smaller poles. This pole that we were raising was longer, larger, and heavier in every way than those I was accustomed to raising. The poles that I had been raising fitted in loose in the raising crutch, down into the circle, on the teeth. When I went to raise them up with the pike pole it was easy to move the jenny down the pole and keep up with the raising up of the pole and protect the men from the weight of the pole. \* \* \* When we were raising that pole that afternoon, when I got hurt, \* \* \* it would hang up in the jenny; the top teeth of the jenny would cut the pole, and it would hang on. \* \* \* After it got a certain distance it got larger, and just the top teeth could cut into the pole, and it would not fit tight down. It had never done that with the poles that I had been accustomed to raising before. \* \* \* The company furnished us with that raising crutch on any other poles that I had helped raise, and I had not thought about that trouble, about the catching or making the pole turn, or anything of the kind. I did not anticipate or understand what danger might befall me in using it that way; never gave it a thought. There were four men there with pike poles, counting myself, assisting in this work. \* \* \* Those pike poles were not all in good order; one of the boy's pike

poles, in the lead, had a loose spike, and that would come out. \* \* \* It would come out of the end of the pike pole, and would be sticking into the pole, which would result in a strain on the other three men. That happened at the time I was injured, leaving myself and two men holding up the pole. \* \* \* As to what happened to me there at that time, the other boys kind of give way and the pole swung over, and I swung under to catch the weight, and when I did I hurt my hip. I swung under to catch the weight to keep it from coming down, from falling. I have no idea what caused the pole to swing around. The pole never swung around that way when it would slip down into the crotch of the jenny and catch on the bottom teeth. This pole was resting on the upper teeth of the jenny. I had never been in that kind of danger before, in that way; when I caught the strain of that pole it seemed to rip my bone loose, my backbone and hip and made me awful sick. When that pole twisted that way, and that weight fell on me, I hallooed to the others to hold up on to it and put the weight to it to push upon the pikes and help me to take the weight. They pushed up a little; what they could, but they didn't have the strength. \* \* \* Just prior to the pole turning one of the spikes was loose on the end of it. I don't remember whether it was before or afterwards that the spike came out."

The witness Russell testified: "There was something unusual happened when they were raising that pole; the old gin that they had there did not seem to be working good; would get fastened in the timber, and they would have some difficulty in getting it loose, and it would leave a strain on them while they were trying to unfasten the gin that they had there. I know that it left a strain on Mr. Burger and the other men while they were unfastening the gin. I could not say whether the pikes with which they were working were in good order or not; only it would seem like they would have trouble with them some time in getting them unfastened. Seemed like some of the men didn't understand the job well, somehow or other. \* \* \* After the pole was placed Mr. Burger went over and lay down on a truck. I went over where he was, and talked to him, and went and got him some water and bathed his face, and after he went to vomiting I sent for a doctor, Dr. McHaffey. That was after the pole was set. He appeared to be then in great pain."

The witness Everett testified: "Every man had to hold with all his strength to save his life. The pole turned a little bit over the way Mr. Burger was. If the pole slips and turns there is a great deal more danger, more weight and strain then on the man towards whom it turns if they support it. \* \* \* A man is liable then to get hurt most any time."



L. P. Phillips testified: "In raising a pole with pike poles they have to have the men in pairs; if you have more men on one side than there is on the other, the odd man has to work against two men. In raising a 45-foot pole with pike poles there would be at least four men with pike poles, two on a side, and a man at the gin (jenny), and then there ought to be two on the sides without poles to push with their hands against the pole (being raised), to steady the pole, and one at the foot, or the butt."

The testimony further shows that the foreman, Mr. Calhoun, was personally present, directing what appellee and his collaborators should do, and how they should do it, and that he stated that so far as he knew none of the men assisting in raising the pole had any previous experience in that character of work. He said: "So far as I know, those were the first poles they had put up." He further testified: "I really didn't know anything had happened other than hallooing; Oscar [appellee] or some of the men hallooed to push. We had just gotten the pikes in ready to throw the pole in the hole, and there was a kind of twist, or the jenny give a little, or something, and I heard him halloa to push, or something to that effect. We went ahead and threw the pole in the hole, and Burger went over and sat down on a — then he got up and laid down on one of those express trucks, and I went to him. I have heard it stated that the spike on one of those pike poles was loose; that when they would stick it into the pole, the spike part of it would stay there; they would have to pull it out. I don't remember of one being in that shape."

We, of course, cannot quote all the testimony bearing on the issues submitted to the jury, and have undertaken to give above only so much of it as, in our judgment, authorized and supports those paragraphs of the court's general charge complained of by the assignment here under consideration, and which make plain the fact that the court committed no error in refusing the peremptory instruction requested by appellant. Touching the question of the condition of the pike pole being submitted as an issue of negligence, it may be said that, while on cross-examination appellee stated that he did not remember or know whether the spike came out of the pike pole before or after the electric light pole swerved or turned, causing his injury, yet, in view of his testimony on direct examination, to the effect that the spike came out at the time he was injured, and the other facts and circumstances in evidence, it became and was a question for the jury to determine whether the furnishing by appellant of such an instrument to be used in doing the work in which appellee was engaged was an act of negligence, and the proximate cause of appellee's injury. Likewise, whether or not either of

the other acts of commission or omission submitted to the jury as a ground of negligence upon which a recovery by appellee might be had was, under the evidence, a question of fact for the determination of the jury.

[2, 3] The sixth and seventh assignments of error complain, respectively, of the refusal of the court to give special charges requested by appellant, submitting as issues in the case contributory negligence on the part of appellee, and negligence on the part of his fellow servants. These charges were properly refused. The evidence did not warrant a finding that appellee's injury was the result either of negligence on his part or the negligence of a fellow servant. No act or omission of the appellee is shown which could be construed as even remotely contributing to bring about the accident and injury of which he complains, nor can the accident or its consequences to appellee be charged to any negligent act or omission of a fellow servant of appellee. Neither the appellee nor any of his fellow servants had anything to do with determining the number and competency of the men required to raise the pole in question, or the fitness of the instrumentalities selected and used in raising it. They were doing the work under the orders and supervision of Mr. Calhoun, appellant's vice principal. He was present and determined and directed what appellee and his fellow servants should do, and how and with what instrumentalities they should do it. Whatever the negligence was that caused appellee to be injured, it was not that of a fellow servant, but of the appellant, the master.

Appellant's assignments of error from the ninth to the fourteenth, inclusive, complain, respectively, that the court erred in refusing to instruct the jury at its request that they would not consider as a ground of negligence on its part: (1) The fact that appellant failed to use ordinary care to furnish the appellee a reasonably safe place in which to work; (2) the fact that the jenny used in raising the electric light pole did not have a crotch large enough to hold the large part of said pole; (3) the fact that the appellant failed to furnish a sufficient number of competent men to raise and place the pole; (4) the fact that one of appellee's employes, to wit, Morse, had a sore hand; (5) the fact that the pole was raised by men with pike poles instead of by block and tackle; (6) in refusing to give a special charge requested, to the effect that, if at the time and place where the appellee claims to have received his injuries, he was not in a sound physical condition, and was more susceptible to an accident by reason of having received injuries while working on the railway in December, 1909, he assumed the risk of dangers resulting from heavy work of the nature of that which he was doing at the time of the accident. For propositions under these several assignments, which

are presented together, and for the testimony requiring the giving of the charges to which they relate, we are referred to the propositions and statements made under the foregoing assignments of error, Nos. 1, 2, 3, 4, and 5. For the reason given in discussing and overruling the said assignments Nos. 1, 2, 3, 4, and 5, we hold that assignments Nos. 8, 10, 11, and 13, here under consideration, are not well taken.

[4] The alleged failure of appellant to use ordinary care to furnish appellee a reasonably safe place in which to work was not submitted to the jury as an issue upon which a recovery might be had, and this was equivalent to a withdrawal of it from the jury's consideration.

[5] In reference to the twelfth assignment it is sufficient to say that the facts therein enumerated, if true, would not of themselves cast upon appellee the assumption of the risk of dangers incident to the character of work in which he was engaged at the time he was hurt. The rights of the appellant in respect to the physical condition of the appellee before and at the time he received the injuries of which he complains in this suit were taken care of by a special charge, given at appellant's request, correctly applying the law applicable thereto, wherein the jury were told, in substance, that although the appellant may have been guilty of negligence, yet as the undisputed evidence showed that appellee had received injuries as a result of an accident while working upon a railway in December, 1909, the appellant herein would only be liable for such injuries as directly and proximately resulted from the negligence of appellant in this case, and that the jury could not find for appellee any greater sum than would reasonably compensate him for the latter injury, and that they could not take into consideration in making up their verdict any injuries or condition which they found appellee was, at the time of the trial, suffering from which were due to the accident of December, 1909, and that, unless they were able to determine from the evidence what portion of his injuries, if any, were occasioned by the negligence, if any, of the appellant, and what portion was occasioned by the accident on the railway in December, 1909, to return a verdict in favor of the appellant.

[6] In answer to the fourteenth assignment, which complains that the court erred in refusing to charge the jury not to consider as a ground of negligence against the appellant the fact that the electric light pole was raised by men with pike poles, instead of by block and tackle, it may be said that nowhere in the court's charge was a verdict in favor of the appellee authorized if the jury should find that appellant was guilty of negligence in adopting the method of raising the pole by men with pike poles, instead of by block and tackle, and hence it cannot be assumed

that the jury based their verdict upon any such ground of negligence. The effect of the failure to submit such an issue was to withdraw it from the consideration of the jury. In refusing the special charge in question and in instructing the jury as the court did, the principle that a master cannot be charged with a breach of the duty owed his servant, simply on the ground that a safer method or a safer instrumentality than that from which the injury resulted was available and might have been adopted by him, was not, in our opinion, violated. Whether in selecting the tools and instrumentalities for appellee and his collaborators to do the work required of them appellant exercised reasonable or ordinary care to provide such as enabled them to perform their duties in reasonable safety was made the test, and the true test, of appellant's liability, by the court's charge, and not whether appellant should have selected and used a block and tackle with which to lift and place the pole in position.

[7] The right of an employer to conduct his own business in his own way is limited so that the right shall not infringe upon the obligation of the master to exercise reasonable care to furnish his servant a reasonably safe place in which to work and reasonably safe instrumentalities with which to perform the work required of him. *Jarrell v. Blackbird Coal Co.*, 154 Mo. App. 552, 136 S. W. 754. Appellee's petition charged that appellant negligently failed to furnish reasonably safe tools and implements with which to perform the work required of him, in that one of the pike poles was fitted with a loose pike or spike, and that the crutch or jenny furnished had too small a cross for use in raising such a large pole as the one being raised when appellee received the injury of which he complains, and the charge of the court instructed the jury, in substance, that if they believed from the evidence that the plaintiff, with his collaborators, was directed by J. H. Calhoun, appellant's vice principal, to raise and place in position the pole "as alleged in plaintiff's petition," and the same was negligence, etc., to find for plaintiff. Thus the charge of the court confined appellee's right to recover, in so far as the method adopted in raising the pole was concerned, to the negligence of appellant in failing to provide reasonably safe tools and implements to be used therefor. In any view of the matter, however, we do not believe we would be warranted in reversing the case because of the failure of the court to give the charge in question.

[8] Nor do we think the case should be reversed because the court refused to charge the jury, at the instance of appellant, "not to consider herein for any purpose the statement made by plaintiff while on the stand that the defendant failed to give him employment for the balance of his life as they had agreed to do." Doubtless, the testimony was

inadmissible, but the record fails to show that any objection was made to it at the time it was given, or motion then made to strike it out. Indeed, the statement of facts, as pointed out by appellee, shows that the testimony was brought out by appellant on cross-examination. In this state of the record appellant will not be heard to complain.

[§, 10] The sixteenth and last assignment of error is that: "The court erred in refusing to permit the appellee to state, upon objection being made by his counsel what physicians in San Antonio stated to him or in his presence with reference to the advisability of an operation on his hip, and what said physicians told him would be the result if he did not have the operation performed as is shown by the defendant's bill of exceptions No. 1." The proposition advanced is to the effect that "this testimony was material on the question as to whether the appellee had fully recovered from his railroad accident of 1909, as his own testimony and that of several of his witnesses tended to show, and was also material upon the issue pleaded by the appellant that the injuries from which appellee is at present suffering were in consequence of the railroad accident, and were not due to what happened at the pole raising on July 27, 1912." Neither the assignment of error nor the bill of exceptions reserved to this action of the court shows when the statements of the physicians proposed to be shown were made, or whether the operation advised by them, if any was advised, was believed to be necessary because of the injury sustained by appellee in December, 1909, or the injury sustained by him for which damages are sought in this action, and hence the materiality of the testimony excluded does not appear. But, aside from this, the testimony was purely hearsay and inadmissible.

We have discovered no error requiring a reversal of the case, and the judgment of the court is therefore affirmed.

# HOUSTON & T. C. R. CO. v. COLEMAN. (No. 7103.)

(Court of Civil Appeals of Texas. Dallas.  
April 18, 1914. Rehearing Denied  
May 9, 1914.)

## 1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT — NEGLIGENCE — EVIDENCE—QUESTION FOR JURY.

In an action for injuries to an employé while assisting coemployés in carrying a cross-tie, caused by the coemployés dropping the tie pursuant to orders of the foreman, evidence held that the question of the negligence of the foreman was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010, 1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

## 2. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT—NEGLIGENCE OF VICE PRINCIPAL.

A foreman who acts for his employer is charged with constructive notice of what will

probably and naturally happen as the result of an order given by him and, where he saw an employé's position, or, by the exercise of ordinary care, could have seen it, the employer was liable for a negligent order causing injury to the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

## 3. TRIAL (§ 296\*)—INSTRUCTIONS—BURDEN OF PROOF.

Where, in an action for injuries to an employé, the court charged that the burden was on plaintiff to show by a preponderance of the evidence of the facts entitling him to recover, a charge in presenting the defense that, if an ordinarily prudent person would have done the act complained of, the verdict must be for the employer was not objectionable, as placing on the employer the burden of proving freedom from negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

## 4. MASTER AND SERVANT (§ 291\*)—INJURY TO SERVANT — ACTIONS — INSTRUCTIONS — NEGLIGENCE.

In an action for injuries to an employé, based on the negligence of the foreman giving an improper order to the employé and coemployés, a charge directing a verdict for the employer if an ordinarily prudent person, under the same circumstances, would have given the order, and that, though the foreman gave the order, that fact alone was not negligence, if an ordinarily prudent person would have given it under similar circumstances, did not shift to the employer the burden of proving freedom from negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

## 5. MASTER AND SERVANT (§ 203\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé assumes the risks ordinarily incident to his employment, and, where he is injured as the result of an assumed risk, it is immaterial what care he exercised in the performance of his duties to avoid the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

## 6. TRIAL (§ 253\*)—ISSUES—INSTRUCTIONS.

Where, in an action for injuries to an employé, based on the negligence of the foreman in giving an order to the employé and coemployés, the single act of the foreman in giving the order was submitted to the jury, so that they might determine whether the giving of the order was negligence, the refusal to submit the issue whether the injuries were due to accident as pleaded was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

## 7. APPEAL AND ERROR (§ 216\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court fails to submit a defensive matter to the jury, defendant must request a charge thereon, or he cannot complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627-641, 660, 662-676; Dec. Dig. § 216.\*]

## 8. MASTER AND SERVANT (§ 139\*)—INJURY TO SERVANT—PROXIMATE CAUSE.

Where an employé engaged with coemployés in carrying a cross-tie was injured by the coemployés dropping the tie pursuant to an order of the foreman directing the employé and coemployés, the giving of the order was the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proximate cause of the injury, authorizing a recovery if the foreman negligently gave it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275, 282, 289, 296; Dec. Dig. § 139.\*]

**9. APPEAL AND ERROR (§ 1004\*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.**

The right of the court on appeal to interfere with a verdict in a personal injury action on the ground that excessive damages are awarded is controlled by the rules governing its right to disturb any other issue of fact found by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

**10. MASTER AND SERVANT (§ 179\*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—INSTRUCTIONS.**

The refusal to charge on the issue of the negligence of a fellow servant is not erroneous because of the abrogation of the common-law rule exempting the master from liability for the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

Appeal from District Court, Collin County; F. E. Wilcox, Special Judge.

Action by J. F. Coleman against the Houston & Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. R. Smith, of McKinney, for appellant.  
R. C. Merritt, of McKinney, for appellee.

RASBURY, J. Appellee sued appellant for damages for personal injuries, and, upon trial by jury, was awarded verdict, followed by judgment for \$5,000, from which this appeal is taken.

Appellee alleged in his petition that he was in the employ of appellant as a section hand, and was engaged in the performance of his duties as such at the time he was injured; the precise ground of negligence urged being that, while appellee and two other section "hands" were engaged in carrying a cross-tie of great weight from where it lay upon the right of way to a push car upon which it was to be placed, appellee carrying one end of the tie resting against his stomach, the other two employes having joint care of the other end, appellant's foreman, knowing that appellee was situated so that he could not drop the tie without preparation for his personal safety, or, if not aware of appellee's dangerous situation, could have known it by the exercise of ordinary care, directed appellee and his fellow servants to drop the tie, whereupon appellee's fellow servants, in response to the order, dropped their end of the tie to the ground, precipitating the other end against appellee, seriously and permanently injuring him.

Appellant pleaded appellee's negligence and assumed risk. Other grounds of negligence and other defenses than those stated were

urged respectively by appellee and appellant, but none of them were submitted by the trial judge.

The evidence offered by appellee sustaining his theory of the occurrence and which was adopted by the jury shows, in substance, that appellee was employed by appellant as a section hand, and at the time he received his injuries he and two fellow servants were engaged in removing cross-ties from appellant's right of way onto a push car, which, in turn, would be pushed over the track to a point where the ties were to be used in constructing a switch. Appellee and his fellow servants, by direction of appellant's foreman, had lifted a tie preparatory to placing same upon the push car; appellee's fellow servants carrying the forward end of the tie by placing thereunder a track wrench as a support, each lifting by the protruding end of same, while appellee carried the rear end of the tie by placing his hands under the same and bracing the end of the tie against his stomach. The tie was a large one, weighing 800 or 400 pounds. After appellee and his coemployes had lifted the tie and were about ready to place the same upon the push car, a brother of appellant's foreman called the foreman's attention to the fact that the tie about to be loaded on the car was not suited for the purpose contemplated, whereupon the foreman stepped in front of the men, looked at the tie, and said: "I want that 'thirteen' on the car next; drop that tie." Whereupon appellee's fellow servants, or at least one of them, dropped his side of the tie, causing the other to do so involuntarily, and causing their end of the tie to fall. When the order was given to drop the tie, appellee did not drop it, because to have done so would have been to take the chance of crippling himself and his fellow employes. The manner of placing the tie after raising it was for appellee's fellow servants to lay or place their end of the tie on the push car and follow with the part supported by appellee; it was dangerous to drop the tie as did appellee's fellow servants, nor was it customary to drop them in such manner. As a result of the dropping of the tie, appellee was seriously and permanently injured.

[1] The first assignment complains of that portion of the court's charge which, in effect, instructed the jury it could find for appellee if appellee could not, with safety, release the tie when the order was given, and the foreman saw and knew appellee's position, or could have seen and known same by the exercise of ordinary care. It is contended that such charge was erroneous, because it was not the duty of the foreman to see and know that each employe was in a position of safety before giving an order for prosecuting the work, and because said order was a necessary one. We cannot agree with the contention. Whether the order to drop the tie, under the surrounding circumstances, was neg-

ligence was for the jury to determine. It may have been necessary, as urged by appellant, to halt the employes and have them release the tie, but whether, in pursuance of that necessity, an order to drop the tie, in view of the situation of appellee, was negligence or not was, as we have said, a question of fact, and the necessity for dropping it was immaterial if the manner was negligent.

[2] The foreman, in acting for his principal, was charged with constructive notice of what would naturally and probably happen as the result of the order to drop the tie. Hence, if the jury believed that the order he gave to drop the tie was, at the time and in view of the situation of the parties and the work in which they were engaged, an act of negligence, appellant would be liable without reference to the necessity of the order. The rule applied to somewhat similar facts is illustrated in *Hugo, Schmeltzer & Co. v. Paiz*, 128 S. W. 912. Under the rule of constructive notice, it was also correct for the court to charge the jury that, if the foreman saw and knew appellee's position, or, by the exercise of ordinary care, could have seen and known the same, appellant was liable, since he was so charged by the pleading and the evidence raised the issue. *Pledger v. Texas Central Ry. Co.*, 68 S. W. 516.

[3] It is next urged that in presenting appellant's defenses affirmatively the court erred in instructing the jury to find for appellant if "an ordinarily prudent person, under the same or similar circumstances," would have given the order to drop the tie. The error asserted is that it places the burden upon appellant of proving that it was not negligent in giving the order to drop the tie. After presenting appellee's theory of the case and appellant's defenses, the court instructed the jury that the burden was upon appellee "to show by a preponderance of the evidence the facts which entitle him to recover." This we think alone sufficient to have advised the jury of appellee's burden in respect to the preponderance of the evidence.

[4] Aside from what we have said, however, we think counsel misconstrues the charge. The paragraph complained of was one of several read to the jury for the protection of appellant, and told the jury that, even though they found the foreman did give the order to drop the tie, that fact alone would not constitute negligence, if, in their opinion, an ordinarily prudent person would have given the order to do so under the same or similar circumstances. Thus it occurs to us that, instead of tending to shift the burden of proof, the portion of the charge complained of emphasizes appellee's duty in that respect, since its clear meaning is that the giving of the order may not have been negligence, and that whether it was or not depends upon whether appellee, under the rule given, has shown it to be.

[5] By the third assignment it is urged that the court incorrectly charged upon the issue of assumed risk and in refusing appellant's special charge on that issue. The fault found with the charge of the court is that, in addition to instructing the jury that appellee assumed the risks ordinarily incident to his employment, etc., there should have been added to the charge the instruction that appellee was also bound to use reasonable care in the performance of his duties for his own safety. We believe the contention to be unsound. A servant assumes the risks ordinarily incident to his employment without limitation, and, if he is injured as the result of such assumed risk, it is immaterial how much care he exercised in the performance of his duties to avoid the injury, since that fact could in no respect make the master liable therefor. The effect of such a limitation upon the charge would have been to tell the jury that appellee assumed the risks ordinarily incident to his employment, provided he exercised ordinary care to avoid them. Such a charge would be applicable upon an issue of contributory negligence, but that issue not being in the case, and the only question submitted being whether the order to drop the tie was negligence, the matter contended for by appellant had no place in the charge.

[6] It is next urged that the court erred in not submitting to the jury whether appellee's injuries were due to an accident. Accident was pleaded, but, in our opinion, the evidence wholly failed to raise the issue. The single act of the foreman in ordering appellee and his fellow servants to drop the tie was submitted to the jury, that they might determine whether same was negligence or not. Obviously, if the injuries resulted from giving that order, as found by the jury, it was not the result of an accident.

[7] Further, conceding for the purpose of the discussion only that the evidence raised the issue, and that the court failed to instruct thereon, it is nevertheless not reversible error, since appellant failed to request submission of that defense. It is a well-settled rule that, if the court fails to submit such defensive matter to the jury, it is the duty of the defense to request same, and, failing to do so, the case will not, on that account, be reversed.

[8] It is next urged under several assignments that the giving of the order to drop the tie was not the proximate cause of the injury; but that, as matter of fact, the proximate cause of the injury was the intervening act of appellee's fellow servants in dropping the tie. We have stated the facts which transpired after the order to drop the tie was given, which was, in effect, a literal compliance by appellee's fellow servants therewith. As we have said, it was a question of fact whether, in the light of the situation of the parties and the attending circumstances,

appellant's foreman ought to have foreseen, as a natural and probable result of his order, the consequences that ensued, and on that issue the jury found he should have so foreseen, and included in that finding under the rule is the further one that the foreman should in like manner have anticipated the identical intervening agencies that contributed to appellee's injuries. For, as said, in effect, by our Supreme Court: "The intervention of an independent agency bringing about the result does not necessarily render the original cause remote, but bears more directly on the question whether the injury ought, under all the circumstances, to have been foreseen, and, where the latter fact appears, the original negligent act ought to have been deemed actionable." *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. Thus, under the rule stated and the finding of the jury, there was no error in submitting as an act of negligence appellant's order in reference to the cross-tie.

[9] It is next urged that the verdict of the jury is excessive. This assignment, of course, attacks the sufficiency of the evidence to sustain the verdict of the jury, and our interference with the verdict is controlled by the same rules that apply to our right to dis-

turb any other issue of fact. We have carefully examined the testimony in reference to appellee's injuries, and, without attempting to set out the same and apply it to the verdict, we have concluded, upon such examination, that the testimony is sufficient to support the verdict, and is not of such character as to justify us, in the exercise of the narrow discretion we possess in such matters, to set the verdict aside.

[10] It is next urged through the medium of attack upon the court's main charge, as well as the court's refusal of certain special charges, that the court erred in refusing to submit to the jury whether or not the tie fell as the result of the negligence of appellee's fellow servants, although no proposition to that effect is contained in appellant's brief. Since the common-law rule that the master is not liable for the negligence of a fellow servant while engaged in the service shown by the evidence in this case no longer prevails in this jurisdiction, the refusal to instruct the jury on that issue presents no error.

All other assignments but present in different form the issues already discussed, and for that reason same will be overruled.

The judgment is affirmed.

## FIRST NAT. BANK OF SHREVEPORT v. CITY NAT. BANK. (No. 2819.)

(Supreme Court of Texas. May 6, 1914.)

## 1. BANKS AND BANKING (§ 171\*)—COLLECTION—NEGLIGENCE.

Where a bank to which drafts had been sent for collection forwarded them to the drawee bank, which marked them paid, but did not remit the funds, it was guilty of negligence in failing to make inquiries for over a month, at the end of which time the drawee bank failed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

## 2. BANKS AND BANKING (§ 171\*)—COLLECTIONS—AGENTS.

Where a bank notified a depositor for whom it made collections that it would not be liable for the negligence of correspondents to whom negotiable paper might be transmitted for collection, and that was the custom among banks, it is not liable for the negligence of a correspondent; its liability ceasing when it uses due diligence in the selection of agents for collection.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

## 3. BANKS AND BANKING (§ 171\*)—COLLECTIONS—NEGLIGENCE.

Where a bank holding drafts for collection transmitted them to its correspondent, who gave the sending bank credit for their amount, the sending bank was not guilty of negligence in failing to make inquiry as to whether the drawee had paid them, where the correspondent bank had been notified to protest the drafts in case of nonpayment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

## 4. BANKS AND BANKING (§ 171\*)—COLLECTIONS—MODE OF COLLECTION.

Where a bank was directed to protest drafts in case of nonpayment, and the drawee was the only bank in the town, it was not negligence to send the drafts direct to the drawee, which was then in good standing; it being the custom in that locality for the drawee itself to make the protest in case of nonpayment, and it appearing that express companies would not handle protest collections.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 597-617; Dec. Dig. § 171.\*]

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by the First National Bank of Shreveport against the City National Bank of Galveston, which impleaded the Stockyards National Bank of Ft. Worth. From a judgment in justice court for plaintiff and for defendant over against the impleaded bank, defendant appealed to the county court, and, from a judgment there for defendant, plaintiff appealed to the Court of Civil Appeals, which certified questions to the Supreme Court. Questions answered.

P. A. Drouilhet, of Galveston, for appellant. Stewarts, Geo. T. Burgess, and J. E. Quaid, all of Galveston, for appellee.

PHILLIPS, J. The certificate of the honorable Court of Civil Appeals for the First

District and the questions thereunder propounded are as follows:

"In this case the First National Bank of Shreveport (which will be hereafter designated as the Shreveport Bank) sued the City National Bank located at Galveston (which will be designated as the Galveston Bank) to recover the amount of three several drafts, aggregating \$326.32, less a credit of \$135.52, on the Edgewood National Bank, which were sent by the Shreveport Bank to the Galveston Bank for collection. The suit was instituted in the justice court. The Galveston Bank brought in the Stockyards National Bank of Ft. Worth (hereafter designated the Ft. Worth Bank), to which it had sent the drafts for collection, and by which they had been sent to the Edgewood Bank, and prayed for judgment over against said bank in case of a recovery against it. A trial in the justice court resulted in a judgment against the Galveston Bank in favor of plaintiff, and in favor of the Galveston Bank against the Ft. Worth Bank. An appeal to the county court resulted in a judgment in favor of the Galveston Bank and the Ft. Worth Bank, upon a peremptory instruction to the jury. The Ft. Worth Bank filed its plea of privilege to be sued in Tarrant county, which was taken under advisement by the county court, but was not ruled upon; the court rendering judgment in favor of that bank as to the demand of the Galveston Bank against it, upon the rendition of the judgment in favor of the Galveston Bank as against the claim of the Shreveport Bank. From the judgment, the Shreveport Bank prosecutes this appeal.

"Appellant, having made no claim against the Ft. Worth Bank, and consequently not being entitled to any relief against it, on its pleadings, cannot complain of the judgment in favor of that bank against the claim of the Galveston Bank. The case as presented is limited to the judgment in favor of the Galveston Bank as to the claim of the Shreveport Bank against it.

"It is stated in appellant's brief, and the evidence shows such to be the fact, that the only disputed facts are as to the sending and receipt of two certain letters, one on January 20 or 21, 1909, and the other on October 30, 1908, both of which, it is claimed by appellee, were written and sent by it to the Shreveport Bank on the dates named, but which appellant claims never to have received, and evidence in support of such contentions was introduced by the parties respectively. Omitting the facts with regard to the sending and receipt of these two letters, which we do not deem material, the undisputed evidence discloses the following facts:

"About May 27, 1908, the Shreveport Bank entered into an agreement with the Galveston Bank, by the terms of which the former

was to keep with the latter, on deposit, not less than \$50,000, upon which the latter bank was to pay 2 per cent. interest. The Galveston Bank was to collect all of the Texas business of the Shreveport Bank at par, by which we understand without expenses to the Shreveport Bank. In pursuance of this arrangement appellant sent to appellee daily its Texas collections, aggregating several thousand dollars in amount, and many different items each day. Each day the receipt of these items was acknowledged by appellee on postal cards, using a printed form containing the following statement: 'Due diligence will be observed in the selection of banks or agents for the collection of all paper out of the city; but this bank will not be responsible for the failure or negligence of such bank or agent.' There is no question that this statement was observed by appellant. About the time a similar arrangement was entered into between appellee and the Ft. Worth Bank, under which appellee was to keep a certain amount on deposit with the Ft. Worth Bank, which was to pay interest on the same, and in consideration thereof to do a similar collecting business for appellee, as to a part of its business in certain territory, free of charge. Under this arrangement it was customary, which custom was general and well understood among bankers, including appellant, to enter a credit of items received from the sending bank, with the understanding that such credits should be canceled if the item was not paid.

"On December 2d and 3d appellant sent to appellee for collection the three small drafts referred to, drawn on the Edgewood National Bank, located at the town of Edgewood, in Van Zandt county, Tex. These items were received by appellee and at once entered to the credit of appellant and promptly transmitted by appellee to its correspondent, the Ft. Worth Bank. Appellee was instructed to protest these drafts if not paid, and these instructions it transmitted to its correspondent, the Ft. Worth Bank. Under the arrangement between these banks referred to it was not expected by appellant that the cash should be remitted to it when collected, nor by appellee that such should be done by its correspondent at Ft. Worth. These drafts reached the Ft. Worth Bank on the 5th December, and were at once transmitted to the Edgewood National Bank, the drawee, for collection and returns, with instructions to protest if not paid, and reached the Edgewood Bank on December 7th, when they were marked 'Paid'; but no returns were made to the Ft. Worth Bank, nor, so far as we can find from the evidence, was there any inquiry made by the Ft. Worth Bank of the Edgewood Bank prior to its failure. In addition to the particular instructions with regard to these drafts, the Edgewood Bank had been previously instructed by the Ft. Worth Bank to collect

and remit promptly all money collected for it. The Edgewood Bank failed and closed its doors on January 13, 1900. Its business was wound up by receivers, and a dividend of \$135.52 was sent to the Ft. Worth Bank, which was transmitted to appellee and by appellee to appellant.

"Up to the day of its failure the Edgewood Bank was in good credit and standing, and was regarded by banks and bankers and business men generally as a solvent and reliable bank. It was the only bank in the town of Edgewood. There were several reliable banks in towns nearer Edgewood than Ft. Worth, one within seven miles, and others at varying distances. Edgewood is nearer Shreveport than Galveston, and there is direct communication between the towns by railroad.

"Immediately upon receiving notice of the failure of the Edgewood Bank the Ft. Worth Bank, on the 18th or 19th of January, notified appellee. Appellee claims to have at once, on the 19th or 20th of January, written and mailed a letter to appellant notifying it of the failure, and introduced evidence of this fact; but appellant denied it had received this letter and supported the denial by testimony. It is, however, undisputed that on February 27th appellant received such notice from appellee. It is stated in appellant's brief that, 'in view of the admitted fact that the bank of Edgewood failed January 13th, this difference is not material.'

"On receipt of the drafts by the Ft. Worth Bank it entered the amounts to the credit of the Galveston Bank, which credit was canceled upon failure of the Edgewood Bank. The credit to appellant by appellee was carried on its books until some time in March, 1900; but in the letter of February 27th appellee stated that, the drafts not having been paid, the credits would be canceled. In this letter of February 27th appellee called attention to a letter of January written by it to appellant notifying the latter of the nonpayment; but in the reply of appellant to this letter it stated that its records did not show this letter of January.

"The undisputed evidence, coming from various bank officials, including the cashier of appellant, shows that at and prior to the transactions in controversy there was a general custom and understanding among bankers in Texas and elsewhere that, when one bank sent to another bank items to be collected out of the town or city of the receiving bank, such bank was not expected to collect such items itself, but through other agencies to be selected by it. It was further shown to be the general and recognized custom, when the bank upon which such collections were drawn was the only bank in the town, and was in good credit and standing, to send the collections direct to such drawee bank. This was the custom, notwithstanding the drafts or checks were to be protested



upon nonpayment, and in such case it was customary for the drawee bank to protest, if not paid, and this was generally done. The Edgewood Bank was the only bank in the town. Express companies would not take collections subject to protest, and it was the general custom for banks and bankers to collect only through other banks. It was also the general custom for banks, upon receipt of checks or drafts which, under this general custom, were to be forwarded for collection through other banks, to credit the same to the sender upon receipt, subject to final payment.

"The business between appellant and appellee was handled in this way, and appellant's cashier testified to these various customs as general, and as controlling the business of banks with each other, and that in sending the drafts in question it expected that appellee would handle this business in the usual and customary way, and not otherwise. After transmitting these drafts to its correspondent, appellee made no further inquiry as to their collection until after the failure of the Edgewood Bank. The Stockyards National Bank was and is a solvent and reliable bank, in good credit and standing, and in every way responsible.

"The question presented is one of great importance to the banking interest, which we think should be definitely settled by the Supreme Court. The authorities are in some confusion. Our jurisdiction in this case is final. For these reasons, we deem it proper to certify to your honorable court the following questions:

"First. Was the Stockyards National Bank, correspondent of the City National Bank, negligent in its dealings with these drafts?

"Second. Was the City National Bank liable to the Shreveport Bank for the negligence, if any, of its correspondent, the Stockyards National Bank?

"Third. Was the City National Bank negligent itself in failing to make inquiry of its correspondent as to the collection of the drafts, or in sending these drafts for collection to the Stockyards National Bank, with the knowledge that the latter bank would send them to the drawee bank?"

[1] In response to the first question we think it is manifest, under the statement of the case made by the Court of Civil Appeals, that the Stockyards National Bank was negligent in failing to make inquiry of the Edgewood National Bank in regard to the collections or a reasonable effort to obtain from that bank the remittance for them. The checks were not sent by it to the Edgewood National Bank for credit to its account upon collection, but for collection and returns, and under further, established instructions to promptly remit direct to it for all collections. It received the items from the appellee on December 5th, and immediately forwarded them to the Edgewood Bank, by which they were received and paid on December 7th.

The Edgewood Bank did not fail until January 13th, more than a month following, during which time it apparently continued to transact its business in regular course. The checks not having been protested or returned, the Stockyards National Bank was necessarily aware, within a few days after it had forwarded them, that the Edgewood Bank had not complied with its instructions to make remittance, and under the circumstances due care would have prompted some effort to learn the cause and obtain the returns. According to the foregoing statement, however, it did nothing in the matter beyond forwarding the checks to the Edgewood Bank, apparently withdrawing its care from the transaction at that initial stage of its own relation, which, of course, was negligent conduct. We do not think that under the circumstances stated it should be held guilty of negligence as a matter of law in sending the checks for collection to the bank upon which they were drawn, for reasons to be stated under the third question.

[2] There is a marked diversity of view in the authorities upon the question whether a correspondent bank, to which another bank receiving from the owner negotiable paper for collection transmits it for collection, is the agent of the owner or the forwarding bank, and whether the latter may be held for its negligence in such transactions. It has not been decided by this court, though reference was made to it and the state of the authorities upon it in *Bank v. Weiss*, 67 Tex. 331, 3 S. W. 299. That, in the absence of a special contract or established and understood usage to the contrary, the correspondent bank is the agent of the forwarding bank, and not of the owner or holder of the paper delivering it to the forwarding bank, is the general rule adhered to by many courts of eminence in this country, among them the Supreme Court of the United States. The contrary holding has been as strongly announced and as firmly maintained by other courts of distinction, and has upon its side the weight of Chief Justice Marshall's opinion in *Bank v. Triplett*, 1 Pet. 25, 7 L. Ed. 37, and Chancellor Walworth's notable dissenting opinion in *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289. An extended discussion of the question, with the authorities supporting each view, may be found in *Morse on Banks and Banking*, §§ 268-287; that author giving his approval to the negative position.

But this case does not present the question in its broad and general nature. It arises here under conditions which would necessarily qualify the operation of even the rule affirmed by those courts that hold the correspondent bank to be the agent of the forwarding bank, and the latter liable for its neglect. There is probably no stronger authority in favor of that rule than *Exchange National Bank v. Third National Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. Yet

in that case it is said: "And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent." And in *Morse on Banks and Banking* it is stated (section 269): "If there is an express contract upon the matter of the first bank's responsibility, of course the question will be governed by it." And in section 270: "Usage may determine the question. If the law has not already been settled by judicial determination, so as to exclude any subsequent evidence of usage to subvert it, the bank may absolve itself from liability for the acts of agents other than itself, or the customer may fix such liability upon the bank, by showing, respectively, that such is the established usage and understood custom in the place where the bank, the extent of whose duty and liability is in question, is situated."

Here it was shown, not only that there prevailed in Texas and elsewhere a general and well-understood custom for banks receiving collections upon other points not to effect the collection themselves, but through the agency of other banks selected by them, a custom known to appellant at the time and expected by it to be pursued in this transaction, but that these particular checks were intrusted by it to the appellee for collection with distinct notice, previously given it by the latter and reiterated in this instance, "that it would observe due diligence in the selection of banks or agents for the collection of all paper out of the city, but would not be responsible for the failure or negligence of such banks or agents." The appellee would have had the undoubted right to decline to handle the paper except upon such understanding of its duty and liability. It was as clearly entitled to attach such condition to its undertaking, and no sound reason can be urged why it should be denied effect as to a party who understood it and so acted as to create assent to and acceptance of it. By forwarding the paper to the appellee with knowledge of this distinct limitation of its liability, the appellant expressed its agreement to the terms of the limitation. It is therefore in the position of having in advance agreed to the exemption of appellee from liability for any negligence of its correspondents in the course of the collection, and accordingly cannot recover of it on account of such negligence.

The second question is answered in the negative.

[3,4] Replying to the third question, we do not think under the circumstances appellee should be held guilty of negligence for merely failing to make inquiry of its correspondent in respect to the collection, or in

sending the checks to it with knowledge that it would send them to the bank upon which they were drawn. The checks were sent by it to its correspondent at Ft. Worth, not for returns, but for credit, and they were credited to its account by the latter bank immediately on receipt. They were sent with instructions to protest in the event of non-payment, a regular method of affording notice in case of dishonor for any cause. It does not appear that appellee had any notice that the collection had failed prior to the closing of the Edgewood Bank. Under such circumstances we think appellee had the right to assume that the checks had been paid, and to act accordingly.

The Stockyards National Bank, appellee's correspondent at Ft. Worth, was a reliable bank in good standing, and there was no negligence in merely sending the checks to it. The Edgewood Bank, the drawee in the checks, was the only bank at Edgewood, and was in good standing up to the time of its failure. The checks were to be protested at Edgewood if not paid. The express company there, apparently the only other public agency for making the collection, would not handle protest paper at all. The established custom, under this somewhat extreme condition, was to send the checks to the drawee bank if it was in good standing, and the instructions to protest were generally observed by such banks. Appellant was aware of this general custom and did not expect this business to be handled differently. Except by the adoption of an extraordinary method, which was not incumbent upon it, it seems to us that in making the collection the Ft. Worth Bank had no other alternative but to send the checks to the drawee bank, and, as that bank was in good standing at the time, it should not be deemed guilty of negligence on that account. *Wilson v. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. It follows that appellee was not negligent in forwarding the checks to its correspondent with knowledge that it would in turn forward them to the bank upon which they were drawn. The third question is therefore answered in the negative.

#### R. W. WILLIAMSON & CO. v. TEXAS & P. RY. CO. (No. 2833.)

(Supreme Court of Texas. May 6, 1914.)

#### LIMITATION OF ACTIONS (§ 21\*)—DESTRUCTION OF FREIGHT—ACTION AGAINST CARRIER.

An action for the value of 30 bales of cotton delivered to defendant with other cotton for shipment is one for breach of contract, where based upon a bill of lading covering the whole shipment, though plaintiff was advised, shortly after the delivery of the rest, that defendant's failure to deliver the 30 bales was due to their destruction by fire; and hence the action is not barred by the two-year statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 90-99; Dec. Dig. § 21.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by B. W. Williamson & Co. against the Texas & Pacific Railway Company. A judgment for defendant was affirmed by the Court of Civil Appeals (138 S. W. 807), and plaintiff brings error. Reversed and remanded.

D. A. Eldridge, of Dallas, for plaintiff in error. T. B. McCormick and T. D. Gresham, both of Dallas, for defendant in error.

**PHILLIPS, J.** The suit was for the recovery of the value of 30 bales of cotton, based upon a bill of lading, issued by the defendant in error to W. A. Arthur & Co., and by that firm for a valuable consideration indorsed to the plaintiffs in error, for the transportation from Detroit, Tex., and delivery at Liverpool, England, of 104 bales of cotton, the shipment to be over the line of defendant in error from Detroit to New Orleans, La., and via the Leyland Steamship Line from New Orleans to Liverpool. While the cotton was in the possession of the defendant in error, and in the course of the transportation from Detroit to New Orleans, 30 bales were destroyed by fire. The remaining 74 bales were duly delivered at New Orleans to the steamship line, which at the time issued to the plaintiffs in error, the then holders of the original bill of lading and owners of the cotton, its marine bill of lading for their transportation to Liverpool, this part of the original shipment being thereafter duly delivered at Liverpool, whereupon both bills of lading were surrendered, with a notation made upon the original bill of lading of the defendant in error indicating the delivery to the steamship line of only 74 bales of the original shipment. It was found by the honorable Court of Civil Appeals that the plaintiffs had notice of there being a shortage of 30 bales in the shipment at the time of the delivery of the cotton to the steamship line at New Orleans, that the consignee of the cotton had notice to the same effect when the bills of lading were surrendered at Liverpool, but that plaintiffs in error had no actual knowledge of the destruction by fire of the 30 bales in question while in transit to New Orleans, until a later time.

The suit was filed more than two years after the destruction of the 30 bales, and after the plaintiffs in error acquired actual knowledge of that fact, but within four years from the date they acquired such knowledge, and that accordingly the cotton could not and would not be delivered in compliance with the obligation of the bill of lading. The trial court sustained the plea of limitation interposed by the defendant in error upon the view that the two-year statute of limitation applied to the action. The honorable Court of Civil Appeals affirmed the judgment upon the same ground.

As determined by the allegations of the pe-

tition the suit was clearly one for the breach of the contract of the defendant in error as evidenced by its bill of lading, by which it became obligated to make delivery of the full number of bales constituting the shipment; and the character of the action was not changed, we think, to that of conversion by the facts we have recited in respect to the plaintiffs in error having notice of the shortage in the shipment when it reached New Orleans, and, becoming advised, shortly after the delivery of the 74 bales at Liverpool, that the failure to make delivery of the 30 bales was due to their destruction by fire, to which the Court of Civil Appeals attached importance in its decision of the case. The question is controlled by the holding announced by this court in the case of *Elder Dempster & Co. v. Railway Co.*, 105 Tex. 628, 154 S. W. 975, decided since the decision of the case by the Court of Civil Appeals, to the effect that in suits of this character the two-year statute of limitation is inapplicable.

The judgments of the district court and the Court of Civil Appeals are accordingly reversed, and the cause is remanded to the district court for further trial.

Reversed and remanded.

HOUSTON & T. C. RY. CO. v. FOX et al.  
(No. 2618.)

(Supreme Court of Texas. May 13, 1914.)

1. EVIDENCE (§ 817\*)—HEARSAY—DECLARATIONS OF PARTIES.

In an action for damages for personal injuries to plaintiff's wife while she was a passenger on defendant's train, declarations by plaintiff to others that his wife had been injured on a trip were hearsay and inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 817.\*]

2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the proof of the accident and injury rested solely upon the testimony of plaintiff's wife, and the hearsay statements of the husband corroborated her testimony, the admission of those statements in evidence was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

3. DAMAGES (§ 166\*)—EVIDENCE—POSSIBILITY OF INJURY.

The admission of testimony by a witness for the defendant on cross-examination that it was conceivable that plaintiff's wife had received the injuries of which she complained, although he found no such injuries at the time he examined her for life insurance after the accident, was erroneous, as permitting plaintiff to show a possibility of injury as a basis for the recovery of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478, 479, 481; Dec. Dig. § 166.\*]

4. WITNESSES (§ 414\*)—STATEMENTS OF INJURED PERSON—RECENT FABRICATION—CORROBORATION.

Where the defendant introduced evidence that plaintiff's wife made no complaint of the injuries for which recovery was sought, for the purpose of showing that her claim was a recent fabrication, plaintiff can introduce statements

by his wife to others at about the same time, which tended to prove the occurrence of the accident and the injury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.\*]

**5. WITNESSES (§ 414\*)—STATEMENTS OF INJURED PERSON—RECENT FABRICATION—CORROBORATION.**

Such statements should be confined to those showing the occurrence of the accident and the resulting injury; and statements as to the circumstances of the accident, including the time and manner in which plaintiff's wife was injured, are inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.\*]

**6. EVIDENCE (§ 220\*)—ADMISSIONS—INJURIES TO PASSENGER—DEMAND FOR SETTLEMENT.**

In an action for injuries sustained by plaintiff's wife while a passenger on defendant's train, evidence that the plaintiff had made no demand for settlement before instituting suit is immaterial, since no demand was necessary, and its exclusion was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.\*]

Error to Court of Civil Appeals of the Fifth Supreme Judicial District.

Action by R. L. Fox and another against the Houston & Texas Central Railway Company. A judgment for the plaintiff against the Houston & Texas Central Railway Company was affirmed by the Court of Civil Appeals (156 S. W. 922), and the railway company brings error. Judgment of the trial court and of the Court of Civil Appeals reversed, and cause remanded to the district court.

Baker, Botts, Parker & Garwood, of Houston, for plaintiff in error. Evans & Carpenter, of Greenville, for defendants in error.

BROWN, C. J. Judge Talbot made a very clear statement of the facts disclosed by the evidence which we adopt as follows: "Appellee Fox brought this suit against the Gulf, Colorado & Santa Fé Railway Company and the appellant, Houston & Texas Central Railway Company, to recover damages for personal injuries sustained by his wife, Mrs. Mary Fox, while she was a passenger en route from Celeste, Tex., to Bertram, Tex. Each of the defendants answered by general demurrer, general denial, and pleas of contributory negligence on the part of the appellee's wife. A jury trial resulted in a verdict and judgment in favor of appellee against the appellant for the sum of \$10,000, and in favor of the Gulf, Colorado & Santa Fé Railway Company. From the judgment against it the appellant appealed. No question is raised about the pleadings, and further statement of them is unnecessary. The evidence is sufficient to show that on or about the 22d day of December, 1910, Mrs. Fox, appellee's wife, bought a through ticket at Celeste, Tex., entitling her to passage from that place over the road of the Gulf, Colorado & Santa Fé Railway Company to Dallas, thence over appellant's road to Hearne, Tex., where Mrs. Fox changed cars to continue her jour-

ney. As the train approached Hearne, which was about 2 o'clock in the night, the station was announced and the train stopped. Mrs. Fox, accompanied by her little boy, about 10 or 11 years of age, arose from her seat and started to leave the train. After taking a step or two toward the car door, the train was negligently moved with a sudden jerk or lunge forward and then backward almost at the same instant of time, which threw Mrs. Fox off her balance and to the floor of the car, seriously injuring her. She testified: 'I was thrown down, and I fell forward in kind of a career. I lay there some little bit of time. I felt a severe pain strike me, especially in the small of my back, and it seemed to me like it run all over me, and it seemed to me like it hurt me all over; I lay there for some bit of time, kind of numb or something; at the same time I didn't hardly realize what was going on for some little bit of time; my little boy came to me, and he had hold of me the first thing I knew, and he says "Ma, are you hurt?" I told him \* \* \* I was nearly killed.' Mrs. Fox further testified that her son helped her up, and that they went out of the car and into the station house, where she stayed until about 11 o'clock forenoon of that same day, when she took another train and continued her journey to Bertram, still suffering from her injury. Mrs. Fox was 51 years of age at the time of the accident, and was a strong and vigorous woman for her age." The Court of Civil Appeals affirmed the judgment of the trial court, from which judgment the writ of error was granted.

[1, 2] The plaintiff was permitted, over proper objections, to prove by W. P. Byers that the plaintiff told him (Byers) that: "Mrs. Fox got hurt and was not in good health; then when she got hurt she was on a visit somewhere." Over like objections of defendant J. B. Ellison testified that "in the spring of 1911 he saw and talked to Fox about selling him some liniment," and "plaintiff said he wanted the liniment, as his wife had taken a trip and got hurt and wanted liniment." This evidence tended to corroborate Mrs. Fox in her statement of the accident and injury. It was hearsay pure and simple, and in this state of the evidence was material; therefore the error of admitting it is reversible error. The facts of the accident were proved by Mrs. Fox only, and no other person on the train is shown to have known of the severe lurching of the train. The jury would have been justified in finding against her evidence. The effect of both and each statement was to corroborate Mrs. Fox's evidence.

[3] Dr. Pierson was a witness for defendant, and testified that he made examination of Mrs. Fox on her application for life insurance, and on cross-examination plaintiff's counsel propounded this question: "She

[Mrs. Fox] may have been suffering some pain at that time from the hurt she had that might have afterwards resulted in the condition she is in now?" The witness answered, "It is conceivable, I suppose." Counsel for defendant moved to strike out the question and answer, which motion the court overruled. It would be useless to discuss the proposition that the answer of Dr. Pierson could prove nothing more than that it was barely possible for such result to follow. The rule settled in this court is: "To justify the assessment of damages for apprehended future consequences of a present injury, it is not enough that such consequences may occur, but there must be a reasonable probability—that is, it must be reasonably certain that such consequences will ensue." *G., C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 82, 15 S. W. 558. Also *Lentz v. City of Dallas*, 96 Tex. 287, 72 S. W. 59; *G., H. & S. A. Ry. Co. v. Powers*, 101 Tex. 164, 105 S. W. 491.

The error in admitting the declarations of plaintiff and the grosser error of permitting the proof of possible injurious results require a reversal of the judgments of the district court and of the Court of Civil Appeals.

[4] The effect of the defense was to charge Mrs. Fox with having fabricated the case, and defendant sought to sustain, by the evidence of the employes on the train at the time, that they knew nothing of the occurrence when it occurred, and that Mrs. Fox did not mention the fact at times and under circumstances when she should have done so, and plaintiff sought to sustain her under the rule stated in *Wigmore on Evidence*, vol. 2, § 1129, as follows: "The charge of recent contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did not speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, i. e., as a self-contradiction. The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. This use of former similar statements is universally conceded to be proper; though occasionally it is difficult to apply the principle to the facts."

The defendant proved by Fizer that Mrs. Fox stayed at his house the night of December 23, 1910 (the next night after she claimed to have been injured), and that Mrs. Fox spoke of having been in good health for years, and seemed then to so be. Spoke of the long time she had to "lay over" at Hearne. At family prayer said she had been "fortunate in not having any accident on her trip." This witness was corroborated by other witnesses. Defendant said in effect, Because

you did not tell of your injuries and the accident at McNeil, you are guilty of having manufactured the story. To which Mrs. Fox replied by witnesses, "I told it to my sister Mrs. Cox the next day at Bertram," and made proof by Mrs. Cox and others that she did relate the facts of the accident. Defendant proved by a number of the neighbors of Mrs. Fox (the names are unimportant) that when Mrs. Fox returned to her home they met her and associated with her as usual with neighbors, and that Mrs. Fox did not speak of the accident at Hearne, or of any injury, until a short time before this suit was instituted. Plaintiff testified that he met his wife when she arrived at Celeste on her return from her visit, and she told him of the occurrence and her injuries.

[5] Defendant proved by Dr. Pierson that after the date of the accident he examined Mrs. Fox on her application for life insurance, and that she answered in substance that she was in good condition, and did not say anything of the occurrence at Hearne. Plaintiff proved that Mrs. Fox applied to one Curtis, for life insurance, and told him that she had been hurt. That was the application on which Dr. Pierson examined her. Defendant says because Mrs. Fox did not speak of her injuries at McNeil to the Fizer family, at her home to her neighbors, nor to Dr. Pierson, she must be discredited. When she offered proof that she did speak to her sister at Bertram, to her husband at Celeste, and to Curtis, the agent who took her application, her statements are objected to as self-serving, therefore not admissible. If the defendant had not charged Mrs. Fox with fabricating her claim, such declarations would not have been admissible. Defendant's proposition is that because Mrs. Fox did not speak of the accident on certain occasions, she is guilty of recent contrivance, and that it cannot be proved that she did speak of the matter at another time because her declarations are self-serving. There is much authority directly on the question, for courts uniformly hold that under such circumstances her declarations as to the occurrence of the accident were admissible if made near the time when it is alleged and proved that she should have spoken, but did not speak. It is claimed that Mrs. Fox's declarations were not admissible. The admissibility of that evidence can be determined by stating the issue to be proved or disproved. The defendant below asserted that there was no accident nor injury to Mrs. Fox; that she had fabricated the whole matter. To sustain the charge evidence was offered to prove that on different occasions when Mrs. Fox should have spoken of the accident she was silent. To meet these charges she proved that at a time near to that mentioned she did speak of the fact of the accident to her, giving the time and place.

By this evidence the issue of fabrication was met. But in addition to the fact of the injury her statements of circumstances of the accident, including the manner in which she was injured, were admitted over the objections of the defendant. The declarations which went beyond the facts of the accident were not relevant to the issue of fabrication, and should not have been admitted; they were self-serving declarations, therefore inadmissible. We will not undertake to analyze the evidence and state the portion not admissible, but the trial court at another hearing will confine the declarations of Mrs. Fox to such as tends to prove the occurrence of the accident and injury. It is difficult to be specific on this question, and much must be left to the trial judge.

The case of *Aetna Insurance Company v. Eastman*, 95 Tex. 34, 64 S. W. 863, is not in conflict with our decision in this case. In that case the declarations of Eastman were in support of his evidence given at the trial of an issue of fact upon which his recovery depended. Mrs. Fox's declarations as proved simply met the charge of recent fabrication, and were called for by the evidence offered by the defendant. The distinction is plain. It is unnecessary for us to comment on the *Eastman* Case.

[6] The plaintiff in error complains of the action of the trial court in refusing to permit it to prove by plaintiff when testifying that he made no demand of the railroad company for settlement before instituting the suit. No obligation rested upon plaintiff to make a demand before instituting suit; the assignment does not present an instance in which the plaintiff failed to speak when he was in a position that called upon him to make his claim known; it was not the same as the position of Mrs. Fox when it was charged that she failed to speak of the accident. If admitted, the fact that plaintiff made no claim before suit would not tend to prove any fact material to the defense.

The judgments of the Court of Civil Appeals and of the district court are reversed, and the cause is remanded to the district court of Hunt county.

#### TWEED v. WESTERN UNION TELEGRAPH CO. (No. 2329.)

(Supreme Court of Texas. May 13, 1914.)

#### 1. EVIDENCE (§ 182\*)—SIMILAR MATTERS—RELEVANCY.

In an action for injuries claimed to have affected plaintiff's mind, evidence as to the ability of patients in an insane asylum to care for themselves, play billiards, keep up with the current literature of the day, and do the work of the institution, was irrelevant and should have been excluded, as it furnished no guide for determining plaintiff's mental capacity.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 182;\* *Insane Persons*, Cent. Dig. § 7.]

#### 2. EVIDENCE (§ 545\*)—OPINION EVIDENCE—COMPETENCY—COMPETENCY OF EXPERTS—EVIDENCE OF COMPETENCY.

Where a witness' capacity as an expert regarding insanity had not been attacked, evidence to prove him capable was irrelevant.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.\*]

#### 3. EVIDENCE (§ 481\*)—ADMISSIBILITY—CONCLUSION OF WITNESS.

In a telegraph lineman's action for injuries, the testimony of a witness that there was no danger for a lineman to go upon a pole and use a safety belt after he had heard the foreman say that it was all right, or, as he doubtless intended to testify, that such statement would satisfy the lineman that there was no danger, was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2248-2254; Dec. Dig. § 481.\*]

#### 4. DAMAGES (§ 163\*)—EVIDENCE—PRESUMPTIONS—MENTAL SUFFERING.

Mental suffering from personal injuries will be presumed in the case of an insane person, as well as a sane person, until such abnormal mental condition as prevents the party from experiencing mental suffering is proved.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 454-459; Dec. Dig. § 163.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by E. A. Tweed against the Western Union Telegraph Company. A judgment for plaintiff was reversed by the Court of Civil Appeals (188 S. W. 1155), and plaintiff brings error. Judgment of the Court of Civil Appeals affirmed, and case remanded.

Carden, Starling, Carden & Hemphill, of Dallas, and T. M. Campbell, of Palestine, for plaintiff in error. N. L. Lindsley and W. J. J. Smith, both of Dallas, for defendant in error.

BROWN, C. J. The application was granted because the judgment of the honorable Court of Civil Appeals, in reversing the judgment and remanding the case, "practically settled the case." We conclude that, if the trial court should follow the law as declared in the opinion, it would result in a judgment against the plaintiff in error. The facts are not definitely in favor of either party as to authorize this court to enter judgment; therefore we affirm the judgment of the Court of Civil Appeals, and remand the case.

We make this statement of the facts: The plaintiff, Tweed, was in the employ of the telegraph company, and was seriously injured by the falling of a pole on which he was at work. It was charged that the pole was unsound, and the company negligent in furnishing it, therefore liable for the injury caused by the falling of the pole. The company defended upon the ground of the contributory negligence of the plaintiff in the manner of using the pole, and also because plaintiff assumed the risk of using the defective pole. The law upon each of those issues is so well settled that we cannot give

aid to the court in another trial by discussing those rules. We conclude that the most effective aid we can render to the district court at another trial will be to review those issues of law which will probably arise again.

[1] The first error pointed out by the honorable Court of Civil Appeals which we will notice was permitting Dr. Rosser to testify, over defendant's objection, as follows: "Well, just roughly, I would say that out of 1,000 patients (meaning at the Terrell Insane Asylum) not over 25 or 30 of them would not be able to take care of a calf of nature. The balance of them would be able to do it, and that proportion of them who are able to do it go out on their daily walks with one attendant to take care of 50 of them at a time. Many of them spend their time in the reading ward and playing billiards; many of them are expert billiard players. Probably 100 out of 1,000 keep up with the current literature of the day." And in allowing said witness in the same connection to testify: "A great majority of the farming is done by the patients (meaning the patients at the Terrell Insane Asylum). The laundry and dairy are taken care of by the patients; they milk the cows and take care of the cows and of the milk; do the planting with an overseer. These are regular patients down there in the asylum. The trouble with them is they have either lowered their intelligence or are twisted on certain points." So far as we can see from the opinion, the evidence was irrelevant, and should have been excluded. It furnished to the jury no guide for determining the mental capacity of plaintiff.

[2] There seems to have been no attack upon Dr. Rosser's capacity as an expert in regard to insanity, and there was no reason for admitting evidence to prove him capable. It was irrelevant, because there was no issue to which it could apply. *I. & G. N. Ry. Co. v. Lane* (Civ. App.) 127 S. W. 1067; *Rogers on Expert Evidence*, p. 85. No comment is necessary or could elucidate the question.

[3] It appeared from the court's opinion that a witness was permitted, over defendant's objection, to testify "that there is no danger for a lineman to go up on a pole and use a safety belt on construction work after he has heard the foreman say it is all right." There could be no doubt of the impropriety of such evidence, and its character excited in the mind of the writer doubt of the correctness of the statement in the record. Doubtless the witness testified or intended to testify that such statement would satisfy the servant that there was no danger. In either phase it was not admissible.

[4] The honorable Court of Civil Appeals quotes from *T. & P. R. R. Co. v. Curry*, 64 Tex. 85, as follows: "The rule regulating

pleading in this class of cases is thus stated: 'The general allegation of damages will suffice to let in proof and to warrant recovery of all such damages as naturally and necessarily result from the wrongful act complained of; the law implies such damages—that is, damages of that sort—and proof only is necessary to show the extent and amount.'

\* \* \* The rule, however, is satisfied when from the facts stated the law infers other fact or facts; for whatsoever the law infers from a given state of facts the adverse party is presumed to know, and must take notice of, whether it is specially pleaded or not. The law infers, when such injuries to the person are shown to have existed as are alleged and proved in this case, that physical pain resulted therefrom; for by common observation we know that in the ordinary operation of natural laws pain is a necessary result of such injuries, unless the condition of the injured person be abnormal, which will not be presumed. This is equally true as to mental suffering; for it is contrary to common experience and the laws of man's existence and nature that any sane, healthy, and robust person by physical injuries may be made a cripple for life in a matter affecting his health, comfort, or capacity, without mental pain resulting from the changed condition."

The Court of Civil Appeals concludes that from the use of the word "sane" the Supreme Court meant to hold that in case of physical injury to an insane person there could not be *mental* suffering. This is not a sound construction of the language of the opinion. The court distinctly applied the same rule to mental as to physical suffering; each would be presumed from the injury, and no doubt physical pain in such cases would be suggested. Such abnormal mental condition as would prevent the presumption of mental suffering would be a matter of defense, which must be proved and submitted as a fact.

There is no principle of law which would authorize this court to say that one afflicted with melancholia could not experience mental anguish or any of the emotions which constitute mental suffering. The question of damages for physical pain and mental suffering is for the jury, and we know of no rule of law which would deny either, unless the defendant should prove such condition as would authorize the jury to say that such presumed result did not arise from the physical injury. Surely no court has a right to say that any character of insanity prevents a party from experiencing mental suffering, when such persons manifest an appreciation of physical pain.

The cause is remanded to the district court.

**PUGH v. WERNER. (No. 834.)**

(Court of Civil Appeals of Texas. El Paso.  
April 30, 1914.)

**1. APPEAL AND ERROR (§ 219\*)—REVIEW—PROCEEDINGS IN TRIAL COURT.**

Where findings of fact and conclusions of law are filed, but there are no exceptions to the findings or request for additional findings, the court of appeals will only inquire whether the pleadings sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317-1320, 1322, 1323; Dec. Dig. § 219.\*]

**2. STATUTES (§ 267\*)—CONSTRUCTIONS—REMEDIES AND PROCEDURE.**

Acts 33d Leg. c. 127, amending Rev. St. 1911, arts. 1827, 1829, 1902, providing for judgment as by confession in case a paragraph of an answer alleging matter in bar is not denied or excepted to, had no application to an amended answer filed prior to the date when the act took effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

Appeal from Reeves County Court; H. N. McKellar, Judge.

Suit by R. G. Werner against Spencer B. Pugh. Judgment for plaintiff, and defendant appeals. Affirmed.

Spencer B. Pugh, of Pecos, for appellant.  
J. A. Buck, of Pecos, for appellee.

**HARPER, C. J.** This suit was brought by appellee, R. G. Werner, against appellant, Spencer B. Pugh, and others, for the recovery of certain personal property. The other parties defendant having filed disclaimers, the case went to trial against Pugh alone. Appellee's petition contained the usual allegations necessary to recover for conversion of personal property. The appellee secured his writ of sequestration, and the property was levied on by the sheriff, and appellant replevied. Appellant answered by general demurrer, general denial, and specially pleaded that at the time the suit was filed the property sued for was in the possession of the district court of Reeves county by and through its receiver of the Arno Co-operative Irrigation Company in a suit instituted by said Werner; that at the time of institution of this suit the receiver had not been discharged; and that long after this suit was filed the district court by its order delivered the said property to appellant as the president of said corporation. Cause was tried by the court without a jury. Judgment rendered for the property, and, in the event it was not forthcoming, for \$799 as the value thereof, etc.

The first and second assignments of error charge that the court erred in rendering its judgment in favor of appellee and in not rendering judgment for the appellant because the undisputed evidence showed that at the time of the institution of this suit appellant was not in possession of the property sued for, but that it was in the possession of a re-

ceiver of the irrigation company, appointed by the district court.

[1] The trial court, upon request of appellant, filed findings of fact and conclusions of law. There is no finding among those filed by the court upon the question raised, but in the absence of an exception to the findings as filed, and a request for additional findings, this court will only inquire into whether the pleadings justify the judgment, and we so find. *Continental Ins. Co. v. Milliken*, 64 Tex. 46; *Gardner v. Watson*, 78 Tex. 25, 13 S. W. 39; *Oldham v. Medearis*, 90 Tex. 506, 39 S. W. 919.

[2] The third assignment charges that "the court erred in overruling appellant's motion for judgment by confession upon the ground that paragraph No. 4 of appellant's answer had not been excepted to or denied as required by Acts of 33d Leg. amending articles 1827, 1829, and 1902, p. 256. This statute has no application to this case for the reason that the answer of appellant upon which he relies was filed before the statute went into effect. The amended answer relied upon was filed in July, 1913, and the statute invoked went into effect September 1, 1913.

There being no error in the record, the cause must be affirmed, and it is so ordered.  
Affirmed.

**GALVESTON, H. & H. RY. CO. v. LEGGIO. (No. 5,265.)**

(Court of Civil Appeals of Texas. San Antonio. April 22, 1914.)

**RAILROADS (§ 443\*)—INJURIES TO STOCK—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.**

Evidence, in an action for damages for killing a mule on a railroad track, held to sustain a finding that the engineer could have seen the mule in time to stop and did not attempt to do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by V. Leggio against the Galveston, Houston & Henderson Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John L. Darrouzet, of Galveston, and John T. Garrison, of Houston, for appellant.  
Geo. G. Clough and Aubrey Fuller, both of Galveston, for appellee.

**CARL, J.** Appellee, V. Leggio, sued the Galveston, Houston & Henderson Railway Company for the value of a mule killed by one of appellant's engines at Dickinson, in Galveston county, and recovered \$125, from which judgment this appeal is prosecuted.

The engineer testified that his train was running about 35 miles per hour through the town of Dickinson, no stops being made between Houston and Galveston; and he says he could not have stopped his train



without endangering the lives and limbs of the passengers. Other testimony is to the effect that the track was straight and that the mule was on the track while the train was yet about a half mile away; that they tried to scare the mule away; and that the train did not slow down, even after it struck the deceased. These facts justified the trial court in concluding that the engineer could have seen the faithful beast of burden in time to stop, and that he made no effort to do so, thereby causing the untimely demise of Leggio's mule.

There are but two assignments of error, which we have carefully examined, and, finding them without merit, same are overruled.

Judgment is affirmed.

# GULF, C. & S. F. RY. CO. v. JAMES B. & CHARLES J. STUBBS. (No. 5271.)

(Court of Civil Appeals of Texas. San Antonio. April 22, 1914. Rehearing Denied May 13, 1914.)

## 1. ASSIGNMENTS (§ 92\*)—RIGHT OF ASSIGNEE—SETTLEMENT WITH ASSIGNOR.

Where defendant, after notice that one, having a claim for damages against it, had assigned to plaintiff a half interest therein, and in any compromise, settlement, or recovery, settled with and paid the assignor, plaintiff may recover of it half the amount it paid the assignor, without pleading or proving the damages, though he might sue it on the claim for damages, or the assignor for his share of the sum paid him.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 158; Dec. Dig. § 92.\*]

## 2. INSANE PERSONS (§ 61\*)—ASSIGNMENT OF CLAIM—SETTLEMENT WITH ASSIGNOR.

Though when H. assigned to plaintiff a half interest in a claim for damages against defendant, and in any settlement, H. was insane, so that the contract was voidable, yet H. not having disaffirmed it, but having thereafter, with knowledge of the facts, and before settling with defendant, ratified it, defendant having had knowledge of the contract, though not of the ratification, was liable to plaintiff.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 93-99; Dec. Dig. § 61.\*]

## 3. CONTINUANCE (§ 30\*)—AMENDMENT AT TRIAL—DISCRETION.

Allowing plaintiff to amend his petition after the case had gone to trial, without granting defendant a continuance, is largely a matter of discretion, not abused, where the amendment simply enlarges on the cause of action, and does not require of defendant any evidence not before required.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.\*]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by James B. & Charles J. Stubbs against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Terry, Cavin & Mills and A. H. Culwell, all of Galveston, for appellant. D. D. McDonald and James B. & Chas. J. Stubbs, all of Galveston, for appellees.

CARL, J. Appellees, James B. & Charles J. Stubbs, a law partnership, sued appellant, alleging that on February 23, 1912, they were employed by Charles Hansen to represent him in his claim for damages against appellant growing out of a collision which occurred on or about February 18, 1912; and that said Hansen authorized appellees to sue for, settle, or compromise his claims, and in consideration of their services rendered and to be rendered to said Hansen, he transferred and assigned to them in writing a one-half interest in his claims and causes of action against appellant, and in any compromise, judgment, or recovery that he might be entitled to by reason of said collision and injuries and damages resulting therefrom. There are further allegations that they were representing said Hansen and carrying out this agreement with Hansen, and had notified appellant of their employment and of their interest in the claim; but that, although appellant had actual notice of appellees' contract, about May 20, 1912, appellant settled with Hansen for \$3,500, and a judgment was entered in Hansen's favor for that amount, which was paid. The prayer was for \$1,750 or one-half of the sum received by Hansen.

Appellant answered by general demurrer, general denial, and specially that at the time Hansen made the contract, if any, with appellees, he was mentally unfit to and incapable of making a valid contract, and same is void; and further that, after Hansen recovered his understanding, he repudiated said contract and declined to recognize appellees as his attorneys.

By trial amendment, appellees further alleged that, since the cause went to trial, they had learned that said Hansen had received \$1,500 additional in satisfaction of injuries to himself, and for injuries to his minor daughter, growing out of the same accident in which his wife was killed, and alleging that said \$1,500 additional payment was a settlement out of court and unknown to appellees until developed in the trial. Their additional prayer was for one-half of the \$1,500 settlement made out of court, or a total of \$2,500.

The trial, which was before the court, resulted in a judgment in favor of appellees for \$2,375, from which the appeal is taken.

The contract entered into is as follows: "Galveston, Feby. 23d, 1912. Messrs. James B. and Charles J. Stubbs, Lawyers, City—Dear Sirs: I hereby employ you to represent me in my claim for damages against the Gulf, Colorado & Santa Fé Ry. Company, growing out of the collision on February 18th, 1912, and all injuries and damages resulting therefrom, and I hereby authorize you to sue for, settle or compromise such claim; and in consideration of your services rendered and to be rendered, I hereby transfer and assign to you a one-half (½) interest in my claims,

demands and causes of action and any compromise, settlement, judgment or recovery that I may be entitled to by reason of said collision, injuries and damages. Charles Hansen. Witness: W. J. Jenkins, M. D. Miss Julia Clooney."

It is admitted that this contract had been brought to the attention of the railway company, and that Hansen recovered a judgment against the company on May 20, 1912, for \$3,500, which was settled May 23, 1912, for \$2,350 to Hansen; and on May 22, 1912, he settled outside of court for his own injuries and those of his daughter for the sum of \$1,500. The trial court finds that the company had actual notice of the contract before the settlements were made; but appellees were not notified of the settlements, and they knew nothing about such compromise until the judgment was entered for \$3,500, and did not know of the \$1,500 settlement until the trial of this cause. It is further found by the court that Hansen never disaffirmed the contract, but as late as the latter part of April or first of May he manifested an intention to abide by the terms thereof with full knowledge of its contents and of the efforts being put forth thereunder by said attorneys.

The trial court concluded that as a matter of law, while Hansen may not have known that his wife was dead at the time he executed the contract, he did know she and the child were with him, at the time of the collision, and must have known that what he was contracting for was the recovery of damage to which he might be entitled for all injuries and damages growing out of the collision from whatever source; and further that the contract conveyed to appellees a one-half interest in and to each and all causes of action growing out of the collision. The court also concludes that Hansen did not disaffirm the contract; that appellant had notice of the contract and, having such notice, had settled with Hansen for \$2,375; and that appellees were entitled to judgment for one-half of that sum.

[1] The contract not only assigned an interest in the claim for damages, but a one-half interest in any compromise, settlement, or recovery as well. As we construe the holdings of the courts, an attorney holding a contract such as the one in this case has three remedies, in the event the client settles the claim after notice to the party liable as to the existence of the contract, viz.: (1) He may proceed on the assigned cause for damages, in which event he would plead and prove the damages and liability therefor, and recover his part of such damages as might be established (*Selter v. Marshall* [Sup.] 147 S. W. 226); (2) he might sue the client for his share of the sum paid in settlement; or (3) he may recover his part of the sum paid the client without pleading and proving the damages. The last is the remedy selected in this

case, and there appears to be ample authority for so doing.

A case almost identical with the one under consideration came before the Supreme Court in *G., H. & S. A. Ry. Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166, in which the judgment of the Court of Civil Appeals, 30 Tex. Civ. App. 161, 70 S. W. 96, was affirmed. That contract said: "I agree to give and hereby assign to them one-third of whatever may be recovered in said suit, or by way of compromise." Ginther settled, after the suit was filed, for \$2,500, and his attorneys intervened and obtained judgment against the railway for one-third of the amount paid Ginther. Judge Williams said: "The instrument plainly expressed the intention to assign an interest in a cause of action of which a judgment or compromise was to be the measure, and the expression of this intention, in any language, was all that was required to make an assignment, as contradistinguished from a mere agreement to pay so much as a contingent fee. *Christmas v. Russell*, 14 Wall. 84, 20 L. Ed. 762. While the contract may have left the plaintiff free to compromise, it gave the assignees an interest in the claim which they had the right to have paid in the settlement. This right, when the defendant knew of its existence, could not be defeated by payment to the plaintiff. The position of defendant was that of any other person paying a debt to the original creditor instead of an assignee whose rights were known"—citing *Railway v. Vaughn*, 16 Tex. Civ. App. 403, 40 S. W. 1065.

Another case very similar to this one came before the Austin Court of Appeals in *G., C. & S. F. Ry. Co. v. Eldredge*, 35 Tex. Civ. App. 467, 80 S. W. 556. The court said: "The appellees' cause of action was for 45 per cent. of the amount paid by the appellant to Eldredge. The contract upon which they base their cause of action transfers to them this percentage of the amount that might be received in compromise. Such being the case, they would be entitled to recover this amount without establishing the fact that the appellant would be and was liable to Eldredge on a cause of action for damages, as alleged in the petition. The right to recover in a case of this kind for the part of the amount that the assignees were entitled to that was paid to the injured party in settlement is recognized by the case of *G., H. & S. A. Ry. Co. v. Ginther*, supra, and cases there cited." See, also, *G., C. & S. F. Ry. Co. v. Miller*, 21 Tex. Civ. App. 609, 53 S. W. 709; *T. C. L. Co. v. Holt*, 144 S. W. 1029; *Powell v. G., H. & S. A. Ry. Co.*, 78 S. W. 977; *Texas Cent. Ry. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 924.

From the authorities cited, it seems to be well settled that the assignee of an interest in a claim for damages may hold the party liable therefor responsible for his proportion-

ate share of a settlement made with the client after notice. The assignment is to one-half of "my claims, demands, and causes of action and any compromise, settlement, judgment, or recovery." Hansen did not expressly waive the right to himself settle the claim; but the railway was put upon notice that appellees had and owned a one-half interest in any compromise. So, when the railway paid Hansen all of the money, they could not thereby force appellees to sue Hansen to recover the money. The company knew of appellees' interest, and, when it paid Hansen all of it, the risk was the railway's. Appellees were not required to plead and prove the damages to Hansen, as contended, but could sue for their part of the settlement made. *G., C. & S. F. Ry. Co. v. Eldredge*, 35 Tex. Civ. App. 467, 80 S. W. 556; *G., H. & S. A. Ry. Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166; *Texas Cent. Ry. Co. v. Andrews*, 67 S. W. 924.

In view of the foregoing, assignments 1, 2, and 3 are overruled.

[2] By the fourth and fifth assignments, appellant contends that, if Hansen ratified the contract of employment sued upon, such ratification was not binding upon the railway, and that no liability was, or could be, created against it by reason of such ratification because there is no evidence that the railway had any notice of such ratification before the settlement was made, and the finding of the court is against the great weight of the evidence. The railway had pleaded that, at the time Hansen made the contract, he was not in a mental condition to do so, and did not know all the facts. For instance, it was claimed that he did not then know his wife was dead.

That appellant had actual notice of the contract is not disputed. The court found that Hansen had not disaffirmed the contract but had manifested an intention to abide by its terms after knowing all the facts and before the settlement was made. In *M. P. Railway Co. v. Brazzil*, 72 Tex. 239, 10 S. W. 406, it is said: "There has been some conflict of decision whether the contract of an insane person is void or voidable, but the great weight of authority holds the contracts of such persons only voidable. *Elston v. Jasper*, 45 Tex. 413; *Wharton's Law of Contracts*, 98-118; *Pollock's Principles of Contracts*, 76-84; *Anson on Contracts*, 114; 2 *Kent, Com.* 593. Contracts only voidable are obligatory until in some manner repudiated or annulled, and may at any time be ratified and thereby the right to avoid them be lost." If, subsequent to the time of making a voidable contract, the party, then having capacity to do so, ratifies the same, the contract will then stand in all its terms as originally made, and cannot thereafter be set aside. "A ratification relates back to the inception of the transaction and makes a deed as obligatory as if

originally made by the party or by his authority," says Judge Gould in *Railway Co. v. Chandler*, 51 Tex. 416; and Mr. Justice Fly cites this case with approval in *Bremner v. Fields*, 34 S. W. 447. The railway knew at the time it settled that appellees were claiming to represent Hansen, and knew they held a contract, which, if voidable, was subject to ratification at any time by Hansen. The fourth and fifth assignments are overruled.

[3] Complaint is made that the trial court erred in permitting appellees to file a trial amendment on May 21, 1912, after the case had gone to trial, in which claim was made for \$750, or one-half of a \$1,500 settlement made by Hansen with the company out of court. Appellant claimed that it was a new and distinct cause of action, and asked to withdraw announcement and continue, which the court refused. Appellant admits in its brief, and did not then deny, that such settlement had been made. No defense whatever is shown against same other than is presented in regard to the \$3,500 judgment. The receipts evidencing this settlement were produced by appellant's attorney during the trial of the cause. "It is within the discretion of the trial court to grant the request of the plaintiff to withdraw its announcement and amend its pleadings." *G. B. Grocery Co. v. Carter*, 30 S. W. 487. The statute (*R. S.* 1824), providing that amendments shall be filed before the parties announce ready for trial, and not thereafter, is directory, and it is not error for the court, in the exercise of a sound discretion, to allow the pleading to be amended, even after the trial has commenced." *Railway Co. v. Goldberg*, 68 Tex. 687, 5 S. W. 824. In this case Judge Gaines says: "Admitting, for the sake of the argument, that the amended petition set up a new cause of action, the question of continuance was largely in the discretion of the court." 1 *Ency. Dig. Tex. Reps.* 211-213.

Whether the court has abused that discretion is a proper subject of review. But, where a continuance is asked on the ground of surprise caused by filing an amendment, it must appear that the amendment makes it necessary to produce evidence not before required. And none other was required because the fact that settlement was made was admitted. *Fisk v. Miller*, 13 Tex. 227; *Beham v. Ghio*, 75 Tex. 89, 12 S. W. 996; *Parker v. Spencer*, 61 Tex. 164. Nowhere is it made to appear that appellant had any other defense than that which was urged and which applied as well to the matter set up in the amendment. While it is the purpose of the law to safeguard the rights of litigants and give a fair trial, it is at the same time the policy of the law to terminate suits as soon as that may be done fairly and to prevent a multiplicity of suits. In *Beham v. Ghio*, 75 Tex. 88, 12 S. W. 997, Judge Gaines says: "If the court be satisfied, upon suffi-

cient grounds, that in fact there is no surprise, and that he is as ready to proceed as if the amendment had been filed a sufficient length of time to enable him to prepare his case for trial, and that the application to continue is for delay only, the continuance should be refused." *Cummings v. Rice*, 9 Tex. 530; *Parker v. Spencer*, 61 Tex. 164; *Whitehead v. Foley*, 28 Tex. 10; *Bank v. Sharpe*, 33 S. W. 677; *Tel. Co. v. Bowen*, 84 Tex. 477, 19 S. W. 554; *Johns v. Northcutt*, 49 Tex. 454. The amendment in this case did not change the cause of action, but simply enlarged upon it, and the entire matter grew out of the same transaction. *Ball v. Britton*, 58 Tex. 57; *Railway v. Pape*, 73 Tex. 503, 11 S. W. 526.

We have carefully considered all assignments and do not think any of them should be sustained.

The judgment is affirmed.

### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. EVANS. (No. 7142.)

(Court of Civil Appeals of Texas, Dallas.  
April 18, 1914. Rehearing Denied  
May 9, 1914.)

#### 1. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICTS AND FINDINGS—CONCLUSIVENESS.

Where the issues of negligence and contributory negligence were fully and fairly submitted, and it could not be said that the jury's findings in relation thereto were without substantial evidence to support them, the appellate court was not warranted in disturbing the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 2. RAILROADS (§ 326\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The issue raised by the action of the driver of a horse and buggy in attempting to cross a railroad crossing, which was torn up for repairs, at the invitation of the foreman in charge, was one of contributory negligence, and not assumption of risk.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1037-1042; Dec. Dig. § 326.\*]

#### 3. RAILROADS (§ 308\*)—ACCIDENTS AT CROSSINGS—DEFECTS IN CROSSINGS—CHANGING LOCATION OF HIGHWAY.

The failure of a railroad to construct a temporary crossing, while the regular crossing upon which plaintiff was injured was torn up for repairs, constituted negligence, if such a temporary crossing might easily have been constructed on either side of the regular crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 959-963, 966, 967; Dec. Dig. § 303.\*]

#### 4. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—QUESTIONS FOR JURY.

Whether a railroad company was guilty of negligence proximately resulting in injuries to the driver of a horse, which ran away at a crossing which was torn up for repairs, and whether the driver was guilty of contributory negligence or assumed the risk, *held*, on the evidence, questions for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 5. RAILROADS (§ 340\*)—INJURIES TO THIRD PERSONS—ACCIDENTS AT CROSSINGS—STATEMENTS OF RAILROAD FOREMAN.

A railroad foreman, in charge of repair work at a highway crossing, was the representative of the company, to give notice of its condition to travelers ignorant thereof; and the company was liable for injuries to a traveler, if due to negligence of the foreman in stating that he could cross.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1102-1104; Dec. Dig. § 340.\*]

#### 6. TRIAL (§ 296\*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CURE OF ERROR.

A charge that plaintiff could recover for injuries sustained from his horse running away at a railroad crossing, which was torn up, if defendant's foreman represented that a wagon had crossed and he could cross over, was not erroneous, because such statements were a mere expression of opinion, as they could hardly be so considered, and it was further charged that he could not recover if they were mere expressions of opinion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

#### 7. RAILROADS (§ 351\*)—ACCIDENTS AT CROSSINGS—ACTIONS FOR INJURIES—INSTRUCTIONS.

A charge permitting recovery for injuries sustained from plaintiff's horse running away at a railroad crossing, which was torn up, if plaintiff relied upon the representations of defendant's foreman that he could cross, was not defective, because not submitting knowledge of facts putting plaintiff on inquiry, particularly as it was merely an omission, which could have been supplied, if requested.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

Appeal from District Court, Collin County; F. E. Wilcox, Special Judge.

Action by B. B. Evans against the St. Louis Southwestern Railway Company of Texas for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 158 S. W. 1179.

E. B. Perkins, of Dallas, and Head, Smith, Maxey & Head, of Sherman, for appellant. L. C. Clifton, of McKinney, and Evans & Carpenter, of Greenville, for appellee.

**TALBOT, J.** This is the second appeal in this case, the first going to the Court of Civil Appeals of the Sixth District, sitting at Texarkana, and resulting in the case being reversed and remanded by that court, because the trial court had submitted a cause of action not then pleaded. After the return of the mandate, and on September 15, 1913, the appellee filed an amended petition, in which said cause of action was pleaded. The suit was instituted by appellee, Evans, to recover damages for personal injuries received by him through the negligence of appellant's servants. The defenses were a general denial, contributory negligence, and assumed

risk. A trial resulted in a verdict and judgment in favor of appellee, and the appellant appealed.

The evidence warrants the following conclusions of fact: Appellant's railroad passes through the town of Nevada, in Collin county, Tex., running practically east and west. About one-half mile east of Nevada the railroad crosses the Farmersville and Royse public county dirt road, which runs north and south. On the 18th day of March, 1910, the appellee was and had been for some time a mail carrier, and a part of his route and many of the patrons to whom he delivered mail resided on both sides of the appellant's railroad on said public dirt road. Appellee used for the purpose of carrying the mail a horse and single buggy, and was on his route delivering mail, traveling along the public road, when hurt. When he reached the point where the defendant's railroad crossed the dirt road, its agents and servants were there repairing the track and roadbed on said railroad crossing. They had removed the dirt from between the ties and around the rails on the public road crossing, making the same a skeleton track, and had removed all of the dirt from between the ties to the depth and thickness of the ties, which was six or seven inches, and the dirt had been piled out on the south side of the track, forming an embankment or ridge across the public dirt road parallel with the railroad and something near the ends of the ties. This rendered the track dangerous for travelers, using the dirt road, to pass over the crossing, which was known to appellant, but unknown to appellee. When appellee drove up to the crossing, he was informed by the agent of appellant in charge of the repair work that it would be all right to cross over the same by leading his horse; that others before him had done so that morning; and appellee, relying upon said representations, got out of his buggy and attempted to lead his horse, hitched to the buggy, over the crossing. When he led his horse onto the skeleton track, he discovered for the first time the depth of the holes between the cross-ties, and by reason of the condition of the track his horse became frightened, ran away, and seriously injured appellee. The servant of appellant knew the condition of the track and the probable danger to appellee in attempting to cross it, but neither was known to appellee at the time he attempted to pass over the crossing. The appellant was guilty of negligence in removing the dirt from every part of the crossing at the same time, and in throwing up the embankment across the same, without leaving some portion of it reasonably safe for the use of persons traveling the public dirt road, and in permitting said crossing, for the time shown, to remain in that condition, or in failing to construct a temporary way around the crossing, and in making the statements shown to appellee. The appellee under the

circumstances, was not guilty of contributory negligence, and did not assume the risk of danger in using the crossing.

It is first assigned that the court erred in refusing appellant's special charge directing the jury to return a verdict in its favor. Five propositions are urged under this assignment, which are in substance as follows: (1) That a railway company has a right to reconstruct and repair its road over a highway, and for this purpose may disturb the enjoyment and use of the highway by the public so long as such work renders such disturbance reasonably necessary; (2) that the evidence in this case failing to show any negligence upon the part of the railroad, as charged by plaintiff, the court should have instructed a verdict for the appellant; (3) that the undisputed evidence disclosed that in going over the crossing in question appellee chose a dangerous way, when a safe one was available to him, and therefore was guilty of contributory negligence, precluding a recovery; (4) that the undisputed evidence shows that appellee, with full knowledge of the condition of the crossing, or such knowledge as would put a reasonably prudent man on inquiry as to its condition, went into the same with his horse and buggy, and was negligent in using it after knowing its condition, or negligent in using it without knowing its condition, and therefore is not entitled to recover; (5) that plaintiff, when he attempted to use the crossing, knew or should have known that the use of it was attended with danger; that it was more unsafe for him to use the same than to go farther and use another crossing, or wait and use the crossing where the accident occurred after it was finished; and hence he assumed the risk of the increased danger, and cannot recover for the injuries caused thereby.

[1] Our conclusions of fact, which we think are supported by the evidence, and which, under the court's charge, were necessarily the conclusions of the jury, determine the propositions of no actionable negligence on the part of the appellant and contributory negligence on the part of the appellee, barring a recovery against appellant. The jury was distinctly charged that if they believed from the evidence that the appellant was not guilty of negligence in the statements of its foreman, if any, made on the occasion when appellee was attempting to cross the railroad track, or that appellee was not induced to attempt to pass over said track by reason of said statements, if any, which were mere expressions of the foreman's opinion, and so understood to be by appellee at the time, then in either such event to find for defendant. They were also instructed that if, in failing to leave some portion of its track intact and accessible to persons traveling the dirt road, the appellant was not guilty of negligence, or was not guilty of negligence in failing to provide a temporary crossing at the place in

question, to find for appellant upon both such issues. Upon the question of contributory negligence they were instructed that if the appellee failed to look at the condition of the crossing, and that he could by looking have ascertained the condition of the same before going on it, and that in failing to look he was guilty of negligence which contributed to his injuries, or that if appellee knew, or by the exercise of ordinary care could have known, of the condition of the crossing before going on it, and that in undertaking to pass over same with such knowledge, or without informing himself as to such condition, or if there was another way, which appellee could have taken, so as to have passed over appellant's track in safety, and that in not taking such other way appellee was guilty of contributory negligence, then in either such event to find for defendant. Thus, it appears that the issues of negligence and contributory negligence were fully and fairly submitted, and, not being prepared to say that the jury's findings in relation thereto are without substantial evidence to support them, we would not be warranted in disturbing their verdict.

[2] In regard to appellant's fifth proposition stated above, it is sufficient to say that, if in any event the issue of assumed risk could arise in a case of this character, it did not, in our opinion, arise in this instance. The issue made by the evidence was one of contributory negligence on the part of appellee, and not one of assumed risk. But, if we should be mistaken in this, then the answer to appellant's contention upon this phase of the case is that the evidence did not conclusively establish the facts necessary to charge appellee with the assumption of the risk incident to his attempt to pass over the crossing, and the peremptory instruction, so far as such question is concerned, was properly refused.

[3] The proposition to the effect that the appellant, under our statute, had the right to reconstruct or repair its railroad over the public dirt road in question, and for that purpose could disturb the enjoyment and use of all of said road by the public so long as such work made such disturbance reasonably necessary, should not be sustained. In *Texas Midland Railroad v. Johnson*, 20 Tex. Civ. App. 572, 50 S. W. 1044, this court held that the statutory duty imposed upon railway companies to restore public highways crossed by their railroad tracks to such state as not to unnecessarily impair their usefulness is not postponed until the completion of the crossing, and in so holding said: "We think a liberal and fair construction of that statute would require the railway company not to wholly prevent passage of travelers along the way during the time of the construction of the railroad, when their passage may practically be provided for during the time the work is going on. If a temporary turn of the highway around the work of construction may practically be provided,

then that would be a duty owed by the company to the public." After quoting the foregoing excerpt from the *Case of Railway Co. v. Johnson*, supra, the Court of Civil Appeals for the Sixth District, on the former appeal of this case, and on practically the same facts as now appear in the record, said: "There was testimony from which the jury might have found that appellant could easily have constructed a crossing over its track on either side of the traveled part of the road, for the use of the public, until it restored said traveled part to its former state. If it might have constructed such a crossing, and did not, and so violated a duty it owed to appellee as one of the general public, it cannot be said there was no evidence warranting a finding by the jury that it was guilty of negligence."

[4] We think these conclusions of the Court of Civil Appeals of the Sixth District, with reference to both the testimony and the law of the case, correct, and shall adhere to them. Clearly, the evidence offered by appellee, or all the evidence taken as a whole, was not so lacking in probative force as warranted the trial court in holding, as a matter of law, either that appellant was not guilty of actionable negligence resulting proximately in the injury of appellee, or that appellee was guilty of contributory negligence, or has assumed the risk of injury in attempting to pass over the crossing at the time, place, and under the circumstances as shown, and those questions were properly submitted to the jury for determination. The cases cited by appellant in support of its several contentions were decided upon facts dissimilar to those in the case at bar, as we understand them, and do not control its decision.

This disposes of appellant's second, third, fourth, fifth, and sixth assignments of error adversely to its contention, and they need not be stated and discussed in detail.

[5-7] The seventh assignment complains of that paragraph of the court's charge wherein the jury was instructed that if the appellee, while approaching appellant's railroad track in a buggy drawn by a horse, for the purpose of crossing said track, was informed by the foreman of the crew then and there engaged in ballasting or fixing said track that the track or crossing was a little rough, but that a wagon had passed over it a short time before that, and that if he (appellee) would get out of his buggy and lead his horse he could cross over, and that said statements, if made, were made as representations of fact, with the intention that the appellee should act on same, and that appellee relied upon said statements and was induced to act thereby, etc., and that if said foreman in making said statements was under all the circumstances of the case guilty of negligence, and such negligence was the proximate cause of appellee's injury, to find for appellee. The propositions contended for

under this assignment are: (1) "The evidence shows that the foreman, Odom, was not authorized to make the statement attributed to him, the same was not within the implied scope of his authority, and negligence as to appellant cannot be predicated on it." (2) "Negligence cannot be predicated on the expression of an opinion about a matter that may be understood as well by one rational mind as another." (3) "The charge is wanting in an essential ingredient, in not submitting to the jury knowledge by plaintiff of facts that would put a prudent man on inquiry as to the condition of the crossing and would have caused him to find out the condition, or that the plaintiff might have known of the condition."

Neither of these propositions should, in our opinion, be sustained. With knowledge that travelers on the public dirt road would probably appear and undertake to pass over the crossing while its track was being reconstructed or repaired, appellant placed its foreman in exclusive charge and control of the work. He thereby became the representative of the company whose duty it was to give notice of the condition of the crossing to such travelers as were ignorant of its dangerous condition and desired to use it, and in the discharge of this duty his acts and statements were such acts and statements, if negligently made to appellee's hurt, as rendered the appellant liable for damages sustained thereby. The statement in question can hardly be considered as the expression of the foreman's opinion. He was in a position to know the condition of the crossing, and his statement in reference thereto clearly purported to be the statement of facts within his knowledge, and was calculated to induce one desiring to use the crossing to rely thereon. The charge complained of made the right of appellee to recover on this issue depend upon a finding that the statement was a representation of fact, and made with the intention that appellee should act on the same. Besides, in another paragraph of the court's charge, the jury were told that if they believed the statements in question were mere expressions of opinion, and so understood by appellee, to return a verdict in favor of appellant on the issue.

As to the third proposition, it is sufficient to say that we do not believe the charge was defective in the particular claimed. If it was, then it appears to be one of omission, which should have been supplied by a special charge requested by appellant.

The other assignments of error have been disposed of by what we have already said or disclose no reversible error. The evidence supports the verdict, the issues were fairly submitted to the jury, and, finding no error in the record requiring a reversal of the case, the judgment of the court below is affirmed.

# WILSON v. WARE et al. (No. 5,254.)

(Court of Civil Appeals of Texas. San Antonio. April 15, 1914. Rehearing Denied May 13, 1914.)

## 1. PAYMENT (§ 42\*)—PAYMENT—APPROPRIATION OF PAYMENTS.

If there was no appropriation of a payment made upon a promissory note, it would be applied to the interest.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 121; Dec. Dig. § 42.\*]

## 2. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTIONAL AMOUNT.

Where the principal and interest of the note sued on, when added to the 10 per cent. attorney's fee provided for in the note, amounted to \$201.61, a justice's court did not have jurisdiction in the action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 157-172; Dec. Dig. § 44.\*]

## 3. JUSTICES OF THE PEACE (§ 42\*)—JURISDICTIONAL AMOUNT.

The fact that the amount in controversy was only \$1.61 over \$200, the jurisdictional amount of a justice court, cannot be considered in order to give it jurisdiction of the action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 148; Dec. Dig. § 42.\*]

Appeal from Uvalde County Court; T. M. Milam, Judge.

Action by John T. Wilson against O. L. Ware and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. L. McCammon, of Sabinal, for appellant. H. C. King, of Sabinal, and L. Old and L. E. Lanier, both of Uvalde, for appellees.

FLY, C. J. This is a suit for the balance due on a promissory note, with interest and attorney's fees, instituted by appellant against O. L. Ware and J. W. Ware, appellees, in the justice's court of precinct No. 2, Uvalde county. Appellant sued for \$198, including attorney's fees, and the cause was dismissed on the ground that the attorney's fees and the balance of the principal of the note amounted to more than \$200. The cause was appealed to the county court, where the appeal was dismissed for want of jurisdiction.

[1] The note was executed on June 7, 1907, and was for \$227, due in one year, or before, and provided for 8 per cent. interest per annum from date, and for 10 per cent. attorney's fees on principal and interest in case the note was placed in the hands of an attorney for collection, or suit was brought thereon. On November 10, 1907, all of the interest to that date and \$50 on the principal had been paid, leaving due the sum of \$177. On May 1, 1908, there was a payment of \$2.45. There was no appropriation of the payment, and under those conditions the payment would be applied to the interest. *Hampton v. Dean*, 4 Tex. 455; *Hearn v. Cuthbert*, 10 Tex. 216; *Tooke v. Bonds*, 29 Tex. 419.

[2] When the payment was made, on November 10, 1907, the principal was reduced to \$177, and there was due on the note on December 13, 1912, principal, \$177, and \$69.15, interest, amounting in the aggregate to \$246.15. Ten per cent. on that sum for attorney's fees would amount to \$24.61, which, added to the principal sum of \$177, would be \$201.61. That sum was not within the jurisdiction of the justice's court.

In the case of *Burke v. Adoue*, 3 Tex. Civ. App. 494, 22 S. W. 824, 23 S. W. 91, it was held: "It may be true that the claim for the attorney fee was so distinct from the debt that the plaintiffs might have wholly abandoned it, and have thus obtained a standing in court upon a cause of action which the court had power to adjudicate. But this was not done. The effort was made to abandon a part of that demand and recover the remainder. Upon principle, it would seem that this was not permissible. The cause of action upon the note was entire, and was a liquidated demand, as was the stipulated fee. What court had the power to hear and adjudicate it was determined by law. The right to have the cause passed upon in that forum belonged to defendants, as well as to the plaintiffs, and the arbitrary action of neither could deprive the other of its enjoyment." That decision was approved by the Supreme Court in *Railway v. Canyon Coal Company*, 102 Tex. 478, 119 S. W. 294.

[3] The smallness of the excess cannot be taken into consideration. As said by the Supreme Court in *Clark v. Brown*, 48 Tex. 212: "This being a question of jurisdiction determinable by a particular amount in dollars and cents, to wit, \$200, the smallness of the deficiency in reaching that amount is immaterial, if it can certainly be ascertained by a proper calculation that an appreciable deficiency does actually exist." In that case the amount sued for in the justice's court amounted to \$189.80.

The judgment is affirmed.

ST. LOUIS, S. F. & T. RY. CO. et al. v. GILLIAM & JACKSON. (No. 601.)

(Court of Civil Appeals of Texas. Amarillo. April 11, 1914. Rehearing Denied May 9, 1914.)

1. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—PRESUMPTIONS.

Where the shipper claimed that a verbal contract, instead of the written one, limiting the carrier's liability, governed, and there was sufficient evidence to prove the terms of the verbal contract and to sustain the shipper's claim that there was no consideration for the written contract, a verdict in the shipper's favor raises a presumption that the jury found that the shipment was made under the verbal contract, though the question which contract governed was not submitted, and hence the

failure of the charge to submit issues presented by the written contract was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

2. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR.

Where the defendant carrier did not request any instruction submitting the issue whether a written contract limiting its liability was based on a valid consideration, and a verdict for plaintiff raised a presumption that it was without consideration, and that the rights of the parties were fixed by a verbal contract, a statement by the trial court that some of the provisions of the written contract were without consideration, while improper, being on the weight of the evidence, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

3. CARRIERS (§ 62\*)—VALIDITY OF ORAL CONTRACT.

Where the agent of a carrier verbally contracted with a shipper, the carrier is liable on such contract, though a written bill of lading was subsequently drawn up and accepted, unless the shipper at the time of making the verbal contract knew he would be required to sign the written contract, and hence, where a shipper relied on a verbal contract, evidence of its terms is admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 195-206½; Dec. Dig. § 62.\*]

4. EVIDENCE (§ 491\*)—OPINION EVIDENCE—WHAT CONSTITUTES.

In an action for delay of a shipment of cattle, testimony by a witness that he thought the run was a "very slow run" is not objectionable as opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2269; Dec. Dig. § 491.\*]

Appeal from District Court, Hardeman County; J. A. Nabers, Judge.

Action by Gilliam & Jackson against the St. Louis, San Francisco & Texas Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Fires, Decker & Clarke, of Quanah, for appellants. J. C. Marshall and M. M. Hankins, both of Quanah, for appellees.

HALL, J. The appellee instituted this suit in the district court of Hardeman county, Tex., against appellants for damages to a shipment of cattle made by appellee over appellants' line of road about March 23, 1912, from Quanah, Tex., to Kansas City, Mo. By original petition, appellees sought to recover on account of the negligence of appellant in delaying the cattle and by reason of rough and careless handling, causing shrinkage, and alleged a decline in the market. Appellant filed a general denial and specially pleaded the fifth paragraph of the written contract of shipment, which paragraph provides that the live stock in said shipment were not to be transported or delivered within any specified time nor in season for any particular market. This is followed by the following: "And herein plaintiff pleads each and every paragraph, clause and provision of said contract, attaches the said contract hereto, and makes the same a part of this answer." The ap-



pellant further specially set up in defense the regulations of the Interstate Commerce Commission forbidding carriers to confine cattle in cars more than 28 consecutive hours and alleged that the plaintiff in writing released the "36-hour rule" and requested that said cattle be unloaded, fed, and watered, which was done. The contention of appellee is that the shipment was made under an oral contract, and by supplemental petition set up the same, and alleged that there was no consideration for the written contract plead by appellant. The case was tried upon special issues submitted to the jury, and resulted in a verdict and judgment for appellees in the sum of \$873.69.

[1] The appellant's first assignment of error urges the proposition that because the thirteenth paragraph of the written contract of shipment provided that, in case of delay for any cause for which the company may be liable, payment should be made on the basis of the amount which the shipper is caused to expend on account of delay for feed, water, and care of live stock, the court erred in submitting to the jury any other measure of damages than that provided for in said paragraph. As said above, the appellee pleaded a want of consideration for the written contract, but alleged that the shipment was made under a verbal agreement entered into between appellees and the agent of appellants at Quanah. The court nowhere submitted to the jury the issue as to which contract controlled the shipment, nor was the question of the want of consideration submitted. We must presume in this state of the record that the jury found the shipment to have been made under the verbal contract and that there was no consideration for the written contract. There is evidence in the record sufficient to prove the terms of the verbal contract alleged by appellees and to sustain the plea of want of consideration as alleged. *Devine v. U. S. Mortgage Co.*, 48 S. W. 585; *Holly v. Simmons*, 99 Tex. 230, 89 S. W. 776; *Breneman v. Mayer*, 24 Tex. Civ. App. 164, 58 S. W. 725. Such being the case, the error of the court, if any, in failing to charge upon any issue which might have been injected into the cause by the terms of the written contract, becomes harmless.

[2] The second assignment of error complains of the action of the court in stating in the hearing of the jury that some of the provisions of the written contract introduced by appellant were without consideration. By force of the presumption mentioned above, we must conclude that the written contract was without consideration. This statement of the court, under ordinary circumstances, would require a reversal of the judgment. It has been frequently held that any remark of the court with reference to the evidence which tends to give his opinion, either as to the weight or effect of the evidence, falls within the statute prohibiting the trial court

in the charge from discussing the weight of the evidence. *Howorth v. Carter*, 23 Tex. Civ. App. 469, 56 S. W. 539; *Texas & Louisiana Lumber Company v. Rose*, 103 S. W. 444; *Lewter v. Lindley*, 89 S. W. 784. The remark of the court having been made with reference to an issue which, through the failure of appellant to have submitted to the jury, we are forced to presume was found in accordance with the statement made by the court, we must hold the error to be harmless. Having failed to have the issue submitted to the jury, we think appellant has waived its right to complain, since the verity of the court's statement is presumed.

[3] The third assignment of error is that the court erred in permitting the testimony of the plaintiff Jackson to the effect that the defendants' agent at Quanah promised to get his cattle into Kansas City in time for the Monday market. The objection urged to the testimony was that the evidence was irrelevant, immaterial, and, as shown by the written contract offered in evidence, the agent had no authority to make such statement, and it was not shown that he did make the statement by any authority of the defendants. The suit being based upon the oral contract, this testimony was admissible to prove the plaintiff's allegations. Where the agent of a carrier verbally contracts with the shipper, the carrier may be held liable, notwithstanding the fact that a written bill of lading is subsequently drawn up and accepted by the shipper, and the verbal contract will be binding upon the carrier, in the absence of anything showing that at the time the verbal contract was entered into the shipper knew that he would be required to sign the written contract and that he was familiar with the contents of the writing. *Gulf, etc., Ry. Co. v. Funk*, 42 Tex. Civ. App. 490, 92 S. W. 1032; *Atchison, Topeka & Santa Fé Ry. Co. v. Bryan*, 37 S. W. 234; *Gulf, etc., Ry. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *M., K. & T. Ry. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073; *G., C. & S. F. Ry. v. McCord*, 81 S. W. 1032.

The fourth and fifth assignments are without merit. We think the charge of the court upon the question of the measure of damages was sufficient, and not subject to the criticism urged by appellants. The court submitted the following special issues to the jury:

"(4) If in answer to the preceding questions you say the defendant was guilty of negligence in either of the respects inquired about, then state whether or not the market value of said cattle was thereby decreased on the Kansas City market on the 26th day of March, 1912, and to what extent? That is to say, what would be the difference between their market value at that time and place, delivered in the condition they were, and what it would have been, had they been handled with ordinary care, if you find they were not, and delivered within a reasonable

time, if you find they were not; and in this connection you are instructed that you may take into consideration the appearance of the cattle and their loss of flesh, if any, but not the difference in the market price of such cattle on said market, between what it was on the 25th of March, 1912, and what it was on the 26th of March, 1912, if there was any, as I shall reserve that issue for questions hereinafter asked."

"(6) Was the market value of said cattle less on the 26th of March, 1912, than it was on the 25th of March, 1912, and, if it was, then say what was the loss to plaintiffs, if any, because of such depreciation in the Kansas City market, if you find there was such."

The answers of the jury to these issues, and to further special issues requested by defendants, show clearly that they did not assess double damages.

[4] The sixth assignment of error insists that the court erred in permitting the witness Wall to answer the following question, because his answer called for and gave an opinion upon a mixed question of law and fact, and upon a matter which the jury was impeded to decide: "Q. In the run made with these cattle, was it an ordinary run, or was it slow or fast? A. I called it a very slow run." If the question be held to be objectionable, the answer was not. *G., H. & S. A. Ry. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42. A witness may be allowed, although he is not an expert, to testify that a train was running fast or slow. *G., H. & S. A. Ry. Co. v. Huebner*, 42 S. W. 1021; *G., H. & S. A. Ry. Co. v. Sullivan*, 42 S. W. 568; *G., C. & S. F. Ry. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614.

We find no error in the record requiring a reversal of the judgment, and it is therefore affirmed.

#### DALLAS CONSOL. ELECTRIC ST. RY. CO. v. STONE. (No. 7,138.)

(Court of Civil Appeals of Texas, Dallas.  
April 18, 1914. Rehearing Denied  
May 9, 1914.)

#### 1. CARRIERS (§ 320\*)—INJURIES TO PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Whether a street railway company, maintaining exit doors on its cars, was negligent in permitting the door of a car to remain open while a passenger on a crowded car attempted to reach the vestibule and notify the conductor of her desire to alight, causing her to be thrown from the car running on a curve, held under the evidence for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

#### 2. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge, "This is a suit by [plaintiff against defendant] to recover damages alleged in plaintiff's petition to have resulted \* \* \* by reason of being thrown from one of defendant's street cars, the fall alleged to have been

caused by the negligence of the conductor," merely calls attention in a brief way to plaintiff's cause of action and is not on the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 3. TRIAL (§ 296\*)—INSTRUCTIONS—ISSUES.

Where the court covered the defense in its charge, a charge calling attention in a brief way to the cause of action, without referring to the defense, was not prejudicial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

#### 4. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a street car passenger thrown from the car running on a curve, the evidence showed that to notify the conductor to stop it was necessary for the passenger to make her way through the crowd to near the doorway leading from the car into the vestibule, that the exit door was open, and, if the door had been closed, the accident would not have occurred, and that the conductor knew of the passenger's position, a charge which enumerated the facts and stated that, if the conductor was negligent in permitting the door to be open, a finding for the passenger was authorized properly submitted the issue of the negligence of the conductor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

#### 5. APPEAL AND ERROR (§ 1063\*)—REVIEW—INSTRUCTIONS—OBJECTIONS.

Where the facts pleaded and proved, on which plaintiff relied for a recovery, were grouped in a charge submitting the issues, defendant could not complain because it was not necessary for plaintiff to prove all the facts pleaded to obtain a verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1063.\*]

#### 6. CARRIERS (§ 317\*)—INJURIES TO STREET CAR PASSENGERS—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a street car passenger falling from the car running on a curve, the conductor contradicted the testimony of plaintiff as to the crowded condition of the car, and stated that plaintiff deliberately walked to the car door to step off and then fell, the testimony of plaintiff that she never at any time got off the car at the place of the accident was admissible to show that she did not attempt to alight at the time of the accident and to show that the conductor was testifying about some other person.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Lola Bell Stone against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thompson, Knight, Baker & Harris, of Dallas, for appellant. Wood & Wood, of Dallas, for appellee.

RAINEY, O. J. Lola Bell Stone, while traveling as a passenger on one of appellant's street cars when turning a curve, was thrown

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

through an open door to the street and injured. This suit was instituted to recover damages for such injuries. She recovered judgment, and the street car company appeals.

The evidence adduced warrants the following conclusions of fact, as stated by appellate, viz.:

"First. That, when plaintiff entered the car, all the seats were occupied, and the standing room in the car was so crowded with standing passengers that plaintiff was compelled to stand at a place where she could get nothing to hold to or sustain herself.

"Second. That plaintiff, while standing a few feet from the rear door of the car, without any brace or support, desiring to get off at the next stopping place, could not reach the signal on the side of the car, by reason of the crowded condition of the car, and, in order to notify the conductor to stop the car at the next stopping place, she made her way through the standing crowd, a few feet to the edge of the doorway leading out of the body of the car into the vestibule, and told the conductor, who saw her there and who was standing in the vestibule, that she desired to get off at next stop.

"Third. That the vestibule of the car is one that closes, and that it has two doors, an entrance door and exit door, both of which could be closed, but both of them were open at the time the plaintiff stationed herself in the doorway of the open door of the body of the car to inform the conductor that she desired to get off at the next stop.

"Fourth. That the car was running at least at an ordinary speed, and, while the plaintiff was in the said doorway of the body of the car, the car entered a sharp curve, and, by reason of the swing of the car, she was thrown out into the street through the open exit door and injured.

"Fifth. That, if the exit door of the vestibule had been closed, the accident would not have occurred.

"Sixth. That the conductor knew of plaintiff's position in the doorway, caused by the crowded condition of the car, and knew that the car was approaching a curve, and knew that the exit door, within a few feet of plaintiff, was open, and that she might fall through it when the car should reach the curve.

"Seventh. That the car was then in the middle of the block and running, and no necessity for the door to be open.

"Eighth. That plaintiff was not at fault in occupying the exposed position of which the conductor was aware."

Appellant complains of the refusal of the requested charge, which reads: "You are instructed that the plaintiff has failed to establish any negligence against the defendant, alleged by them to exist, and you are therefore instructed to return your verdict for the defendant."

The contention is that the evidence fails

to establish any actionable negligence on the part of defendant; therefore it was the duty of the court to instruct the jury to return a verdict in its favor.

[1] We do not concur in the contention of appellant. The negligence relied on by appellee is the leaving of the car door open under the circumstances. When appellee took passage, all the seats were taken, and she was compelled to stand; the car being crowded. When near the point of her destination, not being able to reach a signal button to indicate her intention of leaving the car, she crowded back to the rear of the car to inform the conductor of her desire to alight, taking her position near the door in readiness to alight, the car running rapidly on a curve, and she was thrown through the open door of the car to the street. Had the door been shut, it is clear that appellee would not have been thrown from the car and injured. While the appellant had the right to keep the car door open, we think it was a question for the jury to say under the evidence whether the permitting the door to remain open was the exercise of that degree of care which relieved it from negligence. *Railway v. Morris*, 60 S. W. 813; *Railway Co. v. Williams*, 20 Tex. Civ. App. 591, 50 S. W. 737; *Railway Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Elliott v. Railway Co.*, 68 Wash. 129, 122 Pac. 614, 39 L. R. A. (N. S.) 608; *Hanson v. Railway Co.*, 64 N. J. Law, 686, 46 Atl. 718.

In the case of *Railway Co. v. Glover*, supra, it was said: "There may be no negligence whatever in failing to have gates [on a street car]. \* \* \* But, when a company has provided gates, due diligence might require the company to use them, and failure to use them might be negligence in the given instance. Whether it would be or not is a question for the jury."

Again it is said in the case of *Elliott v. Railway Co.*, supra, which was an action by a passenger on a street car, one of the grounds of negligence being that the gate at the rear end of the car was open, and he fell out and was injured. There was a city ordinance requiring the gates to be kept closed when the car was in motion. The court said: "This ordinance, the fact that the accident occurred, and the fact that plaintiff did not open the gate are enough to sustain the finding of negligence. Such ordinances (and it may be questioned whether they do more than affirm a general rule)" were "to protect" passengers.

Again it is said in *Hanson v. Railway Co.*, supra: "If common carriers are to be allowed to cram their cars with passengers, to their own profit and to the discomfort of the public, they should be held all the more to a strict and active responsibility to use due care to secure safe entrances and exits. Otherwise the obligation of a plain duty will be weakened by \* \* \* their own creation."

[2, 3] Appellant's fourth assignment of error is: "The court erred in the following paragraph of his charge to the jury: 'This is a suit by Lola Bell Stone, by her father, G. W. Stone, as her next best friend, against the Dallas Consolidated Electric Street Railway Company, to recover damages, alleged in plaintiff's petition to have resulted to Lola Bell Stone, by reason of being thrown from one of defendant's street cars; the fall alleged to have been caused by the negligence of the conductor in charge of the car.'" The criticism of this charge is: That it set out the claims and allegations of plaintiff's pleading, and those of defendant are ignored, and that it is upon the weight of the evidence and calculated to impress the jury with the importance of plaintiff's case. We consider the criticism to this part of the charge without merit. The charge does not pretend to set out the pleadings in full, nor does it emphasize any part thereof, but merely calls attention in a short way to plaintiff's cause of action. It is not upon the weight of the evidence, nor could defendant have possibly been prejudiced by the omission to recite its pleas, as its defense was contributory negligence. The court fully covered that defense in its charge.

[4] The appellant complains of the following paragraph of the charge, viz.: "You are instructed that if you believe from the evidence that on or about the 24th day of February, A. D. 1912, the plaintiff, Lola Bell Stone, boarded one of the defendant's cars, known as an Ervay car, at or near the intersection of Ervay and Commerce streets in the city of Dallas, to go to Hughes Bros.' Manufacturing Company on South Ervay street, and further believe that when she boarded said car it was filled with passengers and they were crowded, and that she was unable to get a seat, and she was compelled to stand, and passengers were standing on either side of her, so that she was unable to catch hold of either side of the car, or brace herself against anything, and further believe that the conductor of said car was in the vestibule of the rear end of the car, and further believe that the car door in the rear end of the body of the car was open, and that the exit door of the vestibule was open, and that the conductor knew both doors were open, or by the use of ordinary care would have known they were open, and further believe that, when the car was nearing the street or place at which Lola Bell Stone desired to get off, she could not reach the side of the car so as to ring the signal, because of many passengers standing in the car, and that she stepped back a short distance and told the conductor she desired to get off at the next stop, and just at that time, or a few seconds thereafter, the car turned on a curve, and that Lola Bell Stone was thereby thrown out of the car onto the ground, and thereby

injured as alleged in plaintiff's petition, and further believe that the conductor was guilty of negligence in permitting the doors to be open under the circumstances, you should find for the plaintiff, unless you find for the defendant under some other instruction given you by the court." The main contention is: "Where the only issue of negligence (if any) presented by the pleading and proof was the act of the defendant's conductor in leaving the doors of its car open, the plaintiff was not entitled to recover in any event unless the jury had found that the leaving of the doors open was negligence, and was the proximate cause of the injuries sustained, and the court therefore erred in permitting a recovery in behalf of the plaintiff upon the finding that other immaterial and irrelevant facts and conditions caused and brought about the accident and injuries of which plaintiff complains." We think the charge correct. The leaving of the door of the car open was not per se negligence. Whether or not it was negligence depended upon the proof of certain facts in this instance, such as the court enumerated in its charge. It particularly charges the jury that if "the conductor was guilty of negligence in permitting the door to be open under the circumstances," to find for plaintiff. *Compress Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032.

[5] It groups the facts pleaded and proved upon which plaintiff relied for a recovery, and, if any of them were not necessary, it placed a greater burden upon plaintiff than was required, and defendant has no cause of complaint.

[6] The sixth assignment of error is: "The court erred in permitting the plaintiff, Lola Bell Stone, to testify over defendant's objection, timely interposed, that she never at any time got off the car at the place where she fell on the occasion of the accident of which she complains."

The evidence here complained of was admissible to show that plaintiff did not get off or attempt to alight from the car at the place on purpose. This testimony was introduced after the conductor had testified, contradicting appellee as to the car being crowded, to there being seats for all passengers, to appellee having deliberately walked to the car door, and to stepping off on the ground and then falling. The evidence was also admissible as a circumstance to show that the conductor had in mind a different occasion, and that he was testifying about some lady other than appellee.

The assignments relating to the argument of appellee's counsel to the jury present no reversible error. They are of such a nature that the effect on the jury would not have produced a verdict other than the one returned.

The judgment is affirmed.

RYMAN et al. v. PETRUKA. (No. 5274.)

(Court of Civil Appeals of Texas. San Antonio.  
April 29, 1914.)

**1. LIMITATION OF ACTIONS (§ 99\*)—SUIT TO SET ASIDE—FRAUD.**

Where a grantee in a deed, duly acknowledged, delivered, and recorded, went into possession and dealt with the property as his own, the right of the grantors to sue to set aside the deed on the ground of fraud was barred by limitations, where the grantors took no action during their lifetime, though they lived more than five years, in the absence of anything to show that they did not know of the fraud at the time of the execution of the deed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 477-479; Dec. Dig. § 99.\*]

**2. ACKNOWLEDGMENT (§ 62\*)—IMPEACHMENT.**

Where a deed executed by husband and wife was acknowledged in proper form, and the notary who took the wife's acknowledgment testified that he acquainted her with the contents of the deed, evidence that the wife, who was Polish, could not talk much English, and that the notary could not talk Polish, did not justify the setting aside of the deed.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. § 62.\*]

**3. LIMITATION OF ACTIONS (§ 103\*)—EXISTENCE OF TRUST—REPUDIATION.**

Where parents holding property in trust as common family property of all the children, conveyed it to a son, and the deed was duly acknowledged, delivered, and recorded, and the son entered into possession and dealt with the property as his own, a suit by the other children to set aside the deed brought over nine years after the execution and recording of the deed, and the taking of possession by the son, was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.\*]

**4. LIMITATION OF ACTIONS (§ 73\*)—DISABILITIES—COVERTURE.**

Where female children were married and of legal age when their brother obtained a deed from the parents and took possession and set up an adverse claim to common family property, limitations ran against the female children by the removal of disability of coverture.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.\*]

Appeal from District Court, Matagorda County; Sam'l J. Styles, Judge.

Action by Annie Ryman and others against Thomas Petruka. From a judgment for defendant, plaintiffs appeal. Affirmed.

Gainess & Corbett and W. D. Wilson, all of Bay City, for appellants. W. S. Holman, of Bay City, and John T. Duncan, of La Grange, for appellee.

CARL J. Appellants, Annie Ryman, Mary Gola, Lizzie Sherrer, Kate Lecompte, and Rosa Gastmeyer, joined by their husbands, sued their brother, Thomas Petruka, appellee, for an interest in about 2,000 acres of land in Matagorda county and about 1,000 head of cattle and their increase. The plaintiffs and defendant below are the children of Joseph and Caroline Petruka, deceased. On

May 23, 1902, Joseph and Caroline Petruka executed a deed, wherein and whereby they conveyed all of their land to appellee, and appellants charge that this deed was obtained by fraud of appellee, and that it was without consideration, and that one of the expressed considerations, viz., the caring for his parents, was unperformed, to the extent that his mother died of neglect. It was further charged that Caroline Petruka did not understand English, and that the notary who drew the deed and took the acknowledgment did not understand the Polish language; that she could not and did not write her name, and that she was under the impression that the deed conveyed only the 200-acre homestead. And it was alleged that there had never been any administration upon the estates of Joseph and Caroline Petruka, who, it is claimed, died intestate.

Appellee answered by general demurrer, general denial, and by special pleadings that he had actually earned the property conveyed to him, and that what interest his father and mother had was conveyed in consideration of their appreciation of his care, support, and attention to them. Appellee further pleaded that his father and mother left a will in which they gave him all their property, and bequeathed to appellants each the sum of \$400, and alleged and exhibited the receipts of all of them, except Annie Ryman, and shows that, while the will has not been admitted to probate, it has been filed, but was not probated, because the county judge was disqualified from acting, having been attorney for appellee. He also pleaded three, four, five and ten years' limitation as to the land and the right to sue therefor. It is alleged that the receipts executed were in full of the interest in the estate of Joseph and Caroline Petruka.

In answer to the pleas of limitation, appellants pleaded coverture, and that the land and cattle were earned by appellants in connection with Joseph and Caroline Petruka, their parents, but that the title was taken in their parents' name, and held in trust for all of them; that the will was witnessed by Julia Petruka, appellee's wife, who was disqualified to act, and that the will is not properly executed; and that neither Joseph nor Caroline Petruka understood the deed executed, and that same was procured by fraud of appellee. It was further alleged that the receipts were not intended to be in full settlement, or were other than receipts to the extent of \$400.

Appellee replied in a supplemental answer, excepting generally, and specially that the right to repudiate said deed was solely in Joseph and Caroline Petruka, and that more than four years had elapsed between the time same was executed and recorded and the death of the parents, who alone had the right to repudiate same. He also pleaded

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the will was a family settlement, and disposed of their property, and that they had given their children all they intended they should have, and that the land and personal property were given to appellee during their lifetime and at about the date of the execution of the deed, and turned over to him the property in 1902 at the date of the deed.

The court instructed the jury to find for appellee, which was done, and judgment thereupon was entered for the defendant at the conclusion of the trial.

[1] The suit was filed September, 1911, and the deed executed by Joseph and Caroline Petruka to Thomas Petruka was dated May 21, 1902, and was filed for record May 23, 1902, in the office of the county clerk of Matagorda county. Caroline Petruka died some time in September, 1907, and Joseph Petruka died May 23, 1909. So it will be seen that Mrs. Petruka lived over five years after the execution and recording of said deed, and Joseph Petruka lived seven years; and there is no evidence that either of them ever expressed any dissatisfaction with the deed or took any steps to set the same aside. During all those years that deed was of record where every one might read it; and on the same day the deed was executed, the will was made. The undisputed evidence shows that, from and after the deed and will were executed, the appellee took and held possession of all of the property, both real and personal, and dealt with it as his own. The deed was of record, which was constructive notice to every one of its contents, and the testimony of appellants shows that they actually knew, or ought to have known, from the date of the deed and will that Tom Petruka "got everything," as they put it. All of them, except Mrs. Ryman, signed receipts in full for the \$400 bequeathed to them in the will, and Mrs. Ryman thought she ought to receive more. The petition does not charge that Joseph and Caroline Petruka did not know of the deed actually made prior to their death, nor is it sought to excuse them from failing to bring a suit or to take steps to rectify the alleged wrong before they died. The fraud, if any was practiced, was against them, and not against the children. It is not alleged that they did not know the contents of the deed and will before they died, nor that they did not know from the very day these instruments were executed up to the time they died that Tom Petruka had gone into possession and was actually claiming both land and personal property.

The deed introduced shows ample consideration to support it, and shows that it is an executed contract. That deed reads, in part, as follows: "The State of Texas, County of Matagorda. Know all men by these presents, that we, Joseph Petrucio and his wife, Catherine Petrucio, of said county and state, for and in consideration of the sum of

two thousand dollars to us in hand paid by Thomas Petrucio, and the further consideration of the fact that the said Thomas Petrucio, our said son, has remained with and taken care of us in our old age and managed and taken care of our property for us without any compensation, we have granted," etc.

Suppose that Joseph and Caroline Petruka could have set this deed aside as soon as it was placed upon record for them, the law charges them with notice of its contents, if they did not actually know of the same; they did not do so, and limitation would run against them from that date. And both of them were barred from maintaining a suit even at the time Mrs. Petruka died, unless excused by pleading and proof that they did not discover the fraud, or could not have done so by the exercise of ordinary care.

[2] The deed, as written and acknowledged, is in proper form, and the notary who took Mrs. Petruka's acknowledgment says he acquainted her with the contents of the deed. And the evidence offered to set that deed aside is totally insufficient. Summed up, it is merely to the effect that she could not talk much English, and that the notary could not talk the Polish language. Deeds executed with all the formality of the law will not be set aside, except upon clear and convincing evidence.

[3] If it be true that, as contended, Joseph and Caroline Petruka held the property in trust, as the common family property which plaintiffs helped to earn, then appellants would have limitation running against them from May 21, 1902, until September, 1911, when the suit was filed; for they knew from the date of the deed and will, as well as the receipts made out, and which all of them but one signed, that Tom Petruka claimed and held everything.

[4] But the parties all knew, or ought to have known, from May 23, 1902, the claims Tom Petruka was making, and that he held all the property as his own. It is not enough to say that plaintiffs were laboring under coverture; for they must know that several years ago a law was passed which took away this defense as to an adult married woman and permitted limitation to run against her, and plaintiffs were all married and of legal age when appellee took the deed and set up adverse claim to all the property in 1902. R. S. art. 5634; *Shook v. Laufner*, 100 S. W. 1042.

No sufficient legal excuse is pleaded or proved why Joseph and Caroline Petruka did not discover and correct the alleged fraud; and, upon the showing made, they were themselves barred at the date of Mrs. Petruka's death. And, if plaintiffs ever had any right to maintain a suit, they were barred before they brought it, and the court properly instructed a verdict for defendant. Judgment is affirmed.

**UNITED BENEVOLENT ASS'N OF TEXAS  
v. LAWSON et al. (No. 338.)**

(Court of Civil Appeals of Texas. El Paso.  
April 28, 1914. Rehearing Denied  
May 14, 1914.)

**1. APPEAL AND ERROR (§ 742\*)—BRIEFS—ASSIGNMENTS OF ERROR—PROPOSITIONS.**

Under Court of Civil Appeals Rule 30 (142 S. W. xiii), requiring that each point under each assignment of error shall be stated as a proposition unless the assignment itself sufficiently discloses the same, assignments that the verdict is contrary to law and that the verdict and judgment are not supported by the evidence fail to show wherein the verdict and judgment are so defective, and, not being presented with appropriate subjoined propositions, are insufficient to present any question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**2. INSURANCE (§ 813\*)—BENEFIT CERTIFICATE—ACTIONS—PARTIES.**

Where defendant issued a benefit certificate insuring the life of deceased in favor of her husband, from whom deceased was divorced, the husband was a proper, but not a necessary or indispensable, party in a suit by deceased's children to recover the amount of the certificate; and hence plaintiffs were entitled to dismiss as to the husband if they so desired.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1994; Dec. Dig. § 813.\*]

**3. APPEAL AND ERROR (§ 544\*)—REVIEW—RECORD—BILL OF EXCEPTIONS—NECESSITY.**

An order overruling a plea of privilege, though noting an exception, is not reviewable in the absence of a bill of exceptions disclosing the facts on which the court acted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

**4. APPEAL AND ERROR (§ 500\*)—SCOPE OF REVIEW—RULINGS.**

An assignment to the overruling of a plea setting up the pendency of a suit in another county on the same cause cannot be sustained, where it does not appear that any action was taken by the trial court on the plea, and the transcript does not show any exception with relation thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.\*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Willis W. Lawson and others against the United Benevolent Association of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed.

Morris Rector, of Ft. Worth, for appellant. Ward & Ward, of Houston, for appellees.

HIGGINS, J. Appellant issued its benefit certificate insuring the life of Margaret E. Lawson in favor of her husband, James W. Lawson. The parties were afterwards divorced, and on August 21, 1912, Mrs. Lawson died. This is a suit by her children to recover of the insurer the amount of the certificate.

[1] The first assignment is that the verdict is contrary to the law; the second is that the verdict and judgment are not sup-

ported by the evidence. They are submitted as propositions. Under the former practice, assignments complaining of the insufficiency of the evidence or that the judgment was contrary to the law were required to particularize and point out in what respect the evidence was insufficient or the judgment contrary to the law. Possibly this rule as to the sufficiency of such an assignment has been changed by Acts of 1913, Reg. Session, p. 276. But it does not alter Rule 30 of the Courts of Civil Appeal (142 S. W. xiii), which requires that each point under each assignment shall be stated as a proposition unless the assignment itself sufficiently discloses the same. Assignments of such general nature as those indicated do not disclose the point, and in such case the points in the assignment must be presented by appropriate subjoined propositions. Since the assignments themselves do not disclose the point, they cannot be treated as propositions, and for failure to support same by appropriate propositions, they are not entitled to consideration and will not be considered.

[2] Plaintiffs originally made James W. Lawson a party defendant and thereafter entered a dismissal as to him. He was a proper but not an indispensable or necessary party. Plaintiffs had a right to dismiss as to James W. Lawson, if they saw fit to do so. Such dismissal did not in any wise affect appellant's right, by cross-action against him, to have had him retained as a party and the conflicting claims of the parties, if any, adjudicated. By proper and timely action appellant could have preserved this right. If it did not do so, it was its own fault. The third assignment, which complains of plaintiff's dismissal as to James W. Lawson, is therefore overruled.

[3] The fourth assignment complains of the overruling of a plea of privilege. The order overruling the same notes an exception thereto, but there is no bill of exception disclosing the facts upon which the court acted, and in the absence thereof the matter cannot be reviewed.

The fifth assignment is submitted as a proposition. As such it is insufficient because it does not disclose the point or reason why it is contended the court erred in the action to which the assignment relates. For this reason it will not be considered.

[4] The sixth assignment complains of the action of the court in overruling a plea setting up the pendency of a suit in Tarrant county based upon the same certificate upon which the present suit is based. Our attention is not called to any action of the court upon such plea, nor of any exception in relation thereto, and our examination of the transcript does not disclose any. In this condition of the record the assignment of necessity must be overruled.

The petition is not subject to a general de-

murrer as is contended under the seventh assignment. *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189. Lawson and Bransford were not indispensable parties, for which reason the eighth assignment is overruled.

The ninth and tenth assignments are not supported by statements as the rules require and are not considered.

The eleventh assignment is submitted as a proposition. As such it is multifarious. Neither is it supported by such statement as the rules require. It is not considered.

**Affirmed.**

**WESTERN UNION TELEGRAPH CO. v.  
CATHEY. (No. 5267.)**

(Court of Civil Appeals of Texas. San Antonio.  
April 29, 1914.)

**1. TELEGRAPHS AND TELEPHONES (§ 74\*)—ACTIONS FOR DELAY—INSTRUCTIONS.**

Where plaintiff claimed that defendant's failure to deliver on the 15th a message announcing the death of his mother prevented him from attending her funeral, but claimed no damages because of defendant's failure to deliver it on the following day, it having not reached the delivering office till the 16th, a charge to find for plaintiff, if defendant was negligent in delivering the message within a reasonable time after receipt at its destination, is erroneous, though other charges stated that plaintiff could only recover for negligence occurring on the 15th, for such charge might have misled the jury to believe that the court was of the opinion that the message was received at its destination on the 15th instead of the 16th, and tended to allow a recovery for negligence not counted upon.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.\*]

**2. TRIAL (§ 296\*)—INSTRUCTIONS—ERROR.**

Where correct charges do not refer to or modify an erroneous charge which is in direct contradiction, the two cannot be reconciled and judgment must be reversed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**3. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST.**

The refusal of a requested charge covered by the charge given is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 37\*)—TRANSMISSION—DUTY OF TELEGRAPH COMPANY.**

A telegraph company is bound only to exercise ordinary care to transmit and deliver a message within a reasonable time and is not under the absolute duty of so doing.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.\*]

Appeal from District Court, Austin County; Frank S. Roberts, Judge.

Action by Z. W. Cathey against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Hume & Hume, of Houston, for appellant.  
C. G. Krueger, of Bellville, for appellee.

**FLY, C. J.** This is a suit for damages arising from a failure to deliver a message informing appellee of the death of his mother in Arkansas, and by such failure preventing him from attending her funeral. The cause was tried by jury and resulted in a verdict and judgment for appellee in the sum of \$900.

It was alleged in the petition that the message was delivered to an agent of appellant at Huntington, Tex., by Knight and Lynn, brothers-in-law, to appellee to be transmitted to him, care of Dr. Steck, at Bellville, Tex.; that the message was delivered to said agent at about 10 o'clock a. m. on December 15, 1911; that if the message had been promptly delivered to Dr. Steck, the latter would have immediately notified appellee of its contents, or would have sent the message to him at Buckhorn, where he resided, some six or seven miles from Bellville; that Steck lived in Bellville; that there was a telephone line from Bellville to Buckhorn; and it was further alleged: "Plaintiff further shows to the court that, if the defendant had promptly transmitted and delivered said message as it was bound to do, this plaintiff could have and would have taken the H. & T. C. Railway Company's passenger train at Hempstead at about 11 o'clock p. m. of December 15, 1911, and gone to Dallas, Tex., where he could and would have taken the Texas & Pacific Railway Company's passenger train and gone to Texarkana, and at Texarkana he would and could have taken the Iron Mountain Railway Company's passenger train and gone to Prescott, Ark., and at Prescott, Ark., he would and could have taken a team or automobile and gone to his mother's home in time to have viewed her remains and attended her funeral, or the plaintiff could have taken the G., C. & S. F. Railway Company's passenger train at Bellville, Tex., at 11:30 p. m. December 15, 1911, and reached Dallas at about 7 a. m. December 16, 1911, and at Dallas could have taken the Texas & Pacific passenger train and gone to Texarkana, and at Texarkana could and would have taken the Iron Mountain Railway Company's passenger train for Prescott, Ark., where he would and could have taken a team and reached the home of his mother on the morning of December 17, 1911, in time to have viewed her remains and attended her funeral, as the trains above mentioned made close connections with each other. Plaintiff further shows to the court that he could and would have made and he can now make the trip either from Bellville, Tex., or from Hempstead, Tex., by either of the routes above stated in 22 or 23 hours time."

[1, 2] The evidence showed without contradiction that the message was not re-



ceived at Bellville, by the agent at that place, until on the morning of December 16, 1911, between 8 and 9 o'clock. The message was never delivered, and if it had been promptly delivered after reaching Bellville, to appellee, it would have availed him nothing, as he places his cause of action on the failure to deliver the message on December 15, 1911, so that he could have left on the night of that day at certain hours. It is not claimed that there was any causal connection between the negligence in delivery on December 16th and the damages claimed, but the cause of action rests on a failure to deliver on December 15th. The court, at the request of appellant, instructed the jury that appellee had no cause of action unless the message was received by appellant in time to have transmitted it to Steck at Bellville before 6 o'clock p. m. on December 15th, the hour at which the office of appellant at that place closed. All of the evidence tended to show that, if there was delay that resulted in damage, it arose before the message reached Bellville, and also showed that the message did not reach Bellville until the morning of December 16th.

With the evidence making out that state of case, the court instructed the jury to find for appellee if appellant was negligent in delivering the message to Steck "within a reasonable time after having received the same at Bellville." That was error, and it was not corrected by charges to the effect that appellee could only recover for negligence on December 15th, because it may have caused the jury to believe that the court was of the opinion that, although the agent had sworn that the message was not received until the morning of December 16th, it was received by him on December 15th. The erroneous charge was directly in conflict with other parts of the court's charge as well as the special charge. They cannot be reconciled and must lead to a reversal. *Baker v. Ashe*, 80 Tex. 356, 16 S. W. 36. When a positive error is found in one paragraph of the charge of the court, it is not corrected by another paragraph, which does not refer to and modify the erroneous charge. *Railway v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Reed v. W. U. Telegraph Company*, 31 Tex. Civ. App. 116, 71 S. W. 389; *Railway v. Rodgers*, 89 Tex. 675, 36 S. W. 243.

[3] The second assignment of error is overruled. The court charged in effect as requested in the charge, the rejection of which is complained of in the assignment.

[4] A telegraph company is under obligations to exercise ordinary care in the transmission and delivery of messages committed to its care, and the court erred in charging the jury that: "Whenever a telegraph company accepts a message for transmission and delivery, it is its duty to deliver the same within its free delivery limits within a reasonable time after the same is received, but

it is not bound to deliver such message beyond its free delivery limits." Instead of holding appellant to the exercise of ordinary care in the transmission and delivery of the message, the charge imposed upon it the absolute duty of delivering the message within a reasonable time. *W. U. Telegraph Co. v. Rosentreter*, 80 Tex. 406, 15 S. W. 1048, 26 Am. St. Rep. 759; *W. U. Telegraph Co. v. Hays*, 63 S. W. 171; *Hargrave v. Telegraph Co.*, 60 S. W. 687.

The other assignments of error are overruled.

The judgment is reversed, and the cause remanded.

## LAKESIDE IRR. CO. v. KIRBY.†

(No. 5282.)

(Court of Civil Appeals of Texas. San Antonio.  
April 15, 1914. Rehearing Denied  
May 13, 1914.)

### 1. WATERS AND WATER COURSES (§ 152\*)— PRESCRIPTIVE RIGHTS—PLEADING.

It having been only three years before commencement of the injunction suit when defendant was incorporated, and its answer not alleging that its predecessor in title claimed or exercised the sole right to pump water out of the lake, but merely that it had done so, the issue of it having acquired a prescriptive right to take all the water from the lake for irrigation is not raised.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

### 2. WATERS AND WATER COURSES (§ 152\*)— PRESCRIPTIVE RIGHT—EVIDENCE.

Evidence in an injunction suit held insufficient to show a prescriptive right, by exercise thereof for ten years by defendant and its predecessor, prior to the suit, to take all the water from a lake for irrigation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

### 3. PLEADING (§ 216\*)—GENERAL DEMURRER TO PETITION.

Matters not alleged in the petition cannot be considered in support of a general demurrer to it.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 535-539; Dec. Dig. § 216.\*]

### 4. WATERS AND WATER COURSES (§ 114\*)— DIVERSION—INJUNCTION—ADEQUATE REMEDY AT LAW.

The remedy by action for damages for diversion of waters, not being as practical and efficient to the ends of justice and its prompt administration as that of injunction, is inadequate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 124, 125; Dec. Dig. § 114.\*]

### 5. WATERS AND WATER COURSES (§ 114\*)— DIVERSION—INJUNCTION—ADEQUATE REMEDY AT LAW.

Under the statute an injunction is authorized though there be an adequate remedy at law.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 124, 125; Dec. Dig. § 114.\*]

### 6. WATERS AND WATER COURSES (§ 247\*)— INJUNCTION SUITS—NECESSARY PARTIES.

Persons whom defendant has contracted to furnish water, without any provision as to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

source thereof, are not necessary parties to a suit to enjoin it from pumping from a lake more water than it pumps into it; an injunction not preventing it from fulfilling the contracts, or prejudicing their rights thereunder.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

**7. WATERS AND WATER COURSES (§ 240\*)—STATUTORY APPROPRIATION.**

An irrigation company was not a statutory appropriator of waters from a lake, though it pumped water from a river into a canal leading into a lake, and then pumped from the lake; its irrigation affidavit stating the water was to be appropriated from the river.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 240.\*]

**8. WATERS AND WATER COURSES (§ 109\*)—NATURAL LAKES—DIVERSION—RIGHTS OF OWNERS OF BED.**

A person owning part of the bed of a natural lake, valuable with the water on it and worthless without it, has a right to have the water maintained at its natural level, unless lowered by another riparian owner for riparian uses; so that the owner of another part of the bed may not divert the water to irrigate non-riparian lands, when this injuriously affects the rights of the first owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 118, 119, 121; Dec. Dig. § 109.\*]

**9. JUDGMENT (§ 252\*)—PRAYER.**

Relief other than that specifically prayed for may be granted under the further prayer for general relief.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.\*]

Appeal from District Court, Colorado County; M. Kennon, Judge.

Suit by John H. Kirby against the Lakeside Irrigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Adkins and J. J. Mansfield, both of Columbus, for appellant. A. J. Wirtz, of Eagle Lake, and Ring, Carothers & Brown, of Houston, for appellee.

**MOORSUND, J.** This appeal is from a judgment permanently and perpetually enjoining appellant from diverting water from Eagle Lake in such a way as to lower the level thereof and from pumping any water out of said lake unless it concurrently pumps an equal amount of water into the same. Eagle Lake is a natural lake with a normal area of 1,250 acres or more, entirely owned by private citizens. The appellee owns 700 acres out of the P. Reels survey, including 552 acres covered by the waters of the lake and 148 acres bordering on the lake. Appellant owns 452 acres out of the McLain & McNair league covered by the waters of the lake and adjoining appellee's land. The remainder of the lake is owned by other persons. Appellant, an irrigation company chartered under the laws of this state, owns a pumping plant on the Colorado river and carries the river water about two miles through a ditch to Moore's branch, an arm of the lake on the

west side. On the east side of the lake the appellant has another pumping plant by which it pumps the water through its canals to consumers owning rice fields on surveys not riparian to the lake. Appellant was incorporated in 1909, at which time it bought the pumping plants and canal system of the Eagle Lake Rice Irrigation Company. Thereafter, until the spring of 1912, it pumped the lake almost dry each year. At said time the lake was full, and when appellant began pumping appellee filed this suit, and on May 24, 1912, a temporary injunction was granted restraining appellant from further lowering the level of the waters of the lake. Appellant's river pump has a capacity of 40,000 gallons per minute, and its two lake pumps together are capable of pumping 35,000 gallons per minute, and since May 24, 1912, appellant has pumped into the lake as much water as it pumped out. Appellee alleged that his 700 acres constitute a very valuable hunting and fishing preserve when the lake is in its normal condition, and will produce an income of about \$2,500 from the sale of hunting and fishing privileges, but, if the water is unduly lowered, the tract becomes useless and valueless, and rank weeds and vegetation spring up in the bottom, choking same up and doing permanent and irreparable injury thereto; that defendant owns no farming land riparian to or adjacent to the lake, and does not use any water pumped from said lake to irrigate land riparian to same, but carries the water to lands remote therefrom, where it sells the water to various nonriparian owners to irrigate their rice lands. These allegations were sustained by proof. It was also alleged that plaintiff owns valuable farming land bordering on the lake. The proof showed that plaintiff and one Womack own a 1,000-acre tract in the McLain & McNair tract; their land being close to the lake, so that when it was extra full the water touched said land.

Defendant filed a general demurrer, a special exception, a general denial, a plea of prescriptive right to use all the water, and pleaded: That its vendor, the Eagle Lake Rice Irrigation Company, obtained a charter in 1900 as a public service irrigation company, and complied with title 73, c. 2, of the Revised Statutes, in establishing its canals and right to take water from Eagle Lake, which charter provided that "the general office of said corporation and its principal place of business shall be at Eagle Lake, Colorado county, Texas, and the head gate of said canal is to be constructed on the east bank of the Colorado river near the west corner of the McLain & McNair league, in Colorado county, Texas, and thence the water is to be conducted in a surface canal into a natural lake, named Eagle Lake; another head gate and pumping station is to be erected on the east margin of the said Eagle Lake

on or near the east corner of the said league, —from thence the canal is to be run eastwards with two prongs, total aggregate length about twenty miles." That said company operated said irrigation plant for several years, and more than 12 years preceding the filing of the suit defendant bought the property and franchises of said company, procured a charter for the purpose of operating same, and ever since has operated said plant and taken water from said lake, and by such purchase became the owner of 452 acres of land, covered by a large part of the waters of said lake; one line of said land extending across the lake near its center, the defendant owning land on both sides of the lake at the terminl of said line. That defendant went into actual possession of said lands, right of ways, canals, pumping plant, and property, and has ever since continued in possession thereof, operating the pumping plants and taking water from the lake for irrigation purposes, having the peaceable, open, notorious, exclusive, uninterrupted, and adverse possession of said canals and property with the knowledge of plaintiff and those under whom he claims, extending over a period of more than 12 years next preceding the filing of the suit, and has been the sole taker of water from said lake during said time, wherefore defendant again asserted its plea of prescriptive right. The final judgment, appealed from, was rendered on September 18, 1913.

[1, 2] By its first assignment of error appellant contends that the judgment is erroneous because the evidence shows that it had acquired a right by prescription to take all the water from Eagle Lake for the purposes of irrigation. This contention cannot be sustained. Appellant failed to plead that its predecessor in interest claimed or exercised the sole right to pump water out of said lake, but merely that appellant had done so, while the proof shows that appellant did not come into existence until March, 1900. But if the pleading had raised the issue, the evidence fails to show that the Eagle Lake Rice Irrigation Company and appellant together exercised for ten years prior to the filing of the suit the rights so claimed. Appellee acquired title to his 700 acres in 1908 from the estate of Wm. Dunovant. Dunovant pumped water out of the lake in 1901 and 1902, and was pumping in August, 1902, when he died. His administrators pumped water out of the lake in 1903 with three pumps, one 20-inch, one 18-inch, and the other a 12-inch pump. The 20-inch pump had a capacity of about 15,000 gallons per minute. This suit was filed May 12, 1912. It further appears that appellant has never denied or questioned the right of Dunovant or Kirby to the waters of the lake. During some years appellant's predecessor pumped practically all of its water from the river for the entire year. In 1906 or 1907, Kirby had a conversation

with the president of the Eagle Lake Rice Irrigation Company, in which he complained of the lowering of the water by said company, and said president told him they had not put in quite as much water as they had taken out, but that the matter would come out all right. Kirby's understanding of said president's statement was that such company was to put in as much water as it took out, and no claim was made to him that the company had the right to pump all the water out of the lake. The testimony is wholly insufficient to show any prescriptive right to pump all the water out of the lake.

[3] The second assignment complains of the overruling of the general demurrer. The first proposition reads as follows: "As the unappropriated waters of the streams of Texas belong to the public for the purposes of irrigation, if appellee owns land susceptible of cultivation riparian to Eagle Lake as alleged by him then all water not reasonably needed or appropriated by appellee, to be proved by him, for domestic purposes, stock raising, and to irrigate such land, is subject to appellant's statutory appropriation, or where it appears that appellee is not making, or contemplates the making, of any such use, appellant's appropriation cannot be enjoined."

We find no allegations in the petition to which this proposition can be applied. The petition discloses no statutory appropriation by appellant, nor any allegation that the waters of the lake are subject to appropriation under the statute.

[4, 5] By the second proposition it is contended the allegations show that appellee had a legal remedy for damages and was therefore not entitled to an injunction. The remedy of suit for damages would be inadequate, under the facts alleged; that is, not as practical and efficient to the ends of justice and its prompt administration as would that of injunction. In addition, under our statute an injunction is authorized though there be an adequate legal remedy. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 82; *Santa Rosa Irrigation Co. v. Pecos River Irr. Co.*, 92 S. W. 1015.

[6] The third assignment reads as follows: "The court erred in rendering judgment enjoining the defendant, Lakeside Irrigation Company, from furnishing water from Eagle Lake to the lands of various persons who are entitled to such water under contracts with defendant to furnish same as long as defendant's canal should be operated, and which persons are not parties to this suit."

The contracts do not provide that water is to be furnished from Eagle Lake, and the appellant is not restrained from furnishing water to those with whom it has contracts. It is undisputed that said persons have no riparian rights in the waters of the lake, and we cannot see that it is any concern of theirs

whether appellant is required to pump into the lake as much water as it takes out. The injunction does not prevent the fulfillment of their contracts, or prejudice their rights under such contracts, and they were not necessary parties to this suit. *Biggs v. Miller*, 147 S. W. 637. In the case of *Matagorda Canal Co. v. Markham Irr. Co.*, 154 S. W. 1177, it was alleged by plea in abatement that certain persons, naming them, had contracts with defendant, and if defendant was enjoined from taking water from the Colorado river the crops of the parties would be destroyed, and it was further alleged that said persons had riparian rights superior to any held by plaintiff. It was held that said persons were necessary parties to the suit. In said case as well as that of *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653, the injunction sought would have directly prevented the fulfillment of the contracts held by persons not parties to the suit. In this case the evidence shows that all contracts were complied with during the pendency of the injunction, and that the injunction does not affect such contracts. The assignment is overruled.

[7-8] The fourth assignment reads as follows: "The court erred in rendering judgment restraining defendant from pumping any water out of Eagle Lake unless it concurrently pumped an equal amount of water into Eagle Lake, for the reason that there are no pleadings to justify such restraint, and no prayer therefor by plaintiff."

By the first proposition it is contended that as appellee failed to allege that he was sole owner of the bed of the lake or the necessity for use of all the waters for domestic purposes, stock raising, or reasonable irrigation of cultivatable land riparian thereto, he has stated no grounds for a judgment enjoining appellant from taking any water out of the lake, and in this connection it is asserted that appellant is a statutory appropriator of the waters of the lake. The irrigation affidavit of the Eagle Lake Rice Irrigation Company, under whom appellant holds, states that the water is to be appropriated from the Colorado river and not from Eagle Lake; hence we may discard the theory that appellant is a statutory appropriator of the waters of the lake. Article 4996, Rev. Stat. 1911. The case of *Biggs v. Lee*, 147 S. W. 709, therefore, has no application to the facts of this case, as it merely holds that a riparian owner as against a statutory appropriator does not have the right to have all the water flow past his land. The statutes do not mention natural lakes, and it may be doubted whether any designation made can be construed to cover such lakes. While it is alleged that appellee has cultivatable land riparian to the lake, it is not alleged that he had irrigated or desired to irrigate any land; but he alleged that appellant had no cultivatable land riparian to the lake and that it was pumping the water to lands not riparian thereto. Ap-

pellant contends that it can take all the water for irrigation purposes because such taking does not interfere with appellee's use of same for irrigation, domestic purposes, or stock raising, as he does not allege that he is using it for either of such purposes. On the other hand, appellee contends that under our decisions, being a riparian owner, he is entitled to have the lake remain in its normal condition, subject only to the right of other riparian owners to take from it such water as they need for their domestic uses and for their stock and to make a reasonable use thereof for irrigating their riparian lands.

In the case of *Watkins Land Co. v. Clements*, 98 Tex. 589, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653, the court said: "Plaintiffs have not the right to apply all of the water flowing from Toyah Spring or along that creek to their riparian lands, but have a right in common with others to make a reasonable use of the water. Neither have they the right to appropriate any of that water to nonriparian land which they may own, although it may adjoin land owned by one of them which is entitled to the use of the water. *Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 27 [48 Pac. 908]. Nor has either of them the right to sell water to others to irrigate lands not riparian. *Ormerod v. Todmorden*, L. R. 11 Q. B. Div. 162; *Gardner v. Village of Newburgh*, 2 Johns. Ch. (N. Y.) 162 [7 Am. Dec. 526]; *Higgins v. Water Co.*, 36 N. J. Eq. 542." As we understand this statement, it fully sustains appellee's contention. See, also, *Santa Rosa Irrigation Co. v. Pecos River Irr. Co.*, 92 S. W. 1014. Where it is shown, as in this case, that a person owns a part of the bed of a natural lake, which is very valuable with the water upon it and worthless without it, we think such person has the right to have the water of the same maintained at its natural level, unless that level is disturbed by another riparian owner for riparian uses recognized by our decisions, and that another owner of part of the bed of the lake cannot be permitted to divert the water to irrigate nonriparian lands, when it is shown that such diversion injuriously affects the rights of the owner of the other part of the lake. The contention that the water should be divided between the owners of the land covered by the lake in proportion to their ownership of such land cannot be sustained. To do so would be to permit the diversion of the water to nonriparian purposes to the injury of the other riparian owner. Appellee is entitled to the enjoyment and use of his land with the opportunities, advantages, and benefits thereto accruing by reason of a portion thereof being covered by a natural lake, subject only to riparian rights of others, and even if it was sought to irrigate riparian lands therefrom, which is not the case, the use for such purpose would have to be a reasonable one.

The contention that the relief given is not warranted by the prayer in the petition can-

not be sustained. In addition to praying that defendant be enjoined from diverting water from the lake in such a way as to lower the level thereof, plaintiff also prayed for general relief.

The fourth, fifth, and sixth assignments are overruled.

The judgment is affirmed.

## BOWINGTON v. WILLIAMS et al.

(No. 329.)

(Court of Civil Appeals of Texas. El Paso. April 30, 1914.)

### 1. FRAUDS, STATUTE OF (§ 60\*)—CREATION OF EASEMENT.

A perpetual easement in land liable to be divested only if the use of the dominant tenement be changed must be created by deed; a parol license being insufficient.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 94, 95; Dec. Dig. § 60.\*]

### 2. EASEMENTS (§ 61\*)—PLEADING—PROOF.

A party claiming an easement against the owner of the fee is bound to plead and prove it.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.\*]

### 3. EASEMENTS (§§ 1, 18\*) — ACQUISITION — MODE.

An easement over the land of another may be acquired when it is necessary for an outlet to the county road, or by verbal agreement in the nature of estoppel.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 1, 2, 5-7, 50-55; Dec. Dig. §§ 1, 18.\*]

### 4. EASEMENTS (§ 61\*)—EASEMENTS OF NECESSITY—PERSONS ENTITLED TO CLAIM.

The way of necessity reserved to a vendor who sells land surrounding other land which he retains, and to which he can have access only through the granted premises, cannot be asserted by the vendor for the benefit of subsequent grantees to whom he sold the inaccessible tract.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.\*]

### 5. FRAUDS, STATUTE OF (§ 139\*) — PAROL GRANT OF EASEMENT—EFFECT.

Where a parol grant of a way has been acted upon by the expenditure of moneys which would be lost if the right of way be revoked, an easement arises by estoppel.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 334-341; Dec. Dig. § 139.\*]

### 6. EASEMENTS (§ 35\*)—ACTIONS—PLEADING—SUFFICIENCY.

A pleading that defendant acquired a way by parol agreement upon the conveyance to plaintiff of the land over which he asserted it is not good as a plea of an easement by estoppel, because alleging no fact showing the injustice of a revocation of the way.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 35.\*]

### 7. EASEMENTS (§ 61\*)—RESERVATION—EFFECT.

Where an owner of land verbally reserved a way over the land conveyed so as to have access to a parcel retained, the right is personal to him, and cannot inure to the benefit of subse-

quent grantees to whom he conveyed his remaining parcel.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.\*]

Error to District Court, El Paso County; A. M. Walthall, Judge.

Trespass to try title by K. N. Bowington against H. H. Williams and W. H. Strahan, who cross-complained. There was a judgment for plaintiff against the first-named defendant, and for W. H. Strahan on his cross-complaint, and plaintiff brings error. Reversed and remanded.

U. S. Goen, of El Paso, for plaintiff in error. McBroom & Scott and Maury Kemp, all of El Paso, for defendants in error.

HARPER, C. J. This suit was instituted March 8, 1912, by plaintiff in error, K. N. Bowington, against H. H. Williams and W. H. Strahan, defendants in error, in trespass to try title and for damages; plaintiff alleging that his right to the use of the 14-foot roadway across the westerly part of lot 1, block C, San Elizario Grant, El Paso county, Tex., which had been conveyed by Williams to Strahan by deed, dated April 5, 1911, and by Strahan to plaintiff in error by deed, dated June 5, 1911, was being interfered with, and that he had been dispossessed of a portion thereof by defendant Williams. Plaintiff asked that his title to said strip of land be quieted, and also prayed for an injunction restraining defendant Williams from further interfering with his use and enjoyment of said roadway. Defendants Williams and Strahan, in their original answers, demurred generally, and specially denied the allegations of plaintiff's petition.

On August 19, 1912, defendant Strahan filed an amended answer, in which he admitted that he had bought of defendant Williams the 14-foot strip of land sued for, and had sold an undivided one-half interest therein to plaintiff in error, and by way of cross-action alleged that on June 5, 1911, he conveyed by warranty deed a 15-foot strip of land off the western side of lot 2, block C, San Elizario Grant, which strip connected with the southerly end of the roadway obtained from Williams; that, after the sale of said 15-foot strip to plaintiff, he had no outlet to the county road over the 14-foot roadway save by crossing over the northerly 30 feet of said 15-foot strip, and that it was necessary that he and his assigns have an easement over said strip of land that he might have an outlet from lot 2 of block C to the county road; that while he gave to plaintiff a warranty deed to said 15-foot strip, yet part of the consideration was a verbal agreement that he have an easement over the northerly 30 feet thereof; that since the filing of this suit, and prior to the filing of his cross-action, he had sold and assigned said lot 2 of block C, together with his inter-

est in said roadway, to Lamar Davis and Aris T. Celum, with an agreement to have their rights to an easement in said 30 feet adjudicated in this suit; he therefore asked for a judgment, declaring an easement to said northerly 30 feet of said strip to him and his assigns, and for an injunction restraining plaintiff in error from fencing up same, or interfering with his enjoyment thereof.

To defendant Strahan's amended answer and cross-action, plaintiff demurred generally, and specially excepted to that part of said cross-action asserting an easement in the northerly 30 feet of said 15-foot strip by virtue of verbal agreement between grantor and grantee on the ground that such an easement could not be created except by deed. The demurrers were overruled, and, said cause coming on for trial on November 19, 1912, before the court without a jury, a judgment was rendered in favor of plaintiff in error for title and possession of said 14-foot roadway, together with a permanent injunction restraining defendant Williams from further interfering with plaintiff's right or enjoyment in said roadway. Judgment was also rendered in favor of Strahan on his cross-action against plaintiff in error giving to said Strahan and his assigns an easement and permanent roadway over the northerly 30 feet of the 15-foot strip off the westerly side of lot 2, block C, San Elizario Grant, and plaintiff in error was permanently enjoined from fencing same, or interfering with the use thereof by defendant Strahan or his assigns.

Plaintiff in due time filed a motion for a new trial, which was, on December 27, 1912, in all things overruled, to which ruling plaintiff duly excepted. Thereafter, on October 31, 1913, plaintiff in error filed his petition and bond, citation was duly issued, and said cause is now before this honorable court for review.

[1] The appellant, in five assignments of error, raises by general and special exceptions that defendant cannot establish an easement upon land by parol. By his third assignment he charges that the court erred in admitting parol testimony as to the easement claimed, and by the fourth that, because there was no necessity in legal contemplation for an easement over premises sued for, therefore the court erred in his conclusion of law and fact, and in rendering judgment for an easement; and his fifth assignment, submitted as a proposition, reads as follows: "The court erred in rendering judgment for defendant Strahan giving him an easement in the property sued for, as it was shown by his first amended original answer and cross-action that he had parted with his interest in said land, and said right of use, if any, not being created by deed, and, if anything, nothing more than a license, was personal to himself, and could not pass to his assigns, and therefore he was not en-

titled to the relief prayed for, and for which the court gave judgment; said error being specified in paragraph 1 of plaintiff's motion for a new trial."

A perpetual easement in land liable to be divested only if the estate should be used for other purposes than those contemplated by the parties can only be created by deed; a parol license being insufficient for the purpose. *Texas W. Ry. Co. v. Wilson*, 83 Tex. 154, 18 S. W. 325; *T. & P. Ry. Co. v. Durrett*, 57 Tex. 48. See 6 Michie's Dig. p. 782, for other authorities.

[2, 3] Where a party claims an easement as against the owner of the fee, it is incumbent upon him to plead and prove it. *Texas W. Ry. Co. v. Wilson*, 83 Tex. 154, 18 S. W. 325. There are several ways by which a person may acquire the right to an easement over the lands of another, and the appellee asserts the right (a) by necessity, i. e., that it was necessary for him to have a right of way over appellant's premises as an outlet to the county road; (b) by verbal agreement in the nature of an estoppel.

[4-6] The former applies when a vendor sells land to another to which the former can only have access through the granted premises. *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *Howell v. Estes*, 71 Tex. 690, 12 S. W. 62; *Sellers v. Texas Cent. Ry. Co.*, 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337. And the latter arises when the owner of land by parol agreement gives a right of way over it which has been acted upon by expending moneys, etc., which would be lost if the right to enjoy the easement could be revoked. *Harrison v. Boring*, 44 Tex. 255. Since there is no pleading by appellee that he acquired the easement by an estoppel, except that he plead parol agreement, he falls far short of the burden placed upon him by the rule requiring him to plead his easement. *Texas Western Ry. Co. v. Wilson*, supra. And since the appellee cannot claim his easement under the rule of necessity (*Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260) by reason of the fact that he no longer owns it, the general demurrer should have been sustained.

[7] In view of another trial, it may be well to pass upon appellee's counter proposition that he is entitled to prove that the easement was a part of the consideration in the deed between the parties. If he were still the owner of the premises (sold to Davis and Celum), he would be entitled to it under proper showing; but it was personal to him, and could not inure to the benefit of his vendees. Besides, such considerations are confined to the parties to the instrument (*Taylor v. Merrill*, 64 Tex. 496), and such written contracts should speak for themselves (*Sellers v. T. C. Ry. Co.*, 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657).

For the reason given, the cause is reversed and remanded for a new trial.

**HERRINGTON v. STATE. (No. 2989.)**

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 13, 1914.)

**1. PHYSICIANS AND SURGEONS (§ 2\*)—REGULATION OF PRACTICE—STATUTES—VALIDITY.**  
Acts 30th Leg. c. 123, prohibiting the practice of medicine without a proper certificate, is valid.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**2. INDICTMENT AND INFORMATION (§ 125\*)—STATUTORY OFFENSES—SEPARATE OFFENSES.**  
A complaint and information, which charge conjunctively the offenses denounced by Pen. Code 1911, art. 755, punishing the practicing of medicine by one publicly professing to be a physician and surgeon or by one offering to treat any disease by any system, do not charge separate and distinct offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**3. INDICTMENT AND INFORMATION (§ 125\*)—REQUISITES—SURPLUSAGE.**

Where a complaint and information distinctly charge the offense of treating or offering to treat any disease by any method in violation of Pen. Code 1911, art. 755, subd. 2, the allegations in the complaint and information attempting to charge accused with professing to be a physician or surgeon in violation of subdivision 1 will be treated as surplusage, and thereby render the complaint and information good as against the objection that separate and distinct offenses are charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**4. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—INSTRUCTIONS COVERED BY THE CHARGE GIVEN.**

Where the issues raised were correctly submitted by the court in the charges given, it was not error to refuse special charges requested by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**5. CRIMINAL LAW (§ 830\*)—INSTRUCTIONS—REQUESTS.**

Where the evidence suggests a defense, the court may refuse to give accused a special charge on the subject where it does not correctly state the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

Appeal from Bazar County Court; J. R. Davis, Judge.

Lon H. Herrington was convicted of unlawfully practicing medicine, and he appeals. Affirmed.

Swearingen & Ward, of San Antonio, and Morris & Hartwell, of La Crosse, Wis., for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** Appellant was convicted for unlawfully practicing medicine, and his punishment assessed at a fine of \$150 and one day in jail.

The conviction was had under the Acts of 1907, p. 225. The articles of that act, embraced in our Penal Code, are 750 to 756, inclusive. The other sections of the act are in our Revised Civil Statutes.

[1] Appellant contests the constitutionality of said act and the validity of the complaint and information in this case on many grounds—unnecessary to here state them. The constitutionality of the act has so many times been sustained by so many decisions of this court and also by the Supreme Court of the United States in *Collins v. State*, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439, that we deem it unnecessary to discuss the questions again. Most of these cases by this court are collated by appellant in his brief. The complaint and information are in substantial compliance with the statute and follow the forms that have heretofore, in all the cases where raised, been held sufficient.

[2] The complaint and information do not charge two separate and distinct offenses as claimed by appellant. It charges the same offense conjunctively as denounced by article 755. Judge White, in section 405, p. 297, in his *Ann. C. C. P.*, collates some of the authorities and therein from them states the correct rule as follows: "Where several ways are set forth in the same statute by which an offense may be committed and all are embraced in the same definition and made punishable in the same manner, they are not distinct offenses and they may be charged conjunctively in the same count." See *Phillips v. State*, 29 Tex. 233; *Lancaster v. State*, 43 Tex. 519; *Berliner v. State*, 6 Tex. App. 182; *Copping v. State*, 7 Tex. App. 61; *Day v. State*, 14 Tex. App. 26; *Nicholas v. State*, 23 Tex. App. 317, 5 S. W. 239; *Davis v. State*, 23 Tex. App. 637, 5 S. W. 149; *Comer v. State*, 26 Tex. App. 509, 10 S. W. 106; *Howell v. State*, 29 Tex. App. 592, 16 S. W. 533; *Laroe v. State*, 30 Tex. App. 874, 17 S. W. 964; *Willis v. State*, 34 Tex. Cr. R. 148, 29 S. W. 787; *Brown v. State*, 38 Tex. Cr. R. 597, 44 S. W. 176; *Moore v. State*, 37 Tex. Cr. R. 552, 40 S. W. 287; *State v. Smith*, 24 Tex. 285; *State v. Edmondson*, 43 Tex. 162. See, also, section 383, p. 286, *White's C. C. P.* Mr. Bishop, in volume 1, § 434, of his *New Criminal Procedure*, says: 'Some single offenses are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader chooses, if not repugnant; and, at the trial, it will be established by proof of its commission by any one of them.' Again, in section 436, he says: 'A statute often makes punishable the doing of one thing, or another, sometimes thus specifying a considerable number of things.' Then by proper and ordinary construction a person who in one transaction does all violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will

not be double, and it will be established at the trial by proof of any one of them."

[3] But even if it could be held that article 755 prescribed two separate and distinct offenses, then in the complaint and information herein all that part which charges the first alternative of said statute could and should be regarded as surplusage, as the remainder clearly and distinctly charges an offense under the second clause of said article. See *Mayo v. State*, 7 Tex. App. 342; *Gordon v. State*, 2 Tex. App. 154; *Burke v. State*, 5 Tex. App. 74; *Hampton v. State*, 5 Tex. App. 463; *Smith v. State*, 7 Tex. App. 382; *Rivers v. State*, 10 Tex. App. 177; *Gibson v. State*, 17 Tex. App. 574; *Holden v. State*, 18 Tex. App. 91; *Moore v. State*, 20 Tex. App. 275; *McConnell v. State*, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Osborne v. State*, 24 Tex. App. 398, 6 S. W. 536; *Cudd v. State*, 28 Tex. App. 124, 12 S. W. 1010; *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404; *McLaurine v. State*, 28 Tex. App. 530, 13 S. W. 992; *Finney v. State*, 29 Tex. App. 184, 15 S. W. 175; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *McDaniel v. State*, 32 Tex. Cr. R. 16, 21 S. W. 684, 23 S. W. 989; *Loggins v. State*, 32 Tex. Cr. R. 358, 24 S. W. 408; *Lassiter v. State*, 35 Tex. Cr. R. 540, 34 S. W. 751; *Williams v. State*, 35 Tex. Cr. R. 391, 33 S. W. 1080; *Webb v. State*, 36 Tex. Cr. R. 41, 35 S. W. 380; *Mathews v. State*, 39 Tex. Cr. R. 553, 47 S. W. 647, 48 S. W. 189; *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, 39 S. W. 110. And especially should this be done as the court in the charge submitted solely the allegations under the said second clause of said statute. It seems the judge of the court himself prepared no charge as he was authorized not to do under the statute (article 739, C. C. P.), but the only charges he gave were those asked by the state's attorney and by the appellant.

[4] The court committed no error in refusing to give the special charges requested by appellant which he did refuse. All issues properly raised were correctly submitted by the court in the said special charges given by him.

[5] The evidence did not raise, so as to require a submission, the question that the appellant was only a masseur in that sphere of labor, who publicly represented himself as such. If it could be held that the evidence even suggested that issue, the court correctly refused to give appellant's special charge on that subject, because it did not correctly charge the law. *Hobbs v. State*, 7 Tex. App. 118; *Lawrence v. State*, 20 Tex. App. 536; *Sparks v. State*, 23 Tex. App. 448, 5 S. W. 135; *Mealer v. State*, 145 S. W. 354.

The state's witness, Miss Spangler, or Robinson, was not an accomplice, and the court

did not err in refusing appellant's special charge so telling the jury and requiring her testimony to be corroborated. 1 Whart. Crim. Ev. (10th Ed.) § 440; 4 Enc. of Ev. p. 630; *Underhill's Crim. Ev.* (2d Ed.) § 69; 12 Cyc. p. 447; *Allison v. State*, 14 Tex. App. 126; *Chittister v. State*, 33 Tex. Cr. R. 638, 28 S. W. 683; *Holmes v. State*, 156 S. W. 1174; *Ausbrook v. State*, 156 S. W. 1177; *Bush v. State*, 151 S. W. 556; *Minter v. State*, 159 S. W. 300.

The evidence was uncontradicted and was clearly sufficient to show appellant's guilt. There is no other question raised necessary to be discussed or decided.

The judgment is affirmed.

#### MARSHALL v. STATE. (No. 3091.)

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 13, 1914.)

#### CRIMINAL LAW (§ 189\*)—FORMER JEOPARDY—ELEMENTS.

One who obtains on habeas corpus his discharge under a judgment and sentence adjudged absolutely void cannot, on a subsequent prosecution for the same offense, rely on the judgment and sentence in support of a plea of former jeopardy, whether he has undergone any part of the punishment imposed or not.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 801, 821, 872-874; Dec. Dig. § 189.\*]

Appeal from District Court, Grayson County; M. H. Garnett, Judge.

Randell Marshall was convicted of violating the prohibition law, and he appeals. Affirmed.

Spearman Webb and Hamp P. Abney, both of Sherman, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of violating the prohibition law, and sentenced to one year's confinement in the penitentiary. The record in this case presents but one question that need be discussed; in fact, in his brief this is the only question presented by appellant. The facts agreed to show that appellant was indicted August 9, 1913; was tried August 18, 1913, in the district court of the Fifty-Ninth district, and the jury returned a verdict stating: "We, the jury, find the defendant guilty as charged in the indictment," assessing no penalty. Thereafter, the court entered a judgment on this verdict, and on September 13th sentenced appellant to serve a term in the penitentiary for not less than one nor more than three years. The appellant did not appeal from this judgment and sentence, but two days after sentence was pronounced, on September 15, 1913, he sued out a writ of habeas corpus before the judge of the Fifteenth judicial district, and upon hearing was remanded. From that judgment he appealed to this court, and this



court, in the case of *Ex parte Randell Marshall*, 161 S. W. 114, relieved him of said judgment and sentence, holding that they were unauthorized and void, and remanded relator for another trial.

When the case was again called in the Fifty-Ninth district court, appellant entered a plea of former jeopardy, and, while there is a motion to strike it out on the ground that the plea is insufficient, we will not pass on that question, as the matter presented is one of importance, and likely to often arise, and should be definitely settled.

In the first place we will say that, had not the former judgment and sentence been absolutely void, we could have given no relief under the writ of habeas corpus. As said in *Church on Habeas Corpus*, § 353: "An erroneous sentence rendered by an inferior court having jurisdiction of the person, place, and subject-matter cannot be successfully attacked upon habeas corpus, unless it is so far erroneous as to be absolutely void." Our own decisions have always followed this rule. *Ex parte Japan*, 36 Tex. Cr. R. 482, 38 S. W. 43; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076, and authorities cited. The reason why the sentence and judgment were held void was that the law under which they were rendered and entered was held void, and the court had no authority to enter such judgment and sentence. And a plea of former jeopardy, nor any other plea, cannot be based upon void judgments.

In *Bishop's Crim. Proc.* § 1005 (3d Ed.), it is said: "The test is that if the verdict sufficiently finds anything, whether for or against the defendant, judgment will be rendered on the one side or the other for what is thus found; otherwise the work of the jury will be treated as null, the judgment if entered will be arrested, and the defendant may be tried anew"—citing authorities. And this is the rule adopted in this court in the case of *Dubose v. State*, 13 Tex. App. 424, wherein Judge White quoted the above excerpt, and said: "His first trial resulted in the following verdict rendered by the jury, viz.: 'We, the jury, find the defendant, John Dubose, guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary for life.' Judgment was rendered on this verdict, but upon motion of defendant in arrest it was set aside and a new trial awarded him. Though not shown specifically by the record, doubtless the motion was sustained upon the ground that the verdict failed to find the degree of murder of which the jury ascertained defendant to be guilty, which fact is made essential by statute in verdicts of convictions for murder. Penal Code, art. 607; *Buster v. State*, 42 Tex. 315; *Brown v. State*, 3 Tex. App. 295; *Krebs v. State*, 3 Tex. App. 349; *Colbath v. State*, 2 Tex. App. 391; *Booth v. State*, 4 Tex. App. 202; *Nettles v. State*, 5 Tex. App. 386. On the second trial, which ensued after the new trial above noticed was awarded,

defendant set up the former trial and conviction and the new trial in a special plea, claiming that they operated as an acquittal. This plea of former acquittal was excepted to by the district attorney, and on his motion was stricken out by the court. It is urged on this present appeal that the court erred in sustaining said exceptions, and in striking out said plea. In *Simco v. State*, 9 Tex. App. 338, this court had occasion to discuss the nature, character, and effect of the special pleas of former jeopardy, *autrefois acquit* and *convict*, and one of the rules laid down as established both by statute and decision was that a defendant is not exempt from a second trial for the same offense where a new trial has been granted on his motion, and that if he moves in arrest of judgment, or *applies to the court to vacate a judgment already rendered, for any cause*, and his motion prevails, he will be presumed to waive any objection to being put a second time in jeopardy, and so he may ordinarily be tried anew. Code Crim. Proc. art. 20; 1 *Bish. Crim. Law* (4th Ed.) § 844. \* \* \* Such being the law, and the verdict of the jury being clearly insufficient and void, because it failed to find the degree of murder of which the defendant was found guilty, it was most clearly the duty of the court to declare it a nullity, set it aside, and arrest the judgment to be rendered upon it; and, under such circumstances, whether the new trial is awarded *ex mero motu* by the court or upon defendant's motion, the rule is the same; defendant may again be placed upon trial, and a plea of former jeopardy will not avail him. And, the verdict being a nullity, it could not possibly operate an acquittal of murder in the first degree. See *Buster v. State*, 42 Tex. 315. It was not error, therefore, for the court to strike out defendant's special plea and hold him to a second trial, as was done." To the same effect is *Sterling v. State*, 25 Tex. App. 721, 9 S. W. 45, 8 Am. St. Rep. 452, and *Garza v. State*, 39 Tex. Cr. R. 360, 46 S. W. 242, 73 Am. St. Rep. 927.

Appellant relies on the case of *Grisham v. State*, 19 Tex. App. 504, an opinion by Judge White, who also rendered the opinions in the cases of *Dubose* and *Sterling*, hereinbefore referred to, and Judge White certainly intended to announce no different rule to that announced by him in the *Dubose* Case, rendered prior to the *Grisham* opinion, and in the *Sterling* Case rendered by him subsequent to that time, and in the *Grisham* Case he makes it plain that the reason he held the plea good was the *verdict and judgment* in the *Grisham* Case *were valid*, and defendant had suffered at least a part of the punishment, and the judgment was set aside by the court without the *solicitation of the defendant*. He had in no way sought to have himself relieved from the effects of the verdict and judgment.

The facts in this case do not bring appellant within the rule there announced, but in

this case, within two days after the rendition of the sentence, appellant moves by applying for habeas corpus to be relieved of any and all punishment under the judgment, sentence, and verdict theretofore rendered and entered, and on his motion and solicitation, and by virtue of proceedings brought by him, he is by this court relieved from undergoing the penalty fixed by the judgment and sentence; this court holding the verdict was insufficient in law upon which to base the sentence and judgment.

However, in his brief appellant contends that he was "constructively" in the penitentiary from September 13 to November 13, 1913, the date this court rendered the opinion holding the judgment and sentence void. We do not think the facts in this case justify any such conclusion, for two days after sentence he applied for and was granted a writ of habeas corpus by the district court, and from that time until this court disposed of his appeal, had he been conveyed to the penitentiary, the officer so doing would have been in contempt. Appellant, by his act in applying for the writ, had stayed the hands of the officers, and he could not from and after the date of granting the writ be legally confined in the penitentiary, and, as a matter of fact he has not been, nor is it contended that he has been, confined therein. So he has undergone no part of the punishment. But if this were not true, and he had undergone part of the punishment under a void judgment, if he secured his release therefrom by applying for a writ of habeas corpus, a plea of former jeopardy would not be sustained.

This question is exhaustively discussed by Judge Davidson in the case of *Ogle v. State*, 43 Tex. Cr. R. 219, 63 S. W. 1009, 96 Am. St. Rep. 860. In that case Ogle had been convicted and served nearly 18 years in the penitentiary, and secured his release on habeas corpus because the grand jury that returned the indictment was composed of more than 12 men, and was therefore void. The court held that, as he had instituted proceedings to obtain his release from the judgment on the ground that it was void, the fact that he had served 18 years in the penitentiary would not avail him, when he had not served the full term of punishment. Had he not instituted proceedings to have the judgment declared void, and served the punishment fixed thereunder, the rule would be otherwise; but, when a person institutes proceedings and secures the annulment of the judgment, and it is declared void, it will no more avail him as a defensive plea than it will avail the state to punish him thereunder. The judgment and sentence having been declared void by this court, it is no longer a legal judgment and sentence, even though it may appear on the record of the district court of Grayson county, and cannot be made the basis of a plea of jeopardy. In *Am. & Eng. Ency. of Law*, vol. 17, p. 606, the rule is said to be:

"If on motion of defendant the verdict is set aside or vacated, a waiver of objection to being again put in jeopardy will be implied, and he may, as a rule, be tried again, and this is so though the defendant has served out a part of the sentence." In this case it was at the instance of and on application made by appellant that the original judgment and sentence were vacated and held void, and as upholding this rule in addition to the authorities cited from Texas, cases are cited from the following courts of last resort: *Kenuall v. State*, 65 Ala. 492; *Territory v. Dorman*, 1 Ariz. 56, 25 Pac. 516; *Stewart v. State*, 13 Ark. 720; *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *Gibson v. State*, 26 Fla. 109, 7 South. 376; *McGee v. State*, 97 Ga. 360, 23 S. E. 831; *Phillips v. People*, 88 Ill. 160; *State v. Arnold*, 140 Ind. 659, 42 N. E. 1095, 43 N. E. 871; *Brown v. United States*, 2 Ind. T. 582, 52 S. W. 56; *State v. Severson*, 79 Iowa, 750, 45 S. W. 305; *State v. McNaught*, 36 Kan. 624, 14 Pac. 277; *Com. v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114; *State v. Oliver*, 39 La. Ann. 470, 2 South. 194; *Cochrane v. State*, 6 Md. 400; *Gom. v. Green*, 17 Mass. 515; *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *Morris v. State*, 8 Smedes & M. (Miss.) 762; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *McGinn v. State*, 46 Neb. 427, 65 N. W. 46, 36 L. R. A. 450, 50 Am. St. Rep. 617; *State v. Blaisdell*, 59 N. H. 328; *Smith v. State*, 41 N. J. Law, 598; *People v. Dowling*, 84 N. Y. 478; *State v. Rhodes*, 112 N. C. 857, 17 S. E. 164; *State v. Lee*, 114 N. C. 844, 19 S. E. 375; *Lesslie v. State*, 18 Ohio St. 391; *Pennsylvania v. Huffman*, Add. (Pa.) 140; *State v. Stephens*, 13 S. C. 285; *State v. Reddington*, 8 S. D. 315, 66 N. W. 464; *Campbell v. State*, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417; *Briggs v. Commonwealth*, 82 Va. 554; *State v. Friedrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791; *State v. Hill*, 30 Wis. 416, and other cases cited on pages 606, 607, of said volume 17.

The United States Supreme Court, in the case of *Murphy v. Mass*, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711, held: Their plea of former jeopardy cannot be sustained, because it is quite clear that a defendant who procures a judgment against him upon indictment to be set aside may be tried anew upon the same indictment for the same offense of which he had been convicted; citing authorities.

This is the rule adopted in this court, except that, in case the verdict is insufficient, and the judgment and sentence void, as said by Judge White in *Dubose v. State*, supra, the court on his motion may set it aside before punishment is undergone. However, in this instance, it was set aside and held void

by this court at the request of appellant, and the court did not err in striking out the plea; and the judgment is affirmed.

### FORWARD v. STATE. (No. 3108.)

(Court of Criminal Appeals of Texas.  
April 29, 1914.)

#### 1. CRIMINAL LAW (§ 511\*)—EVIDENCE—WITNESSES—ACCOMPLICES—CORROBORATION.

Where the prosecuting witness testified that his watch was stolen while he was in a saloon, that accused was the only person close enough to him to have taken it, and that accused's accomplice to whom the watch was delivered, and who pawned it, remained seated in a chair some distance away during the entire time he was in the saloon, there is sufficient corroboration to support a conviction on the accomplice's testimony that accused took the watch and delivered it to him to pawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.\*]

#### 2. CRIMINAL LAW (§ 826\*)—TRIAL—INSTRUCTIONS—OBJECTIONS—TIME FOR REQUESTS.

Under Act April 5, 1913 (Acts 33d Leg. c. 138), amending Code Cr. Proc. 1911, art. 743, where no objection was made when the charge was submitted to accused's counsel before argument, a request to charge on circumstantial evidence, made during the closing argument for the state, comes too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2008; Dec. Dig. § 826.\*]

#### 3. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—CHARGE ON CIRCUMSTANTIAL EVIDENCE.

In a prosecution for theft from the person, where the prosecuting witness testified that accused was the only person who had an opportunity to steal his watch, and accused's accomplice testified that accused delivered it to him to pawn, the facts are in such close juxtaposition as to be equivalent to positive testimony, and a charge on circumstantial evidence is unnecessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

#### 4. CRIMINAL LAW (§ 1171\*)—TRIAL—APPEAL—HARMLESS ERROR.

Where the jury were charged to disregard it, a reference by the district attorney in argument to marks of guilt on accused's face is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Amos Forward was convicted of larceny from the person, and he appeals. Affirmed.

V. B. Hudson, of Bryan, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for stealing a watch from the person of Hezekiah Dobbins, and his punishment assessed at the lowest prescribed by law.

Appellant contends that the evidence is insufficient to sustain the verdict, and within and as a part of that, that the testimony of Chris Tatum, who was an accomplice, was not sufficiently corroborated.

[1] The evidence by Dobbins is to the effect: That on the morning of about May 21, 1913, he went in a saloon, in Hearne to get a drink of beer, and as he walked in he pulled out and looked at his watch and then replaced it in his pocket. The watch was in his side pants watch pocket, and to it was attached a fob. That appellant was standing up at the bar when he walked up and called for beer. Appellant at the time asked him to get him (appellant) also a glass of beer, which he refused to do. That appellant, while he (Dobbins) was at the bar, walked right up by his side, and they stood there about 5 or 10 minutes. That appellant then called him off in the back just out of the saloon, exhibited to him his (appellant's) little old silver watch, and tried to get him to give him \$3 on it. He refused that. That Dobbins then started out of the saloon door, felt for his watch, and missed it, and at once accused appellant of getting it, which appellant vigorously denied. Dobbins swore: "While I was in that saloon, there was no one close enough to me to get my watch, but the defendant, Amos Forward, no one else at all." Dobbins at once went and complained to the officer that his watch had been stolen from him. The officer searched appellant, but did not then find the watch on him. That Chris Tatum, when he (Dobbins) went in the saloon, was sitting in a chair over by the heater and never got up out of the chair while he was in the saloon.

The evidence in no way puts either the saloon keeper or his porter in such position or proximity to Dobbins, while he was in the saloon, as for any suspicion even to attach to them that either got the watch. The accomplice, Tatum, testified substantially as did Dobbins: That he was sitting back of the heater the whole time Dobbins was in the saloon and never got near him, but that appellant and Dobbins were standing close together right in front of the bar, and that appellant called Dobbins back in the rear of the saloon, and that he never got up out of the chair the whole time Dobbins was in the saloon. That, after remaining in the saloon some little time after Dobbins accused appellant of stealing his watch and appellant denied it, he (Tatum) went out of the saloon and to a Mexican chile joint. That appellant then came in the chile joint, called him out, told him to take the watch over to a pawnbroker's, pawn it, and get money on it, and he would divide with him the money. That appellant then delivered to him Dobbins' watch, and he pawned it with the pawnbroker, got a dollar on it, took the dollar back and delivered it to appellant, and appellant gave him half of it. That he saw Dobbins and told Dobbins if he would give him \$2.50, he would go and get his watch. Dobbins, under the direction of the officer, gave him \$2.50, and before he got back to Dobbins with the watch he was arrested. He denied that he had

it, and the officers searched him and could not find it and then put him in jail. The officer then went to the pawnbroker and found out that Tatum had pawned the watch, a short time afterwards came and redeemed it, and then the officer went to the calaboose where Tatum was confined, and, after talking with him, Tatum got the watch out of the calaboose where he had hid it and delivered it to the officer. The watch was thoroughly identified by all the witnesses as the watch Dobbs stated was stolen from him in the saloon by appellant. This accomplice, Tatum, had been himself convicted for stealing this watch at the previous term of court, but the court granted him a new trial, and the case was still pending against him at the time he testified in this case.

It has been long settled by the many decisions of this court what is essential to the corroboration of the testimony of an accomplice. We think unquestionably, under the law and decisions, the testimony of the accomplice, Tatum, was amply and fully corroborated. *Nourse v. State*, 2 Tex. App. 316; *Jones v. State*, 4 Tex. App. 531; *Tooney v. State*, 5 Tex. App. 193; *Simms v. State*, 8 Tex. App. 243; *Clanton v. State*, 13 Tex. App. 157; *Moore v. State*, 47 Tex. Cr. R. 415, 83 S. W. 1117; *Nash v. State*, 61 Tex. Cr. R. 264, 134 S. W. 709; *Warren v. State*, 149 S. W. 135; and many other cases unnecessary to cite. The testimony in this case is clearly sufficient to sustain the verdict.

[2, 3] This case was tried February 6, 1914, long after the Act of April 5, 1913 (Acts 33d Leg. c. 138, had been in effect, amending article 743 and previous articles as to the charge of the court. Before the argument began, the court submitted his charge to appellant's attorney. At the time he made no objection thereto that the court had failed to charge on circumstantial evidence, nor did he at that time request any charge on circumstantial evidence. During the closing argument of the district attorney, he, for the first time, requested the court to submit a charge on circumstantial evidence. The court at that time refused to do so. We cannot review this question even if the court should have given such charge. Besides, under any contingency the facts proven in this case, if they did not show by direct or positive proof appellant stole the watch, they are in such close juxtaposition thereto as to be equivalent to direct testimony, and a charge on circumstantial evidence was not required. Branch's Criminal Law, § 203, first subdivision and the next to the last subdivision under this section on page 107, where some of the cases are collated; *Baldwin v. State*, 31 Tex. Cr. R. 589, 21 S. W. 679; *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816; *Dobbs v. State*, 51 Tex. Cr. R. 629, 103 S. W. 918; *Adams v. State*, 34 Tex. Cr. R. 470, 31 S. W. 372; *Crews v. State*, 34 Tex. Cr. R. 533, 31 S. W. 373; *Beason v. State*, 43 Tex. Cr. R. 442, 67 S. W. 96,

69 L. R. A. 193; *Cabrera v. State*, 56 Tex. Cr. R. 150, 118 S. W. 1054; *Law v. State*, 160 S. W. 99; *Ballard v. State*, 160 S. W. 92.

[4] As one ground of his motion for new trial, appellant complained that the district attorney, in his closing argument, said: "I want you to look into this defendant's face and see if you do not see marks of guilt there." Appellant alone swore to his motion for new trial. The district attorney contested the motion on this ground and attached thereto his, and the affidavits of every one of the jurors wherein he and they swore that he did not use the language attributed to him above, but instead used this language, "Gentlemen of the jury, look into the face of the defendant, and see if there are not marks of intelligence there," and at the time he made said statements he was discussing the intelligence of prosecuting witnesses and comparing same to that of the defendant. The court heard all this in hearing the motion for new trial and overruled it. However, he approved appellant's bill of exceptions to the effect that the district attorney did use such language in his closing argument. We also find that the appellant requested, and the court gave, this special charge to the jury: "You are instructed not to consider that part of the argument or remarks made by the district attorney to this effect, viz., 'Gentlemen of the jury, look into the face of this defendant, and say if you do not see marks of guilt there.' You will not consider this part of the argument for any purpose." Under the circumstances and the authorities, this question does not present reversible error. *Pierson v. State*, 18 Tex. App. 564; *House v. State*, 19 Tex. App. 239; *Hardy v. State*, 31 Tex. Cr. R. 293, 20 S. W. 561; *Tweedle v. State*, 29 Tex. App. 591, 16 S. W. 544; *Bingham v. State*, 6 Tex. App. 169; *Frizzell v. State*, 30 Tex. Cr. App. 56, 16 S. W. 751; *Gowans v. State*, 64 Tex. Cr. R. 405, 145 S. W. 614.

The judgment is affirmed.

#### LANDRUM v. STATE. (No. 3054.)

(Court of Criminal Appeals of Texas. April 22, 1914. Rehearing Denied May 13, 1914.)

#### 1. EMBEZZLEMENT (§ 4\*)—ELEMENTS OF OFFENSE.

Where defendant induced prosecutrix to deliver to him certain certificates of stock in a life insurance company and a note for \$300, for which he was to procure for her shares in another insurance company and deliver the same to her after the exchange had been made, but he sold her shares and converted the proceeds, he was guilty of embezzlement.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 1; Dec. Dig. § 4\*]

#### 2. EMBEZZLEMENT (§ 35\*)—PROPERTY EMBEZZLED—INDICTMENT.

Where defendant induced prosecutrix to deliver to him certain stock certificates and a note, to be exchanged for shares in another com-

pany and returned to her, but he immediately sold the stock so delivered and converted the proceeds, he was properly charged with embezzling the proceeds of the sale and not the stock.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 55-59; Dec. Dig. § 35.\*]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

W. B. Landrum was convicted of embezzlement, and he appeals. Affirmed.

Odell, Johnson & Harrell, of Cleburne, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was convicted of embezzlement, and his punishment fixed at five years' confinement in the penitentiary.

[1, 2] Appellant contends that the facts do not show that he is guilty of the crime of embezzlement, and, if they do, then he was guilty of embezzling the stock delivered to him by Mrs. Dunn, and not the proceeds of the stock, and could not be convicted under this indictment, which charged him with embezzling the proceeds derived from a sale of the stock. We have read the record critically, and have arrived at the conclusion that under the facts an indictment for embezzlement will lie. Mrs. Dunn testified she was the owner of certain stock in the Amicable Life Insurance Company; that appellant represented to her that he was agent of the Mutual Loan & Investment Company, and that the Mutual Loan & Investment Company had an option on 250 shares of stock in the Western Casualty & Guaranty Company; that appellant induced her to deliver to him her stock in the Amicable Life Insurance Company, and give a note for \$300, for which he was to procure for her shares of stock in the Western Casualty & Guaranty Company. She swears positively, "I did not sell my stock to him [appellant]." If appellant only claimed to have an option to purchase Western Casualty & Guaranty Company stock, and Mrs. Dunn did not sell him her stock, but delivered it to him to be used by him in procuring for her stock in the Western Casualty & Guaranty Co., such relations would be established between them as would bring him within the terms of article 1416 of the Penal Code. An agency or fiduciary relationship would be shown by her testimony. The question here presented is discussed at length in the case of *Leonard v. State*, 7 Texas Crim. App. 417, and especially in the opinion on the motion for rehearing. As said in that case, the fact that appellant had authority to dispose of the Amicable Life Insurance Company stock would not render it less embezzlement, if he had the criminal intent at the time he received the stock, or conceived the criminal intent after he had sold the stock, and then converted the proceeds to his own use and benefit. If she had sold the stock to appellant, of course there could be

no embezzlement, but she swears positively she did not do so, but delivered it to him under an agreement that he was to use it in procuring for her stock in the Western Casualty & Guaranty Company, upon which he had an option, and in this way the relationship between him and Mrs. Dunn arose. He did not claim to own the Western Casualty & Guaranty Company stock, only that he had an option to purchase it, and this stock of the Amicable Life Insurance Company and the note were given to him with which to make the purchase for Mrs. Dunn. If the evidence conclusively showed that appellant had the fraudulent intent at the time he made the representations to Mrs. Dunn, perhaps appellant would be guilty of swindling and not embezzlement, but if at the time he made the representations he intended to procure the stock in the Western Casualty & Guaranty Company for Mrs. Dunn, he would come lawfully into possession of the Amicable Life Insurance Company stock, with authority to dispose of it, and the offense would be embezzlement.

In the case of *Golden v. State*, 22 Tex. App. 15, 2 S. W. 537, this court held, in an opinion by Presiding Judge White: "Defendant induced Mrs. Weedon to turn over the money to him, ostensibly and with the understanding that he was to deposit the same for her in bank for safe-keeping. She intrusted it to him for that and no other purpose. At the very time he obtained it, it is true that to all intents and purposes he was a thief, intending to steal it; but in so far as she was concerned, she was only creating him her agent to take the money for deposit for her to the bank. The trust imposed in him by her was that he would, as her agent, take the money to the bank, and it was intrusted to him solely for that purpose. Instead of complying with the purposes of the trust and his agency, he misapplied, misappropriated, embezzled, and converted to his own use the money so confided to him. The evidence makes a most clear and indubitable case of embezzlement, even though it may contain all the essential elements of theft also. It amply sustains the conviction for embezzlement, and we feel fully justified in adding that the facts developed in this record discover as heartless and as inhuman a wrong to obtain money by fraudulent devices as is rarely to be found in the history of crimes unaccompanied by personal violence."

In this case there can be no question but that Mrs. Dunn intrusted her stock in the Amicable Life Insurance Company to appellant to be used by him in the purchase of Western Casualty & Guaranty Company stock, and for no other purpose. The question then arises, Did appellant embezzle the stock or the proceeds of the stock; he being convicted of the latter offense? The court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

instructed the jury: "If you should believe from the evidence that at the time the defendant sold said certificates of stock to Mr. Stewart, he made the sale of the same as his own property, with the intention at said time fraudulently to deprive Mrs. Dunn of their value and to appropriate it to his own use and benefit, and with the intention that he would not carry out his agreement with Mrs. Dunn and would not invest said proceeds in certificates of stock in the Western Casualty & Guaranty Company for Mrs. Dunn, or if you have a reasonable doubt as to whether or not this was his intention at the very time he made the sale of said certificates of stock to Mr. Stewart, then the defendant cannot be convicted under either of the counts submitted to you in this indictment, and it will be your duty to give him the benefit of such doubt and acquit him." It is thus seen that the issue was squarely submitted to the jury, and they find under the facts in the case that the intent to appropriate to his own use was conceived after he had sold the Amicable stock to Mr. Stewart; and, if so, he would be guilty of embezzling the proceeds of the sale and not the stock itself, and we cannot say this conclusion is not warranted by the testimony. Appellant may at that time have intended to purchase Western Casualty & Guaranty Company stock for Mrs. Dunn, and the fact that he sold her stock in the Amicable in the very town where he secured it from her would indicate as much, or a boldness in wrongdoing not often met with. At any rate, we cannot say that the jury were not authorized to so find, and, as the court fairly submitted that issue to them, and they find against him on this contention, the judgment is affirmed.

DAVIDSON, J., absent at consultation.

Ex parte BARNES. (No. 3118.)

(Court of Criminal Appeals of Texas. April 22, 1914. Rehearing Denied May 13, 1914.)

**1. HABEAS CORPUS (§ 85\*)—APPLICATION—EVIDENCE.**

An application for writ of habeas corpus for the discharge of relator is merely a pleading, and, in the absence of any evidence of the truth of the allegations of the application, relator must be remanded.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

**2. GRAND JURY (§ 36\*)—WITNESSES—REFUSAL TO BE SWORN—EFFECT.**

One who, when summoned before the grand jury, refuses to be sworn, and who, when brought before the district judge, again refuses to be sworn and answer any question, or to affirm in any way, is guilty of contempt of court, authorizing confinement in jail until she will take the oath required by law, in the absence of any proof that her refusal was on account of any religious or other convictions.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 75-78; Dec. Dig. § 36.\*]

**3. GRAND JURY (§ 36\*)—PRIVILEGE OF WITNESSES—ANSWER TENDING TO SUBJECT WITNESS TO CRIMINAL PROSECUTION.**

That a person summoned before the grand jury refused to be sworn to testify because she presumed that she would be questioned about alleged incestuous relations between herself and her father did not excuse her for her refusal to be sworn, but, after being sworn, she would be justified in refusing to answer questions relating to the subject.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 75-78; Dec. Dig. § 36.\*]

**4. WITNESSES (§ 303\*)—PRIVILEGE OF WITNESSES—ANSWER TENDING TO SUBJECT WITNESS TO CRIMINAL PROSECUTION—IMMUNITY.**

Where, on the refusal of a witness summoned before the grand jury to be sworn on the ground that she presumed she would be questioned concerning a crime committed by her and another, the district attorney, with the sanction and approval of the district judge, tendered her immunity from prosecution as to any matter about which she might testify, she could be compelled to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1049, 1050; Dec. Dig. § 303.\*]

Habeas corpus by Lottie Belle Barnes for her discharge from custody. Relator remanded.

John R. Storms, of Ft. Stockton, and Edwin F. Vanderbilt, of San Antonio, for appellant. W. C. Linden, Dist. Atty., of San Antonio, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Relator, having been refused a writ of habeas corpus by the district courts in Bexar county, applied to this court and was granted a writ, and the hearing set for April 15th.

[1] On that day relator's attorney and the district attorney appeared and argued the case, but relator introduced no evidence in support of the allegations contained in the application. In the absence of any proof supporting the allegations, relator should be remanded. The application is merely a pleading, and does not prove itself. Ex parte Welburn, 157 S. W. 154, and cases there cited.

[2] The district attorney did offer some evidence, and this evidence would show that when the relator was summoned before the grand jury she refused to be sworn or affirm. When she was carried before the district judge she again refused to be sworn to answer any question, or to affirm in any way, and yet there is no proof offered that such action was on account of any religious or other convictions. This would be such contempt as would authorize her confinement in jail until she should purge herself of contempt and take the oath required by law to be administered to all witnesses.

[3] It would seem from the proof offered by the district attorney that relator presumed that she was going to be questioned by the grand jury about alleged incestuous relations between her and her father. This

furnishes no excuse for refusing to be sworn to answer such questions as might be propounded to her by the grand jury. After being sworn, if such questions were propounded, then, and not until then, would she be justified in refusing to answer such questions.

[4] However, it further appears from the testimony offered by the district attorney that when the witness refused even to be sworn, that he then and there offered and tendered her complete and absolute immunity from prosecution as to any matter about which she might be called upon to testify, which tender met with the sanction and approval of the district judge. Under such circumstances, she could be compelled to testify as to her incestuous relations between herself and her father, if any. Ex parte Muncy, 163 S. W. 29, and Ex parte Higgins, 160 S. W. 696. As said in the Higgins Case, it is the better practice that the sanction and approval of the judge of the district court be made a matter of record in his court, and, while the judgment entered in this case impliedly so states, yet it does not expressly do so, and in all such orders it would be proper, and the court should recite that immunity from prosecution had been offered the witness, which offer the court approved, and he then and there informed the witness she could not and would not be prosecuted for any matter about which she might be called on to testify.

The relator is remanded.

DAVIDSON, J., absent at consultation.

### SCOTT v. STATE. (No. 3113.)

(Court of Criminal Appeals of Texas.

April 29, 1914.)

#### 1. RAPE (§ 59\*)—ASSAULT WITH INTENT—INSTRUCTIONS—DEFINITION OF FORCE.

In a prosecution for assault with intent to rape a girl under 15 years of age, it was not necessary for the court to define "force" in the charge, since the consent of the girl would be no defense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

#### 2. CRIMINAL LAW (§ 678\*)—SEPARATE OFFENSES—ELECTION.

Where it appeared that defendant was separately indicted for assaults with intent to rape a girl under 15 years of age, alleged to have been committed on two different dates, and evidence of both offenses was admitted in the trial on the indictment charging the second offense, in connection with a statement that the state relied on the second offense, the defendant could be convicted only for the second offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.\*]

#### 3. CRIMINAL LAW (§ 783½\*)—SEPARATE OFFENSES—ELECTION—INSTRUCTIONS.

In such a case, while the evidence of the first offense should not have been stricken, the

court should have instructed the jury that the defendant was not on trial for the offense committed on the former date.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1879, 1886; Dec. Dig. § 783½.\*]

#### 4. RAPE (§ 59\*)—ASSAULT—INSTRUCTIONS—"AGGRAVATED ASSAULT."

In a prosecution for assault with intent to rape a girl under 15, where the court submitted the issue of aggravated assault, such assault should have been defined as being, under the circumstances of the case, the indecent and improper fondling of the person of a female under 15.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 270, 271.]

Appeal from District Court, Grayson County; J. K. Jamison, Special Judge.

George Scott was convicted of an assault with intent to rape, and he appeals. Reversed and remanded.

Lawson & Cawthon, of Denison, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of an assault with intent to rape, and his punishment assessed at 15 years' confinement in the penitentiary.

The indictment in this case charges the assault to have been committed on or about the 10th day of November, 1913, on Gladys Sconyers, a girl under 15 years of age.

[1] The complaint that the court should have defined "force" and instructed the jury in regard thereto is not applicable to this character of case; for, if the offense was committed with the consent of the girl, it would be no defense, for, under the law, she is declared too immature to consent.

[2] But it appears that after the girl had testified to the offense taking place on November 10th, on cross-examination she also testified to appellant having also assaulted her on October 25th, and on that date had given her \$2, when the county attorney stated: "Counsel understands there are two cases against the defendant in this matter. We are trying him now on the 10th of November. I don't suppose he wants to try both cases at once." After appellant had further cross-examined her in regard to these transactions, the county attorney, on redirect examination, had her testify: "Mr. Scott was at my house twice, and tried to do that way with me. I remember what happened each time he was there. The first time he was there was about October 24th or 25th, and the last time about the 10th of November—the day he was arrested." It is further shown by another bill that the county attorney in his closing address said to the jury: "That, if defendant was not guilty of the crime alleged on November 10th, then they should consider the evidence as to whether or not he was guilty of the crime attempted to be proved as

having been committed on October 25, 1913." The court, in approving the bill, states: "The county attorney took the position presented by the charge of the court, which was to the effect, if defendant at any time within three years prior to the return of the indictment did as charged, he would be guilty." This but emphasizes the contention that the jury was authorized to convict appellant on this trial of either of the offenses testified to by the prosecuting witness, although there were separate indictments pending for each of said alleged offenses.

[3] The record also discloses that appellant moved to strike from the record and instruct the jury not to consider any testimony in regard to an alleged act on October 25th. This was after the county attorney had stated, as shown above, that he was trying the offense this time alleged to have taken place on November 10th. While, under the circumstances, the court did not err in not striking this evidence from the record, yet the court in his charge should have instructed the jury that he was not on trial for the offense alleged to have occurred on October 25th, and the purposes for which said testimony was admitted in evidence, and especially when appellant's counsel presented a special charge requesting that the court so instruct the jury as he did in his special charge No. 2. Special charges Nos. 1 and 3 were correctly refused by the court.

[4] Another matter we would call attention to, although not complained of in a way which we would be authorized to consider it, yet as the case will be reversed for the reasons above stated, and as the court submitted aggravated assault, the court should have in some portion of the charge properly defined aggravated assault as applicable to the evidence in this case—the indecent and improper fondling of the person of a female under 15 years of age.

The judgment is reversed, and the cause remanded.

#### GUTHRIE v. STATE. (No. 3089.)

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 13, 1914.)

##### 1. WEAPONS (§ 13\*)—RIGHT TO CARRY—RECOVERY OF PROPERTY.

Where a husband sold his corn crop and thereafter separated from his wife, who remained on the farm and resisted efforts of the purchaser to gather the crop, accused, hired by the purchaser to gather the crop, both knowing of the wife's claim and her intention to resist, is not authorized to carry a pistol.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.\*]

##### 2. WEAPONS (§ 13\*)—RIGHT TO CARRY—CONSENT OF ANOTHER.

No one can give to another permission to carry arms on his premises in violation of law.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.\*]

##### 3. WEAPONS (§ 9\*)—RIGHT TO CARRY—"PLACE OF BUSINESS."

A farm to which accused goes to forcibly take some corn claimed by his employer is not the "place of business" of accused within the statute so as to entitle him to carry a pistol.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 8; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

Appeal from Red River County Court; George Morrison, Judge.

Joe Guthrie was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Chambers & Black, of Clarksville, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$100.

[1] The facts in this case would show J. L. Upchurch was a married man, and in the year 1913 rented land from Dr. Dinwiddle and raised a crop thereon; that in the latter part of October he sold his ungathered corn crop to Turner Devinney in payment of a debt due for groceries, and in a few days thereafter, and before Mr. Devinney had gotten the corn, he and his wife parted, and he had left the place, his wife continuing to live in the house on the rented premises. It appears that on the morning of November 1st Mr. Devinney employed Bob Swope and W. A. Huddleston to gather the corn, and they went in the field to do so. Mrs. Upchurch went to the field and vigorously protested, and caused these two men to throw the corn they had gathered out of the wagon and leave the premises. They reported the facts to Turner Devinney, and also told appellant about the circumstances. Roy Elmore testified that he, appellant, and C. R. Fogg met Swope and Huddleston, and they told appellant about being run out of the cornfield by Mrs. Upchurch, when appellant replied "that he would gather the corn if Devinney would pay for it"; that, when Swope and Huddleston told appellant he had better let it alone as he might get killed, appellant said "he was ready to die, and would gather it for Devinney if he wanted him to." Devinney then told appellant to get some hands and gather the Upchurch corn. C. R. Fogg and Roy Elmore went with him. It further appears from the record that Mr. Devinney told appellant "that Mrs. Upchurch or her brother-in-law might prevent him from gathering the corn, or might hurt him, and he [appellant] had better carry a gun for protection." Appellant armed himself with a pistol and went to the cornfield to gather the corn. Appellant admits he carried the pistol to the Upchurch cornfield, but says Mr. Devinney told him it was not against the law for him to do so.



Appellant, Elmore, and Fogg all testify that, when they got to the field and commenced to gather the corn, Mrs. Upchurch appeared on the scene, armed with a pistol, ordered them to desist, and throw out what they had in the wagon, and, when they refused, she was very abusive, used obscene language, and drew her pistol on appellant, when appellant drew his pistol and fired it, as he says, in the ground. After Mrs. Upchurch had further cursed and abused them, appellant said "he had wasted the first shot, but he had no more to waste, and that the one he had shot was all he had to throw away." The woman apparently was frightened and left, going back to the house. Thus it is seen that Devinney and appellant both knew that Mrs. Upchurch was claiming the corn before appellant consented and agreed to go and gather it. It may be that the title of Devinney to the corn was perfect, having bought it from the husband of Mrs. Upchurch; but, as they knew that after the separation Mrs. Upchurch was claiming the corn, the law did not authorize them, or either of them, to arm themselves with a pistol and go and take the corn by force. Such proceedings as this leads to too many unfortunate homicides for the law to sanction such proceedings. If Mrs. Upchurch had not become frightened when appellant fired his pistol, and had fired back at appellant, there would have been more than likely a dead man or woman in the field that day.

After Upchurch had separated from his wife and left her there on the rented premises, no man had a right to enter thereon, without her consent, and by force take property therefrom to which she was setting up a claim. If Mr. Devinney in fact was the legal owner of the corn, after he had been informed by Swope and Huddleston that she claimed the corn and had driven them from the field, he had no legal right to send an armed force in the field and take the corn by force. In this day and time no man can take the law into his own hands; but, if his property is wrongfully detained by another, the law furnishes him ample remedies. He could have sworn out a sequestration writ, and the officers of the law would have taken charge of the corn, and the right to the corn adjudicated. The contention of appellant that, as Mr. Devinney had bought the corn from the husband, he as the employé of Devinney, had a right to arm himself, enter the premises by force, and take the corn, regardless of the protests of the wife, cannot be sustained.

[2] The charge of the court was more favorable to appellant than he was entitled to

in law, and, as there was no exception reserved to the introduction of testimony, the judgment is affirmed. The contention of appellant that, if the testimony brought him within any of the exemptions named in the statute, the verdict should not be sustained is sound in law; but the facts in this case do not bring him within any of the exemptions. He was not carrying the pistol on his premises nor in his place of business. The premises were the premises of Mr. and Mrs. Upchurch, and, if Mr. Upchurch had given him permission to go on the premises armed with a pistol, this would not authorize him in law to do so. No one can give to another permission to carry arms on his premises in violation of law. This was not his place of business, for he was employed by Mr. Devinney at another and different place, and he willingly undertook to engage in this seeming dangerous enterprise—go on the premises of another and forcibly take property therefrom that his employer was claiming, and armed himself with a pistol so as to be able to forcibly take the corn.

[3] If the Upchurch farm can be held to be the place of business of appellant, then every person who has some slight business with his neighbor, or in any portion of the town, or in another part of the precinct of his residence, can claim that, while attending to this temporary matter, he had the right to carry a pistol with him and keep it on him while transacting this business matter, and such construction would nullify the pistol statute. The cases of *Ball v. State*, 25 S. W. 627, *Ross v. State*, 28 S. W. 199, *Sanderson v. State*, 50 S. W. 348, *Page v. State*, 25 S. W. 774, *Gibbs v. State*, 158 S. W. 687, *Craig v. State*, 60 Tex. Cr. R. 195, 131 S. W. 563, and other cases cited by appellant, do not sustain his contention. In the *Craig Case* the appellant had the pistol in the room where he slept and kept his clothes; in the *Page Case* he had the pistol in the bank where he was regularly employed; in the *Ross and Ball Cases* the defendant was residing on the premises where he had the pistol, making it his home for the time being; in the *Gibbs Case* the evidence showed he had the pistol on land he had rented and had control of. The facts in this case come more clearly within the rule announced in *McCauley v. State*, 45 S. W. 576. In that case *McCauley* had left his home and gone to his employer's house to assist in killing a hog. This "temporary business" did not exempt, even though he had the legal right to be on the premises where he had the pistol, and was engaged in a lawful business.

The judgment is affirmed.

**SUGARMAN v. STATE. (No. 3105.)**

(Court of Criminal Appeals of Texas. April 29, 1914.)

**INDICTMENT AND INFORMATION (§ 81\*)—COMPLAINT AND INFORMATION—SUFFICIENCY—ALLEGATION OF CHRISTIAN NAME.**

A complaint and information, alleging that the Christian name of accused is unknown, support a conviction, if otherwise good, where accused does not, during the trial, suggest his name and no motion in regard thereto is made.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 216-224; Dec. Dig. § 81.\*]

Appeal from Bexar County Court; J. R. Davis, Judge.

One Sugarman was convicted of crime, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25.

The complaint and information allege that the Christian name of appellant was unknown. When tried, he did not suggest what his name really was, and no motion in regard thereto was made. No statement of facts accompanies the record; neither does it contain any motion for a new trial, nor any order on such motion if any was filed, the recognizance taken in the case reciting that an appeal had been taken to this court.

The complaint and information being sufficient, the judgment is affirmed.

**SCOTT v. STATE. (No. 3101.)**

(Court of Criminal Appeals of Texas. April 29, 1914.)

**LARCENY (§ 8\*)—ACTS CONSTITUTING.**

Where no valid levy of personality of a debtor was made until a specified date, and possession was not taken by the sheriff until that date, an appropriation by the debtor of the personality prior to that date was not larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 20; Dec. Dig. § 8.\*]

Appeal from Childress County Court; Frank W. Freeman, Judge.

L. F. Scott was convicted of theft, and he appeals. Reversed and remanded.

Joseph H. Aynesworth, of Childress, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**DAVIDSON, J.** Appellant was convicted of the theft of milo-maize, and his punishment assessed at a fine of \$5 and one day in the county jail.

Substantially, the evidence is that appellant leased 125 acres of land from A. T. Culbertson. This lease was to include the year 1913 from the 1st of January to 31st of December. Appellant agreed to and did plant 100 acres of cotton and 25 acres of maize, of which Culbertson was to have one half and

appellant the remaining half. On the 13th of August it seems that a verbal contract was entered into by appellant with one J. C. Neely, by which appellant agreed to convey to Neely his undivided interest in the crops and deliver the premises to Neely on the 18th of August. For this Neely assumed the payment of four notes mentioned in the statement of facts, and agreed to execute and deliver to appellant his, Neely's, promissory note for the sum of \$70.55 to be dated August 13, 1913, and due October 30, 1913. Neely also agreed to execute and deliver to appellant a mortgage upon the property conveyed by Scott to him to secure the note for the above \$70.55. On August 19th Neely filed suit in the district court against appellant, setting forth the terms of the contract, alleging that appellant would not give him possession and turn over to him the property mentioned. In other words, he, appellant, refused to carry out the verbal contract. In his petition Neely alleges that he executed and tendered to appellant the above-mentioned note for \$70.55 as well as the mortgage upon the crop to secure the note, and asked for an enforcement of the contract. He also asked for possession and a writ of sequestration. The writ was granted on 19th of August, after the premises were to be delivered under the previous verbal contract. This writ was placed in the hands of the sheriff. The return shows that the sheriff went to the premises, saw appellant, and told him he had a writ and would levy upon the premises and all the growing crop which had not been gathered. On 23d of August, after the first supposed levy, another writ of sequestration was issued and placed in the hands of the sheriff, or rather one of his deputies, with return on it showing he had levied upon and taken possession of the premises. Appellant agreed to get off the premises as soon as he could find another place, and was left in possession of the premises and property as he had been at all times during the year. Between the first and second levy appellant gathered some of the maize and placed it in the barn with other maize which was already in there. This was done, however, after he had seen and consulted with an attorney, who had informed him that the property was his, and he did not have to move, and that he could use the maize. There seems to be no question of the fact that neither of the officers ever did dispossess appellant of the premises, but he was left in possession, except for the fact that he was told the levy had been made. It is also shown that appellant's attorney advised him that he did not have to move, and that the property belonged to him, and he could use it. It is further shown that he had about 1,500 pounds of maize in the barn, and he gathered an additional amount of the maize alleged to have been levied upon, and placed it in the barn on top of his own maize. He had two

mules belonging to Mr. Culbertson with which he made the crop and some of his own stock. To this stock he fed some of the maize. He had more maize in the barn than that which had been gathered, and there was no intention or purpose on appellant's part to sell any maize or any other property. Appellant also testified he had consulted an attorney about his rights, and had been informed by the attorney that the levy was not valid, and that he was in possession of the premises and property, and had a right to use it. There seems to be no dispute in regard to the evidence, which shows that appellant had the 1,500 pounds of maize in the barn, or about that amount, and that after the supposed levy was made he gathered the maize part of the crop and placed it in the barn there on the premises, and that he in no way handled it or used it except enough of the maize to feed the stock. These are the facts in the case. This does not constitute a case of theft. The property is alleged to be in the sheriff who made the levy. There is no fraudulent intent on the part of appellant shown or attempted to be shown. Without going into the legal status of the levy or supposed levy of the writ and validity of it, we hold that the facts, independent of the illegality of the legal proceedings, do not show a case of theft, even conceding that appellant used the maize in feeding the stock, and that is all the evidence of appropriation found in this record.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J., and HARPER, J. We do not agree to the reasoning and all that is said in the above opinion, for if a valid levy had been made and possession shown in the sheriff, we think the facts would sustain a conviction. But as the evidence discloses that no valid levy was made until September 6th, and possession of the property not taken by the sheriff until that day, and appellant appropriated none of the property after September 6th, the evidence will not sustain a conviction, and we therefore agree to a reversal of the case.

# SWILLEY v. STATE. (No. 8103.)

(Court of Criminal Appeals of Texas. April 29, 1914.)

## 1. CRIMINAL LAW (§ 1090\*)—APPEAL—BILL OF EXCEPTIONS—NECESSITY—MOTION FOR CONTINUANCE.

Where no bill of exceptions was reserved to the action of the trial court in overruling accused's motion for continuance on account of the absence of witnesses, such ruling cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

## 2. WITNESSES (§ 331½\*)—IMPEACHMENT—FORMER TESTIMONY OF ABSENT WITNESS—WITNESS SICK OR TEMPORARILY ABSENT.

In a prosecution for homicide, where the defendant had made an affidavit as to the testimony that would be given by three absent witnesses, it was error to compel him to testify on cross-examination as to what he had heard those witnesses testify at the inquest, and at a hearing on habeas corpus, where two of the witnesses were shown to be kept away from the trial by sickness, and the other was temporarily absent from the state; the former testimony of witnesses being inadmissible to impeach the defendant's credibility, or for any other purpose, where they are alive and within the jurisdiction of the court.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.\*]

## 3. CRIMINAL LAW (§ 721\*)—CROSS-EXAMINATION OF ACCUSED—SUBJECT OF INQUIRY.

It was improper for the district attorney to ask accused whether he had testified at a hearing on habeas corpus; since he had the right to testify or not at such hearing, as he saw proper, and his failure so to do was not a circumstance against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

## 4. CRIMINAL LAW (§ 822\*)—TRIAL—INSTRUCTIONS—CHARGE CONSIDERED AS A WHOLE.

Where the defendant claimed justifiable homicide on the ground that deceased was attempting to rob him, and also on the ground of self-defense, a charge, one paragraph of which seemed to require the jury to believe both grounds of justification existed before they could acquit, was not erroneous, where the charge, considered as a whole, was not susceptible of that construction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 8158; Dec. Dig. § 822.\*]

Appeal from District Court, Jasper County; A. E. Davis, Judge.

John Swilley was convicted of crime, and he appeals. Reversed and remanded.

Bisland, Adams & Bruce, of Orange, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The offense alleged in the indictment was committed in Orange county, and tried in Jasper county on a change of venue.

[1] When the case was called for trial, appellant moved to continue the case on account of the absence of three witnesses, J. P. Crain, Mrs. M. J. Reed, and Albert Cram, all of whom are stated to reside in Orange county, Cram being alleged to be temporarily out of the state. The record discloses that Crain and Mrs. Reed did live in Orange county, and were absent on account of sickness. As there was no bill of exceptions reserved to the action of the court in overruling this motion, it is not presented in a way we can review the matter.

[2] Appellant does not deny that he killed Ed Rosenbaum, but admits he did so, stating that while he was asleep Rosenbaum came into his room and had stolen his purse from his pocket; that he awoke and grappled with Rosenbaum, and charged him with

the theft, which Rosenbaum denied; that a struggle ensued, when Rosenbaum rushed out of the door, grabbed a shotgun sitting near the door, and attempted to shoot him, when he (appellant) shot deceased with a Winchester, thus presenting two grounds of justifiable homicide, one self-defense, and the other robbery and killing the thief while in the presence of the person robbed. Appellant in his application stated facts he expected to prove by the absent witnesses which would tend to support his theory of self-defense; that is, they arrived at the scene of the homicide shortly after the shooting, and they saw a gun lying on the ground where appellant testified deceased was when he attempted to shoot him.

Of course, this application for a continuance was not admissible in evidence on the trial of the case for appellant for any purpose, nor did he offer it in evidence. The jury should not and did not know anything of the contents of such application until the happening of the hereinafter cited occurrences. Appellant took the stand in his own behalf, and testified to a state of facts tending to support the above two pleas of justification. On cross-examination, the prosecuting officers were permitted to read in the presence of the jury, a portion of appellant's application, and ask appellant if he was not present at the inquest proceedings and hearing of this case on habeas corpus and heard the witnesses testify on one or the other two proceedings, and then, over objection, he was compelled to tell what he heard these witnesses testify at these trials. We do not deem it necessary to state all this reproduced testimony; it is sufficient to state that a portion thereof was highly injurious to appellant, and in direct conflict with a portion of his testimony on this trial. Testimony of absent witnesses given at a former trial cannot be reproduced or put in evidence, except in those cases where the witnesses have since died, gone beyond the jurisdiction of the court, or kept away by the connivance of the defendant. The record shows that two of the witnesses were then in Orange county, sick, and within the jurisdiction of the court. The other witness was only temporarily absent from the state, his family still residing in Orange county. Under such circumstances, testimony given at either the habeas corpus trial or the inquest could not be reproduced by defendant or any other person, and the fact that he had applied for a continuance on account of their absence did not authorize the state to reproduce their testimony on this trial. These matters are complained of in several bills of exception, but we have passed on them jointly, for, under the record in this case, none of the reproduced testimony was admissible. And, of course, the testimony being inadmissible, the charge in regard thereto was improper. It was not admissible to affect the credit of defendant,

nor for any other purpose; the witnesses being alive and within the jurisdiction of the court.

[3] Again, it was improper for the district attorney to ask the witness whether or not he testified at the habeas corpus trial. He had the right to testify or not, as he saw proper, and the fact he did not deem it necessary nor advisable to testify on the habeas corpus hearing would not be a circumstance against him. *Brown v. State*, 57 Tex. Cr. R. 269, 122 S. W. 567, and cases there cited.

[4] Appellant complains that the charge, taken as a whole, would bear the construction that the court, instead of instructing the jury that if they believed either of the defensive theories of justification, required them to believe both, before he would be entitled to an acquittal. While in one paragraph of the court's charge it would seem that the criticism was just, yet the charge, taken as a whole, we do not think, would bear this construction, nor would the jury be misled wherein the court instructed the jury that, if they believed the robbery theory, they would acquit, "and," if they believed the self-defense theory, they would acquit. Perhaps if the word "or" had been used in the beginning of this second paragraph the meaning would be more clear, and on another trial the court will so word his charge as to be free from this criticism.

The judgment is reversed, and the cause is remanded.

#### BRADFIELD v. STATE. (No. 2926.)

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 13, 1914.)

##### 1. THREATS (§ 1\*)—ELEMENTS OF OFFENSE—STATUTORY PROVISIONS.

Pen. Code 1911, art. 1182, providing that if any person shall send, or cause to be sent, deliver, or cause to be delivered, to any other person any anonymous letter reflecting upon the integrity, chastity, virtue, etc., of such person or any other person, the person so "sending" the letter shall be guilty of a misdemeanor, is violated where the writer of the letter himself delivers it to the person to whom it is addressed, in view of Code Cr. Proc. 1911, art. 25, requiring its provisions to be liberally construed to attain the object intended; Rev. St. 1911, art. 5502, subd. 6, requiring the court to look to the intention of the Legislature; Pen. Code 1911, art. 9, requiring that Code and all other criminal laws to be construed according to the plain import of the language without regard to the usual distinction between penal and other laws; and article 10, providing that words specially defined shall be understood in that sense, and other words in the sense in which they are understood in common language.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.\*]

##### 2. STATUTES (§ 178\*)—CONSTRUCTION—STATUTORY RULES OF CONSTRUCTION.

Rev. St. 1911, art. 5502, prescribing rules for the construction of civil statutory enactments, applies and is of binding force in criminal prosecutions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 257; Dec. Dig. § 178.\*]

**3. THREATS (§ 5\*)—COMPLAINT—LETTERS.**

Under Pen. Code 1911, art. 1182, making it a misdemeanor to send an anonymous letter "reflecting" on the integrity, chastity, etc., of any person, a complaint and information charging the sending of a letter which "reflects" upon a person named was not defective.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 9, 10; Dec. Dig. § 5.\*]

**4. THREATS (§ 5\*)—COMPLAINT—SENDING ANONYMOUS LETTER.**

A complaint and information for sending an anonymous letter reflecting upon a person's integrity, chastity, etc., need not contain the letter, in view of Code Cr. Proc. 1911, art. 453, requiring only such certainty as will enable accused to plead the judgment in bar of another prosecution; article 460, providing that it shall be sufficient to charge the offense in ordinary and concise language and with such certainty as will give defendant notice of the offense charged and enable the court to pronounce judgment; and article 474, providing that it is sufficient to use other words conveying the same meaning as the words used in a statute or including the sense of the statutory words.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 9, 10; Dec. Dig. § 5.\*]

**5. WITNESSES (§ 352\*)—IMPEACHMENT—CHARACTER AND CONDUCT OF WITNESS.**

On a trial for delivering to a 15 year old girl an anonymous letter reflecting on her integrity, chastity, etc., evidence that on the night before the delivery of the letter accused was seen hugging and kissing such girl was properly excluded, in the absence of any showing that this was with her consent or permission, as otherwise such conduct would not have reflected on her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.\*]

Appeal from San Saba County Court; J. T. Hartley, Judge.

E. D. Bradfield was convicted of an offense, and he appeals. Affirmed.

Walker & Burleson, of San Saba, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for delivering to Miss Alma Walker, a young 15 year old girl, an anonymous letter, and his punishment assessed at the lowest prescribed by law.

[1] The statute is: "Article 1182. If any person shall send, or cause to be sent, deliver, or cause to be delivered, to any other person any anonymous letter or written instrument of any character whatsoever, reflecting upon the integrity, chastity, virtue, good character or reputation of the person to whom such letter or written instrument is sent or addressed, or of any other person, or wherein the life of such person is threatened, said person so sending such letter or written instrument shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than two hundred and fifty dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than one month nor more than twelve months." The complaint and information allege: That on August 1, 1913, appellant "did then and there unlawfully send

and deliver to Miss Alma Walker, an anonymous letter, typewritten in the Spanish or Mexican language, which said letter, according to its words and tenor reflects upon the chastity, virtue, good character and reputation of the said Miss Alma Walker, to whom said letter was sent and delivered and intended for."

The uncontradicted evidence shows that, at the time and place alleged, appellant himself wrote and delivered to Miss Walker a typewritten letter in the Spanish or Mexican language, which reflected upon her in the particulars specified. No name was signed or written thereto, except this: "From 5, 4, 2, in the alphabet." The figures 5, 4, 2 in the alphabet are the initials of appellant. The letter was produced, identified, and introduced in evidence. It was shown to be in the Spanish or Mexican language. It was translated by two competent witnesses and without question reflected upon Miss Walker, as stated above.

Appellant contends that the indictment was invalid, because, under the terms of the statute, as he contends, no punishment was fixed where the writer himself delivered such letter, contending that because the article of the Code above quoted says said person so sending such letter shall be punished, and that the statute does not prescribe any punishment for one who himself delivers such letter.

In our opinion appellant's contention cannot be sustained. We think that the true construction of said article, and the undoubted intention of the Legislature, was, not only to make it unlawful for any person to deliver or cause to be delivered any such letter, as well as to send or cause it to be sent, and that where said act says, said person so sending such letter, does not exclude but embraces one who delivers it or causes it to be delivered as well as one who sends or causes it to be sent.

The undoubted rule of construction applicable to this question is well established, as laid down by 2 Lewis' Sutherland, Statutory Construction, §§ 589 and 590, as follows:

"The modern doctrine is that to construe a statute liberally, or according to its equity, is nothing more than to give effect to it according to the intention of the lawmaker, as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the act; so it may restrain the general words to exclude a case not within that purpose.

"There is no arbitrary form of words to express any particular intention; the intent is not identical with any phraseology employed to express it. Any language is but a sign, and many signs may be used to signify the same thing. In statutes, the sense signified is the law; the letter is but its servant or its vehicle. Language is so copious and flexible

that when general words are used there is an absence of precision, and all words and collocations of words admit of more than one interpretation. In the construction of remedial statutes, while the meaning of the words is not ignored, it will be subordinated to their general effect in combination in a whole act or series of acts, read in the light of all the pertinent facts of every nature of which the courts take judicial notice. Liberal construction of any statute consists in giving the words a meaning which renders it more effectual to accomplish the purpose or fulfill the intent which it plainly discloses. For this purpose, the words may be taken in their fullest and most comprehensive sense. Where the intent of the act is manifest, particular words may have an effect quite beyond their natural signification in aid of that intent."

But, in addition to this common-law rule of construction, our own statutes and decisions especially are applicable. Article 25, C. C. P., is: "The provisions of this Code shall be liberally construed, so as to attain the objects intended by the Legislature: The prevention, suppression, and punishment of crime."

[2] Article 5502 (3268) of our Revised Civil Statutes is: "The following rules shall govern in the construction of all civil statutory enactments: \* \* \* (6) In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times, the old law, the evil and the remedy." As frequently held by this court, said article of the Revised Statutes, "though embraced in the Civil Statutes, is, in our opinion, equally as applicable, and of binding force in criminal prosecutions." *Murray v. State*, 21 Tex. App. 630, 2 S. W. 760, 57 Am. Rep. 623. To the same effect are articles 9 and 10 of the Penal Code. Taking all these together, it is clear, as has frequently been held by this and our Supreme Court, that all penal statutes shall be liberally construed, and that the old or common-law rule that they will be strictly construed has been abrogated. *The Road Cases*, 30 Tex. 503; *Ex parte Gregory*, 20 Tex. Cr. App. 210, 54 Am. Rep. 516; *Ex parte Garza*, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

In *Chapman v. State*, 16 Tex. App. 78, this court said: "When the intention of a statute is plainly discernible from its provisions, that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. *Brooks v. Hicks*, 20 Tex. 666; *Forshey v. Railroad Co.*, 16 Tex. 516. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter is not within the statute unless it be within the intention of the makers. *Holmes v. Carley*, 31 N. Y. 290; *Chase v. Railroad Co.*, 26 N. Y. 523. In construing a statute the principal object should be to arrive at the intention of the Legislature. Such construction ought to be given the statute as will best answer the in-

tention which its makers had in view. Whenever the intention can be discovered, it ought to be followed, although it may seem to be contrary to the letter of the statute. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 3&O, 8 Am. Dec. 243; *Sedg. on Con. & Stat. Law*, p. 225 et seq.; *Potter's Dwarrior on Stat. p. 174 et seq.*"

In *Sartain v. State*, 10 Tex. App. 653, 38 Am. Rep. 649, this court said: "'Courts are not confined to the literal meaning of the words employed, in the construction of statutes, but, as was said in *Burgett v. Burgett*, 10 Rep. 221, the intention of the lawmakers may be collected from the cause or necessity of the act; and statutes are sometimes contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac. tit. Statute, 1, §§ 38, 45, 50. Every statute should be construed with reference to its object, and the will of the lawmakers is best promoted by such a construction as secures that object and excludes every other.' *Castner v. Walrod*, 83 Ill. 171 [25 Am. Rep. 369]; *Walker v. State*, 7 Tex. App. 245 [32 Am. Rep. 595]."

In *Whisenhunt v. State*, 18 Tex. App. 496, this court said: "It is a well-settled rule of statutory construction 'that the intent and meaning should be followed although it may seem to be contrary to the letter of the statute.' *Sedgwick on Statutory Construction*, 256. 'Statutes are to be construed according to the intentions of the makers, if these can be ascertained with reasonable certainty, although such construction may seem contrary to the ordinary meaning of the letter of the statute.' *Id.* p. 313; [*Staniels v. Raymond*] 4 Cush. (Mass.) 314; *Wilson v. Ireland*, 4 Md. 444."

In *Albrecht v. State*, 8 Tex. App. 314, this court said: "If a reasonable construction of the language would tend to effectuate this purpose (the legislative intent), and another construction equally as reasonable would have a contrary tendency, under well-established canons of construction courts should not hesitate in choosing the former to the exclusion of the latter. Intention frequently controls express language in the construction of a statute. *Walker v. State*, 7 Tex. App. 245 [32 Am. Rep. 595]." "The intention of the Legislature in enacting a law is the law itself." *Edwards v. Morton*, 92 Tex. 153, 46 S. W. 793.

It is needless to cite the many other decisions from this court and our Supreme Court to the same effect.

[3] Appellant's other objection to the complaint and information is, because they allege said letter "reflects" upon the chastity, virtue, good character and reputation of the said Miss Alma Walker, whereas, the statute says "reflecting." This is very hyper-

critical and, of course, presents no cause to hold the pleading bad.

[4] Another contention of appellant is that the complaint and information are fatally defective in that they do not contain the said letter. In our opinion it was unnecessary to copy the letter in either the complaint or information. Article 470, P. C., prescribes that if any person shall go into or near any public place, etc., and shall use loud and vociferous or obscene, vulgar, or indecent language, swear or curse, or yell or shriek, etc., in a manner calculated to disturb the inhabitants, shall be fined, etc. This court expressly held, in *Foreman v. State*, 31 Tex. Cr. R. 479, 20 S. W. 1109, that it was unnecessary to allege what the language was; that following the statute was sufficient. In *Jones v. State*, 35 Tex. Cr. R. 565, 34 S. W. 631, *Glass v. State*, 23 Tex. App. 425, 5 S. W. 131, and *Satchell v. State*, 1 Tex. App. 438, this court held that in prosecutions for the fraudulent disposition of mortgaged property it was not necessary that the indictment set out the mortgage by its tenor, or by an exhibited copy.

Article 453, C. C. P., is: "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense."

Article 460, C. C. P., is: "An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment."

Article 474, C. C. P., is: "Words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning, or which include the sense of the statutory words."

It has many times been held by this court that, when an indictment charges the offense substantially in the language of the statute, this is all that is necessary. Judge White says: "It will generally be sufficient if the indictment follows the exact words of the statute, and it is rarely ever safe to depart from them." Section 344, subd. 2, of his C. C. P. Ann.

In his motion for new trial, appellant has some complaints to the court's charge, and he also requested one charge which was refused. These matters are not raised in such a way that this court is authorized to review them, under a uniform and large number of decisions. *Giles v. State*, 148 S. W. 320; *Mealer v. State*, 145 S. W. 354; *Cabiness v. State*, 146 S. W. 934; *Gowans v. State*, 64

Tex. Cr. R. 401, 145 S. W. 614; *Smith v. State*, 145 S. W. 918; *Luttrall v. State*, 64 Tex. Cr. R. 411, 142 S. W. 589; *Perkins v. State*, 144 S. W. 244; *Golden v. State*, 146 S. W. 946; *Yarborough v. State*, 147 S. W. 270; *Milan v. State*, 146 S. W. 185; *Gamble v. State*, 146 S. W. 551; *Staten v. State*, 63 Tex. Cr. R. 592, 141 S. W. 526; section 813, subd. 6, Wh. O. C. P.

[5] Appellant complains that the court would not permit his witness Miss Viola Matlock to testify that, on the night before appellant delivered to Miss Walker said letter, she (the witness) was returning from church in company with Rick Woods and that about a mile and a half from the church she saw defendant hugging and kissing Miss Walker. We think there was no error in excluding this testimony. It was not sought to show by this witness that appellant hugged and kissed Miss Walker with her consent or permission. If he did so without her permission or by force, such conduct, in no event, would have reflected on Miss Walker. On cross-examination by appellant, Miss Walker testified that she did not let the defendant so treat her the night before, or any other time, and his letter to her would indicate that if he attempted to so mistreat her she resented it and he bore marks of her resentment on his person, for he said to her in the letter, "Dog gone, but I have a blue spot where you hit me to-night."

We have not taken up, in the order presented by appellant, his contentions, or each of them, separately; but we have considered them all, and they are embraced and passed upon by what we have said in this opinion.

There is no reversible error shown, and the judgment will be affirmed.

#### CAPSHAW v. STATE. (No. 3077.)

(Court of Criminal Appeals of Texas. April 29, 1914.)

#### 1. WITNESSES (§ 337\*)—IMPEACHMENT—CHARACTER OF WITNESS.

The court should not have permitted the district attorney to ask defendant, in a prosecution for seduction, if he had not left another county because indicted for rape on a certain girl, when the attorney at the time was aware that no such indictment had ever been presented, or arrest made.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.\*]

#### 2. WITNESSES (§ 344\*)—IMPEACHMENT—CHARACTER OF WITNESS.

Proof that a witness had left another county because he had carried a pistol was not admissible for the purpose of impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.\*]

#### 3. WITNESSES (§ 340\*)—IMPEACHMENT—CHARACTER OF WITNESS.

Where, in a prosecution for seduction, the district attorney asked one of defendant's witnesses if he had not left another county because he carried a pistol, and if he had not so

stated to a third party, it was error to permit the attorney to call such third party to contradict the witness; such evidence not being admissible for impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1116, 1117, 1119, 1121; Dec. Dig. § 340.\*]

4. CRIMINAL LAW (§ 780\*)—TRIAL—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.

In a prosecution for seduction, a charge upon the testimony of an accomplice, "that the corroborating evidence need not be direct and positive, independent of the testimony of [the accomplice], but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense," etc., was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

Davidson, J., dissenting in part.

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

Robert Capshaw was convicted of seduction, and he appeals. Reversed and remanded.

Mantooth & Collins, of Lufkin, and W. F. Ramsey and C. L. Black, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for seduction; the punishment being eight years in the penitentiary.

The court, at the request of the district attorney, gave the following charge: "You are further charged in connection with the main charge as to Eula Scroggins being an accomplice, and that her testimony must be corroborated by other testimony tending to connect the defendant with the offense charged: That the corroborating evidence need not be direct and positive, independent of the testimony of the said Eula Scroggins, but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense of seduction as hereinbefore defined to you (and which tend to connect the defendant with the commission of the offense charged), will fulfill the requirements of the law." Several objections were urged to this charge. Among others, that it was on the weight of the evidence as well as its tendency to emphasize and give undue importance to the issue of corroboration, and had the effect to lead the jury to believe that in the opinion of the court the witness was sufficiently corroborated. We are of opinion the exceptions to this charge are well taken. First, that it is on the weight of the evidence, and, second, that it emphasizes and gives undue importance to the issue of corroboration, and had the effect to lead the jury to believe, as contended by appellant, that the witness was sufficiently corroborated. The rule laid down as to corroboration in the case is not the correct one. Quoting from

the charge, we find this language: "The corroborating evidence need not be direct and positive, independent of the testimony of said Eula Scroggins, but proof of such facts and circumstances as tend to support her testimony." Under the authorities this rule has been condemned, and in recent cases. The usual criterion by which the testimony of an accomplice is to be weighed, valued, or corroborated is that, in order to be sufficient, the facts and circumstances must corroborate the accomplice, independent of her testimony; that is, discarding the testimony of the accomplice, if there are no facts and circumstances which tend to show the commission of the offense, or to sustain her testimony which is independent of her testimony, the corroboration is not sufficient. But the court here tells the jury that it is not necessary that it be independent of her testimony. In other words, it may be dependent upon her testimony. In a certain sense this may be true; that is, her testimony must be corroborated by the facts, and they must so adjust themselves as to in fact corroborate the accomplice as required by the statute, but her testimony, or the testimony dependent upon her testimony, cannot be used as corroboration. It must come from an undefiled and outside source, and not from the accomplice's testimony. If testimony that was dependent upon her testimony could be used as corroboration, then the statutory rule that her testimony must be corroborated would be set at naught. Without following up this matter we cite *Curry v. State*, 151 S. W. 319; *Bishop v. State*, 151 S. W. 821; *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 919; *James v. State*, 167 S. W. 727, decided at the present term of the court. Also as bearing upon these suggestions of the error in the charge, see *Campbell v. State*, 57 Tex. Cr. R. 302, 123 S. W. 583; *Lemmons v. State*, 58 Tex. Cr. R. 269, 125 S. W. 400; *Garlas v. State*, 48 Tex. Cr. R. 451, 88 S. W. 345. These seem to be a sufficient number of cases to sustain the proposition that the court's charge was error without going further into the case.

[1] Another bill of exceptions recites that the district attorney propounded to the defendant while he was upon the witness stand the following question: "Is it not a fact that you left Rains county because you were indicted for rape or assault to rape on Zoe Wells, and did you not so state or tell Ed Shofner?" Various objections were urged to this question. The witness answered: "I was not indicted in Rains county for rape or assault to rape on Zoe Wells, nor did I ever tell Ed Shofner that I was indicted for rape or assault to rape on this girl." The grounds of objection were renewed, and the bill of exception reserved. This bill of exception is well taken, and the court should have sustained the objections. It is stated in the bill of exception that the district



attorney was aware at the time he asked the question that no such indictments had ever been presented, and no arrest had ever been made, or charge against the appellant, and under those circumstances the court should not have permitted the district attorney to ask such questions. The authorities, we think, upon this question are ample. See *Ballard v. State*, 160 S. W. 716; *Branch's Crim. Law*, § 867; *Clements v. State*, 153 S. W. 1137. Judge Harper, writing the opinion in the *Clements Case*, says: "In another bill it is claimed that the state asked certain questions to prejudice the jury against witnesses for defendant; the state's attorney knowing at the time that no grounds existed upon which to base such questions." In the case at hand the bill recites the district attorney knew there was nothing upon which to base the question, inasmuch as no such things had occurred in Rains county. This was the defendant testifying in the case, and if, as a matter of fact, appellant had been indicted for rape or assault to rape, it might have been used as a means of impeaching him, or attacking his credibility; but, as no such thing occurred, and the district attorney had knowledge of the fact, the court should not have permitted this question, as it was calculated to injure the rights of the defendant before the jury. This sort of testimony should never be permitted to go to the jury when it is known that it did not occur, and proof could not be made of the charges for the supposed felonious conduct.

[2] Another bill of exception recites that, when the witness C. C. Capshaw was testifying for the defendant, on his cross-examination, he was asked whether or not he had left Rains county because he had carried a pistol, and whether or not said witness had told John Hubbard that he (said witness) had left Rains county because he had to carry a pistol, and whether or not he had shown him signs of rust on his clothing where he had carried a pistol in Rains county. Various objections were urged to this manner of cross-examination of the witness, and the witness could not be attacked by showing that he had carried a pistol, even if he had carried one; that it would tend to prejudice the jury against the weight and credibility of the testimony of said witness given in behalf of his son, defendant. The court overruled these objections and permitted him to testify denying that he had made any such statement. The court signs this with the statement that, by referring to the statement of facts on this subject, and further, the witness said that Hubbard would not testify to any such thing. The qualification does not seem to assist in clearing the matter. The fact that Hubbard would not testify to any such thing would have been an urgent rea-

son why the question should not have been permitted, or the answer given. The question was based upon the idea that the witness had stated to John Hubbard that he had carried the pistol. Now, if John Hubbard would deny, as stated by the judge in his qualification that he would do, that he had made such statements, it would have presented to the court a very strong reason why the question should not have been asked, or the answer given. In the first place the witness could not be attacked by proof that he carried a pistol, and in the next place the question shows that the impeachment was to be drawn from Hubbard, and the court qualified the bill by stating Hubbard would not so testify. In view of this, the court should have sustained the objection and excluded the testimony.

[3] Another bill which might be considered in the same connection was that Hubbard was permitted to testify that the same witness, C. C. Capshaw, had told him that he had left Rains county because he had to carry a pistol, or words to that effect, and that he (Capshaw) had shown him (John Hubbard) his clothing which had rust on them, and the rust was the result of carrying a pistol when he was in Rains county. Objection was made to this for various reasons set out in the bill, and the court overruled the objections, and the witness was permitted to testify that the witness Capshaw had told him (Hubbard) that he (Capshaw) "had to tote a pistol" while he was in Rains county on account of some threats or something of that kind, and he showed him his clothing too, etc. The court qualifies this by referring to the statement of facts and C. C. Capshaw's and Hubbard's evidence on the subject. The statement of facts shows, in substance, what the bill of exception shows—that Capshaw was a witness for the defendant, who was his son, and the predicate was laid and the question was asked with reference to carrying the pistol, under the circumstances detailed, while in Rains county, and it was denied, and Hubbard was placed on the stand to and did contradict him. Under all the authorities this evidence was inadmissible. Carrying a pistol involved neither legal nor moral turpitude, and it was wholly immaterial in this case, and could only go to the prejudice of appellant in attacking his witness, who was his father and one of his important witnesses. We deem it unnecessary to cite cases in support of this.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

PER CURIAM. [4] The majority of this court does not believe the quoted charge is erroneous, but comes within the rule laid down in the case of *Beeson v. State*, 60 Tex. Cr. R. 39, 130 S. W. 1006.

COST et al. v. SHINAULT et al. (No. 292.)  
(Supreme Court of Arkansas. April 27, 1914.)

1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding not contrary to the preponderance of the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 72\*)—AUTHORITY OF SCHOOL DIRECTORS—STATUTORY PROVISIONS.

Kirby's Dig. § 7643, authorizing school directors to permit a private school to be taught in the schoolhouse while not occupied by a public school, unless otherwise directed by the voters of the district, does not exclude other uses of school buildings, where the same do not interfere with the schools nor injure the buildings, and does not render invalid a contract authorizing a local lodge of a secret society to use a school building for a lodgeroom; the use not interfering with the school nor injuring the building.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 177, 178; Dec. Dig. § 72.\*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 72\*)—AUTHORITY OF SCHOOL DIRECTORS—STATUTORY PROVISIONS.

Kirby's Dig. § 7614, conferring on school directors the power to control the school affairs with the custody of the schoolhouses and grounds, and preserve the same, vests in the directors discretion in arrangements for the interest of the district and they may, with the approval of the voters of the district, permit a secret society to use the school building as a lodgeroom, where such use does not interfere with the school nor injure the building, but is advantageous to the district in view of its financial condition.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 177, 178; Dec. Dig. § 72.\*]

Appeal from Lawrence Chancery Court; Geo. T. Humphries, Chancellor.

Suit by A. B. Cost and others against J. F. Shinault and others. From a decree for defendants, plaintiffs appeal. Affirmed.

W. A. Cunningham, of Walnut Ridge, for appellants. W. E. Beloate, of Walnut Ridge, for appellees.

SMITH, J. Appellants were plaintiffs below, and alleged the following facts in their complaint. That they were citizens and taxpayers of school district No. 64 of Lawrence county, Ark., and interested in the educational interests of that district, and that appellees, who were defendants below, were school directors of said district, and as such had control of the schoolhouse and grounds, and that school was being taught in the school building, all of which was needed for the accommodation of the children attending school. That the said directors, notwithstanding that fact, are about to lease a part of said building to the Independent Order of Odd Fellows as a lodge hall, and are about to cause said building to be remodeled, without right or authority from the voters of said district, by causing the stairway to be

moved, and other changes to be made, and that, if such changes are made, it will entirely unfit the building for the use for which it was originally designed, and will make the same totally unfit for use as a school building. That the use of said building as a lodgeroom is entirely inconsistent with its use as a school, and will interfere with the use and enjoyment of the other rooms of the building as schoolrooms, and will cause great and irreparable injury to the public, and interfere with the educational interests of said district.

Plaintiffs prayed that said directors and all other persons be forever enjoined from changing or altering said building in any way, without first submitting the plans thereof to the voters of said district, and that said directors be enjoined from leasing any part of the building to any person for any purpose whatever, except for the conduct of schools. The answer denied that the directors were about to make any change in the building which was detrimental to it, or any contract or lease with reference to the use of the building which would in any way interfere with the school being taught therein.

There was offered in evidence a contract dated December 27, 1911, made between representatives of the local Odd Fellows Lodge and the directors of the district, under the terms of which, for the consideration of \$50, to be paid on or before October 1, 1912, the directors rented to said lodge the upper part or second story of the school building for the use of said lodge for a term of one year from January 1, 1912, with an option to renew said lease for a period of five years. The school district, however, reserved the right to use the building for school exhibitions and entertainments of its own. At the annual school election in May, 1912, the directors caused the question of the ratification of this lease to be submitted to the electors voting at that election, and it was ratified by a vote of 19 for and 1 against.

[1] It appears that the revenues of the district had been insufficient to provide the necessary funds for school purposes, and subscription lists had been circulated upon which private contributions were asked for school purposes. The evidence was conflicting as to the interference with the school on account of this lease, and of the damage to the building in adapting it to the uses of the Odd Fellows. But the court found the fact to be that no damage was occasioned to the said school building by reason of the changes made in the building by the Odd Fellows Lodge, and that no interference had or would result to the school being taught, or that would thereafter be taught, in said building by reason of the upper story thereof being used as a lodgeroom, and that the plaintiffs' complaint should be dismissed for want of equity.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We think this finding was not contrary to the preponderance of the evidence.

[2] Appellants cite us to section 7643 of Kirby's Digest, which provides that directors may permit a private school to be taught in the district schoolhouse during such time as the said house is not occupied by a public school, unless they be otherwise directed by a majority of the legal voters of the district, and contend that the express granting of power for this purpose is in effect a denial of power to let it for any other purpose. But we do not agree with that contention.

[3] Section 7614 of Kirby's Digest provides that the directors shall have charge of the school affairs and the school educational interests of their district, and shall have the care and custody of the schoolhouses and grounds and property of the district, and shall carefully preserve same, and gives to them authority to purchase or lease a schoolhouse site and to rent, purchase, or build a schoolhouse with the funds of the district. And this section vests them with the duty and discretion of making the most advantageous arrangements possible, within the powers conferred, for the interest of the district. In the case of *Boyd v. Mitchell*, 69 Ark. 202, 62 S. W. 61, this section was construed to give school directors the right to prohibit the use of a school building for religious worship, where it was shown the building and contents were being injured, notwithstanding the land on which the school building was situated was conveyed to trustees for the purpose of religious worship, and was by them conveyed to the school directors for the same purpose, and the building was erected in part by subscriptions, with the understanding that it was to be so used under the charge of the directors. The court pretermitted any discussion of the power of the directors to make any arrangement to build a house to be used as a schoolhouse, and also as a church or as a place for religious worship, as it found, under the facts in that case, that the schoolhouse was, when built, to be under the control of the directors of the school district and the property of said district; and, after so finding the facts to be, it was there said: "If it was to be under their control, in contemplation of law it was within their province, and was, perhaps, in strictness, their duty, not to allow it used for purposes other than school purposes. It seems that this is apparent. They have no power beyond those expressly granted or arising by necessary implication." The court found in that case that the schoolhouse was being damaged by the use which was being made of the building, and that the directors, in the exercise of their power of control and their duty to preserve the property of the district, had the right to prohibit the use of the schoolhouse for religious purposes, and that this was true notwithstanding the

individual contributions which had been made, and which were used in erecting the schoolhouse, upon the understanding that the house was to be used as a schoolhouse and for religious worship.

So here we should not hesitate to hold that the contract was void, if its performance interfered with the school. But the chancellor has expressly found that such was not the case. The electors of that district, who were the patrons of that school, voted for the ratification of the contract, and in their depositions made it appear, by a preponderance of the evidence, that the schools were not being interfered with nor the building damaged. Upon the contrary, the revenues of the district were being supplemented by the annual rental in the sum of \$50, and under the circumstances we think the contract was not an unlawful one, nor void as being against public policy. Of course the district could not divert its funds for the purpose of building or providing lodgerooms for any association or society, however benevolent its purposes might be; neither would the directors have the right to make any contract which authorized the use of the school property in a manner which interfered with the schools. But, as has been stated, that was not done in this case.

It is a matter of common knowledge that many quasi public uses are made of the rural school buildings of the state. We do not believe it was the purpose of the Legislature, in granting express authority for private schools to be taught in the public school building, to exclude other uses where such uses do not interfere with the schools nor injure the buildings.

We think the decree of the chancellor is correct, and it is affirmed.

#### LEMUELS v. STATE. (No. 288.)

(Supreme Court of Arkansas. April 27, 1914.)

#### 1. WEAPONS (§ 17\*)—CARRYING PISTOL—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to warrant a conviction of carrying a pistol as a weapon.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 20, 22-33; Dec. Dig. § 17.\*]

#### 2. CRIMINAL LAW (§ 730\*)—ARGUMENT OF COUNSEL—CARRYING WEAPONS.

In a prosecution for carrying a pistol as a weapon, in which accused claimed to be on a journey to a town 20 miles from home, argument of counsel that the statute on which the prosecution was based was antiquated law, and that accused had no need to carry "one of these sheep legs" when going only 20 miles from home on an electric lighted train to a town large enough to be well policed, did not have a tendency to influence the jury, where the court instructed, on objection, that if accused was on a journey, he had a right to carry a pistol, defining a journey, and instructing that it was the jury's duty to determine whether he was on a journey.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. CRIMINAL LAW (§ 304\*)—JUDICIAL NOTICE—SITUATION OF TOWNS.

The court will take judicial notice that Texarkana is not situated in Little River county, Ark.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. § 304.\*]

### 4. CRIMINAL LAW (§§ 699, 1154\*)—ARGUMENT OF COUNSEL—DISCRETION.

Control of the argument of counsel is within the discretion of the court, and a judgment will not be reversed for prejudicial argument, unless there is a manifest abuse of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656, 3059; Dec. Dig. §§ 699, 1154.\*]

Appeal from Circuit Court, Little River County; Jeff. T. Cowling, Judge.

Jean Lemuels was convicted of carrying a pistol as a weapon, and he appeals. Affirmed.

Steel, Lake & Head, of Ashdown, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

HART, J. Appellant prosecutes this appeal to reverse a judgment of conviction for the offense of carrying a pistol as a weapon. His punishment was fixed by the jury at a fine of \$50. The facts are substantially as follows:

[1] Appellant lived on a farm 10 miles distant from Ashdown, in Little River county. On the 23d day of December, he went from his home to Ashdown by dirt road, and there took a train to Texarkana, which was 20 miles distant. He had not been to Texarkana but two or three times in five years, and was not acquainted there. He carried his pistol with him. He left Texarkana for his home on the same night that he arrived there, and got back to Ashdown about 4 o'clock the next morning. He states that he then went immediately to the home of a friend and laid aside his pistol until he left Ashdown, which was about 9 o'clock in the morning; that he carried his pistol with him on his way home, and stopped at his brother's house; that he laid aside his pistol when he arrived there, and did not put it in his pocket again until he started home. His brother testified that the appellant stopped at his house that day to attend a wedding; that when he arrived he handed him the pistol, and that he put it in his dresser drawer; that appellant saw where he put the pistol; and that he did not know when appellant took the pistol out of the drawer. The witness for the state testified that on the day in question he saw appellant pull a pistol out of his pocket and shoot a man. Under these circumstances, the jury were warranted in finding the appellant guilty. *Henderson v. State*, 91 Ark. 224. It is true the defendant testified that the pistol was placed in the drawer when he arrived at his brother's

house to attend the wedding, and that he did not take it out of the drawer until he started for home; but the witness for the state stated that he drew the pistol out of his pocket and shot at a person at his brother's house. The gist of the offense is carrying a pistol as a weapon, and the length of time it may be carried for such purpose is immaterial. From the testimony the jury might have inferred that appellant put the pistol in his pocket before he intended to go home, and that he put it there for the purpose of using it in the row which he intended to have with the man whom he shot. Therefore there was sufficient evidence to warrant the verdict.

[2] Counsel for appellant, however, earnestly insist that the judgment should be reversed on account of prejudicial argument made by the prosecuting attorney. During his closing argument to the jury, the prosecuting attorney, in referring to the statute under which appellant was being prosecuted, said that it was an antiquated law; and counsel for appellant objected to this argument. The court, in response to the objection, said to the jury: "If the jury believes he was on a journey, he would have a right to carry a pistol." Again, the prosecuting attorney said: "This man traveled on a lighted train with electric lights. He went into a town which is large enough for you to conclude that it is well policed, and they do not need one of these sheep legs in their pockets. Those things are made to kill people. A man has got no right to carry one of those things when he is going within 20 miles of where he has been raised." The court told the jury that if they believed beyond a reasonable doubt that the defendant carried a pistol in Little River county, within 12 months before the finding of the indictment, concealed in his pocket, they would find him guilty, unless they found from the evidence that he was on a journey. The court then defined to the jury what constituted a journey, and told them it was a question for them to determine whether or not he was on a journey, as defined, at the time he carried the pistol.

[3, 4] The court will take judicial notice that Texarkana is not situated in Little River county, Ark., and the defendant could not have been convicted of carrying the pistol as a weapon while there. Thus it will be seen that the issue to be tried before the jury was narrowed down to the single question of whether the defendant carried the pistol as a weapon while at his brother's house in Little River county on the occasion that he shot another person. As we have already stated, we think the jury were warranted in finding that he was guilty. It was his duty to have laid the pistol aside when he arrived at his brother's house until he resumed his journey. This he claimed he did. It is shown in evidence, however, that he had a

row with a man there and drew the pistol out of his pocket, or from some place on his person where he had it concealed, and shot the man. The control of the argument was within the discretion of the court, and the judgment ought not to be reversed unless there was a manifest abuse of the court's discretion in that regard. When we consider the instructions of the court, and the fact that the court told the jury during the progress of the argument of the prosecuting attorney that if they believed that appellant was on a journey he had a right to carry the pistol, we do not think that the remarks of the prosecuting attorney had a tendency to influence the jury to find a verdict which they thought was not warranted by the evidence. As was said in the case of *Blackshare v. State*, 94 Ark. 548, 128 S. W. 549, 140 Am. St. Rep. 144, we do not think that the remarks made by the prosecuting attorney were calculated to influence a jury of sensible men to disregard the oath they had taken to try the cause according to the law and the evidence and a true verdict render.

The judgment will be affirmed.

**HENSON et al. v. HARGRAVES et al.**  
(No. 287.)

(Supreme Court of Arkansas. April 27, 1914.)

**APPEAL AND ERROR (§ 1074\*)—HARMLESS ERROR—JUDGMENT.**

That the judgment of the circuit court, on appeal from the county court, was in form one of dismissal of appeal is harmless; it appearing it tried the issue under the pleadings *de novo*, and, in effect, rendered the same judgment as the county court, dismissal of the petition.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4248-4252; Dec. Dig. § 1074.\*]

Appeal from Circuit Court, Baxter County; Jno. W. Meeks, Judge.

Petition of J. F. Henson and others for vacation of roads, I. P. Hargraves and others filing a remonstrance. From an adverse judgment of the circuit court on appeal from the county court, petitioners appeal. Affirmed.

At the July, 1912, term of the Baxter county court a petition was presented asking for the opening up and establishing of a public road, as follows: "Leaving the Mountain Home and West Plains public road north of the store of W. M. Davis, in the town of Gamaliel, Ark., run thence in a northwest direction along an old road through the lands of Henry Bean and intersect the road known as the Red Bank road, running from North Fork to Bakersfield, Mo."—and also for an order "re-establishing and opening up a road running from the Red Bank ford on North Fork."

A remonstrance was presented at the same term of court by J. F. Henson, Henry Bean, and others, in which Bean asked damages in

the sum of \$200 by reason of the establishment of the road running over his land, and Henson asked damages by reason of the road running over his land.

The court heard the report of the viewers, who had been previously appointed, and the testimony of witnesses for and against the establishment of the roads, and assessed damages in favor of Bean in the sum of \$75, and in favor of Henson in the sum of \$10, and duly established the roads as above described.

On September 14, 1912, the petition of appellants was presented to the county court of Baxter county, asking that the roads above described be vacated, for the following reasons: (1) That said roads are and will be of no use to the traveling public; (2) that to keep up said roads would greatly reduce the finances of said district, as said district has now more roads than it can possibly keep in repair; (3) that damages have already been assessed against said road district and paid, leaving nothing with which to open up said road; (4) that it was an injustice and a burden upon petitioners, who were citizens and taxpayers of the road district.

At the January, 1913, term of the Baxter county court Hargraves and others appeared and presented their objections and remonstrance to the petition of the appellants, setting forth that the roads above described were necessary for the public travel of the neighborhood and would be of great public convenience. They set up that only at the last term of the county court the roads were duly established; that the order establishing the roads was made after exceptions were filed by Henry Bean and J. F. Henson, the parties through whose land one of the roads runs; that the order was made, and a public trial was had as to whether the road was a public convenience, and as to whether appellants Bean and Henson were damaged; that Henry Bean, at the hearing, was awarded \$75 as damages, and J. F. Henson the sum of \$10; that the sum of \$75 awarded to Bean had been paid out of the funds of the road district; that all of the expenses of declaring the road to be a public road had already been placed against the county; that only at the last term of court was the order made establishing these roads, and that it would not be just and right to have same vacated so soon thereafter on the petition of Henson and others.

A comparison of the petition to vacate and the remonstrance indicates that several parties whose names were signed to the petition to vacate had also signed the remonstrance against said petition. The remonstrance prayed that the petition presented by the appellants for vacating the road be dismissed.

The record recites the following as having occurred at the January, 1913, term of the county court: "This cause came on to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

heard and was submitted to the court upon the petition of J. F. Henson and others, asking that the former orders of this court made at its July term, 1912, establishing the road (above described) be vacated and set aside, and also upon the remonstrance against said petition filed by I. P. Hargraves and others, and upon the proof of publication of the notice given as required by law. Whereupon the petitioners asked that no further proceedings be had on their petition until the next regular term of the court, which was by the court refused, and the court, after hearing the evidence in the case and finding that the petitions of both the plaintiff and defendant contain the same names, and that since the order of this court made at its July term, 1912, the damages assessed by said court and awarded to Henry Bean for lands taken, owned by him, had been fully paid, whereupon plaintiff asked the court for an order appointing viewers to view out said road, which was refused, and the court, being fully advised in the premises, doth dismiss plaintiffs' petition." Then follows a recital of the judgment, declaring the roads above described public roads and ordering the same to be opened up and put in repair. The record then shows that the petitioners to vacate, excepted and prayed an appeal to the circuit court, which was granted; and the county court ordered that all the original papers in the cause be certified to the circuit court.

The record further shows that at the September, 1913, term of the Baxter circuit court the following proceedings were had: "On this day, this cause being reached on its regular call, the parties appeared by their respective attorneys, and the defendants, by attorney, by oral motion, moved the court to dismiss the appeal from the county court taken by the plaintiffs in this cause, which motion was heard by the court upon the transcript of the order of the county court of Baxter county, Arkansas, on file in this cause, and the plaintiffs' petition and the defendants' answer or remonstrance on file in this cause, said petition and remonstrance being the only evidence introduced at the hearing of said motion, and the court, being fully advised in the premises, doth sustain said motion, whereupon said appeal is hereby dismissed." To this ruling of the court appellants duly excepted, and appealed to this court.

Z. M. Horton, of Mountain Home, for appellants. S. W. Woods, of Marshall, for appellees.

WOOD, J. (after stating the facts as above). When the whole record is considered, we are of the opinion that the court, on the motion to dismiss the appeal, entered upon a hearing of the merits of the petition to vacate and the remonstrance thereto, and

evidently treated the petition to vacate and the remonstrance thereto and the findings of the county court as the evidence in the trial on the motion to dismiss. While the record recites that it was a motion to dismiss the appeal, all the record, all considered, shows that the court really entered into a hearing on the merits of the issue as presented by the petition and the remonstrance, and treated their respective recitals, together with the findings of the county court, as the evidence of the facts, and on this evidence entered a judgment dismissing, as the record recites, "the appeal." But this, in our opinion, was a clerical misprision, and the judgment which the court really intended to render and did render was a judgment dismissing the petition on the merits. In other words, we are of the opinion that the circuit court heard the issue presented by the petition to vacate and the remonstrance thereto de novo on its merits, and dismissed the petition; thus, in effect, rendering the same judgment that the county court had rendered. The judgment was not technically in proper form, but that can make no difference. In *Shemwell v. Finley*, 95 Ark. 342, 129 S. W. 792, we said: "The form of the judgment is improper; but the circuit court heard the cause de novo, and reached the same conclusion the county court did, and, in doing so, gave great weight to the decision and judgment of the county court. The obvious intent of the circuit court was to render the same judgment the county court did, and did so by affirming it. This was not prejudicial to the defendant." Affirmed.

#### BRICKEY v. CONTINENTAL GIN CO. et al. (No. 291.)

(Supreme Court of Arkansas. April 27, 1914.)

#### 1. EVIDENCE (§ 445\*) — SUBSEQUENT ORAL AGREEMENT.

In an action upon notes given for the purchase price of a gin outfit, brought before the maturity of the notes under the terms of the contract of sale, which provided that the notes should become immediately due if the buyer failed to keep the outfit insured as he agreed, an answer, alleging that the written contract was varied by a subsequent oral contract, whereby the seller agreed to carry the insurance on the outfit and therefore the action was prematurely brought, constitutes a defense, since a subsequent parol contract may be shown to modify a prior written one.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

#### 2. FRAUDS, STATUTE OF (§ 52\*)—PERFORMANCE WITHIN ONE YEAR—AGREEMENT TO INSURE.

An oral contract by the seller of goods to carry insurance on the goods until the notes given by the buyer for the purchase price should mature, which was more than one year after the contract was made, was not void under the statute of frauds, since the agreement to take out the insurance was to be performed immediately, although the insurance itself was to continue for more than one year.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 79; Dec. Dig. § 52.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

Action by the Continental Gin Company against Clarence Brickey and others. Judgment dismissing defendants' answer and counterclaim, and defendants appeal. Reversed and remanded, with directions.

Appellee was the plaintiff below, and alleged in its complaint, which was filed on October 10, 1913, that it had sold the defendants a gin outfit for the sum of \$1,572, of which \$524.04 had been paid in cash, the balance to be paid according to the terms of certain notes, made a part of the contract of sale, due and payable November 15, 1913, and November 15, 1914, respectively; that the defendants agreed to insure the property in 10 days after its arrival in some good and reliable insurance company in the sum of \$1,000, and to continue the insurance without cost to the plaintiff, as its interest might appear; that the contract of sale provided that, upon failure to pay any of the said notes upon maturity, or the failure to keep any of the terms of the agreement contained in the contract, all the deferred payments should at once become due and payable. It was alleged that the defendants failed to insure said property within 10 days after its arrival as provided, and it was thereafter totally destroyed by fire, and that by reason of the failure to insure said property, said notes had become due and judgment was asked for the amount of them. The contract contained the following provisions: "If the undersigned fails to pay any of the said notes when due; or fails to make any payments, as herein required; or fails to keep any of the terms of the agreement herein contained, then all of said notes or deferred payments shall at once become due and payable. And the undersigned agrees to pay all cost and damages sustained, and such cost including an attorney's fee." And also the following further provision: "On failure to pay the taxes or to keep such property insured as provided herein, then you, at your option, may pay such taxes and insure the property and charge the same to the undersigned, who agrees to pay the same with eight per cent. interest per annum." The defendants answered, admitting the execution of the contract and of the notes, but alleged that, subsequent to the execution of the notes and contract, there was entered into an oral agreement by which the plaintiff agreed to carry the insurance upon the property, and thereby waived this provision of the contract and released the defendants therefrom, and that because of said agreement the notes sued on had not matured and the suit was prematurely brought. They also filed a counterclaim, arising out of said agreement upon the part of the plaintiff to insure the property and its failure so to do, and judgment was asked in the sum of \$1,000 because of this failure. The plaintiff

filed a demurrer to so much of the defendants' answer as set up a subsequent oral agreement. A reply to the counterclaim was also filed, in which the subsequent agreement on the part of the plaintiff to insure the property was denied, and it was alleged that if any of its agents had made such a contract, they were without authority, and the agreement was void on that account; and, moreover, it alleged the subsequent agreement was void as having been made without consideration, and that, the original contract having been reduced to writing, as required by the statute of frauds, it could not be subsequently altered or changed by parol, and that if any such contract had been made, it was void under the statute of frauds, which was specially pleaded. There was no motion to make the counterclaim more definite or certain, and upon the hearing the court sustained the demurrer, and the defendants stood upon their answer and counterclaim, and excepted to the action of the court in dismissing them, and have duly appealed to this court.

W. P. Strait, of Morrilton, and Mehaffy, Reid & Mehaffy, of Little Rock, for appellants. J. F. Sellers, of Morrilton, for appellee.

SMITH, J. (after stating the facts as above). [1] This suit was brought upon the theory that the notes had matured and become payable because of appellants' failure to insure the property, as required by the contract of sale. Appellants alleged that the suit had been prematurely brought because of the subsequent parol agreement, by the terms of which appellee agreed to insure the property. The effect of such agreement, if valid, would be to abate the suit on the notes for the reason that it was prematurely brought. Appellees' failure to insure the property would not make the notes due and payable, before they would otherwise become due, if they had been relieved of that obligation by a subsequent parol agreement, by which the insurance should be taken out and paid for by the gin company. We think the court erred in sustaining the demurrer to the answer. In the case of *Von Berg v. Goodman*, 85 Ark. 605, 109 S. W. 1006, it was said: "No rule \* \* \* is violated by allowing proof of a subsequent parol agreement changing the terms of a prior written contract." The original contract gave appellee the right to insure the property in the event the appellants failed to do so, and to charge the costs thereof to appellants, together with interest at the rate of 8 per cent. per annum. The answer presents a question of fact, and if it be true that this subsequent agreement was entered into, then this suit must abate as having been prematurely brought. *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253; *Hickey v. Thompson*, 52 Ark. 234, 12 S. W. 475.

[2] Appellee insists that the parol agreement is void under the statute of frauds because the contract of sale was made April 25, 1913, and the last note would not fall due until November 15, 1914, and that the suit itself was begun more than a year before the maturity of the last note, and that therefore the period for which the insurance was to be carried was more than one year. But while the contract of insurance would have continued for more than a year, the agreement to take out the insurance was one to be performed immediately, and the statute of frauds has no application. *Meyer v. Roberts*, 46 Ark. 80, 55 Am. Rep. 567.

The judgment will therefore be reversed, and the cause remanded, with directions to overrule the demurrer.

PEARSON et al. v. QUINN et al. (No. 293.)  
(Supreme Court of Arkansas. April 27, 1914.)

1. APPEAL AND ERROR (§ 781\*)—HEARING—COSTS—TERMINATION OF CONTROVERSY.

Where, pending an appeal from a judgment annulling a prohibitory order, the effect of which would be to authorize licenses to sell intoxicating liquors within three miles of a certain schoolhouse, Acts 1913, p. 116, was passed, prohibiting the sale or giving away of intoxicating liquors within ten miles of the school building in question, such act operated to terminate the controversy involved in the appeal, which would therefore not be determined merely to decide a question of liability for costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

2. APPEAL AND ERROR (§ 781\*)—DETERMINATION OF APPEAL—QUESTION OF COSTS.

The exceptions to the general rule that the Supreme Court will not decide a case merely to determine a question of costs are where the very question in issue is the legality of a particular item of costs, the liability of a prosecutor for costs in a criminal action, and taking the case as properly decided below, whether costs were adjudicated against the proper party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action between S. S. Pearson and others and F. F. Quinn and others. From a judgment in favor of the latter, the former appeals. Dismissed.

This litigation involved a petition for the revocation of an order made by the county court of Miller county, which prohibited the sale of intoxicating liquors within three miles of the main public school building situated on block 34 of the city of Texarkana, Ark., as per the original plat of said city. The prayer of this petition was granted by the county court, and, upon an appeal to the circuit court, where the case was heard de novo, numerous findings of fact were requested, but the court made findings, the effect of which was to declare that the petition

for the repeal of the original prohibitory order contained a majority of the adult inhabitants residing within three miles of the said schoolhouse, and an order was entered annulling the prohibitory order; the judgment of the court below being rendered on the 21st day of December, 1912. Time was asked and given for the preparation of a bill of exceptions and on the 18th day of March, 1913, the judge approved the bill of exceptions prepared in this case. The motion for a new trial alleged various errors as grounds for granting a new trial, and these have been discussed in the briefs which have been filed.

The effect of the judgment of the court below was to make it lawful and permissible for the county judge of that county to grant license to sell intoxicating liquors if he saw proper to do so. But on February 7, 1913, the General Assembly by an act approved on that date, and which is found at page 116 of the Acts of 1913, enacted a law which prohibited the sale or giving away of any intoxicating liquor within ten miles of the said public school building.

J. N. Cook, of Texarkana, for appellants.  
Jas. D. Head, of Texarkana, for appellees.

SMITH, J. (after stating the facts as above). [1] The decision of this court cannot give any relief to the original petitioners, who are the appellees in this cause. In so far as authorizing the sale of liquors is concerned. Neither will appellants secure any relief, if the judgment of the court below should be reversed, except that they would thereby escape the payment of costs, and, as no result can follow the decision of this cause, except the determination of the question of liability for the costs of the litigation, we will decline to entertain this appeal.

In the case of *Wilson v. Thompson*, 56 Ark. 115, 19 S. W. 323, in an opinion by Chief Justice Cockrill, it was said: "The circuit court erred in its judgment. The order for prohibition was made in January, 1890, and has expired by limitation of law. The appeal is therefore fruitless. For that reason the practice would have justified a dismissal, without going into the question presented by the record. The costs only are not involved, but it was not for that reason that we have felt called upon to determine the cause, for costs are only an incident of litigation, and cannot be made the object of the appeal any more than of the litigation. But the cause was of practical importance, and the appellants prosecuted the appeal without delay. Having gone into the subject of litigation and found that the judgment was erroneous, the appellants are entitled to their costs in both courts." It appears that, notwithstanding the appellants were there adjudged to be entitled to their



costs, the appeal was not entertained for the purpose of determining that question; but, upon the contrary, it was expressly stated that the appeal would not be entertained to determine that question; but it was entertained, and the question there involved was decided, because of the public interest of the question involved. Here there is no question of public interest, because the action of the Legislature in passing the special act makes any action which the court may take unimportant to any litigant, except to determine liability for costs.

In the case of Commissioners of Vance County v. Gill, 126 N. C. 86, 35 S. E. 228, it was said: "The court will not go through the record merely to decide who would have won if the cause of action had not died pending appeal; that it will not decide the merits of a controversy which no longer exists merely to determine who shall pay the costs. Herring v. Pugh, 125 N. C. 437 [34 S. E. 538], and numerous cases there cited." In the case of Herring v. Pugh, cited in the last-mentioned case, the court announced the conditions under which it would review and decide the merits of a cause which had been settled, or the subject-matter of which had been destroyed, since the judgment below and where the decision on appeal would merely decide who should pay the costs, and it was there said: "On the appeal in the main action the judgment adverse to the defendants has been affirmed, and, the cause of action having thus been terminated, an adjudication upon the merits in this appeal would simply decide an abstract proposition of law, since judgment in this appeal could now have no possible effect but to determine who should pay the costs. The court has repeatedly held that this will not be done. Wikel v. Commissioners, 120 N. C. 451 [27 S. E. 117]; Russell v. Campbell, 112 N. C. 404 [17 S. E. 149]; Pritchard v. Baxter, 108 N. C. 129 [12 S. E. 906]; Hasty v. Funderburk, 89 N. C. 93; State v. Railroad, 74 N. C. 287; Futrell v. Deans, 116 N. C. 38 [20 S. E. 1013]; Elliott v. Tyson, 116 N. C. 184 [21 S. E. 106]."

[2] "The exceptions to the general rule that this court will not decide upon a mere question of costs are: (1) Where the very question at issue is the legality of a particular item of costs (Elliott v. Tyson, 117 N. C. 114 [23 S. E. 102]; Blount v. Simmons, 120 N. C. 19 [26 S. E. 649]); or (2) the liability of a prosecutor for costs in a criminal action (State v. Byrd, 93 N. C. 624); or (3) taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party (State v. Horne, 119 N. C. 853 [26 S. E. 36])."

In the case of Cobb v. Hammock, 82 Ark. 584, 102 S. W. 382, the county court made an excessive allowance to the county judge on account of salary, and certain citizens

appealed from that order. On appeal the circuit judge refused to set aside the allowance, for the reason that at the time the cause was heard in the circuit court a full quarter had expired, and the county judge was then entitled to all the salary for the quarter for which the salary had been allowed. Upon appeal to this court it was said that the judgment of the circuit court would not have been disturbed, had that court adjudged only the right to the salary; but it erroneously rendered judgment against the citizens for the costs of the appeal from the county court. That case was reversed because, as was there said, the citizens had the right to appeal to the circuit court from an erroneous order of the county court, and therefore the penalty of paying the costs of appeal should not have been visited upon them, because the error in the order appealed from had afterwards become harmless.

In other words, that was a case properly decided by the court below, but the costs were not adjudged against the proper party, and that action of the court fell within the third exception in the North Carolina case cited above.

For the reasons stated, the appeal will be dismissed.

#### REEDER v. EPPS. (No. 282.)

(Supreme Court of Arkansas. April 27, 1914.)

##### 1. BROKERS (§ 63\*)—COMPENSATION—RIGHT TO.

A broker, employed to sell or find a purchaser for land, earns his commission when he produces a purchaser ready, willing, and able to buy upon the terms named, though no binding contract is made through some fault of his principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.\*]

##### 2. BROKERS (§ 61\*)—IMPLIED COVENANTS.

Where an owner of land employs a broker to sell it, there is an implied obligation on his part, not only to furnish a good title, but a marketable one; and, if the broker produces a purchaser ready, willing, and able to buy, he is entitled to his commission, though the sale is prevented by defect in the title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.\*]

##### 3. BROKERS (§ 64\*)—ACTIONS FOR COMPENSATION—BURDEN OF PROOF.

A broker, engaged to obtain a purchaser, who claims a commission, though the sale was prevented because of an alleged defect in title, has the burden of proving that his principal failed to discharge an obligation resting upon him with reference to making the title good.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

##### 4. BROKERS (§ 64\*)—COMMISSION—CLOUD ON TITLE.

An administrator's deed to land ordered sold by the probate court for payment of debts carries complete title, and so a broker, employed by one who traced his title through such administrator's deed, is not entitled to compensation for procuring a purchaser who would not buy unless the owner secured a quitclaim deed

from the heir to whom the land had been allotted before sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.\*]

Appeal from Circuit Court, Lee County; J. M. Jackson, Judge.

Action by C. C. Epps against F. L. Reeder. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Burke & Mann, of Marianna, S. H. Mann and J. W. Morrow, both of Forrest City, for appellant. H. F. Roleson, of Marianna, and Thomas & Lee, of Clarendon, for appellee.

**McCULLOCH, C. J.** This is an action to recover compensation alleged to have been earned by appellee as commissions in negotiating a sale of land by him for appellant. The sale was not consummated, but appellee alleges, and attempts to prove, that he produced a purchaser "ready, willing, and able" to buy the land upon the prescribed terms, and, that the consummation of the sale was prevented by the fault of appellant. Appellant resided in the state of Illinois and owned a tract of land in Lee county, Ark., which he placed upon the market for sale, and listed it with appellee, who was in the real estate business at Stuttgart, Ark. Appellee found a purchaser in the person of one Van Arsdale, and he brought the parties together for sale and purchase. Appellee wrote to appellant informing him of the fact that he had found a purchaser, and instructed him to execute a deed to Van Arsdale and deposit it in one of the banks at Stuttgart, where said purchaser was to pay the portion of the price agreed upon and deliver a note and mortgage for the deferred payments. Appellant executed the deed in accordance with the request of appellee, and deposited same in the bank, and also furnished an abstract of title so that the purchaser's attorneys in Stuttgart could have an opportunity to pass upon the title. Appellant was represented by attorneys in Forrest City Ark., and most of the correspondence was thereafter conducted between the two sets of attorneys. The Stuttgart attorneys who examined the title reported to appellant that they found eight defects in the chain of title, one of which was that in order to perfect the title it was necessary to procure a deed from Mrs. Lela Ford. Some of these defects were subsequently corrected, and thereafter the attorneys for the purchaser agreed to waive the other alleged defects and approve the title if appellant would get a quitclaim deed from Mrs. Ford. Appellant, through his attorneys, replied to this request by offering to comply with all the other terms, but declined to procure a deed from Mrs. Ford on the ground that she had no interest in the land nor color of title, and that she would not give a quitclaim deed unless she was paid something for it. Thereupon the purchaser

instructed the bank to return the deed to appellant, and the negotiations between the parties were dropped.

In the chain of appellant's title was a deed from the administrator of the estate of W. H. Pearce, deceased, conveying the lands pursuant to an order of the probate court of the county of said decedent's residence. Mrs. Lela Ford was a daughter of William H. Pearce. The only explanation in the record of why the deed from Mrs. Ford was demanded is a reference in a letter of the Forrest City attorneys to a partition decree, and the statement that the sale by the administrator of the William H. Pearce estate had passed the title, and that the heirs of the decedent had no further interest in the property.

There are numerous assignments of error in regard to the rulings of the court in giving and refusing instructions. But we need not discuss them, for we are of the opinion that the disposition of the case here turns primarily upon the question of the sufficiency of the evidence.

[1] The law is well settled that, in the absence of a special contract providing otherwise, an agent employed to sell or find a purchaser for land earns his commission and is entitled to recover the same when he produces a purchaser ready, willing, and able to buy upon the terms named and the principal enters into a binding contract with the produced purchaser, or, having an opportunity to do so, declines to accept the purchaser. *Moore v. Irwin*, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. 1168, 131 Am. St. Rep. 97. He must, however, have the opportunity to accept the purchaser upon the terms named, and to enter into a binding contract, for if the negotiations are stopped by the purchaser without fault of the principal before a binding contract is entered into, then no commissions are earned.

"The broker, having presented a proposed purchaser who is capable of entering into a contract of purchase, and willing to do so, has earned his commission when the vendor accepts him and enters into a valid contract with him for the sale of his land, even though the sale is never in fact consummated by reason of the failure of the proposed purchaser to perform his part of the contract." *Moore v. Irwin*, supra.

In the present case no contract was entered into between appellant and the purchaser, and negotiations ended short of consummation of the sale. Appellee earned no commissions, therefore, unless it be shown that the failure of the negotiations resulted from some fault of appellant. *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797; *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103.

[2-4] The turning point of the case, therefore, is whether or not appellant was at fault in failing to furnish a title satisfactory to

the purchaser, for it was his duty under the contract to do that. Appellant employed appellee to sell land for him, and this implied an obligation on his part, not only to furnish a good title, but a marketable one, and if he failed to do so upon the production by appellee of a purchaser ready, willing, and able to buy the land, the commission was earned, notwithstanding the existence of a defect in the title which prevented the sale. *Cheat-ham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076; *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146, 5 South. 473; *Gross on Real Estate Brokers*, § 168.

There is no evidence in this case of bad faith on the part of appellant, or of unwillingness on his part to consummate the sale. The failure of negotiations resulted from the insistence of the purchaser upon the procurement of a quitclaim deed from Mrs. Ford and the refusal of appellant to accede to that request.

If the request was one which the purchaser had the right to make, then the failure of the negotiations must be laid at appellant's door, and he is liable for the commission, notwithstanding that there was no consummation of the sale. On the other hand, if appellant did all that his contract required of him, and the purchaser receded from the negotiations, then the fault was with the latter, and appellant is not responsible, for the reason that the minds of the parties never met. In other words, if the procurement of the deed from Mrs. Ford was necessary to make the title good and merchantable, then the duty rested upon appellant to procure it. But, on the other hand, if the objection to the title was a capitious one, or based upon a defect which was not calculated to affect the title, then appellant was not bound to comply with the request by procuring the deed.

The evidence in the case does not establish the fact that Mrs. Ford had any interest in the land, or that she held any color of title which cast a cloud upon appellant's title and affected its merchantability.

The burden was upon appellee to show that appellant had failed to discharge an obligation which rested upon him with reference to making the title good. All that is shown here is that Mrs. Ford was a daughter of W. H. Pearce and a suggestion in one of the letters about a partition decree concerning this land. The title of W. H. Pearce, however, was transferred to appellant's grantor through the deed of the administrator of the estate; and, even if there had been a division of the lands of the estate and allotment of the same to Mrs. Ford, that would not constitute a cloud upon the title for the reason that the jurisdiction of the probate court over lands needed for the payment of debts was complete, and the deed of the administrator, made pursuant to a sale under order of the court, carried the title, freed from any claims of the heirs.

Our conclusion is that appellee has failed to show any refusal on the part of appellant to comply with any just demand of the proposed purchaser with reference to making the title good and merchantable, and that the failure of the negotiations did not result from any fault of appellant; therefore he is not liable for the commission.

The facts of the case seem to have been fully developed; and, as the evidence is not sufficient to sustain the verdict in appellee's favor, the judgment is reversed, and the cause is dismissed.

### YUTTERMAN v. GRIER. (No. 258.)

(Supreme Court of Arkansas. April 13, 1914.)

#### 1. APPEAL AND ERROR (§ 1046\*)—HARMLESS ERROR—TRANSFER OF CAUSE TO EQUITY—CORRECT DECISION.

Where the decision of the chancellor in a suit to apportion accretion among several land-owners along a stream, which was transferred to equity on the ground of multiplicity of suits, was correct under the undisputed evidence in the case, the appellant cannot complain of the transfer to equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.\*]

#### 2. NAVIGABLE WATERS (§ 44\*) — RIPARIAN RIGHTS—"ACCRETION."

Land formed by the shifting of a river, the banks caving in on one side, and the receding waters forming land by deposit of sediment on the other, is "accretion," notwithstanding the fact that the greater part was formed during one overflow, and that the caving in of the opposite bank was perceptible at times; the test being, not the rapidity of the change, but whether the land formed can be identified as the land of a former owner.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. § 44.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 99, 100.]

Appeal from Sebastian Chancery Court: J. V. Bourland, Chancellor.

Action by James Grier against Henry Yuterman to recover possession of lands claimed as accretion, to which action other persons interested in such lands were made parties and the cause transferred to equity. Decree for the plaintiff, and defendant appeals. Affirmed.

Winchester & Martin, of Ft. Smith, for appellant. H. O. Mechem, of Ft. Smith, for appellee.

McCULLOCH, C. J. This controversy involves the title to lands alleged to have been formed by accretion on the west bank of the Arkansas river in Sebastian county, Ark. Plaintiff, Grier, instituted the action against defendant, Yuterman, in the circuit court of Sebastian county, Ft. Smith district, to recover possession of what he claims is the accretion to his land. The circuit court rendered judgment in his favor for some of the land claimed, but apportioned the accretion ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cording to the wrong basis, and he appealed to this court. The judgment was reversed on account of that error. 102 Ark. 434, 145 S. W. 194. As the pleadings then stood there was no denial of the allegation that the lands in controversy were formed by accretion. On the remand of the case for a new trial, the defendant amended his pleadings so as to deny the allegation that the lands were formed by accretion and to raise an issue on that question. The plaintiff thereupon amended his complaint so as to show that other land-owners fronting on the river were interested in the apportionment of the accretion and moved that they be made parties and that the cause be transferred to equity. This was done over the objections of the defendant and is one of the principal grounds urged here for the reversal of the decree. The cause was heard upon the pleadings and the depositions of numerous witnesses, and the court found that the lands formed along the original shore line were accretions, and belonged to the riparian owners, and appointed a commissioner to divide the lands according to the rule laid down by this court in *Malone v. Mobbs*, 102 Ark. 542, 145 S. W. 193, 146 S. W. 143, Ann. Cas. 1914A, 479.

[1] The question of the correctness of the court's ruling in transferring the cause to equity is not free from doubt. In *Malone v. Mobbs*, supra, no objection was made to the jurisdiction of the chancery court, and we pretermitted and decision of that question, holding that, no objection having been made to the cause proceeding in equity, the decree could not be attacked here. We held in *Deidrich v. Simmons*, 75 Ark. 400, 97 S. W. 649: "That the mere fact that boundaries are in dispute is not of itself sufficient to authorize the interference of equity; and that courts of equity will not interpose to ascertain and settle boundaries unless, in addition to the confusion and dispute over the boundaries, some other peculiar equities are shown." In *Brizzolara v. Ft. Smith*, 87 Ark. 85, 112 S. W. 181, we held that a court of equity will (quoting from Mr. Pomeroy) "take cognizance of a controversy, determine the rights of all parties, and grant the relief requisite to meet the ends of justice, in order to prevent a multiplicity of suits, where a number of persons have separate and individual claims and rights of action against the same party, but all arise from the same common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action," there being a community of interest between them in the question at issue and in the remedy. 1 Pomeroy's *Equity Jurisprudence* (3d Ed.) §§ 255, 269." In *Ellsworth v. Hale*, 33 Ark. 633, the court decided that "to warrant the interference of chancery on the ground, alone, of preventing multiplicity of suits, the same rights should be claimed by different persons against one, or by one against many."

Whether the facts of this case are sufficient to bring it within the rule which permits a court of equity to assume jurisdiction in order to avoid multiplicity of suits we will refrain from deciding, for we are of the opinion that the decision was correct upon the undisputed evidence and that appellant cannot, for that reason, complain of the transfer to equity.

[2] It is not contended that the court did not apportion the alleged accretion according to the rule established by this court in *Malone v. Mobbs*, supra. The only contention as to the facts is that the proof does not establish that the land was formed as accretion.

But we are of the opinion that the proof, not only establishes the fact, but that the testimony is undisputed on that issue. The plaintiff introduced a large number of witnesses who were familiar with the lands along the river bank in that locality and had observed them for a great many years, and the testimony of those witnesses thoroughly establishes the fact that the land in controversy was formed by a gradual shifting of the shore line at that place; the banks on the east side of the river gradually caving in, and the deposit on the other side and the recession of the waters gradually forming the lands in controversy on the west side of the river. The only dispute is that some of defendant's witnesses testified that the greater part, if not all, of the land was formed during the overflow of 1898, and that the change was perceptible, in that the caving on the east side was perceptible. Some of the witnesses testified that they saw or heard the bank caving in. This circumstance does not, we think, take the facts of the case out of the operation of the general rule applicable to lands formed by accretion. The law on that subject is well settled.

In *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, Judge Battle, speaking for the court, said: "The water boundaries of land on running streams \* \* \* always remain the same when they change gradually, as by the process of accretion or attrition. They gradually shift as the water recedes or encroaches; and the area of the riparian owner's possession varies as they change by this process. Whatever constituted them at first still constitutes them so long as it remains permanent or shifts gradually and imperceptibly. Hence land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. This rule has been vindicated by some one on the principle 'that he who sustains the burden of losses and of repairs, imposed by the contiguity of water, ought to receive whatever benefits they may bring by accretion.' \* \* \* In order to constitute an accretion, it is not necessary that the forma-

tion be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, 'gradually and imperceptibly made by the water to which the land is contiguous'; but the true test 'as to what is gradual and imperceptible' in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

The court was there speaking in general terms, and it is not literally correct to say that the rule of accretion does not apply if any part of the process is perceptible. For instance, the change of the bed of the river takes place by attrition, causing the caving of the banks on one side and by accretion, the act of deposit, on the other side, or elsewhere along the stream. Therefore the fact that the caving of the banks on one side is observable at any given time does not prevent the formation on the other side of the river from being an accretion which gives title to the land to the riparian owner. This point is emphasized by Mr. Justice Brewer in delivering the opinion of the Supreme Court of the United States in *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186, in the following language: "The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto."

The Supreme Court of Missouri, in a case decided in 1875, which is often referred to, had this to say on the subject, which we think is an important and correct statement of the law: "The terms 'avulsion' on the one hand, and 'gradual and imperceptible accretion' on the other, are used by writers on

alluvion to contradistinguish a sudden disruption of a piece of ground from one man's land to another's, which may be followed and identified, from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification. \* \* \* The length of time during formation is not material." *Benson v. Morrow*, 61 Mo. 345.

The Supreme Court of Iowa, in the case of *Coulthard v. Stevens*, 84 Iowa, 241, 50 N. W. 983, 35 Am. St. Rep. 304, quoted the Missouri court with approval and adopted the same rule.

The Supreme Court of Illinois, in *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269 (quoting from the syllabus) said: "Where a considerable tract of land is, by the violence of a stream and in consequence of its cutting a new channel, separated from one tract of land and joined to another, but in such a manner that it can still be identified, the ownership of such separated tract remains unchanged; but when the change is gradual and imperceptible, except by comparisons made at different points of time, the boundary of the deprived riparian owner remains and follows the thread of the stream."

The Supreme Court of Missouri, in a recent case, followed the rule established by the former case we have quoted from, and emphasized, as in the former case, the test of identity of the new-made land, rather than the length of time in which it was formed. The court said: "In determining whether a riparian owner has title to land in controversy by accretion, the length of time in which it is in course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion; but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion, and the boundary line remains as before the change of the channel." *McCormack v. Miller*, 239 Mo. 468, 144 S. W. 101.

Tested by these rules, we are clearly of the opinion that the land involved in this controversy was accretion, and that the material facts in relation to the formation of the land are undisputed.

If it be conceded that the land was formed during the overflow of one season and that the caving of the bank on the east side of the river was perceptible at times, the process of accretion on the west bank was gradual and imperceptible within the meaning of the law, which cast the title upon the riparian owner.

Decree affirmed.

## GOODMAN et al. v. WILSON.

(Supreme Court of Tennessee. May 7, 1914.)

## 1. MASTER AND SERVANT (§ 301\*)—NEGLIGENCE OF CHAUFFEUR—JOINT LIABILITY.

Where a brother and sister jointly own an automobile, each paying one-half of all expenses, including the wages of the chauffeur jointly employed, and with an equal right to the use of the machine, with the exception that the brother had a preference in being taken to and from work, the sister is liable for injuries sustained in a collision with a buggy while the chauffeur, alone in the machine, was racing with another machine on his way to take the brother home from work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.\*]

## 2. MASTER AND SERVANT (§ 301\*)—RESPONDEAT SUPERIOR—NATURE OF DOCTRINE.

The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person shown to be charged with the injury resulting from the wrong, and in respect of the very transaction out of which the injury arose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.\*]

## 3. MASTER AND SERVANT (§ 302\*)—NEGLIGENCE OF CHAUFFEUR—LIABILITY OF MASTER.

The mere fact that a driver of an automobile was defendant's servant will not make defendant liable, unless it is further shown that at the time of the accident the driver was in the master's business, and acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.\*]

## 4. NEGLIGENCE (§ 22\*)—DANGEROUS INSTREUMENTALITIES—AUTOMOBILE.

An automobile is not such a dangerous machine as would require it to be put in the category with the locomotive, dangerous animals, explosives, and the like, so as to render the owner liable from its use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 31, 32; Dec. Dig. § 22.\*]

Appeal from Circuit Court, Shelby County; Walter Malone, Judge.

Action by Charles S. Wilson against Walter Goodman and Mrs. Corinne A. Richardson. From a judgment for plaintiff against both defendants, affirmed by the Court of Civil Appeals, Mrs. Richardson appeals. Affirmed.

D. W. De Haven, of Memphis, for appellant. George Harsh, of Memphis, for appellee. Steen & Klewer, of Memphis, for defendant Goodman.

LANDSEN, J. This suit was brought by Wilson against Goodman and his sister, Mrs. Corinne A. Richardson, to recover damages resulting from a collision with a buggy in which Wilson was riding and an automobile owned by Goodman and Mrs. Richardson. From the verdict and judgment in the circuit court against both defendants, an appeal was taken to, and the judgment of the circuit court was affirmed by, the Court of Civil

Appeals. The case is presented to us upon the petition of Mrs. Richardson alone. The facts which we consider material are that the automobile which collided with defendant in error is owned jointly and equally by Mrs. Richardson and Mr. Goodman, who are brother and sister. They live in the same residence, and jointly employ one chauffeur, and each pays one-half of his wages, and he serves them both in the operation of the automobile. They equally bear the expense of operation and repair of the automobile, and each of them, separately or jointly, may use it accordingly as their needs or pleasures may require. They have an agreement by which Mr. Goodman has a right of preference to the use of the automobile in being carried to and from his office in the morning and afternoon, if he sees proper to require the use of the car at this time, to the exclusion of the right of Mrs. Richardson to use it at these hours. When either party desires to use the automobile, orders would be given by the one so desiring to use it to the chauffeur for this purpose. Occasionally they used it jointly, and occasionally Mrs. Richardson would ride into town after her brother, or would ride to town with him in the morning when he would go to his office.

On the occasion of the accident, the automobile was going into town to the office of Mr. Goodman, and was going west on Union avenue. Wilson was driving west on Union avenue in an open buggy with a horse attached. The automobile approached him from behind. It was racing with another automobile moving in the same direction, and was running at a rate of speed estimated by the witness for plaintiff at from 25 to 40 miles an hour. When Wilson saw the two automobiles approaching him, he drew his horse and buggy close to the curb, and, as he did so, the automobile in front of that of plaintiff in error passed Wilson, and plaintiff in error's automobile appeared to be trying to get in between the other automobile and Wilson's buggy. In this attempt, the automobile struck the wheel of the buggy, and knocked Wilson into the air, and he fell onto the asphalt pavement. The automobile ran 90 yards after striking the buggy, before it was stopped.

[1] Upon these facts, it is insisted for Mrs. Richardson that she is not liable, because the evidence does not connect her with the accident, and that the chauffeur, at the time of the accident, was in the service of Mr. Goodman only, and therefore the rule of respondeat superior does not apply as between the chauffeur and Mrs. Richardson.

The Court of Civil Appeals was of opinion that, although Mrs. Richardson was not in the automobile at the time, and may not have given orders to the chauffeur to proceed on the journey, still the chauffeur and the automobile at the time of the accident were

on the business of the joint owners of the automobile.

[2, 3] It is undoubtedly true, as a general proposition of law, that the doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the injury resulting from the wrong at the time and in respect of the very transaction out of which the injury arose, and the mere fact that the driver of the automobile was the defendants' servant will not make the defendant liable. It must be further shown that at the time of the accident the driver was on the master's business, and acting within the scope of his employment. This rule was said by Blackstone to be founded on the superintendence and control which the master is supposed to exercise over his servant. 1 Bl. Com. 431.

The rule arises out of the relation of superior and subordinate, and is applicable to that relation wherever it exists, and is coextensive with the relationship itself. It is founded on the power of control which the superior has a right to exercise, and which, for the safety of other persons, he is bound to exercise, over the acts of his subordinates, and in strict analogy to liability *ex contractu* upon the maxim, "*Qui facit per alium facit per se*." *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590. This rule is not modified by the existence of the fact that the negligent servant is jointly employed by two or more persons. For instance, in the case of a flagman at a railroad crossing jointly employed by two or more railroads, the road in whose service he is negligent, or otherwise commits a tort, is liable for his misconduct. *Brow v. Boston, etc., R. R. Co.*, 157 Mass. 399, 32 N. E. 362; *Illinois Central R. R. Co. v. King*, 69 Miss. 852, 13 South. 824.

It is said in 26 Cyc. p. 1525, that: "Where a servant is generally employed by several persons who are not partners, each contributing to his wages, one of the masters is not liable for the misconduct of the servant while engaged solely in the service of another master."

For the text a case is cited from a circuit court in Ohio. From a note to the text, it appears that the case cited was where three persons hired a coachman and divided his wages, and the carriage belonged to one, and the horse to another, and a person was injured by the negligence of the coachman while driving one of his employers. It was held that the latter employer alone was liable for the injuries. Upon such a meager report of the case upon which the text is founded, we cannot determine its soundness. Upon principle, it would seem that if two or more persons, as the case under consideration, purchase an automobile in partnership

and employ a driver, whose duty it is to drive the vehicle for the joint and separate use of the partnership, that both owners would be liable for injuries resulting from the negligence of the driver, whether they were both using the automobile at the time or not. In fact, neither owner was occupying the car at the time of this accident. It had left the residence of Mrs. Richardson, and was on its way to the office of Mr. Goodman for the purpose of conveying him to the residence of Mrs. Richardson, and it is conceded that this was one of the purposes for which the automobile was owned and operated by them. While it is entirely true that the driver and the automobile were going for Mr. Goodman, it is none the less true that the driver was doing the thing for which he was jointly employed, and the machine was being used for one of the purposes for which it was jointly owned. The machine is partnership property, and the driver was in the service of the partnership. There is no separateness of time at which the driver may serve, or of interest in the automobile, so that it could be said that the machine belonged exclusively to one, or the driver was exclusively in his service. The case might be different if the understanding between Mrs. Richardson and Mr. Goodman had been that at certain hours of the day one should have the exclusive use of the machine and the driver. But the proof is that each one has an equal right to the use of the machine and the services of the driver, with the slight exception stated heretofore.

Under the partnership arrangement, Mrs. Richardson could have directed the driver, when leaving for Mr. Goodman, to speed the car and return to her within a given time, and this shows that, as joint employer, she had control of the servant at the time of the accident.

[4] We have examined *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435. These cases and the annotator's notes indicate that the weight of authority is that an automobile is not a dangerous instrument, so as to be classed with locomotive engines, dangerous animals, explosives, and the like, and also that the liability of the owner of an automobile for acts or omissions of his chauffeur in handling the machine depends upon whether, at the time of the act or omission complained of, the chauffeur was acting within the scope of his employment; that the relationship between owner and chauffeur is not different from that existing between master and servant generally, and is governed by the same general rules of law which gov-

ern the relationship of master and servant. The cases referred to do not disclose the existence of any statutory regulation of the subject in the states in which they were decided, and the notes to those cases indicate that the authorities cited are speaking with reference to the general subject of master and servant, and proceeding upon the idea that an automobile is not a dangerous instrument, and falls within the general rule stated. In this case it is not necessary for us to say what effect chapter 178, Acts of 1905, would have upon the general rule, or wheth-

er this enactment of the Legislature was intended to place the automobile in the category of dangerous instruments.

We believe the judgment of the Court of Civil Appeals should be affirmed, for the reason stated, and that is that the driver and the automobile were employed directly in the execution of the purposes of the joint ownership of the automobile and the joint employment of the driver. It was a partnership arrangement, and not a separate interest which each had in the automobile and in the service of the driver.



## COSTIGAN v. KRAUS et al.

(Court of Appeals of Kentucky. May 13, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 523\*)  
—BOND—LIABILITY OF SURETY—WORTHLESS DEBTS OF EXECUTOR.

The surety on the bond of an executor is not chargeable with the amount of notes of the executor to testator; they being worthless and uncollectible throughout the term of the executorship.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2375-2394; Dec. Dig. § 523.\*]

## 2. APPEAL AND ERROR (§ 231\*)—REVIEW—POINTING OUT ERROR.

The objection of appellant, sued as surety on an executor's bond, that it appears from the executor's testimony that he paid certain claims against the estate, and that the burden was on appellees to show they were not just and should not have been paid, is too general; he, desiring review, should point out the specific items, rulings on which are complained of, and direct attention to the evidence claimed to sustain his view.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 523\*)  
—BOND—LIABILITY OF SURETY—PROCEEDS OF LAND IN ANOTHER STATE.

The surety on the general bond of an executor is not liable for the proceeds of the sale of land of testator which came into the executor's hands, the will having given him no power of sale; but the sale having been made under the law of another state, where the land was, and where the executor, as such, had no power.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2329; Dec. Dig. § 523.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 530\*)  
—LIABILITY OF SURETY—SETTLEMENT WITH EXECUTOR.

No recovery can be had on the bond of an executor for a legatee, the surety pleading settlement, and proving that, on the legatee demanding payment, he offered her a certain sum in full of all claims, and, on her acceptance, paid it, taking her receipt therefor; fraud not being shown, and want of consideration not being pleaded.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 530.\*]

Appeal from Circuit Court, Campbell County.

Action by Maggie Kraus and others against M. J. Costigan. From the judgment, defendant appeals, and plaintiffs prosecute a cross-appeal. Affirmed on the cross-appeal, and reversed with instructions on the appeal.

Brent Spence, of Newport, for appellant. Kelly & Regenstien, of Newport, Healy, Ferris & McAvoy and John H. Marckworth, all of Cincinnati, Ohio, and J. Arthur Shackelford, of Newport, for appellees.

MILLER, J. Joseph J. Humbrecht qualified as the executor of the will of his father, Joseph N. Humbrecht, in October, 1906, with the appellant Costigan as surety upon his bond. The testator bequeathed legacies to 20

persons, aggregating \$3,650. The residue of the estate was given to Joseph J. Humbrecht, the son. The executor having failed to pay the legacies, the legatees brought this action on February 12, 1912, against the executor and his surety, to collect them.

The appraisers appointed by the county court valued the personal estate at \$5,029.50. The executor, acting under section 3850 of the Kentucky Statutes, accepted the appraisal as his inventory, by making thereon the following indorsement: "I hereby accept the foregoing as my inventory of the estate of Joseph N. Humbrecht, deceased. Joseph J. Humbrecht, Executor." The inventory included a joint note of Joseph J. Humbrecht and Fred J. Bley for \$1,700; another note of Joseph J. Humbrecht for \$700; a third of Joseph J. Humbrecht for \$500; the note of Mrs. George Hagen for \$988; and the note of Mrs. M. Kramer for \$141.50. These items aggregated \$4,029.50, and nothing was realized from them by the executor. According to the executor's statement, his receipts were as follows: Two bonds for \$500 each, \$1,000; interest and premium on same, \$70; proceeds of sale of Oklahoma land, \$1,192.06—total receipts, \$2,262.06. The chancellor being of opinion that the proof showed the presumption of solvency on the part of the executor had been rebutted, and that he and the other obligors in the notes that were not collected were insolvent, and that said notes were uncollectible, did not charge either of said notes against the executor. The judgment charged the executor with \$2,262.06, as above stated; he was credited with \$642.05; leaving a balance of \$1,620.01 in his hands for distribution. The bequests, excluding the one to the executor, aggregated \$3,650, thus showing that the legatees were entitled to receive 44.38 per cent. of their respective legacies, aggregating \$1,420.24. The chancellor having rendered a judgment against the surety on behalf of the several legatees for their respective bequests, aggregating \$1,420.24, as above stated, Costigan prosecutes this appeal. The legatees prosecute a cross-appeal from so much of the judgment as failed to hold the surety liable for the amount of the notes the executor owed the estate of Joseph N. Humbrecht, deceased. No complaint is made to that part of the judgment which failed to charge the executor with the uncollected Hagen and Kramer notes.

[1] 1. The chancellor properly refused to charge Costigan, the surety, with the indebtedness of the executor. In Kirby v. Moore, 99 S. W. 1157, 30 Ky. Law Rep. 1022, the court said: "The rule is well settled that, where a debtor qualifies as the personal representative of his creditor, the debt is considered as assets of the estate in the hands of the trustee, for which he is liable on his bond. Swart v. Reveal [29 S. W. 24], 16 Ky. Law Rep. 503; Webster v. Webster, 7

Ky. Law Rep. 302; *Howell v. Anderson*, 61 L. R. A. 313, and the cases there cited." See, also, *Hickman v. Kamp's Adm'r*, 3 Bush, 206; *Johnson v. Hicks*, 97 Ky. 118, 30 S. W. 3, 16 Ky. Law Rep. 827; and *Wachsmuth v. Penn Mut. L. I. Co.*, 241 Ill. 409, 89 N. E. 787, 26 L. R. A. (N. S.) 411, with note, 132 Am. St. Rep. 226. But if the executor be insolvent throughout the term of his trust, the surety will not be charged with his principal's indebtedness. *Buckel v. Smith's Adm'r*, 82 S. W. 1001, 26 Ky. Law Rep. 991. Since the evidence in this case fully sustains the finding of the chancellor that the two notes of the executor, and the joint note of the executor and Bley, were worthless and uncollectible throughout the period covered by the executorship, the judgment properly relieved Costigan from liability therefor. *Howell v. Anderson*, 66 Neb. 575, 92 N. W. 760, 61 L. R. A. 318; *Walker v. Walker*, 125 Cal. 242, 57 Pac. 991; *Baucus v. Barr*, 107 N. Y. 624, 13 N. E. 939; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *State ex rel., etc., v. Gregory*, 119 Ind. 503, 22 N. E. 1.

[2] 2. Appellant insists it appears from the testimony of the executor that in the discharge of his duties he paid certain claims against the estate of the decedent, and that the burden is upon the appellees to show the claims were not just and should not have been paid. The statement is too general to attract the attention of the court. If appellant desired to have this court review the ruling of the trial court in passing upon any one of the many specific items adjudged in making the settlement, he should specify the items and direct the court's attention to the evidence which he claims sustains his view. This court cannot undertake to examine each item with the view of ascertaining whether it was properly or improperly allowed or rejected. The objection should be specific in order that the court may pass upon only those claims which are in dispute; otherwise, the court would be called upon to do the work of a commissioner, and practically make up the account from the beginning. Where no errors are pointed out, they will be treated as waived, and the judgment affirmed. *Brown v. Daniels*, 154 Ky. 268, 157 S. W. 3; *Garvey v. Garvey*, 156 Ky. 664, 161 S. W. 526.

[3] 3. The testator owned certain lands in Oklahoma county, Okl.; and, it becoming necessary to sell those lands for the payment of the debts and legacies, supplementary proceedings were had in Oklahoma in the name of Humbrecht as executor, who joined with him the administrator with the will annexed appointed by the Oklahoma court, by which the land was sold and the net proceeds, amounting to \$1,192.06 came into the hands of Humbrecht. The surety denies that this money was received by Humbrecht as executor, his reason for this posi-

tion being a technical one, that there could be no liability against the surety on the bond of Humbrecht, executor, for the proper administration of the proceeds of real estate sold under the judgment of the Oklahoma court. There is no provision in the will directing or authorizing the executor to sell the real estate; the will does not mention real estate.

The general rule as to what property constitutes assets of an estate is stated in 18 Cyc. 1254, as follows: "According to the weight of authority, where an executor or administrator receives property to which he is not legally entitled in the discharge of his duty as personal representative, his administration bond does not cover such property, and his sureties are not liable in respect to it. The liability of the sureties on an executor's or administrator's bond is limited to such assets as rightfully come or ought to have come into his hands in the state of his appointment. Therefore, while as to all the assets which he has a right to receive and does receive, although coming from a foreign jurisdiction, the sureties on the bond will be liable, they will not be liable for such assets which he receives without lawful authority."

\* \* \* The liability of sureties on the general bond of an executor or administrator for the proceeds of the sale of real estate that have come into his hands is governed by the conditions of the bond. In some jurisdictions it is held that the ordinary conditions cover the proper administration of such proceeds, and that if a special bond be required it is to be regarded merely as additional security. In others, the sureties on the general bond are not liable, and a special bond must be given to cover such proceeds as a distinct liability." The author places Kentucky in the second or last class above enumerated, and as authority therefor cites *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. 499, and *Stuart, Receiver, v. Hathaway*, 4 Ky. Law Rep. 438.

In *Speed's Ex'r v. Nelson's Ex'r*, supra, Brooks devised the residuum of his lands to Nell, his executor, for the payment of his debts, and Nell, as executor, having sold the land to Beckwith and others, the question was whether Nell's sureties were liable for the proceeds of the sale of the land. In holding they were not liable, the court said: "The executor's sureties, however, contend they are not liable for the money arising from the sale of the real estate; it constituting equitable and not real assets. It was decided by this court in the case of *Loftus v. Locker*, 1 J. J. Marsh. 298, that the money arising from the sale of real estate, devised to be sold by the executor for the payment of the debts of the testator, was legal assets in the executor's hands; although the land itself, before the sale, was only equitable assets. But in the subsequent cases of *Helm, etc., v. Darby's Adm'r*, 3 Dana, 186, *Cloudas' Ex'r v. Adams*, 4 Dana, 603, and *Clay & Craig v.*

Hart, 7 Dana, 1, a different view of the law was taken; and it may now be regarded as the settled doctrine that money arising from the sale of real estate by an executor, in pursuance of a devise or power conferred on him for that purpose, is equitable assets, constituting a trust fund, and subject to the equitable control of the chancellor. Are the sureties of the executor responsible for equitable assets in his hands? This depends upon the stipulation contained in the bond given by the executor and executed by them as his sureties, and the obligation it imposes upon them. The bond was executed in 1818, and is substantially in the form prescribed by the statute of 1797. The condition of the bond, so far as it is material to this question, is: First, 'that the executor do make a true and perfect inventory of all and singular, the goods, chattels, and credits of the said deceased.' Secondly, 'and the same goods, chattels and credits do well and truly administer according to law.' And, thirdly, 'do well and truly pay and deliver all the legacies contained and specified in the said will, as far as the said goods and chattels will extend, according to the value thereof, and as the law will charge him.' The undertaking by the sureties is that the executor shall administer the goods, chattels, and credits of the deceased according to law. The stipulation does not extend to lands, and the language used cannot, according to any just interpretation, be made to include them or money arising from the sale of them by the executor, in the administration of the estate, as provided for by the bond. The stipulation in reference to the payment of legacies is more comprehensive. They are to be paid by the executor, not only as far as the goods, chattels, and credits will extend, but also as far as the law charge him. And inasmuch as the law would charge him with money arising from the sale of land, charged with the payment of legacies, and received by him, his sureties would be responsible for it. Thus, in the case of *Moore et al. v. Waller's Heirs*, 1 A. K. Marsh. 491, it was decided that, according to the just import of the bond, the sureties are liable for all legacies for which the executor is by law chargeable, whether they relate to personal estate, or grow out of sales directed to be made of the testator's land. And in the case of *Clay & Craig v. Hart*, supra, it was decided that, 'the obligation imposed by the bond being altogether legal, the sureties cannot be liable for any other breach than that of the legal duties of the executor embraced by the condition of the bond. So far as creditors were concerned, the sureties were liable only for the faithful administration of legal assets, or' the goods, chattels, and credits 'of the testator. And therefore though the proceeds of land, if charged with the payment of debts, constituted equitable assets in the hands of the executor, the sureties were not liable therefor.'

The failure, in the executor's bond required by the act of 1797, to impose on the sureties a liability for the faithful performance by the executor, of all powers with which he was invested by the testator, being an obvious defect, an act was passed in 1838 (3 Stat. Law, 239) requiring thereafter all bonds given by executors to contain a further condition, which embraces the whole duty and powers of an executor. But this latter statute cannot affect the liability of sureties in a bond previously given under the act of 1797."

In *Stuart, Receiver, v. Hathaway*, supra, decided in 1882, the court further said: "It is unnecessary to decide many of the questions raised by the appeal, as in our opinion the decision of the case must depend upon the question as to whether the appellee is liable for the proceeds of the land collected by Ray as the administrator of Pope. The legal effect of the bond upon which the appellee is sought to be made liable as the surety of Ray was determined by this court in the case of the *Commonwealth v. Ray*, manuscript opinion delivered in April, 1878. The bond is that usually given by an administrator, binding the obligors to answer for the personal assets that come, or ought to have come, to the hands of the administrator; and under such a bond, as decided by this court in the case cited, the surety is not liable for the proceeds of land sold under a decree or judgment, although at the instance of the administrator. The administrator, as administrator, is not entitled to the money; nor is it usual to direct its payment to him unless he is designated as the special receiver; and thus his bond as receiver creates the liability as to the surety, and not his bond as administrator. It does not appear that the administrator was ever authorized to collect this money, or that he was ever made the receiver, or that he sold the land; but, on the contrary, we infer from the record that the land was sold by the commissioner and the notes made payable to him. But whether so or not, the surety is no more liable under such a bond, than he would be for the rents. See *Wilson v. Unsell's Adm'r*, 12 Bush, 215. Nor is the surety estopped by reason of the judgment against the principal in the bond from making his defense. The judgment is against Ray and not against the surety; and, while the surety may have been a party to the action and excepted to the commissioner's report of settlement, so far as Ray is concerned he was properly charged with all the moneys he received, whether from land or other sources belonging to the estate; and the overruling of the exceptions was only a judgment to the effect that Ray was liable and not the surety, as no judgment was obtained against the surety, and none asked, so far as appears from this record. This purports to be an action in the name of the receiver, under an order of court, on a judgment obtained against the principal, and for which the

surety is attempted to be made liable, or is regarded as more properly an action on the bond with the judgment against the principal offered as conclusive evidence of the surety's liability. Still, the defense may be made and the surety will be allowed to show that he is not responsible, although his principal may be. While Ray, the principal, may not have received this money in his official capacity, he will not be allowed to say that his responsibility never attached because the money ought to have been paid to another, or to himself as receiver. If he received the money, he is liable for it; but not so with his surety. The latter is bound by the letter of his covenant, and his liability cannot be enlarged without his consent. Now it is apparent from the record that the personal assets have been accounted for; and it is equally apparent that Ray, in his settlement, was charged with the proceeds of the sale of this land, and that this constituted the basis of the judgment against him, and it is immaterial whether paid to him by the purchaser, or under an order of the court, the surety is not responsible for it. There may be some conflict in the proof as to the payment of debts by the administrator so as to exhaust the personal assets; and, while we are satisfied the personal assets were accounted for by him, this court, in a suit to enforce the judgment obtained against the principal, will not dissect that judgment with a view of finding what fragmentary portions of it can be charged to the account of the surety. In an action showing the liability of the surety by reason of the failure to account for the personalty, such questions would be the proper subject of inquiry."

It will thus be seen that *Speed v. Nelson*, and *Stuart, Receiver, v. Hathaway*, supra, sustain the text above quoted to the effect that the surety on the general bond of an executor is not liable for the proceeds of the sale of land, coming to the hands of the executor. And, while not so directly in point, there are many other decisions of this court which fully recognized the rule both before and after the decision in *Stuart, Receiver, v. Hathaway*, supra.

Section 3838 of the Kentucky Statutes requires a personal representative to give a bond with surety that he "will faithfully discharge all the duties of his trust." In the case at bar *Humbrecht* gave a bond by which he covenanted that "he would well and truly administer according to law the goods, chattels, credits and effects that may come to his hands, or any one for him by color of his office, which the will empowers him to sell, and make a just and true accounting of all his acts and doings therein, and would further well and truly pay and deliver all the legacies specified in said will as far as the goods, chattels, credits and other effects would extend." And he further covenanted

to make a proper distribution of any surplus effects to the persons entitled thereto.

In *Warfield v. Brand's Adm'r*, 13 Bush, 94, the court said: "The liability of a surety is always to be measured by his covenant. *Grimes v. Clay*, 4 Litt. 6; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Neely v. Merritt*, 9 Bush, 346. And consequently the sureties of an executor cannot be liable for any other breach than that of the legal duties of the executor. *Clay & Craig v. Hart*, 7 Dana, 1; *Speed's Ex'r v. Nelson*, 8 B. Mon. 503; *Neely v. Merritt*, supra. In selling land in obedience to the mandatory directions of the testator, or in pursuance to a discretionary authority, given to the executors, they do not act in virtue of their office of executor, but as the mere donees of a power, i. e., as trustees. *Conklin v. Egerton*, 21 Wend. 436. And it is because of this distinction that prior to the statute of 1838 (*Loughborough*, 239, 240) it was uniformly held by this court that the sureties of an executor were not liable on the bonds in the form then in use for the proceeds of land sold by their principal, under power given in the will. *Helm v. Darby*, 3 Dana, 186; *Cloudas v. Adams*, 4 Dana, 603; *Speed v. Nelson*, supra."

And, while it seems clear that the act of 1838 was passed for the purpose of making the bond of personal representatives embrace the whole duty and powers of such an officer, it did not extend that duty or power, and the consequent liability, to a case of a sale of lands under a judgment of court; the extension only embraced sales of land by the executor under a power giving him authority to make the sale. This fact is clearly pointed out in the following extract from the opinion in the *Brand Case*, supra: "The provisions of these statutes respecting executorial bonds seem to us to indicate an intention on the part of the Legislature to extend the limits of strictly executorial powers and duties; and we think we ought, in furtherance of that intention, to treat all those powers and duties conferred and imposed by the will, the faithful exercise and performance of which are secured by the executorial bond, and which pertain to the settlement of the estate and the ascertainment of the net amount and its distribution, according to the usual course of administration, among those entitled to it, as legal executorial powers and duties, and all others as trusts. By such a construction we avoid complications, and establish a standard which, though it may not conform to the doctrines of the common law, will have the greater merit of uniformity and simplicity." And in *Heeter v. Jewell*, 6 Bush, 512, the court further said: "Generally, neither the duties nor responsibilities of administrators attach to lands, except with reference to rents and emblements and interests, less than freehold estates; but they are charged with the duty of administering 'the goods, chattels, credits, and effects' of their

intestates (1 Revised Statutes, 504), which do not comprehend more than general personal estate, including choses in action and chattels real (1 Bouvier's Law Dict. 563). Clearly then the proceeds of the land which descended to the heirs of Brumson were not assets in the sheriff's hands for which his sureties were responsible, unless the judicial conversion of the land for the payment of debts impressed its proceeds with that character. But conceding that by the sale of the land its proceeds became equitable assets, subject in the hands of the court to the payment of debts, still they were only equitable, not legal assets; and the bond of a personal representative binds his sureties only for legal assets, as was held by this court in the case of *Clay v. Hart*, 7 Dana, 1."

Again, in *Harding v. Harding*, 151 Ky. 402, 152 S. W. 261, the court recognized the rule that the proceeds of the sale of real estate under a power, to pay debts, are assets in the hands of the executor; the court saying: "The testator, by his will, authorized the executor of the will to sell the real estate, and in view of the condition of the estate this was manifestly necessary. The rule is that where the land of the decedent has been sold to pay debts under a power in the will the proceeds are assets in the hands of the executor, and are a trust fund held by him for the payment of debts. *Grider v. Payne*, 9 Dana, 191; *Muldoon v. Crawford*, 14 Bush, 132; *Marrett v. Babb*, 91 Ky. 90, 15 S. W. 4, 12 Ky. Law Rep. 652, 11 Am. & Eng. Ency. of Law, 84; 18 Cyc. 189. The proceeds of the sale of the real estate being assets in the hands of the personal representative for the payment of debts, the interest follows the principal, and is also assets in his hands."

But in all these cases where the proceeds of the sale of land have been held to be assets in the hands of the personal representative for which his bond was liable, the sale was made by virtue of a power given by the will.

In *Clay v. Hart*, 7 Dana, 1, the distinction was made between an express direction and a discretionary power to sell land; it being held that in the latter case the sureties are not liable, although in the former case they would be.

In *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998, 62 Am. St. Rep. 734, it was held that the surety was not liable for the proceeds of land sold in a foreign state under a power conferred by the will, where the will was not probated in that state.

In *Reno v. Tyson*, 24 Ind. 56, it was held that the surety was not liable for proceeds of property which had not been sold under the directions of the will.

Likewise, under a testamentary power to sell real estate for the purpose of a reinvestment, the executor acts as a trustee, and the sureties on his administration bond are

not liable. *People v. Huffman*, 182 Ill. 390, 55 N. E. 981.

And in the late case of *U. S. F. & G. Co. v. Russell*, 141 Ky. 603, 133 S. W. 572, the court said: "The personal estate of a decedent passes to his personal representative. The land and all that passes with the land passes at his death to his heirs, or if he disposes of it by will to his devisee. Unless the land is devised to the executor, he has nothing to do with it. His sureties are not liable for rents of land. *Slaughter v. Forman*, 2 T. B. Mon. 96; *Chambers v. Davis*, 17 B. Mon. 534; *Heeter v. Jewell*, 6 Bush, 510; *Wilson v. Unsell*, 12 Bush, 215; *Shire v. Johnson*, 38 S. W. 694, 18 Ky. Law Rep. 853." See, also, *Ratterman v. Apperson*, 141 Ky. 821, 133 S. W. 1005.

In the case at bar, *Humbrecht*, the executor, had no authority under the will to make this sale; he did not claim any such power. On the contrary, the land was sold under the law of Oklahoma, in which state *Humbrecht*, as executor, had no power whatever. The sale was made upon the petition of *Marshall*, who qualified as administrator with the will annexed, in Oklahoma, and there gave a bond for the faithful performance of his duties. And, although *Humbrecht* executed a bond in Kentucky which, it has been suggested, is somewhat broader than the bond required by the statute, nevertheless neither the statute nor the bond enlarges the power of the executor or the liability of his surety, to the extent of holding the surety liable for the proceeds of the sale of land, in the absence of a power. *Heeter v. Jewell*, *supra*.

The reason for the rule is apparent. The executor's rights and duties being prescribed by the law and the will under which he acts, the liability of the surety is to be measured by that standard; otherwise he would be wholly unable to know the extent of his covenant. The surety is therefore liable only for assets which the executor has a legal right to receive, as executor, either under the law, or under the powers conferred upon him by the will. The rule is peculiarly applicable to this case, where the land belonging to the decedent was in another state, and its ownership probably unknown to the surety. If an executor can go into a foreign state or country and sell land or collect the purchase price thereof, to which he has no legal claim and thereby make his surety liable, the surety is helpless, and his bond a snare to entrap him.

We conclude, therefore, upon this branch of the case, that the court erred in holding the surety liable for the proceeds of the sale of the Oklahoma land.

[4] 4. Finally, it is insisted that the court erred in giving *Maggie Kraus* a judgment for \$335, or for any sum whatever. The will gave *Maggie Kraus* a legacy of \$800, and,

after the executor had left the state, she applied to Costigan, the surety, demanding the payment of her legacy. Costigan, after making an examination of the assets which he was advised were chargeable against him, and comparing them with the debts and legacies, estimated Mrs. Kraus' proportion at \$117.55. He offered to pay her that amount in full of her claim, and she accepted the offer; whereupon he paid her that amount in full of all claims against him, taking her receipt therefor. In this matter Costigan is sustained by the evidence of Spence, his attorney, who only differs from Costigan as to the amount that was paid. That, however, is immaterial.

In his answer Costigan relied upon the settlement, and was met by the charge that it had been obtained by fraud. No attempt was made to avoid it by a plea of no consideration. And, upon the issue of fraud, there was no evidence; neither Mrs. Kraus nor any other witness having testified in her behalf upon this issue.

Under the proof, therefore, the satisfaction and release relied upon by Costigan must be treated as established; and, that being true, he owes Mrs. Kraus nothing. So much of the judgment, therefore, as permitted Mrs. Kraus to recover anything, was erroneous.

The judgment is affirmed upon the cross-appeal, and reversed upon the appeal, with instructions to enter a judgment in accordance with this opinion.

#### HACKNEY v. JUSTICE.

(Court of Appeals of Kentucky. May 22, 1914.)

#### 1. ELECTIONS (§ 255\*)—CONTEST—BALLOTS—PRESERVATION—RECOUNT.

Where ballots voted at an election were strung, bound, sealed, and securely locked with the tally sheet and ballot stubs in the ballot box as provided by Ky. St. § 1482, the fact that none of the ballots except five questioned or doubtful ones were inclosed in an envelope as required by such section, due doubtless to a failure of the clerk to furnish the election officers with the required envelope or envelopes, did not show that the ballots were not preserved as required by law so as to preclude a recount of them in an election contest; it appearing that the box had not been tampered with since the election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 231; Dec. Dig. § 255.\*]

#### 2. ELECTIONS (§ 299\*)—CONTEST—BALLOTS—RECOUNT.

Where ballots voted at an election have been preserved so that their identity is assured, they may be recounted during a contest, and are better evidence of the vote cast than the returns.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 290.\*]

#### 3. ELECTIONS (§ 198\*)—PROCEDURE—SUBSTANTIAL COMPLIANCE.

Substantial compliance by election officers with the requirements of the statute regulating elections is all that is necessary, and mere ir-

regularity on their part will not justify the setting aside of the election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 170; Dec. Dig. § 198.\*]

#### 4. ELECTIONS (§ 230\*)—CONTEST—BRIBERY.

Where contestant received a majority of the legal votes cast at an election for justice of the peace in a magisterial district, the election could not be declared void because it was proved that many votes cast for contestee had been obtained by bribery.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 202; Dec. Dig. § 230.\*]

Appeal from Circuit Court, Pike County.

Election contest by J. A. Justice against Emsy Hackney. Judgment for contestant, and contestee appeals. Affirmed.

A. F. Childers and Roscoe Vanover, both of Pikeville, for appellant. J. E. Childers, of Pikeville, for appellee.

SETTLE, J. At the November election, 1913, the appellant, Emsy Hackney, and the appellee, J. A. Justice, were opposing candidates for the office of justice of the peace in magisterial district No. 8 in Pike county; the former being the nominee of the Republican party, and the latter the nominee of the Democratic party. Magisterial district 8 contains two voting precincts, Lick precinct No. 4, and Grapevine precinct No. 22. According to the official returns, appellant received 203 and appellee 118 votes in Lick precinct, which gave appellant a majority in that precinct of 84 votes. In Grapevine precinct appellant received 103 and appellee 147 votes, a majority in favor of the latter of 44 votes, making appellant's apparent majority in the magisterial district 40 votes, by virtue of which he received his certificate of election.

Thereafter, and within the time fixed by law, appellee, by petition filed in the Pike circuit court, instituted a contest for the office in question upon numerous grounds, and among them: (1) That, by fraud or mistake on the part of the election officers, the votes cast in each of the precincts composing the magisterial district were not properly or legally counted or certified; that appellee received many more votes than were counted or certified for him, and appellant many less than were counted and certified for him, and that a fair canvass or recount of the votes as cast would show that appellee, instead of appellant, had received a majority of all the votes cast in the magisterial district, thereby entitling him to the office; (2) that appellant, and others acting for him, expended large sums of money in bribing voters to vote for him in the election, and that at least 25 voters whose votes were cast and counted for appellant in Lick precinct and an equal number whose votes were cast and counted for him in Grapevine precinct were paid in money and bribed by appellant, or others acting for him, to so vote; that the rejection of these bribed votes would of itself give appellee a majority of the votes cast in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

magisterial district, and entitle him to the office for which he and appellant were candidates.

Appellant's answer specifically controverted and therefore put in issue the grounds of contest alleged in the petition. Upon the hearing of the contest the circuit court caused a recount to be made of the ballots in Lick precinct by commissioners appointed for that purpose. The recount was made in open court, and in the presence of the parties to the contest. From an inspection of the ballots, the recount of the vote, and all the evidence appearing in the record, the circuit court reached the conclusion that appellee had been legally elected to the office of justice of the peace in magisterial district No. 8 by a majority of 16 votes, so, by the judgment rendered, he was given the office, and appellant directed to vacate and surrender it to him with all the records thereof. The contestee, Emsy Hackney, being dissatisfied with the judgment, has appealed.

The contest, aside from the charges of bribery, did not affect the election in Grapevine precinct, in which appellee received a majority of the votes cast; it being agreed by the parties that the votes as cast therein were properly certified by the election officers. The contest on the other grounds urged were wholly as to the election in Lick precinct, and, in arriving at the conclusion set forth in the judgment, the circuit court refused to sustain the charges of bribery made in the petition with respect to either precinct, expressing the opinion that the evidence in support thereof was not sufficient to affect the result of the election in either, and resting the judgment upon the ground that the votes cast in the Lick precinct had not been legally counted or certified by the election officers of that precinct, and that the proper recount made by the commissioners in the presence of the court, and by its direction, so reduced appellant's majority in that precinct as that it was overcome by appellee's majority in the Grapevine precinct, thereby giving the latter the majority in the magisterial district stated in the judgment, and entitling him to the office in contest.

The irregularities and errors in the count and certification of the vote in Lick precinct, as made by the election officers thereof, as well as the manner in which the recount of the votes of that precinct was made by the commissioners under the order and in the presence of the court, are fully shown by the following excerpt from the opinion and judgment of the court: "The court finds from the evidence that the count was made by the officers in an irregular way, in this, the officers testify that they divided the vote or ballots into different piles, and two of the officers counted a given number of ballots, while the other two counted by themselves. In this manner the vote seems to have been canvassed, and the result ascertained by adding the figures together found by the respec-

tive counters; the officers not knowing, except as reported to each other, what the actual vote did show. A motion having been for a recount, and proof having been heard as to the integrity of the ballots; same were opened in the presence of the parties and counsel on both sides, and the court on his own motion appointed F. T. Hatcher, George Pinson, Jr., each of said parties being personally known to the court to be well qualified to perform said service, and appointed for the purpose of representing the Democratic candidate James A. Justice, and the court on his own motion appointed Ex County Attorney O. C. Bowles and Dr. J. D. Meade to represent the Republican candidate party in said count, each of the parties being personally known to the court as eminently fitted to perform said service, and all four of the parties so appointed being known to the court as men of good ability, and the court, upon an inspection of the ballots in the presence of the commissioners and the parties, being satisfied that the ballots had been well preserved, ordered said commissioners to recount said ballots, which was done in open court, and in the presence of all concerned. The commissioners, in the presence of the court, carefully examined each of the ballots and found the following result: That contestant Justice received 139 votes; that contestee Hackney received 164 votes. The stub book from said precinct and certificate of the officers were examined as part of the record in open court, and the certified result by the officers of the election showed that the contestant received 116 votes and contestee 200 votes. The stub book further showed that only 312 persons voted in said precinct; whereas, the officers certify that 316 persons voted between contestant and contestee. The ballots, as shown in the recount by the commissioners, show that 308 ballots were cast between contestant and contestee. The commissioners further found that 5 other persons had voted, as shown by the ballots, 4 of whom had voted for contestee and 1 for contestant, but, the name of the election clerk not being signed thereon, the same were not counted by the commissioners; but the court is of the opinion that the ballots should be counted, and now counts same, because a voter has nothing to do with the preparation of his ballot, and the clerk, by oversight or failure to sign his name thereon, cannot disfranchise the voter. The 5 votes are separated from the other votes and placed in a large envelope and indorsed across the seal thereof by the commissioners in red ink. The court having counted 4 of said ballots for Hackney and 1 for Justice. The ballots, except in a few instances, all appear to have been voted with a stencil, and did not have the slightest indication of having been changed in the least. The petition alleges that contestant received in Grapevine precinct No. 22 147 votes, and contestee 103 votes, making a total vote in

the two precincts of 287 for contestant, as shown by the recount, and 271 for contestee, as shown by the recount, the answer admitting the correct number of votes in Grapevine precinct, which makes a majority for contestee, James A. Justice, of 16 votes."

[1] The facts and conclusions stated in the above quotation from the opinion and judgment of the circuit court are well established by the evidence, and substantially the only ground relied on by appellant for a reversal of the judgment is that there should have been no recount of the ballots from Lick precinct, and this contention rests upon the claim that the evidence fails to show that the ballots were preserved as required by law. In our opinion the evidence furnishes no support to this contention. In the matter of stringing, binding, and sealing the ballots, and securely locking them with the tally sheet and ballot stubs in the ballot box, there was, upon the part of the election officers, a substantial compliance with the provisions of section 1482, Kentucky Statutes. It is true that none of the ballots, except 5 questioned or doubtful ones, which were passed on and properly counted by the court, were inclosed in an envelope as required by the section, *supra*; but this omission resulted, doubtless, from the failure of the county clerk to furnish the election officers the required envelope or envelopes, and, as it was apparent from the court's inspection of the ballots that they had been regularly marked and cast by the voters, though improperly counted and certified by the election officers, and the testimony in open court of the election officers in Lick precinct, the sheriff, his deputies, the county clerk, in whose custody the ballot box was properly placed and kept, his deputies, and others having apparent knowledge on the subject, showing that the ballot box had, from the time it was locked by the election officers until opened by the court, been securely locked, and the ballots therein not handled or tampered with, it is manifest that in requiring a recount of the vote the court adopted the only method that could safely have been employed to properly determine whether appellant or appellee had been legally elected to the office of justice of the peace in magisterial district No. 8.

[2] The foregoing facts bring this contest within the rule thus stated in *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 24 Ky. Law Rep. 1099, as follows: "The rule may be stated to be that, where the ballots are preserved so that their identity is assured, they can be counted during the contest; and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. *Hughes v. Holman*, 23 Or. 481 [32 Pac. 298]; *Owens v. State*, 64 Tex. 500; *People v. Holden*, 28 Cal. 123. But, before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be

proved satisfactorily that the ballots had not been tampered with since the election, and that those offered in evidence are the identical ones cast."

In *McEuen v. Carey*, 123 Ky. 536, 96 S. W. 850, 29 Ky. Law Rep. 931, we, on this subject, also said: "The rule in this state is firmly established that in an election contest the certificate of the precinct officers is *prima facie* evidence of the correctness of their count; but, if the ballots themselves have been lawfully kept, and are shown not to have been tampered with, then they must prevail over the certificate. *Bailey v. Hurst*, 113 Ky. 699 [68 S. W. 867, 24 Ky. Law Rep. 504]; *Edwards v. Logan*, 114 Ky. 312 [70 S. W. 852, 24 Ky. Law Rep. 1099]; *Id.*, 114 Ky. 312, 75 S. W. 257, 25 Ky. Law Rep. 435]; *Hamilton v. Young* [81 S. W. 682] 26 Ky. Law Rep. 447. \* \* \* It is insisted for appellant that great confidence should be placed in the count of the officers, because, as a whole, they were composed both of Democrats and Republicans, and the challengers and inspectors of the respective parties were there and participated in the count, and it is hardly possible that these seven men could have been so egregiously mistaken in so many instances; and it must be confessed that there is great force in this claim. But, on the other hand, it must not be forgotten that in the count of the votes by the officers of the election all do not participate in every part of the count. Usually, as the evidence shows was done in this case, one officer calls off the ballots, and another, or others, tabulate them. It requires but little familiarity with the conduct of elections to realize how easy it is for mistakes to creep into the official count at the end of the day. In the first place the officers have been on duty for many hours, and are usually weary with the duties of the day when the count commences. The judges are generally elderly men, selected for the wisdom which ought to come with age, and the count of the votes, as in the case at bar, usually takes place after dark. Often the light is poor, and under these circumstances it can readily be seen how easy it is for an old man, with dim eyes and a poor light, to overlook sporadic votes. It is conceded that, in races other than the one involved here, several mistakes were made in the count of the officers, so that it is apparent that they were not infallible, and admitting, as is done here, that they made a number of mistakes, we do not see why their count in the clerk's race should be deemed beyond the possibility of error."

In the instant case the recount of the ballots of the Lick precinct disclosed beyond doubt the errors made by the officers of election in their count of the same ballots at the close of the election, which errors were all committed against the appellee, as stated in the judgment of the circuit court. It is not necessary for us to declare that these errors were intentionally or fraudulently made by



the election officers. On the contrary, we incline to the opinion that they were made by mistake, for the evidence shows that the count took place in a schoolhouse near the polling place, because a desk was required upon which to spread the ballots and tabulate the vote, and this work was done with a poor light, moreover, it further appears from the evidence that the election officers counted the ballots in the manner stated in the judgment; that is: "They divided the vote or ballots into different piles; two of the officers counting a given number of ballots, while the other two, counted by themselves. In this manner the vote seems to have been canvassed, and the result ascertained by adding the figures together found by the respective counters; the officers not knowing, except as reported to each other, what the actual vote did show." Under such circumstances it is hardly possible that the count could have been correctly made.

[3] The irregularities and mistakes shown by the evidence to have attended the performance of the duties imposed upon the election officers in counting the votes cast in the Lick precinct, certifying the result, and returning the ballots, did not vitiate the election in that precinct, and, being of such character as to be corrected by the recount of the ballots in the manner adopted by the circuit court, no reason is perceived for disturbing the result of that court's action. Substantial compliance by election officers with the requirements of the statute is all that is necessary; mere irregularity on their part will not give cause for setting aside the election. *Craig v. Spitzer*, 140 Ky. 465, 131 S. W. 264; *Anderson v. Winfree*, 85 Ky. 597, 4 S. W. 351; *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407, 14 Ky. Law Rep. 273.

[4] We deem it unnecessary to determine how many votes were received by appellant through bribery, for appellee's right to the office in contest must have been declared, if none of the votes cast for appellant had been secured by bribery, because of his having received a majority of the legal votes cast in magisterial district No. 8. But, lest it be thought we look with complacency upon the offense of bribery, we deem it proper to say that the evidence conclusively shows that a very considerable sum of money was spent in the election in procuring votes for appellant. The evidence does not directly connect him with the purchasing of these votes; but they were purchased in his behalf by his friends, who, according to the evidence, placed that matter under the management of one Arthur Charles, who was brought from Virginia and furnished the money for that purpose. We think it manifest from the evidence that at least as many votes were purchased for appellant and cast for him as the petition alleges he thus received. On the other hand, it should be said to the credit of appellee

that the evidence fails to show that any of the votes cast for him were secured through bribery. We cannot, however, declare the election void because of the purchase of votes for appellant, as to do so would deprive appellee of the office in contest, notwithstanding his election thereto by unpurchased votes. He was not a party to nor beneficiary of any of the bribery committed, and for that reason, and because of the further fact that he received a clear majority of the votes cast, exclusive of those of any persons bribed, the result of the election as far as he was concerned was not affected by the bribery. As said in *Motley v. Wilson*, 82 S. W. 1023, 28 Ky. Law Rep. 1011: "The policy of the law is to sustain elections. All of our rights, however, reach back to and are based upon a free ballot, because the sovereignty is in the people. If the source becomes muddy, what flows from it will also be contaminated. Hence it follows that, whenever fraud or bribery so far enters into an election that it is impossible to tell who has been elected by the legal votes, it is not to be upheld." *Ford v. Hopkins*, etc., 141 Ky. 181, 132 S. W. 542.

After all, it lies with the grand juries and courts of the counties in which fraud and bribery in elections are committed to deal with and destroy these evils; and it is to be hoped that the bribery shown in this case to have been committed in the election of 1913 in magisterial district 8 in Pike county will receive due investigation at the hands of these instrumentalities of the law, in order that the guilty parties may be brought to punishment.

Judgment affirmed.

## BASSETT v. BASSETT.

(Court of Appeals of Kentucky. May 21, 1914.)

### 1. CONTRACTS (§ 245\*)—WRITING—PRIOR VERBAL ENGAGEMENTS.

A written instrument, granting to complainant an option to share equally with defendant in the purchase of certain land on his paying one-half of the purchase price and one-half of the expenses, interest, costs, and taxes, merged all prior verbal negotiations between the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.\*]

### 2. CONTRACTS (§ 192\*)—CONSTRUCTION—OPTION.

A written instrument recited that, whereas a certain coopeage company had executed a deed to defendant conveying certain land for a specified sum, such instrument was to certify that complainant was to pay one-half of the purchase price and one-half of all expenses, interest, costs, and taxes, and share equally with defendant in the profits arising from the sale of the land, and share equally with defendant any losses that might be sustained. Held, that such instrument should be construed as giving complainant an option only to share in the profits and losses resulting from the purchase of the land on complainant's contributing one-half of the purchase price, expenses, etc., as the same

were payable under the contract for the purchase of the land, and not as entitling complainant to an equal share in consideration of loaning his credit in assisting defendant to raise the money with which to carry out the contract with the vendor, and pay for the land out of the proceeds of sales thereof; and hence complainant, never having made any contribution to the purchase price and expenses, was not entitled to share in the property.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 846-851; Dec. Dig. § 192.\*]

Appeal from Circuit Court, Grayson County.

Suit by R. J. Bassett against E. R. Bassett. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

O'Rear & Williams, of Frankfort, G. W. Stone, of Leitchfield, and L. A. Faurest, of Elizabethtown, for appellant. H. L. James, and George Holbert, both of Elizabethtown, for appellee.

CARROLL, J. The appellee, R. J. Bassett, in 1912 brought this suit in equity against the appellant, E. R. Bassett, in which he averred that in 1909 he and E. R. Bassett entered into a verbal agreement to, and did, purchase certain tracts of land in Grayson county, Ky., aggregating 2,650 acres, describing it; that E. R. Bassett, fraudulently and knowingly, and without his knowledge or consent, had the title to the land conveyed to himself, when it should have been conveyed to both of them jointly so as to invest each with an undivided one-half interest; that he had, equally and jointly with E. R. Bassett, assisted in raising and securing the purchase price, and contributed equally and jointly with him in paying for the land; that when he discovered that the title had been conveyed to E. R. Bassett alone, he demanded of him some acknowledgment of his interest in the land, and thereupon E. R. Bassett executed and delivered to him the following paper: "July 5, 1909. Whereas on May 20, 1909, the Cincinnati Cooperage Co. made a deed to E. R. Bassett conveying 2,650 acres of land in Grayson county, Ky., for the sum of \$8,925.00: Now this is to certify that R. J. Bassett is to pay one-half of said purchase price of the land and one-half of all expense, interest and costs and taxes, and to share equally with E. R. Bassett in the profits arising from the sale of said land and to share equally with E. R. Bassett in any losses that might be sustained." He further averred that since the purchase of the land E. R. Bassett had sold a part of it, and prayed for a reformation of the deed so that it might show his interest in the land, for a settlement of the partnership, and a sale of the land remaining unsold. In an amended petition, filed after all the evidence in the case had been taken, and for the purpose, as averred, of conforming to the proof, he set up that in

May, 1909, they entered into a verbal partnership agreement under and by the terms of which they were to purchase and sell for their joint account the land described in the petition; that the land was bought for the purpose of being sold, and they were to share equally in the profits that might be made, and bear equally any losses that might be sustained in the venture; that when the partnership was formed, they agreed upon a plan for raising the money with which to make the cash payments on the land, and under this agreement each of them was to assist in raising the fund, and that he performed his part of the agreement; that neither of them furnished any of his own money with which to make the payments, but that through their joint efforts and the use of their joint credits, the money to make the payments was secured. The amended petition was controverted of record, and to the original petition E. R. Bassett filed an answer, in which, after denying many of the averments of the petition, including so much of it as averred that there was a verbal agreement of partnership between them, he admitted the execution of the writing dated July 5, 1909, but averred that it had never been accepted by R. J. Bassett; that the writing was executed in consideration of the agreement of R. J. Bassett to pay one-half of the purchase price of the land, and one-half of all expense, interest, cost, and taxes, and that he had failed to pay any part thereof; that the payment of these sums was a condition precedent to his acquiring any interest in the land and to his liability on the writing, and that the writing was in fact merely an offer to allow R. J. Bassett to acquire an interest in the land by the payment of the sums stipulated in the writing; that as R. J. Bassett had never paid anything, the writing never became binding, and therefore he was not entitled to any interest in the land. A reply, controverting the affirmative matter in the answer, completed the pleadings.

It will be observed that in the petition R. J. Bassett, after setting up the verbal agreement of partnership and the writing of July 5th, acknowledging its existence, expressly averred that he "equally and jointly and with the said defendant assisted in raising and securing the money to pay the said purchase price, and contributed equally and jointly with the defendant in paying for same"; while in the amended petition he abandoned the theory that he had paid, or contributed to pay, any part of the purchase money or expenses attending the transaction, and put his right of recovery upon the ground that, "by the terms of the agreement, the said tract of land was bought to be thereafter sold, and the plaintiff and defendant were to share equally in the profits that might be made, or any losses that might be sustained in the venture; that they at said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time agreed upon a plan for raising the money with which to make cash payments on the land, and under said agreement each of them was to assist in raising said funds; that he, plaintiff, performed his part of said agreement, and on the — day of May, 1909, as such partners they purchased from the Cincinnati Cooperage Company the land; that neither the plaintiff nor defendant furnished money of his own with which to make the payments, or any payments, but through their joint efforts and the use of their joint credit money was secured with which to make said payments; \* \* \* that thereafter on his demand the defendant prepared, executed, signed, and delivered to this plaintiff a writing mentioned in the original petition, and that said writing was intended as an acknowledgment of the previous parol contract which had been made between the plaintiff and defendant, and as an evidence thereof."

The record shows without contradiction that on May 20, 1909, the land was conveyed to E. R. Bassett for the consideration of \$8,925, \$5,000 of which was paid in cash, and of the remainder, \$1,000 was to be paid in 60 days, and the balance in equal payments, due in 12 and 18 months, and further shows that the writing of July 5th was executed and delivered.

R. J. Bassett testified very positively that a verbal contract of partnership was entered into before the deed was made, and that the writing of July 5th was executed merely for the purpose of evidencing the parol contract which had theretofore been made; while E. R. Bassett is equally emphatic in his denial that there was at any time any verbal contract of partnership between them, and in his assertion that the writing contained the only contract. Relating how the writing of July 5th came to be executed, E. R. Bassett said: "After I had gone to Cincinnati and made the deal with the Cincinnati Cooperage Company, had paid the purchase price, executed the notes for the deferred payments, and got my deed, I talked to a good many people in and around the bank about what a good thing I had in the purchase, and R. J. Bassett seemed to want to get into it. I thought that if he would perform the stipulations in this writing by paying one-half the purchase price and one-half the interest, taxes, and costs, that it would make money matters with me easier, and I might be able, if he would comply with the terms of this contract, to handle other deals of this kind. I doubted his ability to perform his part of the agreement, but I wrote out this paper and gave it to him some two months after the deal was made with the Cincinnati Cooperage Company. He failed, and has never complied with any of the terms of this writing, and I have treated it as a nullity long since. \* \* \* The writing presents the whole contract. I did not tell him anything. Everything that was

said and done is embraced in that writing contract."

R. J. Bassett related as follows the verbal contract between himself and E. R. Bassett: "E. R. Bassett came to me and told me of the proposition of the Cooperage Company, and that if I would help him out on it, we could make at least \$5,000 on it each. I told him that I did not have the money, and he said that he did not either, but if I could help him through the bank, we could buy it without money and make it pay for itself. I told him that it was too big a proposition, but if we paid \$5,000 down we could certainly get some time on the balance, and I could handle it. We wrote them and got a proposition of \$5,000 cash, \$1,000 in 60 days, and balance in 12 and 18 months. E. R. Bassett wanted me to take a note of Allison, due in 18 months, a draft on the Bank of Woodburn for \$1,200, and he would borrow \$500 from the Citizens' National Bank of Louisville, and me take his note for the balance until we could sell the land and take up these notes with the proceeds. He thought that we could dispose of the most of it in the first year. I told him that I could not use his notes, but could take his note and exchange my sister's note and use hers, which I did. This was E. R. Bassett's proposition, and it was carried out. Q. Where and when was this agreement made? A. Made in the bank just before the purchase of the land. Q. Was it reduced to writing? A. No, sir. Q. State whether or not anything was said in that agreement as to what interest you and the defendant were to have in this land. A. We were to be full partners, and he stated in his proposition that we would make \$5,000 each. Q. Was it or not stated and agreed to by both of you at that time that you were to be full partners in this land? A. Yes, sir."

The following questions and answers give R. J. Bassett's version of the written contract: "I will ask you, Mr. Bassett, whether in this action you depend upon a contract as stated by you on the second page of your deposition, if such contract was made, or do you depend upon a contract containing a stipulation as set out in said writing of July 5, 1909, filed with your petition as Exhibit B. A. I depended in the beginning upon the verbal contract, and E. R. Bassett at my request gave me this written contract, which I considered a written statement of the first. Q. When E. R. Bassett executed that paper B, and delivered the same to you, did you accept it on the stipulations contained in the paper? A. I requested it in the writing to show that I had a half interest in the land according to the original agreement. It was given to me for that purpose, and I so understood it. Q. In taking that paper you never intended to pay half the purchase price named therein? A. I intended to pay half the purchase price, expenses, and everything the

same way that E. R. Bassett did, out of my part from the proceeds of the land, and so understood that contract marked "B." Q. If that was the understanding, why did you not have that put in the writing? A. I requested E. R. Bassett to give me a writing showing that; and he gave me this paper, and asked me if it was satisfactory. I understood that it showed that, and so understand it yet, and E. R. Bassett has never denied it up to the time of this suit, nor questioned my ownership. He prepared the writing himself, and I could have had any change made at the time if I had known that it was necessary. Q. Then I understand you to mean that the expression in that paper, which says, "This is to certify that R. J. Bassett is to pay one-half of the purchase price of the land" don't mean that, but was to be interpreted that the land was to be paid for out of the proceeds of the land and save you and him from paying for it? A. My understanding was as soon as we got the land in our possession we were to begin selling it, and I was to raise the money upon the notes and make it pay for itself, which I did."

[1] On this evidence the first question that naturally suggests itself is, Was the verbal agreement, made as claimed by R. J. Bassett in May, 1909, before the land was purchased, merged in the writing of July 5th, and did that writing express the contract between the parties? Another related question is, If the writing did express the contract, has R. J. Bassett, by his admitted failure to perform the conditions of the written contract, forfeited his right to any interest in this land?

There is no charge or intimation of fraud or mistake in the execution of the written contract, and, under the well-settled rule that all prior verbal engagements concerning a contemplated trade between the parties are to be treated as having been merged in the writing executed by them after the verbal negotiations have ended, we think there can be no doubt that the writing of July 5th must be considered as containing the contract between these parties. Indeed we understand from the evidence of R. J. Bassett that he regards this writing as expressing their contract, and, so treating the case, the rights of the parties are to be determined solely by the contract.

[2] Looking at the matter from this standpoint, the issue between the parties as to the terms of the contract grows out of their different views as to its meaning. R. J. Bassett says that his understanding of the writing is and was that he should pay his one-half of the purchase price and other expenses and costs out of the proceeds realized from a sale of the land, or, as he expresses it, "the land was to pay for itself." In other words, his view is that he was not expected to and did not put up any money or incur any obligation in the purchase of the land, but on account of the assistance he

rendered E. R. Bassett in securing the money to make the first payment, he was to own a half interest in the land and pay his one-half of the indebtedness out of the proceeds of the land. But the contract is not fairly susceptible of this interpretation. It expressly provides that "R. J. Bassett is to pay one-half of said purchase price of the land and one-half of all expense, interest and costs and taxes, and to share equally with E. R. Bassett in the profits arising from the sale of said land." We do not find in the contract anything from which it may reasonably be inferred that R. J. Bassett was only to pay his one-half out of the proceeds of the land whenever it might be sold. This contract contemplates that each of the parties shall bear one-half of the expenses and pay one-half the purchase price, and manifestly this means that these payments were to be made equally when they were required to be made. It seems plain that if E. R. Bassett paid, as the record shows that he did, all the purchase price and all the expense, R. J. Bassett did not perform the conditions of the contract by which he was to have an interest in the land. As we construe this writing, it submitted to R. J. Bassett an option, giving him the right to pay one-half the purchase price and one-half the expense, interest, and costs and taxes, in consideration of which he was to have an equal interest in the profits with E. R. Bassett, or recognized his right to an equal interest when he paid his part of the price. Whether he had an interest in the profits or not depended on his election to accept the option and pay one-half of the purchase price and one-half of all expenses, interest, costs, and taxes, and this he did not do. There is no condition in the writing conferring upon R. J. Bassett the privilege of securing an interest in the land in consideration of the assistance he rendered E. R. Bassett in his (E. R. Bassett's) efforts to raise the money to pay the purchase price. Nor is there any suggestion in the writing that, in consideration of this assistance, R. J. Bassett should have an interest in the profits that might be realized from a sale of the land. Whatever right he might have had, and it is extremely doubtful if he could have any, to an interest in this land under the verbal arrangement by which he agreed to use his position as a bank officer to raise money by lawful as well as unlawful, or, to say the least, questionable methods, were voluntarily surrendered when he accepted this writing as the contract.

Putting aside as irrelevant all the talk between the parties prior to the execution of the writing, and looking to this writing alone as containing the contract between them, we are unable to find anything in it that would authorize us to give R. J. Bassett a one-half interest in this land. He has never made, and, as we understand his evidence, does not feel himself under any obligations

to make, any payments on the purchase price, or in defraying other expenses, unless he can get enough out of the proceeds of the land to enable him to do so. In short, his whole claim to an interest in this land had its origin in schemes of very doubtful propriety, by which he undertook to, and the record shows did, assist E. R. Bassett in raising the money. But under the written contract these efforts and this assistance were ignored, and his right to an interest in the land put entirely upon his undertaking to defray one-half of the expenses.

A great deal is said in the record about declarations of E. R. Bassett in which he recognized R. J. Bassett as a partner in the ownership of the land; but such of these declarations as were made previous to the writing are not competent, and the ones subsequently made are not inconsistent with the writing, and for this reason we have not considered it necessary to extend this opinion in comments on this evidence.

It is further urged that if this writing should be treated as an option, it did not fix any time when R. J. Bassett should contribute his part of the money necessary to comply with the terms of the contract, and therefore, as time was not the essence of the contract, R. J. Bassett had a reasonable time in which to pay his part, and that when he has paid his part out of the proceeds of the sale of the land, this payment will be a compliance with the contract. We do not find ourselves able to agree with this construction of the contract. It seems clearly to contemplate that the money should be contributed as needed. But aside from this there is no demand in either the pleadings or evidence upon which to rest a right of this kind.

Other questions than the one we have discussed have been presented by counsel, but we have not thought it necessary to discuss them, because, in our view of the contract between these parties, after a full and careful consideration of the record, with the aid of oral argument as well as briefs, their rights are to be determined by the writing, and upon this question we have reached the conclusion that R. J. Bassett is not entitled to any of the relief sought.

Wherefore the judgment is reversed, with directions to dismiss the petition.

## LOUISVILLE LOZIER CO. v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. May 22, 1914.)

**LICENSES (§ 11\*)—MUNICIPAL ORDINANCES—OCCUPATION TAXES.**

A domestic corporation, engaged in the business of soliciting orders for the purchase of automobiles from foreign manufacturers, and receiving automobiles to fill orders for delivery to the purchasers, and maintaining a place of business for the sale of automobiles, and sell-

ing in the course of a little over a year four automobiles which it had stored in its garage, and which were not shipped to it from foreign manufacturers for delivery to purchasers on prior orders, operated by reason of the four sales, a garage within a municipal ordinance requiring one keeping a public garage in which automobiles are kept in storage or for sale to pay a license, though the machine sold had been received for use as demonstrators, and though the sales were made because the machines were no longer serviceable as demonstrators.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 18-20, 21; Dec. Dig. § 11.\*]

Appeal from Circuit Court, Jefferson County, Criminal Branch.

The Louisville Lozier Company was convicted of violating an ordinance of the City of Louisville and appeals. Affirmed.

Helm & Helm, of Louisville, for appellant.  
C. W. Huggins, of Louisville, for appellee.

CLAY, C. Defendant, Louisville Lozier Company, was fined \$50 in the Louisville police court for doing business in violation of the general license ordinance of the city of Louisville. On appeal to the Jefferson circuit court, criminal division, the law and facts were submitted to the court, and a fine of \$55 and costs was imposed on defendant. Defendant appeals.

Section 99 of the General License Ordinance of the City of Louisville, ratified September 17, 1908, and published September 23, 1908, is as follows: "Each person, firm or corporation who keeps or operates a public garage in which automobiles or similar machines, driven by gasoline, steam or electricity, are kept in storage or for sale or rent, shall pay a license of one hundred dollars per year." The Louisville Lozier Company is a corporation organized under the laws of Kentucky, with power to buy and sell automobiles, and rent and store same. It has a place of business in the city of Louisville on the north side of Broadway between Fourth and Fifth streets. According to the evidence for the city of Louisville, the defendant has stored in this room four machines—two Loziers, a Pullman, and a Paige. When the license inspectors called at his place of business, the agent in charge offered to sell each and all of these cars at a stipulated price, and to give immediate possession thereof. It was also shown that the place of business bore signs indicating that it was a place where automobiles were kept for sale. It also had a gasoline tank, an oil tank, and a washroom for the purpose of washing automobiles.

Defendant's president testified that the business of the defendant was to sell cars as the agent of a foreign corporation. Sales were made in the following way: After a purchaser ordered a car, the defendant would send in the order to the factory. In

due course of time the factory would ship a car from the factory to the defendant with a bill of lading, and the defendant would then take the car from the freight station and deliver it to the purchaser. This constituted the main business of the defendant. The witness further testified that defendant used a "demonstrator" in making sales, and the sales were made on a commission basis. At the time he testified defendant was the agent for the Lozier Company of Detroit, the Chandler Motor Company of Ohio, and the Palmer-Singer Motor Company of New York. Formerly the company acted as the agent of the Paige Motor Car Company of Detroit, and of the Pullman Motor Company of Pennsylvania. Defendant never had but two Paige cars during its agency contract with the Paige Motor Company. This contract terminated in the spring of 1913. The two Paige cars were used as demonstrators, and were not on hand at the same time. Defendant never had but one Pullman car, which was also used as a demonstrator. Its agency for the Pullman Motor Company terminated about a year before witness testified. Witness further stated that the company did not rent or hire automobiles. It did not sell tires or any materials or supplies for automobiles. It did not store cars of any kind for any one, nor did it wash or repair cars for any one except itself. The company began business in April, 1912. From that time up to the institution of the suit, it had sold only one automobile, which it had on hand in the garage. After the institution of this suit it sold three other cars, which it had on hand as demonstrators. Of the four cars thus sold, two were Paige cars, one a Pullman, and one a Lozier. The Paiges and Pullman were sold because, owing to the termination of the agency contract, they were of no further use as demonstrators. Witness further testified that, with the exception of the Lozier cars, he would sell any cars on hand if given a reasonable price for them, but, being demonstrators, they were not for sale, or advertised for sale.

Defendant insists that it is not liable for the license fee on two grounds: (1) The four isolated sales of automobiles on hand did not constitute the doing of business covered by the license ordinance; (2) the license fee in question is a tax on the occupation or business of carrying on interstate commerce, and therefore unconstitutional and void.

In support of the first proposition we are cited to a number of cases holding that a single act, or even a number of isolated acts, pertaining to a particular business, do not constitute the doing of or carrying on of that business within the meaning of the law imposing a license tax. *Hays v. Commonwealth*, 107 Ky. 655, 55 S. W. 425, 21 Ky. Law Rep. 1418; *Evers v. City of Mayfield*, 120 Ky. 73, 85 S. W. 697, 27 Ky. Law Rep.

481. That principle, however, is confined to cases where there is no intention on the part of such person to engage in such business. Thus, for instance, if a farmer should effect a sale of his neighbor's real estate under a special contract by which he should receive a commission for effecting the sale, this single act would not make him liable for a real estate broker's tax. So, if a merchant, in hauling goods from Louisville to Anchorage, should sell some of his goods to a single party, this would not subject him to a penalty for carrying on the business of a peddler. However, if he is actually engaged in a particular business, with the intention of carrying on that business, his liability for a license tax cannot be made to depend on the number of transactions he has, or the number of sales he makes. In the present case the defendant advertised automobiles for sale. Within little over a year's time it actually sold four automobiles which it had stored in its garage, and which were not shipped to it from other states to be delivered to purchasers on orders previously taken. Defendant's president said that he would sell any car on hand except a Lozier, and the license inspectors testified to the fact that the machines on hand were actually offered for sale. Manifestly it would require a sale of fewer automobiles than of other articles less valuable to constitute the carrying on of such business. Defendant, however, argues with great force that the demonstrators were not procured for the purpose of sale, but only to show the intending purchasers the character and qualities of the machines. The machines were not kept for sale, but were to be used as demonstrators. The sales were made because the agency contracts had terminated, and the demonstrators were no longer serviceable for the purpose for which they were procured. To a certain extent this may be true, and yet defendant's intention must be determined not merely by the statements of its president, but by its subsequent conduct. Doubtless defendant's primary purpose in purchasing the cars and in having them on hand was to use them as demonstrators, but the fact that it actually sold them justifies the conclusion that it intended to sell them if, as a matter of fact, they were of no use as demonstrators, and under the circumstances we cannot say that such sales did not constitute a substantial part of its regular business. On the contrary, we conclude that the evidence is sufficient to show that defendant operated a public garage, in which automobiles not previously shipped by manufacturers doing business in other states, to be delivered to purchasers in response to orders theretofore taken by defendant as their agent, were kept for sale, and is therefore subject to the license tax in question.

Being of the opinion that defendant was liable for the license tax solely on account of its intrastate business, we deem it unnece-

ecessary to discuss the question whether or not defendant's business in acting as agent in selling and delivering machines for manufacturers in other states to purchasers, on orders previously taken by it, is interstate commerce, and therefore not subject to the imposition of a license fee.

Judgment affirmed.

### WALLACE v. COLUMBIA COAL CO.

(Court of Appeals of Kentucky. May 21, 1914.)

MASTER AND SERVANT (§ 118\*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff was employed as a driver to haul coal from the drift of a mine to the tippie. He had been employed for about 8 months prior to an accident, and had been over the track and manipulated a switch lever, while the cars were in motion, about 50 times a day. At the time of the accident, as he approached the first switch going from the tippie, he undertook to adjust it, and in attempting to catch the lever lost his balance and fell over the side of the car. While trying to get back on the car, he passed a post about 25 feet from the switch, located 14 inches from the track, and, while still in the act of trying to regain his balance, he was caught between the post and the car and thrown to the ground, and received the injuries complained of. While it was customary to adjust the switch while the car was in motion, this was a matter which plaintiff did according to his own judgment. While there was evidence that the levers of the other switches were from six to eight inches longer than the one in question, there was no proof that the lever in question was too short for the purpose for which it was used, or that it was defective in any respect, nor was it shown that the post was so near the track as to make it dangerous for the driver while performing his duties in the customary way; it appearing that it was dangerous only because plaintiff had lost his balance and, while swinging out over the car, came in contact with it. *Held*, that the accident was not one which could have been anticipated by a person of ordinary prudence, but resulted entirely from plaintiff's unexpected and unnatural position, and that negligence was not shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Bell County.

Action by W. M. Wallace against the Columbia Coal Company. Judgment for defendant, and plaintiff appeals. Affirmed.

N. J. Weller, of Pineville, for appellant.

CLAY, C. In this action for damages for personal injuries by plaintiff, W. M. Wallace, against defendant, Columbia Coal Company, the trial court, at the conclusion of plaintiff's evidence, directed a verdict in favor of defendant. To review the propriety of the court's action, plaintiff appeals.

The evidence shows that plaintiff, at the time of the accident, was a driver in defendant's employ, and was engaged in hauling coal from the drift mouth to the tippie. On the route there was a main track and side track. He was the only employé engaged in this work. He claims that in order to place

the cars on the proper tracks, and to save time in the performance of his work, he had been told to operate and adjust the switches along the tracks by means of levers while his mules and cars were in motion. On May 31, 1911, plaintiff was making a trip from the tippie to the drift mouth with two mules, one in front of the other, attached to 8 empty coal cars which were from 34 inches to 4 feet high. When he came to the first switch going from the tippie, he undertook to adjust the switch for the purpose of keeping on the main track, and in attempting to catch the lever, while the cars were in motion, lost his balance and fell over the side of the car. While trying to get back on the car the car passed a post about 25 feet from the switch. The post was about 14 inches from the track. While still in the act of trying to regain his balance, he was caught between the post and the car and thrown to the ground, and received the injuries of which he complains. About a month before the accident plaintiff called the attention of the bank boss to the fact that the post leaned too near the track, and the bank boss had it fixed. When the accident occurred, plaintiff was sitting on the edge of the front end of the car with his feet inside. The switch lever which he reached for and missed was curved away from the track, and was about 36 inches high. The levers at the other switches were from 42 to 44 inches high. When on the big cars he had to stoop over to reach the lever. When on the small cars this was not necessary. On cross-examination it developed that plaintiff made the trip between the tippie and the drift mouth about 50 times a day. He manipulated the switches, including the one in question, every time he passed by. On cross-examination witness stated that, as he passed by with his legs and feet inside the car, he tried to throw the switch and lost his balance. While it is customary to adjust the switch while the car is in motion, this was a matter which he did according to his own judgment. He had a right to stop and throw the switch if he desired. He took the chances, and tried to throw the switch without stopping. It was customary, however, not to stop, and that was the way he was directed to do the work.

It will be observed that plaintiff knew of the location of the switch lever and of the post. He used the lever on an average of 50 times a day, and passed by the post the same number of times. It was necessary for the lever to be curved so that it would not come in contact with the car. Conceding that the top of the car was four feet from the ground, the lever was but a few inches below the top. While there is proof to the effect that the levers on the other switches were from six to eight inches longer than the one on the switch where the accident occurred, neither the plaintiff nor any other witness testified that the lever in question was too short for

the purpose for which it was to be used. Nor is it shown that the lever was defective in any other respect. It is insisted for plaintiff that, although he knew of the location of the lever, the evidence fails to show that he apprehended the danger of leaning over for the purpose of taking hold of the lever. We cannot agree with this contention. Any person of ordinary intelligence must be presumed to know that if he has his feet inside the car, and leans out too far, he is liable to lose his balance and fall. There being no evidence that the lever was defective, or was not reasonably safe for use under the particular circumstances, but it appearing that he used the lever about 50 times a day for a period of eight months, and the circumstances being such that he must be presumed to know the danger of falling if he lost his balance, we conclude that the risk attending the use of the lever was one ordinarily incident to his employment, and therefore assumed by him. Nor does the presence of the post, between which and the car he was caught, alter the case. It is not shown that the post was so near the track as to make it dangerous for the driver of the car, while performing his duties in the usual and customary way. It became dangerous in this instance only because plaintiff lost his balance and, while swinging out over the car, came in contact with it. The accident was not one that could have been anticipated by a person of ordinary prudence. It resulted entirely from the unexpected and unnatural position of plaintiff. Had plaintiff not lost his balance, and thereby placed himself in a position to come in contact with the post, the accident would not have occurred. It follows that a peremptory in favor of the defendant was properly given. Judgment affirmed.

#### HALL v. HUFFMAN.

(Court of Appeals of Kentucky. May 19, 1914.)

#### 1. PLEADING (§ 433\*)—PETITION—DEFECTS—CURE BY VERDICT.

A petition so fatally defective as not to support a judgment is not cured by a verdict for plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

#### 2. LIBEL AND SLANDER (§ 80\*)—PETITION—SUFFICIENCY.

A petition in an action by a wife for slander, which alleged that at the time of the filing of the petition she was the wife of H., and that defendant stated of her and concerning plaintiff, that J. had said that he had cuckolded the said H., but which does not show that she was the wife of H. at the time of which J. spoke, states no cause of action.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.\*]

#### 3. PLEADING (§ 34\*)—PETITION—CONSTRUCTION.

A petition attacked on demurrer must be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

#### 4. LIBEL AND SLANDER (§ 86\*)—SLANDEROUS WORDS—INNUENDO.

The natural and reasonable meaning of words alleged to be slanderous cannot be enlarged by an innuendo; and, where the words do not sound in slander, no meaning introduced by an innuendo will make them actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 86.\*]

#### Appeal from Circuit Court, Pike County.

Action by Lee Hall against Effie Huffman. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. Cline, of Pikeville, for appellant.  
Butler & Moore, of Pikeville, for appellee.

NUNN, J. Lee Hall, the wife of John Hall, sued Effie Huffman for slander. The case went to trial, and the jury returned a verdict for the defendant. She appeals, complaining of numerous errors of the court below in the introduction and rejection of evidence, and also as to the instructions given.

[1] The first question, however, is as to the sufficiency of her petition, to which a demurrer was overruled. If it will not support a judgment, the verdict against her cannot be said to cure it, and, since we have reached the conclusion that her petition is fatally defective, it will not be necessary to consider the errors she complains of.

[2, 3] Her petition is as follows: "The plaintiff, Lee Hall, states that she is a married woman, the wife of John Hall; that on the day of —, 1911, the defendant Effie Huffman in Pike county, Ky., in the presence of divers persons, falsely and maliciously spoke of and concerning plaintiff these words: That John Hall said that he had cuckolded her husband, John Hall, thereby meaning, and the hearers so understood it to mean that plaintiff was guilty of adultery; that the John Hall spoken of that had cuckolded her husband was a distant relative of her husband, to plaintiff damage in the sum of \$5,000. She states that defendant is a resident of Pike county." If the words spoken have reference to appellant, they are clearly actionable. Townshend on Slander and Libel (3d Ed.) pages 265, 266. According to Webster, a cuckold is a man whose wife is unfaithful; the husband of an adulteress. It is explained that the word alludes to the habit of the female cuckold, which lays her eggs in the nests of other birds to be hatched by them. To make a cuckold of a man is to seduce his wife, and in order to determine the sufficiency of the petition, it is only necessary to see whether plaintiff, at the time she alleges the words were spoken by John Hall of her husband, was his wife, because in only that way can it be said that the words were spoken of her, and, of course, if the words were not spoken of her, she has no cause of action. The effect of her petition is



that at the time it was filed she was the wife of John Hall, and that the defendant Effie Huffman "spoke of and concerning plaintiff" certain words. The words show that they had direct reference to her husband. When defendant repeated the words that John Hall said he had cuckolded her husband, John Hall, the most that can be said is that she was merely identifying the John Hall who had been imposed upon, but whether the plaintiff was the wife of John Hall at the time he was imposed upon does not appear. There being two John Halls connected with the story makes this theory all the more reasonable; and, in this view of the allegations, it does not necessarily follow that this plaintiff was at the time the wife of John Hall, and therefore the adulteress. He may have been married before his union with the plaintiff; and, so far as any allegations of the petition are concerned, the words spoken of John Hall may have referred to a time when he was yet in marriage with another woman, and the indirect charge of adultery may have had reference to a former wife. These deductions are not strained or farfetched; for, in considering a pleading after an adverse verdict, the same strict rule of construction applies as if we were testing it upon demurrer in the first place. We must construe it most strongly against the pleader.

[4] Neither will the allegation, made by way of innuendo, that the defendant intended, and the hearers understood her to charge that plaintiff was guilty of adultery supply the necessary allegation that plaintiff was the wife of John Hall at the time he is said to have been imposed upon. As is said in the case of *Moore v. Johnson*, 147 Ky. 584, 144 S. W. 756, if there is any principle in the law of slander that is well settled, it is that the natural and reasonable meaning of words laid cannot be enlarged by an innuendo. *Townshend on Slander and Libel* (3d Ed.) § 335, says: "If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action. \* \* \* The office of an innuendo is to explain, not to extend what has gone before, and it cannot enlarge the meaning of words, unless it be connected with *some matter of fact expressly averred*." *Holt v. Ashby*, 150 Ky. 612, 150 S. W. 810; *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610.

Since the words spoken only have an indirect reference to plaintiff's husband, and to become applicable to her it must appear that she was his wife at the time he was said to have been imposed upon, and, except the innuendo, the petition being absolutely silent as to that fact, we conclude that it states no cause of action.

The judgment of the lower court is therefore affirmed.

# BAIRD et al. v. PREWITT.

(Court of Appeals of Kentucky. May 12, 1914.)

## 1. CONTINUANCE (§ 6\*)—RIGHT TO CONTINUANCE—TIME TO ANSWER.

It was not error to overrule defendants' motion for a continuance, to allow them to file defense after the overruling of their demurrer, as they were not entitled to a continuance over the term, though they should have been given a reasonable opportunity to tender an answer during the term.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 6-11, 16, 33, 35, 117; Dec. Dig. § 6.\*]

## 2. PLEADING (§ 288\*)—SIGNATURE—EFFECT OF ABSENCE.

The failure of plaintiff or his attorneys to sign the petition, as required by Civ. Code Prac. § 115, made it defective, but not fatally so, as it could be remedied, and, when remedied, it dated back to the date of filing, so far as concerned the requirement that an answer be filed at that term.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 854, 855, 857, 858; Dec. Dig. § 288.\*]

## 3. PLEADING (§§ 288, 290\*)—SIGNATURE AND VERIFICATION—EFFECT OF ABSENCE.

If a petition is not signed or verified, the action is nevertheless pending from the filing thereof and issuance of summons thereon, though an answer is not due until the petition is signed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 854, 855, 857-863, 886½; Dec. Dig. §§ 288, 290.\*]

## 4. VENDOR AND PURCHASER (§ 280\*)—REMEDIES OF VENDOR—ENFORCEMENT OF LIEN—PLEADING.

The petition, in an action to enforce a vendor's lien, must set forth the terms of the contract in full or in substance; if conveyance has been made in accordance with the contract, that fact must be stated; and, if conveyance has not been made, the plaintiff must allege his ability and readiness to so convey.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 784-789, 791; Dec. Dig. § 280.\*]

## 5. JUDICIAL SALES (§ 13\*)—PETITION—STATUTE—DIVISIBILITY OF LAND TO BE SOLD.

Under the express terms of Civ. Code Prac. § 694, before ordering a sale of real property, the court must be satisfied, by the pleadings or other specified means, whether it can be divided without materially impairing its value; and, where the description does not show whether it is divisible, the better practice is to allege such facts in the petition.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 37; Dec. Dig. § 13.\*]

## 6. LIENS (§ 22\*)—FORECLOSURE—PETITION—STATUTE—EXISTENCE OF OTHER LIENS.

Under Civ. Code Prac. § 694, providing that the plaintiff, in an action to enforce a lien on real property, shall state in his petition the liens, if any, held by others, the better practice, where there are no other liens known to plaintiff, is to state that fact in the petition.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. § 32; Dec. Dig. § 22.\*]

## 7. VENDOR AND PURCHASER (§ 280\*)—REMEDIES OF VENDOR—ENFORCEMENT OF LIEN—PLEADING.

The description of the land, in a petition to enforce a vendor's lien, as a tract in W. county, near W., being the tract conveyed by a certain recorded deed, except two acres thereof, was insufficient to uphold a judgment subjecting the land to the satisfaction of the lien, as the court should have been enabled to render

judgment without reference to any paper not a part of the record, and the two acres excluded should have been set out so they could be identified.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 784-789, 791; Dec. Dig. § 280.\*]

**8. VENDOR AND PURCHASER (§ 22\*)—REQUISITES AND VALIDITY OF CONTRACT—DESCRIPTION OF PROPERTY.**

The description of the land, in a contract of sale, as a certain tract in W. county, about one mile northeast of W., with a reference to a certain recorded deed for a full description, was sufficient to uphold the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.\*]

**9. HUSBAND AND WIFE (§ 239\*)—ACTIONS—ENFORCING LIEN—PURCHASE MONEY—JUDGMENT.**

Where the purchaser's wife was made a defendant to the vendor's suit to enforce his lien, and judgment was rendered against the defendants for the balance of the purchase price, but the record failed to show that the wife signed the notes or was in any way liable, the judgment was erroneous as to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 855, 856, 860, 862, 983; Dec. Dig. § 239.\*]

**Appeal from Circuit Court, Whitley County.**

Action by J. F. Prewitt against T. Y. Baird and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for proceedings consistent with opinion.

R. S. Rose and R. L. Pope, both of Williamsburg, for appellants. Sharp & Smith, of Williamsburg, for appellee.

**HANNAH, J.** On August 13, 1913, J. F. Prewitt instituted this section in the Whitley circuit court against T. Y. Baird and Mrs. T. Y. Baird, to enforce a lien for purchase money upon a certain tract of land in Whitley county, which, by a contract entered into between him and T. Y. Baird on February 24, 1911, he sold and agreed to convey to Baird in consideration of the sum of \$3,900, of which \$500 was paid in cash at the time of the execution of the contract; the remainder of the consideration being evidenced by notes. On October 23, 1913, a motion for a rule to require him to do so having been entered by the defendant, the plaintiff for the first time signed the petition; signature thereof by either plaintiff or his attorney having been theretofore omitted. On October 24, 1913, the defendant filed a demurrer to the petition, and the cause was submitted on the demurrer. On October 25, 1913, the court overruled the demurrer; and thereupon defendants moved the court to continue the case and allow them to file defense to the petition, which motion the court overruled; and judgment was thereupon entered in plaintiff's favor against the defendants for the amount of said notes, and a sale of the land was ordered in satisfaction thereof. These steps are shown only in the judgment which, in part, is as follows: "This cause

being submitted to the court on the general demurrer to the petition of the plaintiff, and the court, being advised, overruled said demurrer, to which the defendants at the time excepted and objected. Thereupon the defendants moved the court to continue the case and allow them to file their defense to the petition, and the court after considering said motion for a continuance, and being advised, overruled same, to which defendant at the time objected and excepted, and directed that judgment go against the defendants for the amount sued for, to which the defendants also objected and excepted at the time. It is ordered and adjudged by the court," etc.

[1] 1. Appellants complain that the court erred in overruling the motion for a continuance and to allow defense to be filed to the action. Appellants, as a matter of right, were not entitled to a continuance for the term, but should have been given a reasonable opportunity to tender an answer during the term. However, the record does not show that any answer was tendered, and the ruling of the court was therefore proper upon the face of the record.

[2] 2. It is also claimed by appellants that the court erred in rendering judgment on October 25, 1913, for the reason that, although the petition was filed on August 8, 1913, it was not signed by the plaintiff or his attorney until October 23d, and that, until the petition was so signed, it was not a petition.

Section 115 of the Civil Code requires that pleadings must be signed by the parties who file them or by their attorney; and the petition was defective, but not fatally so. It was still a petition, and the failure to sign it could be remedied, and, when remedied, related back to the date of the filing thereof, so far as it affects the question of requiring an answer to be filed at that term of the court.

Section 116 of the Civil Code provides that certain pleadings shall be verified, but by section 117 it is provided that failure to verify a petition required to be verified is not ground for dismissal for want of verification, if the petition be verified on or before the calling of the case for trial. A failure to sign the petition may be remedied in like manner.

[3] In *City of Dayton v. Hirth*, 121 Ky. 43, 87 S. W. 1186, 27 Ky. Law Rep. 1209, it was held that, notwithstanding a failure to verify the petition, the action was pending from the date of the filing thereof and issuance of summons thereon. By analogy, if the petition is unsigned, the action is nevertheless pending from the filing thereof and issuance of summons thereon, although an answer is not due until the petition is so signed.

3. It is also insisted by appellants that the court erred in overruling the demurrer to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

petition; and in this contention this court concurs.

[4] In an action to enforce a vendor's lien, the petition must set forth the terms of the contract in full or in substance; if conveyance has been made in accordance with the contract, that fact should be stated; if conveyance has not been made, the plaintiff must allege his ability and readiness to so convey. *Jefferson's Adm'r v. Wilson*, 4 Ky. Law Rep. 626; *Saunders v. Saunders*, 4 Ky. Law Rep. 626; *Barnes v. Bennett*, 5 Ky. Law Rep. 365; *Bullock v. Graham*, 87 Ky. 120, 7 S. W. 889, 9 Ky. Law Rep. 1004; *Moore v. Moxley's Adm'r*, 39 S. W. 420, 19 Ky. Law Rep. 160; *Bybee v. Smith*, 88 Ky. 648, 11 S. W. 722, 11 Ky. Law Rep. 163. The petition fails to make this essential allegation of conveyance or readiness and ability to convey according to the terms of the contract.

[5] 4. Civil Code, § 694, provides that: "Before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of the parties, by affidavits filed, or by a report of a commissioner or commissioners, whether or not the property can be divided without materially impairing its value."

In *Sears v. Henry*, 13 Bush, 413, this court said: "We do not construe this section as requiring an allegation to be made in the pleading to the effect that the property is divisible or indivisible. If the court is satisfied, from the character of the boundary, or the number of acres in the tract, as described in the pleadings, that a division can be had of the land, it is all that is required."

Neither the petition nor exhibit filed therewith describes the land or gives the number of acres in the boundary, and there is nothing in the record by which the court can form an opinion as to whether the property is divisible or not. We think that where, as in this case, the description of the land sought to be subjected, as given in the petition, does not show whether the property is divisible, the better practice would be to state the facts in that respect in the petition. Before ordering a sale of the land, the court must be satisfied concerning that matter in some way; and it is always advisable to make the allegation in the petition.

[6] This same observation applies to the existence of other liens upon the property sought to be subjected. Section 694 of the Civil Code provides that the plaintiff, in an action to enforce a lien on real property, shall state in his petition the liens, if any, which are held thereon by others. The better practice, where there are no other liens known to the plaintiff, is to state that fact in the petition. The petition herein fails to do this.

[7] 5. The description of the land sought to be subjected, as set out in the petition, is as follows: "A tract of land in Whitley county, Kentucky, and near Williamsburg, it be-

ing the same tract of land conveyed to J. F. Prewitt by deed recorded in Deed Book 59, page 412, in the clerk's office of the Whitley county court, excepting therefrom two acres heretofore sold."

[8] The description contained in the contract filed with the petition is as follows: "A certain tract of land situated and being in Whitley county, Kentucky, about one mile northeast of Williamsburg, and for a full and complete description of same, reference is hereby made to a deed of conveyance from E. S. Davis and others to said Prewitt, which deed is recorded in the clerk's office of the Whitley county court in Deed Book 59, at page 412, excepting from said boundary two acres of land heretofore sold by me to Cecil Prewitt, and which said two acres has heretofore been surveyed and set apart to him."

The description of the land in the petition is sufficient to uphold the contract, but it is not sufficient to support a judgment subjecting the land to the satisfaction of a lien for purchase money. The petition should contain a description of the property sufficiently definite to enable the court to render judgment without reference to any paper not made a part of the record; and the exclusion mentioned should also be set out with such accuracy as to enable it to be identified. The petition was fatally defective; and the court should have sustained the demurrer to it.

[9] 6. Another serious error appears in the record. The name of Mrs. T. Y. Baird appears in the caption of the petition and in the caption of the judgment as a defendant; and the judgment is in part in this language: "It is ordered and adjudged by the court that the plaintiff, J. F. Prewitt, recover of the defendants the sum of \$3,944, together with interest," etc. Just why Mrs. Baird was made a party defendant does not appear, as there is no allegation in the petition showing that she signed the notes or is in any way bound therefor. The language of the judgment includes a recovery against her for the amount of the notes sued on, and, as the records fail to show that she is in any way liable for any part of said amount, the judgment is erroneous as to her.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

BRADLEY v. BRADLEY'S ADM'R et al.

(Court of Appeals of Kentucky. May 19, 1914.)

1. HUSBAND AND WIFE (§ 138\*)—SECURITY FOR HUSBAND—CONTRACTS—VALIDITY—LIMITATIONS.

A verbal agreement by a husband to keep in force a mortgage executed by his wife as security for a debt due from him is not binding on her, and she may rely on limitations in defense of a suit to foreclose the mortgage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524-537; Dec. Dig. § 138.\*]

**2. HUSBAND AND WIFE (§ 138\*)—MORTGAGE AS SECURITY FOR HUSBAND—CONTRACTS—VALIDITY—LIMITATIONS.**

A wife executing a mortgage of her property to secure a surety of her husband is not bound by any agreement without her consent between the husband and the surety, whereby a co-surety shall have the benefit of the mortgage, and the agreement does not stop the running of limitations in her favor.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 524-537; Dec. Dig. § 138.\*]

Appeal from Circuit Court, Scott County.  
Action by A. M. Bradley against Emily Bradley's administrator and others. From a judgment denying relief, plaintiff appeals. Affirmed.

Tomlin & Vest, of Walton, for appellant.  
Bradley & Bradley, of Georgetown, for appellees.

CARROLL, J. Emily M. Bradley died intestate in July, 1910, and this was a suit to settle her estate and sell a house and lot to pay her debts—among which was a debt for \$1,825 and interest, secured by a lien on the house and lot. A. M. Bradley came into the case by an intervening petition in which he averred, in substance, that in 1874 Emily Bradley and her husband, B. F. Bradley, executed a mortgage to J. W. Bradley on the house and lot described in the petition and which was owned by her to secure J. W. Bradley as surety in a note for \$1,000 executed to the Deposit Bank; that in 1882 B. F. Bradley and J. W. Bradley and A. M. Bradley joined in a writing, by the terms of which a one-half interest in the mortgage was assigned to A. M. Bradley, as he was also a surety in the note and jointly liable thereon with J. W. Bradley. It was further averred that this thousand dollar note was from time to time renewed and enlarged until it amounted to \$3,500, and was finally paid by J. W. and A. M. Bradley in equal parts as the sureties of B. F. Bradley; that during the life of B. F. Bradley, who lived until 1896, he recognized his liability to the sureties in the note and frequently promised and agreed that if able he would pay them the \$3,500 which they had paid as his sureties; and further agreed that in consideration that the mortgage would not be foreclosed either in his lifetime or the lifetime of Emily Bradley, his wife, the \$1,000 debt and the mortgage to secure it would be kept alive and in full force and effect. It was further averred that Emily M. Bradley, so long as she lived, recognized and acknowledged the existence of the mortgage of 1874 and the interest of A. M. Bradley therein by virtue of the contract of 1882, and agreed that the mortgage should be kept alive upon the promise of A. M. Bradley not to attempt its collection in her lifetime. But afterwards all these averments with reference

to the knowledge or consent of Emily M. Bradley to the extension of the life of the indebtedness or mortgage were withdrawn. He asked for judgment against the estate of Emily M. Bradley for one-half of the \$1,000, with interest from August, 1874, and that he be adjudged a prior lien upon the property described in the petition; or, if that could not be done, that he be adjudged a lien inferior to the mortgage lien set up in the petition. Pending the disposition of a demurrer to this pleading, the administrator filed a reply to it in which he set up that Emily M. Bradley merely executed the mortgage for \$1,000 as the surety of her husband, B. F. Bradley, and did not consent to any changes in the note, but that the note, from time to time, was increased to \$3,500, and new notes from time to time were executed by B. F. Bradley, with J. W. and A. M. Bradley as sureties, in which the increased amounts borrowed by B. F. Bradley were included. He further pleaded the 15-year statute of limitation. After this the house and lot were sold for \$2,650, and at another term of court a demurrer, filed by the administrator to the petition of A. M. Bradley, was sustained, and, declining to plead further, his petition was dismissed.

[1] On this appeal counsel for appellant say that the single question involved is: "Was the verbal contract with reference to the nonforeclosure of the mortgage made between B. F. and A. M. Bradley good in law for the purpose of keeping the debt and mortgage alive and in full force and effect during the life of B. F. Bradley and Emily M. Bradley?" We do not think so. These verbal agreements between B. F. Bradley, the principal in the note, and his sureties, were only binding as between them. Emily M. Bradley was not a party to or in any manner affected by these arrangements between the principal and the sureties. She was merely a surety herself, having mortgaged her property to the sureties of her husband to secure them from loss on account of their suretyship for him in the note for \$1,000 executed in August, 1874.

It is further suggested that, when she joined in the execution of the mortgage on her property to secure the sureties, she invested B. F. Bradley with the power to keep the mortgage and debt alive indefinitely by payments or other valid contracts. We do not find anything in the record to support this assertion.

[2] But there is another sufficient reason why the demurrer should have been sustained to the petition of A. M. Bradley, and it is this: The mortgage executed by Emily M. Bradley in 1874 was executed to J. W. Bradley alone. A. M. Bradley was not a party to it. It was executed, as recited in the mortgage, for the sole purpose of secur-

ing J. W. Bradley as the surety of B. F. Bradley in a note to the Deposit Bank for \$1,000, due four months after date. Emily M. Bradley never consented that A. M. Bradley should have any interest in this mortgage of any kind or character. She was not a party to or bound by the arrangement by which J. W. Bradley and B. F. Bradley agreed that this mortgage was to inure to the benefit of J. W. and A. M. Bradley equally, and it is very plain that Emily M. Bradley did not do anything to stop the statute of limitation from running in her favor, and the statute, we think, presented many years before this suit was brought a complete bar to any action by A. M. Bradley to seek relief against Emily M. Bradley by virtue of this mortgage.

Under the facts stated, it is here sought to enforce a lien on property of the surety more than 30 years after the creation of the liability of the surety. The rule that as between the parties the life of a mortgage may be extended as long as the life of the debt is extended can have no application to this case for two reasons: In the first place, Emily M. Bradley was not the debtor but merely his surety; and, in the second place, she did nothing to extend the life either of the debt or the mortgage.

The judgment is affirmed.

#### WILSON et al. v. TOWN OF WHITLEY et al.

(Court of Appeals of Kentucky. May 19, 1914.)

#### COUNTIES (§ 29\*)—COUNTY SEAT—LOCATION—SUBMISSION TO POPULAR VOTE—ELECTION CONTEST—JURISDICTION.

Acts 1912, c. 46, created the new county of McCreary, and by section 7 thereof provides for an election submitting the proposition of the location of the county seat. The act does not provide for a contest, but does provide that the election shall be "conducted in all respects under the general election law," etc. *Held*, that a court of equity did not have jurisdiction of a contest of such election, since courts of equity have no inherent power to try election contests, but only such as is conferred by express enactment or necessary implication, and the provision that such election should be conducted under the general election law was not broad enough to make the contest provisions of the general election law, which relates solely to the election of officers, applicable to such an election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 29; Dec. Dig. § 29.\*]

Appeal from Circuit Court, McCreary County.

Action by J. J. Wilson and others against the Town of Whitley and others to contest an election determining the location of a county seat. From a judgment on demurrer for defendants, plaintiffs appeal. Affirmed.

L. G. Campbell, of Pine Knot, and H. C. Gillis, of Williamsburg, for appellants. Denton & Flippin, of Somerset, for appellees.

CLAY, C. By an act approved March 12, 1912, the new county of McCreary was created. Acts 1912, c. 46, p. 184. Section 7 of that act is as follows: "The seat government or county seat of said county shall be located at such place as may be selected by the voters of said county. It shall be the duty of the county court of said county, by order entered of record, to call an election to be held, and to direct a poll to be opened at the various voting precincts in said county, which call shall be made as soon after the establishment of the voting precincts by the commission as above directed, as is practicable, and within ninety days after this act shall take effect and be in force. At said election the proposition for locating the county seat shall be submitted to the legal voters of said county. It shall be the duty of the County Court, by orders entered of record, to direct the sheriff of the county to advertise the said election and the object thereof for at least thirty days before the day thereof, in all newspapers published in said county, and if none shall be published therein, then by printed handbills posted up at not less than four of the most public places in each precinct and at the door of the building temporarily used for a courthouse. The officers of said election shall be appointed by the county court, and the county court shall also provide for the form of the ballot to be used at such election. It shall be the duty of the officers of said election in each voting precinct to hold said election for county officers, and said election shall be held during the same hours they are required by law to hold election, and conducted in all respects under the general election law, except that the county court and the two magistrates residing nearest to the temporary seat of government shall constitute the board for canvassing the returns of said election and certifying the result thereof. The place receiving the highest number of legal votes cast at said election shall be the location of said seat of government or county seat, and the result of such election shall be certified to the county clerk of said county by the said board of canvassers and shall be spread by him on the order book of his office, and copy thereof mailed to the Secretary of State."

Pursuant to the above section, an election was held at the regular November election in 1913. Only two towns entered the contest and submitted their claims at the election. These were Pine Knot and Whitley. Of the votes cast, Whitley received a majority of 184, and was awarded the certificate of election. J. J. Wilson and others, citizens and taxpayers of McCreary county, who favored the location of the county seat at Pine Knot, brought this action in equity for the purpose of contesting the election. A demurrer to the petition was sustained, and the petition dismissed on the ground that the court was

without jurisdiction to try the contest. The contestants appeal.

This is an election contest pure and simple. No other question of rights are involved. It is the established doctrine in this state that courts of equity have no inherent power to try contested elections, but can only exercise such power where it has been conferred by express enactment or necessary implication therefrom. *Pflanz v. Foster*, 155 Ky. 15, 159 S. W. 641; *Harrison v. Stroud*, 129 Ky. 193, 110 S. W. 828, 33 Ky. Law Rep. 653, 16 Ann. Cas. 1050; *Patterson v. Knapp*, 125 Ky. 471, 101 S. W. 379, 31 Ky. Law Rep. 108. In many other jurisdictions the same rule is followed. *McCreary on Elections* (3d Ed.) § 351; 15 Cyc. 394; 10 Am. & Eng. Ency. 816; *Markert v. Sumter County*, 60 Fla. 328, 53 South. 613, Ann. Cas. 1912C, 690.

The act in question does not provide for a contest. It does provide that the election shall be "conducted in all respects under the general election law, except," etc. It is insisted that, as contest proceedings in the courts are authorized by the general election law, the power of courts to hear and determine this proceeding is necessarily implied from the language that the election shall be conducted in all respects under the general election law. In the case of *Pflanz v. Foster* a similar question was presented. The question was whether or not the contest provisions of the general election law applied to an election contest arising under the primary election law. It was so insisted because the primary election law contained the following provision: "Except as herein otherwise provided, primary elections under this act shall be conducted substantially as now provided by law in case of regular elections." This contention was rejected on the ground that the above language of the primary election law related solely to the manner of conducting the election. In the case of *Clarke v. Jack*, 60 Ala. 271, the same question was presented. A county seat removal election was held. The act under which the election was held contained no special provision for a contest. It did provide that the general conduct of the election was to be governed by the same rules applicable to general elections. Inasmuch as the general law provided a mode of contesting elections held under it, it was contended that the county seat removal election might be contested under those provisions. It was held, however, that, as the general election law regulating contested elections was confined solely to the election of persons to office, it was not applicable in that case, and consequently no statutory authority existed for the contest of such election. For the same reason we conclude that the clause in question is not broad enough to make the contest provisions of the general election law, which relates

solely to the election of officers, applicable to an election arising under the act in question.

Judgment affirmed.

# **AXTON v. KENTUCKY BOTTLERS SUPPLY CO. et al.**

**KENTUCKY BOTTLERS SUPPLY CO. et al. v. AXTON.**

(Court of Appeals of Kentucky. May 15, 1914.)

## **1. PARTNERSHIP (§ 279\*) — DISSOLUTION — EFFECT.**

A dissolution of a partnership will not abrogate firm contracts, which continue in force and may be enforced against the members of the firm thereafter.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 686, 637; Dec. Dig. § 279.\*]

## **2. PARTNERSHIP (§ 97\*) — DUTIES OF PARTNERS.**

Each partner is bound to act with the utmost good faith towards his copartners, and, each being the confidential agent of the other, one will not be permitted to benefit himself at the expense of the others.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 146-151; Dec. Dig. § 97.\*]

## **3. PARTNERSHIP (§§ 97, 122½\*) — DISSOLUTION — EFFECT.**

Defendant agreed to withdraw from a firm, composed of himself and plaintiffs, which was engaged in the business of selling bottles. The dissolution agreement provided that he should be free to secure interest in any business or contracts that the firm might have, and for payment for his interest in the firm property. Held that, the purpose of dissolution being to effect a sale of defendant's interest in the firm, defendant could not, while yet a member of the firm, cancel the firm orders with manufacturers of bottles and induce them to make him their agent thereafter, for it is the duty of one partner to exercise the utmost good faith towards his copartners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 146-151, 187; Dec. Dig. §§ 97, 122½.\*]

## **4. PARTNERSHIP — DISSOLUTION — BREACH OF CONTRACT.**

In an action against a withdrawing partner for damages for canceling firm contracts before withdrawal, and obtaining them for his individual benefit after withdrawal, an award of \$2,420 held warranted by the evidence.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by W. D. Roy and L. D. Roy, individually, and as partners doing business under the firm name of Kentucky Bottlers Supply Company, against I. T. Axton. From a judgment for plaintiff, defendant appeals, and plaintiff prosecutes a cross-appeal. Affirmed on each appeal.

Burton Vance and W. L. Doolan, both of Louisville, and Geo. W. Jolly, of Owensboro, for appellant and appellee Axton. Thum & Roy, of Louisville, for appellee and appellant Kentucky Bottlers Supply Co.

OLAY, C. Plaintiffs, W. D. Roy and L. D. Roy, individually, and as partners doing business under the firm name of Kentucky

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

Bottlers Supply Company, brought this action against defendant, I. T. Axton, to recover damages for breach of contract of dissolution of a copartnership existing between plaintiffs and defendant. They recovered a judgment against defendant for \$2,420. Defendant appeals, and plaintiffs prosecute a cross-appeal.

In the year 1909 plaintiffs, W. D. Roy and L. D. Roy, father and son, entered into a partnership with defendant, I. T. Axton, under the firm name of Kentucky Bottlers Supply Company. Under this name they engaged in the business of selling bottles and boxes at wholesale, and also acted as selling agents for manufacturers of such ware. At the time the partnership was entered into, W. D. Roy was in the wholesale whisky business, and prior thereto had held a responsible position with one of the largest distilleries in Louisville. His purpose was to establish a business for his son, L. D. Roy. Axton had been engaged in the business of selling bottles and boxes as traveling salesman. In carrying on the firm business W. D. Roy looked after the sales, while Axton purchased the supplies required by the firm. The business prospered from the very first. Early in the year 1911 some friction arose between the Roys and Axton, and as early as March of that year the question of the withdrawal of W. D. Roy or of Axton from the firm was discussed. On April 18, 1911, the following contract of dissolution was entered into by the parties: "Whereas, the undersigned have agreed that the partnership heretofore existing among them shall be dissolved at the close of business April 30, 1911, it is now further stipulated and agreed that I. T. Axton shall retire and turn over to W. D. Roy and L. D. Roy, or to whomever they may elect, all books, papers, and other effects belonging to the firm of Roy & Axton, and in consideration therefor the said W. D. Roy and L. D. Roy shall on May 1st next pay to said I. T. Axton the sum of \$5,000, and also execute to him notes at thirty and sixty days to cover any balance that may be due him as may be shown when the books of Roy & Axton are closed for the month of April. Said notes shall be dated May 1st, and bear interest at the rate of 6 per cent. per annum. Said W. D. Roy and L. D. Roy reserve the option of paying either or both of the notes before maturity. It is agreed that nothing above is to keep I. T. Axton from securing interest in any business or contracts Roy & Axton may now have. W. D. Roy and L. D. Roy also agree to hold I. T. Axton harmless from liability under the lease from W. W. Heaton to Roy & Axton."

The Roys paid to Axton the \$5,000 mentioned in the contract, and also executed and delivered to him two notes, aggregating \$1,659.13.

According to the evidence for plaintiffs the firm had three contracts, one with the Olney Bottle Company, another with the Sheffield

Glass Bottle Company, and a third with the Buckeye Box Company, to furnish supplies during the summer of 1911. On or about the 22d of March, 1911, Axton went East on a trip. While there he arranged with several manufacturers to represent them in the event of the dissolution of the partnership. A portion of his expenses was charged to the firm. The Roys knew nothing of this action on his part until some time later. It further appears that on April 26th Axton wrote, in the name of the firm, to the manufacturers with whom the firm had contracts and canceled the contracts. At the same time he wrote them letters in his individual name requesting his appointment as their sole agent in the Louisville territory beginning with May 1st. In the letters of cancellation he requested the manufacturers not to acknowledge receipt until after May 1st. After receipt of the letters the manufacturers took on other orders, and were unable to supply the Roys with any bottles or other ware during the summer. The Roys attempted to get bottles, but were unable to do so. On this account they were unable to fill their orders, or to solicit any new business for the summer of 1911. W. D. Roy fixes their damage at \$1,000 a month, while L. D. Roy fixes it at \$800 a month. From May 1 to October 1, 1911, the business showed a profit of only \$580. During the preceding summer it appears, without contradiction, that the sales aggregated \$37,827.69, or an average of \$7,565.50 a month, and that the profit on these sales amounted to 10 per cent. It is further shown that the contract of dissolution was drawn by W. D. Roy. Axton wanted to insert in the contract the words "except contracts." To this the Roys would not agree. After some discussion Axton wrote on a slip of paper the following: "It is agreed that nothing above is to keep I. T. Axton from securing interest in any business or contracts Roy & Axton may now have." The paper was handed to W. D. Roy, who finally consented that it might be incorporated in the agreement.

According to the testimony for Axton, the assets of the firm consisted of a lot of supplies and book accounts due the firm for goods sold to customers. These assets were valued at \$16,647.83. Axton's part, which was 40 per cent., was estimated to be worth \$6,659.13. This was the sum received by him. It was understood between the parties that each of the partners would thereafter continue in the same business. No consideration was paid to him for the contracts. Contracts were to be terminated when the partnership terminated. After that time either of the partners had the right to go after these contracts. The reason he notified the manufacturers to cancel the contracts was because the Roys declined to give him a contract indemnifying him against loss on the contracts, and because W. D. Roy was contending that he would have to

go to the Roys for his supplies. It is further shown that the bottle contracts required that specifications for ware for summer requirements should be furnished not later than May 1, 1911, and that none were ever furnished the parties with whom the firm had contracts. It is also shown that the Olney Bottle Company broke down on May 18th, and after that it was unable to furnish either Axton or the Roys any bottles. The firm had no contract with the Wilcox Bottle Company, which simply supplied the Sheffield Glass Bottle Company its orders for a portion of the Roy & Axton ware. It sent W. D. Roy ten cars, but after May 10th was unable to furnish others. Some of the parties to whom the Roys applied for supplies during the summer of 1911 were not engaged in the business of furnishing bottles, but were making other kinds of wares. It was not his duty to furnish specifications for supplies until furnished with orders therefor by W. D. Roy. Axton also claims that he offered to supply the Roys with bottles, but they declined his proposition.

In rebuttal the Roys testified that the provisions of the contract with reference to furnishing specifications for wares prior to May 1st were never enforced by the supply houses, but were always waived. Though Axton did offer to supply them with bottles, he wanted a portion of the profits, and on this account, and in view of his previous conduct, they declined the proposition.

[1-3] Counsel for Axton argue with great earnestness that the contracts for supplies were not considered in valuing the assets of the partnership, and were not included in the invoice; that, so far as all parties were concerned, the contracts were terminated when the partnership ended; that the factories were then free to renew them with either of the parties; and that Axton reserved the right to get the contracts. Having this right, it was immaterial whether he exercised it before or after May 1st. It is not true, of course, that the contracts for supplies ended with the dissolution of the firm. *Campbellsville Lumber Co. v. Bradlee & Wiggins*, 96 Ky. 494, 29 S. W. 813, 16 Ky. Law Rep. 572; *Peck-Williamson Heating & Ventilating Co. v. Miller & Harris*, 118 S. W. 376. They were still binding on the firm, and could have been enforced by the supply houses. It is very evident from the contract of dissolution that the purpose thereof was to effect a sale to the Roys of Axton's interest in the firm. This interest was arrived at by an invoice of the supplies on hand and the accounts due the firm. Even if it was not intended for Axton to convey his interest in the contracts in question, yet the Roys themselves had a 60 per cent. interest, and he only a 40 per cent. interest. Construing the provision of the contract with reference to Axton's "securing interest in any business or contracts Roy & Axton may now have" in a manner most favorable to

Axton, it is manifest that it gave only the right to secure such interest in a lawful way. It did not give him a right while a member of the firm to cancel the contracts in the name of the firm, and thereby destroy the business of his partners. Even upon his theory that the parties were to be free after May 1st to secure interest in the contracts in question, his conduct while a member of the firm deprived the Roys of every opportunity to avail themselves of such freedom. It is the duty of each partner to act with the utmost good faith towards his copartners. Each is the confidential agent of the other, and each has a right to know all that the others know. A person will not be permitted to benefit himself at the expense of the firm. The obligation of good faith is not even confined to persons who are actually partners. It extends to persons negotiating for a partnership, and to persons who have dissolved partnership, and have not completely wound up and settled the partnership affairs. *Collier on Partnership*, p. 166; 2 *Lindley on Partnership*, p. 772; 30 *Cyc.* 438, 659, 660; 22 *Am. & Eng. Ency. of Law*, p. 114. In the present case Axton, while a member of the firm, deprived his copartners of valuable contract rights which they would have enjoyed had it not been for his conduct. Even if his relations with the Roys were unfriendly, and he felt like doing them an injury, he cannot expect that such conduct will receive the sanction and approval of the courts. In his preparation to secure the contracts he took no chances. While a member of the firm he arranged for his appointment as agent of the supply houses in the event of the firm's dissolution. He then agreed to a dissolution, and sold out his interest in the firm. In his letters canceling the contracts with the supply houses, he was careful to advise them not to notify the firm of the cancellation until after May 1st, thus giving the members of the firm no opportunity to act until the cancellations became effective. He knew the value of the contracts. He also knew that it would be practically impossible for the Roys to obtain other supplies, and without such supplies they would be deprived of an opportunity to realize their usual profits during the season of 1911. Under these circumstances, he is clearly liable for damages by way of loss of profits occasioned by the cancellation of the contracts.

[4] We deem it unnecessary to set out in detail the evidence in regard to losses which the Roys actually sustained. The previous year the firm had made on an average of about \$750 a month. The success of its business depended on its ability to get supplies. We think it clear that they used reasonable diligence to secure supplies from other sources. Axton himself admits that the supply contracts were valuable, and the manner in which he endeavored to secure them for himself certainly confirms his testimony. Dur-



ing the season in question the profits of the business were but a few hundred dollars. It is by no means probable that this great falling off was due entirely to Axton's withdrawal from the firm. It was due, we think, in a large measure to the cancellation of the contracts, and the fact that the supply houses then took on other contracts, and were unable to supply the Roys with the ware which they needed. Axton contends that the Roys were not damaged. The Roys claim that the chancellor fixed the damages too low. After a careful consideration of the evidence, we conclude that the judgment does substantial justice between the parties.

The judgment on each appeal is affirmed.

### TROENDLE v. STEGER.

(Court of Appeals of Kentucky. May 22, 1914.)

#### 1. SALES (§ 418\*)—CONTRACT—BREACH—DAMAGES.

Where, in an action for breach of a seller's contract to sell and deliver his wheat crop at threshing time for 80 cents per bushel, the only evidence as to the market value of the wheat at threshing time was that it was then worth only 78 cents per bushel, plaintiff was only entitled to recover nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

#### 2. SALES (§ 416\*) — SELLER'S CONTRACT — BREACH—DAMAGES—MARKET PRICE.

In an action for breach of a seller's contract to deliver wheat at threshing time at 80 cents per bushel, it was error to permit plaintiff to prove that on September 30th, several weeks after threshing time, and after the larger part of the wheat had been delivered under the contract, the market price was \$1 per bushel.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.\*]

Appeal from Circuit Court, Christian County.

Action by Ernest W. Steger against R. T. Troendle. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

W. T. Fowler, Downer & Russell and Fowler & White, all of Hopkinsville, for appellant. Douglas Bell and Trimble & Bell, all of Hopkinsville, for appellee.

TURNER, J. Appellee in this action for damages alleges that in the summer of 1911 he bought from appellant the whole of his wheat crop raised that year, estimated to be 6,000 bushels, at the price of 80 cents per bushel, to be delivered at Fidella station in Christian county; that the defendant failed and refused to deliver to the plaintiff 1,617½ bushels of the wheat so purchased by him; and that said wheat was worth, at the time it should have been delivered under said contract, \$1 per bushel, whereby he was damaged. It is further claimed in the petition that the plaintiff furnished a large number of sacks to the defendant, and that he failed to return 812 of them.

The allegation in the petition as to the time of delivery of the wheat is: "And defendant agreed to deliver to plaintiff at the railroad depot \* \* \* his entire crop of wheat raised that year, and estimated to be 6,000 bushels, and to return to plaintiff all of the wheat sacks furnished him under the contract, all of which was to be done by defendant on or before January 1, 1912."

The defendant answered, denying that he had sold his wheat to the plaintiff under the terms of any such alleged contract or upon any terms whatever, and alleging that he had sold his crop of wheat to the Dunlop Milling Company of Clarksville, Tenn., and had delivered a large portion of it to the plaintiff as the agent of that company when some difference arose between him and the Dunlop Milling Company as to weights, whereupon he ceased the delivery.

On the trial the jury found for the plaintiff the value of 812 sacks as shown by the evidence, and damages at the rate of 20 cents a bushel for the failure to deliver the 1,617½ bushels of wheat.

The evidence for the plaintiff failed to show the time of delivery of the wheat under the terms of his contract as alleged; but the defendant in his testimony stated that under the terms proposed by him to the plaintiff, as well as under the terms of his contract with the Dunlop Milling Company, the wheat was to be delivered from the thresher; and, in fact, that part which was delivered was delivered immediately after the threshing.

[1] There is no evidence in the record as to the market price of wheat at threshing time, except that of the plaintiff himself, who says it was then worth only 78 cents per bushel. Plainly, if the contract price was 80 cents to be delivered from the thresher, and the market price was at that time less than 80 cents, the plaintiff was entitled at most to only nominal damages, and the court should have so instructed the jury.

[2] The plaintiff was permitted by the court to prove that on the 30th of September, 1911, several weeks after the threshing, and several weeks after the larger part of the wheat was delivered, under the contract either with Steger or the Dunlop Milling Company, that the market price of wheat was \$1. If the time of delivery was during the threshing season, clearly it was improper to permit the plaintiff to prove the market value at so late a period as the 30th of September. The market price on the 30th of September certainly could not be used as a basis to fix damages for the failure to deliver wheat the first half of July.

The plaintiff in his evidence fails to fix the time of delivery under the terms of his alleged contract, and it is perfectly apparent from the only evidence on that subject that if there was, in fact, a contract between him

and the defendant, that the delivery was to be from the thrasher.

We fail to see any other error in the record; but, for the reasons given, the judgment is reversed, with directions to grant appellant a new trial.

### KENTENIA CORPORATION v. BOREING LAND & MINING CO.

(Court of Appeals of Kentucky. May 19, 1914.)

#### 1. QUIETING TITLE (§ 12\*)—POSSESSION OF PLAINTIFF—NECESSITY.

Where a common grantor, after conveying to plaintiff the minerals under a tract of lands, afterwards conveyed the land to defendant, without exception or reservation of the minerals, plaintiff could maintain an action to quiet title without being in actual possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.\*]

#### 2. JUDGMENT (§ 570\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment dismissing plaintiff's petition, in an action to enforce specific performance of a compromise agreement to convey certain minerals on the ground that there was no such agreement, was no bar to a subsequent action to cancel the deed under which defendant claimed, since, though the subject-matter of the two actions was the same, the causes of action were different.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.\*]

#### 3. PLEADING (§ 364\*)—ALLEGATIONS AS TO TITLE.

Though plaintiff, in an action to quiet title, was not required to plead the chain of title under which it claimed, and also that of defendant, yet the court did not err in refusing to strike such allegations from the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.\*]

Appeal from Circuit Court, Harlan County.

Action by the Boreing Land & Mining Company against the Kentenia Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank Chinn, of Frankfort, for appellant.  
H. C. Clay, of London, for appellee.

**HANNAH, J.** On March 7, 1888, one Hiram Cawood, being the owner of a tract of land in Harlan county, containing 62.102 acres, sold and conveyed to J. H. Middleton and Calvin Pace the minerals therein and thereunder. They on June 27, 1888, conveyed the minerals thereof to Cumberland Valley Land Company.

On March 27, 1896, one Charles Henry Davis, trustee, instituted, in the circuit court of the United States for the Eastern District of Kentucky, an action against the Cumberland Valley Land Company and other defendants, seeking to recover the possession of a number of tracts of land and the minerals of a number of other tracts; among them being the minerals of the 62.102 acres aforesaid. In compromise and settlement of that action as between Davis, trustee, and

the Cumberland Valley Land Company, the parties mentioned entered into a contract, by the terms of which the land company was to execute to Davis, trustee, a quitclaim deed covering one of the tracts of land which was in controversy in that action; and Davis, trustee, agreed to execute to the land company a quitclaim deed covering all the remaining lands and minerals in controversy therein, including the minerals of the 62.102 acres mentioned; and the action was dismissed as against the land company. Thereupon the land company, pursuant and according to the terms of the contract, executed and delivered to Davis, trustee, a quitclaim deed covering the tract which it agreed to so convey; but Davis, trustee, failed and refused to execute and deliver to the land company a quitclaim deed covering the remaining tracts of lands and minerals in accordance with the terms of the contract. The Cumberland Valley Land Company thereupon instituted an action in the Harlan circuit court in June, 1910, against Davis, trustee, seeking to enforce a specific performance of the contract of compromise above mentioned; and in that action an agreed judgment was rendered and entered directing Charles Henry Davis, trustee, to execute and deliver to the Cumberland Valley Land Company, on or before January 3, 1911, a quitclaim deed covering all the tracts of land and minerals mentioned in the contract of compromise, except the minerals of the 62.102 acres heretofore mentioned, the plaintiff land company dismissing its action against defendant, as to that tract, without prejudice; and the judgment directed that, in default of the execution and delivery by Davis, trustee, of such deed, the commissioner of the court should do so in his stead. He declined to execute it, and the commissioner, pursuant to the terms of the judgment, did so. Thereafter, on March 8, 1911, the Cumberland Valley Land Company instituted a second action in the Harlan circuit court against Davis, trustee, seeking to coerce the execution and delivery of a quitclaim deed covering the minerals of the 62.102 acres in accordance with the terms of the contract of compromise heretofore mentioned. The Kentenia Corporation was joined as a defendant: it being alleged that the corporation had accepted from Davis, trustee, a deed conveying the 62.102 acres to it, with the agreement and understanding upon its part that it would execute and deliver to the Cumberland Valley Land Company a quitclaim deed covering the minerals of the tract so conveyed, in accordance with the terms of the contract of the grantor, Davis, trustee, with the Cumberland Valley Land Company, entered into by way of compromise of the action in the United States Circuit Court heretofore mentioned.

The defendants removed this action to the United States Circuit Court for the Eastern District of Kentucky; and in that court the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Kentenia Corporation answered, denying that it had ever accepted any deed from Charles Henry Davis, trustee, and alleging that, at the time the contract of compromise was entered into between Davis, trustee, and the Cumberland Valley Land Company, it (the Kentenia Corporation) was itself the owner and in the possession of the 62.102 acres, claiming, holding, and owning it under a title superior to that of both the Cumberland Valley Land Company and Davis, trustee. In that action a judgment was entered on August 14, 1912, dismissing the petition. The opinion of the court shows that, as to the defendant Kentenia Corporation, it was dismissed upon the ground that as that was a suit for specific performance, and as the Kentenia Corporation was not claiming under Davis, trustee, it was not therefore subject to the demand for the specific performance of the contract made by Davis, trustee. It was dismissed as to defendant Davis, trustee, upon the ground that by the judgment rendered in the Harlan circuit court in the action filed in June, 1910, the plaintiff was barred of his right to sue for specific performance of the contract of compromise as to this remaining tract; the court holding that the former suit having been brought to enforce the contract in full, and judgment having been taken therein as to part only, plaintiff would not be permitted to split up his cause of action on the contract, and to sue in a subsequent action seeking to enforce the performance of the contract as to the remaining tract. Pending that proceeding, the Cumberland Valley Land Company sold and conveyed the minerals of the 62.102 acres to the Boreing Land & Mining Company, plaintiff herein, on April 8, 1911. Thereafter, on August 3, 1912, the Boreing Land & Mining Company instituted this action in the Harlan circuit court against the Kentenia Corporation, alleging that the plaintiff was the owner and in the constructive possession of the minerals of the 62.102 acres, and that the defendant was wrongfully claiming title to said minerals under and by virtue of a conveyance from Cumberland Company, of date August 3, 1908.

It is alleged in the petition that Hiram Cawood, notwithstanding his conveyance of the minerals of the 62.102 acres to Middleton and Pace, under whom the plaintiff claims, executed and delivered to one Hensley a deed purporting to convey to him the absolute fee-simple title thereto; that Hensley in turn conveyed in like manner to one Fields; and that Fields conveyed in like manner to the Cumberland Company, which in turn conveyed to the defendant Kentenia Corporation. It is alleged that neither Hensley, nor Fields, nor the Cumberland Company had any title to the minerals of the 62.102 acres, and that defendant is claiming under these conveyances, and under the Cawood title, the same under which plaintiff claims, the minerals of

the 62.102 acres in question. Plaintiff prayed that the deed of September 11, 1908, from the Cumberland Company to Kentenia Corporation be canceled in so far as it purported to convey the minerals of the 62.102 acres therein conveyed, and that defendant be enjoined from claiming or asserting title to the minerals of the 62.102 acres under said title.

Defendant, answering, denied that plaintiff was the owner or in the possession of the minerals of the 62.102 acres, alleged that it (the defendant) was the owner and in the possession of the 62.102 acres as well as the minerals therein and thereunder, and prayed that plaintiff be enjoined from asserting any claim or title to the minerals thereof. Defendant also pleaded in bar of this action the proceedings and judgment of the United States Circuit Court for the Eastern District of Kentucky, heretofore mentioned.

Upon a trial the chancellor adjudged that the plaintiff, Boreing Land & Mining Company, was the owner of the minerals of the 62.102 acres, and adjudged a cancellation of the deed of August 3, 1908, from Cumberland Company to Kentenia Corporation in so far as it purports to convey the minerals therein and thereunder; and, from that judgment, defendant Kentenia Corporation appeals.

[1] It is first contended by appellant that the demurrer to the petition should have been sustained for the reason that plaintiff alleges only constructive possession of the minerals of the 62.102 acres. But this objection that the petition does not show that the plaintiff is in the actual possession of the minerals mentioned cannot be maintained. The defendant company being in possession of the surface under a deed purporting to convey the fee-simple title to the land without exception or reservation of the minerals thereof, it was not necessary that the plaintiff be, or allege that it was, in the actual possession of the minerals.

The case of Farnsworth v. Barret, 146 Ky. 556, 142 S. W. 1049, forecloses this contention. In that case one Banks owned a tract of land, the minerals of which he conveyed to Henderson Coal Company, from which company the minerals passed by mesne conveyances to one Barrett. Barrett sold and conveyed same to Keystone Mining & Manufacturing Company, retaining a vendor's lien.

Banks, after and notwithstanding his conveyance of the minerals of the tract to the Henderson Coal Company, executed a deed to one Holloway without exception or reservation of the minerals, conveying the land in fee; and Holloway conveyed in like manner to Taylor, who so conveyed to Farnsworth; and Farnsworth likewise conveyed to Mrs. Nicholson.

Barrett sued Keystone Mining & Manufacturing Company to enforce his vendor's lien; that company answered and cross-petitioned Farnsworth and Mrs. Nicholson, alleging that they were claiming the minerals of the tract

under the conveyances mentioned, notwithstanding the fact that the remote common grantor, Banks, before the execution of the deed under which Farnsworth and Mrs. Nicholson derived title, had severed the minerals of the tract by conveyance to Henderson Coal Company, under which the Keystone Company claimed. They answered and asserted ownership of the minerals of the tract. In that case this court said: "Mrs. Nicholson, not having possession of the minerals under the land, but only of the surface, could not have maintained a suit to quiet her alleged title to the mineral rights. *Combs v. V. I. C. & C. Co.*, 106 S. W. 815, 32 Ky. Law Rep. 601. On the contrary, the Keystone Mining & Manufacturing Company could have maintained a suit against Mrs. Nicholson, the owner of the surface, to quiet its title to the minerals, without being in possession of the land. *Eversole v. V. I. C. & C. Co.*, 122 Ky. 649 [92 S. W. 593]."

Identically the same state of facts exist in the case at bar. Boreing Land & Mining Company, the plaintiff, has a complete chain of title to the minerals from Middleton and Pace, to whom Cawood conveyed the minerals of the 62.102 acres, just as Keystone Mining & Manufacturing Company had from Banks in the Farnsworth Case. Defendant Kentenia Corporation, in the case at bar, has a complete chain of title from Cawood for the land, without exception or reservation of the minerals which he had severed by prior conveyance, just as Mrs. Nicholson had in the Farnsworth Case. And defendant Kentenia Corporation is in possession of the surface, in the case at bar, just as Mrs. Nicholson was in the Farnsworth Case. And, upon the authority of that case, plaintiff, Boreing Land & Mining Company, may maintain its action against defendant corporation to quiet its title to the minerals of the 62.102 acres, without being in possession thereof. The case of *Cumberland Co. v. Kelly*, 156 Ky. 397, 160 S. W. 1077, relied on by appellant, is not in conflict with the views herein expressed. In that case the defendant claimed under a conflicting and independent basic title, not under a remote common grantor with the plaintiff; and the question of the rights of the respective owners of the minerals and surface of a tract of land claimed under a remote common grantor was not therein involved.

[2] 2. Appellant also contends that the chancellor erred in sustaining the demurrer to the second paragraph of its answer, wherein it pleaded an estoppel by virtue of the judgment of the United States Circuit Court for the Eastern District of Kentucky in the action of *Cumberland Valley Land Co. v. Davis, Trustee, and Kentenia Corporation*, hereinbefore mentioned. Appellant contends that appellee had notice of the pendency of that suit at the time it received the conveyance of the minerals of the 62.102 acres from

the plaintiff therein; and that appellee is bound thereby. This may be conceded. But that judgment merely dismissed the petition seeking specific performance of the contract of Davis, trustee, whereby he promised to convey by quitclaim deed, to the Cumberland Valley Land Company, the minerals of the 62.102 acres. The judgment expressly says that "there is no issue as to such ownership, and plaintiff asks no relief based thereon," and that court refused to pass on this question.

In section 259 of Freeman on Judgments it is said: "The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. If this identity of evidence is found, it will make no difference that the form of the two actions is not the same." To the same effect see 23 Cyc. 1158.

In the action, the judgment in which is here sought to be interposed as a bar to this action, the plaintiff, Cumberland Valley Land Company, alleged that Kentenia Corporation, at the time it accepted from Davis, trustee, a conveyance of the 62.102 acres, had notice of the contract of compromise whereby Davis, trustee, promised to convey the minerals of the 62.102 acres to plaintiff, and that Kentenia Corporation accepted that deed with the agreement upon its part that it would, in accordance with the terms of the compromise contract, convey by quitclaim deed the minerals of the 62.102 acres to the plaintiff. The Kentenia Corporation, answering, denied that it had ever accepted any deed from Davis, trustee, and upon that ground the petition was dismissed by the court, as against the Kentenia Corporation.

In the case at bar there is no effort to coerce a performance of the contract of compromise entered into by Davis, trustee. There is no allegation that defendant Kentenia Corporation holds or claims under Davis, trustee. On the contrary, in this action it is charged that defendant claims under a remote grantor common with plaintiff, but that said remote common grantor, after executing a conveyance of the minerals of the 62.102 acres to the person under whom plaintiff claims, executed a deed to another person, under whom defendant claims, conveying the 62.102 acres, without exception or reservation of the minerals which he had therefore severed; and in this action plaintiff seeks a cancellation of the deed under which defendant claims, in so far as it purports to convey the minerals of the 62.102 acres, for the reasons stated.

It will thus be seen that, while the minerals of the 62.102 acres was the subject-matter of the former action as well as of this, the cause of action is not the same. The same evidence which would authorize a recovery in the first action would not authorize a recovery in this.

Nor is the vital issue the same as in the

former action. In the former action, as expressly held by that court, the issue between the plaintiff, Cumberland Valley Land Company, and defendant, Kentenia Corporation, was: Did the Kentenia Corporation accept from Davis, trustee, a deed conveying to it the 62.102 acres, with notice of the compromise contract heretofore mentioned, and with the agreement upon its part that it would, in conformity with that contract, execute to Cumberland Valley Land Company a quit-claim deed covering the minerals of the 62.102 acres.

In the present action the issue is whether the conveyance under which Kentenia Company is alleged to claim the minerals of the 62.102 acres vested in the Kentenia Corporation title to the minerals thereof, notwithstanding the fact that Cawood had severed the minerals thereof by conveyance to one under whom plaintiff claims, before conveying the land to him under whom defendant claims; and, if not, whether the execution and recordation of deeds purporting to convey the fee of the 62.102 acres, without exception or reservation of the minerals by persons who, in point of fact, are not the owners of the minerals because of the former severance thereof, is such a fraud upon the rights of the plaintiff as to entitle it to a cancellation of the deed sought to be canceled, in so far as it purports to convey the minerals of the 62.102 acres of the defendant.

There is identity of subject-matter (that is, the minerals of the 62.102 acres here involved was likewise involved in the former action, the judgment in which is sought to be interposed as a bar to this action); but identity of subject-matter is not an infallible criterion of the sufficiency of the former judgment as an estoppel. "The true requirement is that the cause of action in the two suits shall be the same." 23 Cyc. 1166.

It follows, therefore, that the chancellor properly sustained the demurrer to the second paragraph of the answer wherein the judgment mentioned was pleaded as an estoppel against the cause of action in the petition set out.

[3] 3. Appellant also contends that the court erred in overruling its motion to strike from the petition that part of same in which plaintiff set up in detail the chain of title under which it claims the minerals of the 62.102 acres, as well as the chain of title under which defendant claims, tracing both back in connected order to the common grantor, Cawood. But, in this contention, we do not concur. While it may be conceded that plaintiff was not required to plead the manner of derivation of its title and that of defendant, yet, pleaded as it was, it curtailed the evidence, sharply defined the real controversy between the parties, and enabled the court to comprehend, without difficulty, the facts to which it was sought to have the law

applied. It apprised the defendant of what was admitted by the plaintiff as well as what was claimed by it, and obviated the necessity of either party offering evidence to establish the facts thus admitted.

The chancellor did not abuse the discretion vested in him, in overruling the motion to strike from the petition the language of which complaint was thus made.

The judgment is affirmed.

## UNITED FUEL & GAS CO. v. COMMONWEALTH.†

(Court of Appeals of Kentucky. May 15, 1914.)

### 1. MUNICIPAL CORPORATIONS (§ 121\*)—ORDINANCES—PROSECUTIONS FOR VIOLATIONS—DEFENSES—INVALIDITY OF ORDINANCE.

Notwithstanding Ky. St. § 3639, providing that the validity of any city ordinance shall be tried by a writ of prohibition from the circuit court, the objection that an ordinance imposing a fine for violations was invalid, might be made in a prosecution to enforce it, since a judgment imposing a fine for violation of a void ordinance would deny a remedy by due course of law, in violation of Const. § 14, and the equal protection of the laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. § 121.\*]

### 2. MUNICIPAL CORPORATIONS (§ 590\*)—ORDINANCES—POWER TO PASS ORDINANCES.

Ky. St. § 3637, confers certain powers on councils of cities of the fifth class, and in subdivision 7 provides that they may enact and enforce all other local, police, sanitary, and other regulations not conflicting with general laws. *Held*, that such subdivision does not confer power to make any regulations the council sees fit not conflicting with the general laws, but only embraces matters as to which the council is authorized to legislate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1309; Dec. Dig. § 590.\*]

### 3. GAS (§ 14\*)—GAS COMPANIES—MUNICIPAL REGULATIONS.

The council of a city of the fifth class had no power to make an ordinance imposing a fine on corporations discriminating improperly between their patrons, and had no such right by virtue of a franchise granted to a gas company which provided that the grantee should not discriminate against consumers in delivering gas, as one party to a contract cannot impose a fine on the other party for a violation of the contract, in the absence of legislative authority.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10, 11; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Lawrence County.

The United Fuel & Gas Company was convicted of a violation of a municipal ordinance, and it appeals. Reversed and remanded, with directions.

R. G. Altizer, of Pittsburgh, Pa., and Hager & Stewart, of Ashland, for appellant. W. D. O'Neal, Jr., and J. A. Vinson, both of Louisa, for the Commonwealth.

HOBSON, C. J. The United Fuel & Gas Company holds a franchise granted by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing denied June 19, 1914.

city of Louisa under an ordinance which, among other things, provides that the grantee of the franchise shall furnish for public and private use to the city and its inhabitants natural or artificial gas at a reasonable price, not exceeding in any event \$1 per 1,000 cubic feet, and that the grantee, in delivering gas, shall not discriminate against the consumers in the city. The United Fuel & Gas Company proposed to the inhabitants of Louisa to sell them gas at 20 cents a thousand feet if they would sign a contract for five years, but it charged persons who did not sign such a contract 25 cents a thousand feet. A majority of the consumers signed the five-year contract, but a minority did not sign it. The city council then passed an ordinance which provided that a gas company should not charge one citizen more than another, and imposed a fine of not less than \$50 nor more than \$100 for a violation of the ordinance. Warrants were taken out against the gas company under the ordinance, and the gas company was fined in the police court. It appealed to the circuit court, insisting that the ordinance was void. But the circuit court, being of opinion that the validity of the ordinance could only be inquired into upon a writ of prohibition, refused to pass upon the validity of the ordinance and imposed a fine of \$75 upon the gas company. The gas company appeals.

[1] Louisa is a city of the fifth class. Section 3639, Ky. St., governing cities of the fifth class, is as follows: "The validity or constitutionality of any city ordinance, by-laws or rules of the fifth class cities, shall be tried by a writ of prohibition from the judge of the circuit court in which said city is located, with right of appeal by either party to the Court of Appeals."

While the validity of an ordinance may be tested by a writ of prohibition, as provided by the statute, if the ordinance is not valid, it is a nullity, and, if it is a nullity, there is no law authorizing a fine to be imposed upon the defendant, for a void law is of no more effect after it is passed than if it had never been passed. Being a nullity, it can give no force to any judicial proceeding, and a judgment for a fine under it must stand upon the same footing as a judgment rendered for a fine without any ordinance authorizing it. The court will not inflict punishment under a void law, for under the Constitution every person shall have remedy by due course of law, and all courts shall be open. Section 14. To fine a man under a void ordinance would be to deny him the equal protection of the law and refuse him remedy by due course of law. Neither liberty nor property may be taken from a man except by due course of law, and no judgment can be entered punishing an offense when there is no law warranting it. We therefore conclude that, if the ordinance is void, the objection may be made in the pros-

ecution to enforce the ordinance, if the party so elects, instead of bringing a writ of prohibition.

[2, 3] In the act governing cities of the fifth class, the power to pass ordinances is set out in section 3637, Ky. St. In a number of subdivisions of that section the things that may be provided for by ordinance are set out. Among other things in the seventh subdivision the council is given authority to enact and enforce within the limits of the city all other local, police, sanitary, and other regulations not conflicting with general laws. But this subdivision must be read in connection with the other provisions of the section, and was not intended to confer upon the general council power to make any regulations it saw fit, not conflicting with the general laws of the state. The words "all other local, police, sanitary, and other regulations" refer to the things that the council was authorized to do by the act. The other regulations referred to were not intended to embrace matters on which the council was not authorized to legislate. The act for the government of cities of the fifth class must be read in connection with acts for the government of other classes of cities. No such broad powers are conferred on larger cities, and the minute statement of what the city may do was unnecessary, if this subdivision was intended to give it all power not conflicting with general laws. There is nothing in the act giving the city any power to make ordinances imposing fines upon corporations who discriminate improperly between their patrons. The ordinance granting the franchise is a contract between the city and the grantee of the franchise; and one party to a contract cannot by his act impose a fine upon the other party for a violation of the contract, in the absence of some legislative authority to do so. In *Dillon on Municipal Corporations*, vol. 111, § 1325 (5th Ed.) it is said: "Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so." See, also, *Wyman on Public Service Corporations*, vol. 2, § 1410; *Old Colony Trust Company v. Atlanta* (C. C.) 83 Fed. 39; *Bluefield Water Works Co. v. Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

We do not deem it necessary to consider whether the gas company discriminates against consumers in the city, or to pass upon the question whether it has violated the terms of the franchise. This question may be determined in a civil action in a court of competent jurisdiction. We only now deter-

mine that the ordinance is void for want of authority in the city to enact it; and, that being void, it is a nullity, and, being a nullity, no judgment for a fine may be imposed upon the defendant under it.

Judgment reversed, and cause remanded, with directions to the circuit court to dismiss the proceeding.

HANNAH, J., not sitting.

## ILLINOIS CENT. R. CO. v. DOSS.

(Court of Appeals of Kentucky. May 15, 1914.)

### 1. WATERS AND WATER COURSES (§ 126\*)—OBSTRUCTION OF NATURAL FLOW—TEMPORARY DAMAGE—EVIDENCE.

Evidence, in an action against a railroad for negligent obstruction of the outlets through its road at a fill for the natural flow of water accumulating on plaintiff's land, held to sustain a finding of temporary damage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.\*]

### 2. APPEAL AND ERROR (§ 1048\*)—WAIVER OF ERROR.

Defendant may not complain of plaintiff having been permitted to testify from a written memorandum, having itself been permitted to examine it, and offered it in evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4161, 4168-4169; Dec. Dig. § 1048.\*]

### 3. WATERS AND WATER COURSES (§ 126\*)—OBSTRUCTION—EVIDENCE OF INJURIES TO OTHER LANDS.

Defendant, in an action for obstruction of outlets for natural flow of water accumulating on plaintiff's land, may not go into collateral issues by showing that crops on other lands in the immediate vicinity were destroyed by water during the year for which plaintiff claims damages, and that this was not caused by any act of defendant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.\*]

Appeal from Circuit Court, Muhlenberg County.

Action by J. F. Doss against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Trabue, Doolan & Cox, of Louisville, Taylor & Eaves, of Greenville, S. Lyman Barber, of Louisville, Browder & Browder, of Russellville, and C. L. Sivley, of Chicago, Ill., for appellant. Hubert Meredith, Doyle Willis, and W. J. Ross, all of Greenville, for appellee.

TURNER, J. Appellee is the owner of a tract of land on which he resides, and which is bordered on the south by appellant's right of way. The natural flow of water accumulating on this farm is south toward the railroad. The railroad track at this point is constructed on a fill 4 or 5 feet high along the border of appellee's property. As originally constructed there was left in the fill

two open culverts; one at a point near where two small streams converge on appellee's land, and another about 600 yards further west near where appellee's land joins that of one Bridges. The two culverts were connected by a ditch along the north side of the right of way, which in times of heavy rains aided in conducting the water from the east culvert to the west; the east culvert being upon a higher elevation than the west.

This is an action by appellee for damages, wherein he alleges that these outlets for the water were negligently filled in and obstructed with dirt, sand, timber, stone, and other obstructions to such an extent as to leave an insufficient place for the water to pass through, and causing the same to dam up and flow back over and stand upon the farming lands of plaintiff; and he further alleges that by reason of the construction of a switch track the ditch which formerly aided in carrying off the water had been obstructed, and the natural flow of the water through the same from the east to the west culvert had been obstructed. He prays for damage for lost crops, and for permanent injury to his land. The defendant answered, traversing the material allegations of the petition, and setting up other defenses which are not now relied upon. The jury in the lower court found a verdict for the plaintiff for \$700 for temporary damage growing out of crops destroyed, and did not mention in its verdict any permanent injury to plaintiff's land, and, from a judgment on that verdict, this appeal is taken.

[1] It is first contended that the verdict for temporary damage is not sustained by the evidence. It is in evidence by several witnesses that these culverts some two or three years before the trial had been changed by the company into what is called surface or ballast bridges, and that since the change the space for the escape of the water was not as great as it had been. It also appears that the space under these bridges was obstructed by old piles, which were not used in bracing the bridge, and that there was an accumulation of rock, sand, dirt, and other debris which had washed against these piles; it is also shown that by the construction of the switch the ditch running from the east to the west culvert had been obstructed, and had been permitted to fill in until its depth was not as great as it had been.

Clearly such obstructions as these might have been removed at a reasonable expense, and the jury seemed to have been fully justified in finding the temporary damage.

[2] Appellant complained that on the trial appellee was permitted to testify from a written memorandum which he at the time had. The witness stated that this memorandum was taken from his little books of ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.  
166 S.W.—50

count which he kept about his farm transactions, and that he had previously made it out so that he would not overlook any of the items going back over a period of five years; but it is unnecessary to go into this trivial matter, for the appellant's attorneys themselves were permitted to examine this memorandum, and offered it in evidence themselves.

[3] The appellant complains that the lower court refused it the right to offer evidence that crops on other lands in the immediate vicinity of appellee's land and adjoining it were destroyed by water during the year which appellee claimed such damage, and that such destruction was not caused by any act of the appellant. Clearly it would not be proper to go into these collateral issues; it would involve evidence showing that the situation and elevation of the different tracts of land were the same, that the elevation of the railroad tracks adjoining the other property was the same, that the outlets for the water flowing from such other tracts of land were the same, and it would be endless matter to try such a suit if all these things were gone into.

The instructions given in this case followed closely the ones laid down in a very similar case of *C., St. L. & N. O. R. R. Co. v. Hoover*, 147 Ky. 33, 143 S. W. 770, and are unobjectionable. The two instructions offered by appellant are in substance given in better language by the court.

On the whole case we see no prejudicial error, and the judgment is affirmed.

### CHESAPEAKE & O. RY. CO. v. HARMON.

(Court of Appeals of Kentucky. May 15, 1914.)

#### 1. COSTS (§ 96\*)—AGAINST JUDGES—PROHIBITION.

A police judge, in issuing warrants for violation of an ordinance, having acted within his jurisdiction and in good faith, costs should not be awarded against him on his being prohibited, because of invalidity of the ordinance, from enforcing it by the warrants.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 380; Dec. Dig. § 96.\*]

#### 2. APPEAL AND ERROR (§ 1221\*)—CORRECTIONS—CLERICAL ERROR.

Entry in the judgment of costs against defendant in prohibition, a judge, having been a clerical error, not having been directed in the opinion of the court on appeal, such part of the judgment will be set aside.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4722; Dec. Dig. § 1221.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 1040\*)—COSTS.

The city not being a party to proceedings to prohibit enforcement of an ordinance, because of its invalidity, costs could not be rendered against it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2213, 2214; Dec. Dig. § 1040.\*]

Appeal from Circuit Court, Floyd County.

Action by the Chesapeake & Ohio Railway Company against D. O. Harmon, as Police Judge, to enjoin enforcement of a certain ordinance. Heard on motion in the Supreme Court for a rule against the sheriff of Floyd county to show cause why he shall not make levy on defendant's private property to enforce payment of a judgment for costs. Motion overruled, and judgment corrected.

See, also, 153 Ky. 669, 156 S. W. 121, 45 L. R. A. (N. S.) 946.

Harkins & Harkins, of Prestonsburg, for appellant. Will H. Layne, of Prestonsburg, and Smith & Combs, of Hindman, for appellee and the sheriff.

HOBSON, C. J. The city council of Prestonsburg adopted an ordinance requiring railroad companies to provide and maintain safety gates at all roads and street crossings in Prestonsburg under a penalty of \$100 for each day the ordinance was violated. The Chesapeake & Ohio Railway Company failed to provide and maintain gates as required by the ordinance, and warrants were issued against it by D. O. Harmon, as police judge. Following the issuing of the warrants, the railroad company instituted against Harmon, as police judge, an action to enjoin the enforcement of the ordinance by the warrants on the ground that it was invalid. The circuit court dismissed the petition, but on appeal to this court the judgment was reversed, and the case remanded, with directions to the circuit court to enter a judgment perpetuating the injunction. See *Chesapeake & Ohio Railway Co. v. Harmon*, 153 Ky. 669, 156 S. W. 121, 45 L. R. A. (N. S.) 946. In entering the judgment of this court, the clerk entered a judgment for cost in favor of the appellant against the appellee, and execution was issued on the judgment against D. O. Harmon, police judge. The sheriff of Floyd County, who received the execution, declined to levy it upon the personal property of Harmon, and the appellant has entered a motion for a rule against the sheriff to show cause why he shall not be required to make the levy on Harmon's private property. The case has been submitted on this motion.

[1] Harmon, as police judge, acted within his jurisdiction in issuing the warrants. The validity of the ordinance could under the statute be tested upon a writ of prohibition; or, if the ordinance was void, the police court, on the hearing of the case, could so decide. But the validity of the ordinance could only be tested in one of these ways. It was proper that the warrants should be issued in order that the validity of the ordinance might be tested. Harmon was acting, not only within his jurisdiction, but also in good faith. In such cases costs should not be imposed upon public officers in good faith within their duties. *Scrafford v. Gladwin*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



County Supervisors, 42 Mich. 464, 4 N. W. 167; State v. Bonner, 44 N. C. 257; 29 Cyc. 1449; State v. McDuffie, 52 Ala. 4; 5 Ency. Pl. & Pr. 152, and cases cited. In 32 Cyc. 631, it is said: "In the absence of some statute or distinct regulation of the court, the prevailing party in prohibition is not entitled to costs unless the court, in disposing of the proceedings, so orders. A public officer, against whom a prohibition is sought to restrain an official act, is not liable for the costs of the motion or of any proceeding therein."

[2, 3] The entry of the judgment for costs against Harmon was a clerical error, as no judgment for costs should have been entered; the court not so directing in the opinion. This part of the judgment is now set aside. The execution issuing on the judgment is quashed, and the motion for the rule is overruled. The municipality of Prestonsburg was not a party to the proceedings, and so no judgment for costs could be rendered against it. *Mooney v. Denhardt*, Judge, 144 Ky. 263, 137 S. W. 1059, rests on the facts there shown.

Motion overruled, and judgment corrected as indicated.

#### WOOD v. SHARP'S ADM'R.†

(Court of Appeals of Kentucky. May 15, 1914.)

#### JUDGMENT (§ 545\*)—CONCLUSIVENESS—EFFECT.

Where a claim against the estate of a deceased person was disallowed by the circuit court, the claimant, after disallowance, cannot again file the claim; the judgment of disallowance being final and conclusive, and his only remedy being to move to set it aside or appeal therefrom.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 990, 1305; Dec. Dig. § 545.\*]

Appeal from Circuit Court, Jefferson County; Chancery Branch, First Division.

Claim by D. S. Wood against John M. Sharp's administrator. From a judgment denying the claim, the claimant appeals. Affirmed.

C. T. Atkinson, of Bardstown, and Rowan Hardin, of Louisville, for appellant. Bennett H. Young and Marion Ripy, both of Louisville, for appellees.

SETTLE, J. This is an appeal from a judgment of the circuit court refusing to allow a claim of \$925, asserted by the appellant, D. S. Wood, against the estate of John M. Sharp, deceased. Sharp died August 9, 1900, testate, leaving a considerable estate, but the administrator with the will annexed, finding it insufficient to pay his debts, brought suit to settle the estate, and the case was referred to a commissioner to report the assets and liabilities. Sharp conducted a brokerage business in Louisville for several years before his death. The appellant, by

answer and counterclaim, set up and prayed judgment for a demand of \$5,886.21, alleged to be due him from the decedent's estate upon account, and this claim, duly verified, was filed with the commissioner. It appears from the books of Sharp, and is admitted by appellant, that of this indebtedness \$3,029.97 arose from operations on the stock market through Sharp as broker, and \$2,856.24 from operations on the grain market. The allowance of all but \$925 of appellant's claim was resisted before the commissioner by George Pfau, also a creditor of the estate, who objected to it on the ground that the whole of it, except the \$925 mentioned, which the books of Sharp showed to have been deposited with him by appellant in cash July 14, 1900, as margins on grain speculations, represented profits arising from wagering transactions which, it was claimed, Sharp's estate was not liable for. The commissioner, on the evidence taken by him, sustained the contention of Pfau and rejected all of the claim of appellant except the item of \$925, which was allowed. Following the filing in the circuit court of the report of the commissioner showing this action on appellant's claim, the latter excepted to it. On the hearing of these exceptions and those filed to other claims reported on by the commissioner, the circuit court overruled appellant's exceptions in part and sustained them in part, but in so doing allowed \$3,029.97 of his claim and disallowed \$2,856.24 thereof. The part allowed was what was due appellant by way of profits growing out of his operations with Sharp on the stock market, and the \$2,856.24 disallowed profits realized by him through Sharp as broker on the grain market, the rejected part of the claim included the \$925 which had been allowed appellant by the report of the commissioner, all of which is shown by the judgment of the court entered January 7, 1913, which also allowed or rejected the claims, respectively, of other creditors of Sharp's estate reported on by the commissioner. No exception was entered by appellant to this judgment or appeal taken therefrom. Several weeks after this judgment was rendered, appellant filed with the commissioner an independent claim for the \$925 cash deposit made by him with Sharp July 14, 1900, and asked its allowance; the claim being supported by the affidavits of appellant and others. We have been unable to find in the record any order of the court referring the case to the commissioner a second time for a report as to additional claims against the decedent's estate. But waiving that matter, we do, however, find from the record that counsel for the administrator appeared before the commissioner and objected to any further consideration by him of the claim in question, and also to its allowance, upon the ground that it had previously been presented in another form by appellant and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 19, 1914.

disallowed by the judgment of the court previously entered, January 7, 1913, which, it was claimed, made the matter *res judicata*. This view of the question was adopted by the commissioner, and by his report, later filed, the claim was disallowed. Appellant excepted to the report; but the court, as shown by its judgment then entered, overruled the exception and confirmed the report, thereby sustaining the commissioner's rejection of the claim. This appeal is prosecuted from that judgment.

It is insisted for appellee that, as the only question presented by this appeal was decided by the judgment of the circuit court on January 7, 1913, from which no appeal was prosecuted, the present appeal from the subsequent order or judgment of that court refusing a relitigation of appellant's claim for the \$925 and again rejecting it cannot be entertained by this court. In other words, that the first judgment being final and conclusive of appellant's rights, the matter of appellant's claim is *res judicata*. If this contention prevails, other questions raised by appellant's counsel need not be considered.

In our opinion the contention is sound. The first judgment manifestly disallowed appellant's claim, and, being final and conclusive, it barred his right to relitigate the claim as attempted by the second application to the circuit court for its allowance. His remedy was to move to set aside the judgment, or an appeal therefrom to this court. Neither of these remedies was resorted to. Instead, a second application for the allowance of the rejected claim was made, and the appeal is from the judgment disallowing it the second time. It is the policy of the law to conclude all litigation as speedily as may be consistent with the ends of justice. It is therefore a well-recognized rule that a former judgment, until vacated or reversed, is conclusive in a subsequent action between the same parties as to all demands, claims, or titles put in issue and adjudicated in the first suit, although the second has a different object or relates to a different subject-matter. The following amplification of this doctrine is thus stated in 23 Cyc. 1170: "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. A party therefore must present in one action all the reasons, grounds and evidence which he may have in support of his claim or defense, and if he has several claims or titles to the property in controversy he must assert them all. Again, if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject-matter, he

must avail himself of it, and, whether an original party or an intervener, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense. Further, a plaintiff must recover in one action all he is entitled to; if dissatisfied with the result, he cannot bring a new suit to recover something more on the same cause of action." *Elswick v. Matney*, 132 Ky. 294, 116 S. W. 718, 136 Am. St. Rep. 180; *Sumrall v. Maninnl*, 124 Ky. 67, 98 S. W. 301, 30 Ky. Law Rep. 299; *Holtheide v. Smith's Guardian*, 84 S. W. 321, 27 Ky. Law Rep. 60; *McDaniel v. Stum's Adm'r*, 65 S. W. 800, 23 Ky. Law Rep. 1935; *Moriarity v. Vessey*, 6 Bush, 115.

In *Commonwealth v. Churchill*, 131 Ky. 252, 115 S. W. 189, which was an attempt by a revenue agent in a second proceeding to have listed for taxation property which the county court had failed to assess on a previous similar application by him, we held that the judgment rendered by the county court on the first application was *res judicata* and that the second proceeding could not be maintained. In the opinion it is said: "While the county court acts ministerially in assessing property, it acts judicially in determining whether it is subject to assessment, and so an appeal lies from so much of its judgment as determines whether the property is subject to assessment. When the county court in the former proceeding held that certain property had been omitted from assessment, it necessarily held that this was all that was omitted of the property sought to be assessed in the statement. The determination of the county court that the other property referred to in the statement was not subject to assessment is conclusive upon the commonwealth, *Commonwealth v. Bacon*, 126 Ky. 30 [102 S. W. 839, 31 Ky. Law Rep. 472]. The conclusive effect of that judgment cannot be affected by parol evidence in this action as to what was in fact assessed in that action; nor is it material whether it was an agreed judgment or otherwise. Unless the judgment is opened in the manner provided by law, it cannot be attacked collaterally, and no judgment can be had here for relief which might have been had there if the evidence had been adduced. *Davis v. McCorkle*, 14 Bush, 746; *Anderson v. Merideth*, 82 Ky. 564; *Couchman v. Bush* [83 S. W. 1039], 26 Ky. Law Rep. 1277."

The latest application of the rule in question made by us was in the case of the *United States Fidelity & Guaranty Co. v. William D. Carter, etc.*, 158 Ky. 737, 166 S. W. 238; the question involved being whether, in a suit on a trustee's bond, the surety could attack an item of \$6,089 previously charged against the defaulting trustee in a settlement of his accounts, the surety having been a party to the action in which the settlement was had and to the settlement. In hold-

ing that the circuit court did not err in holding that the surety was concluded by the settlement and judgment confirming same, we in part said: "The guaranty company was not only a party but a privy to the action, and under section 734 of the Code it unmistakably had the right of appeal, and it seems to us that the sole question for determination is whether the judgment of the lower court on that settlement and the guaranty company's failure to take the appeal has precluded it from questioning the validity of the charge in a collateral suit. \* \* \* We are of opinion that the settlement of the trustee's accounts is conclusive evidence against the surety, and, it having failed to take an appeal, that settlement and the judgment thereon is res judicata as to the surety."

It is not material that the circuit court erred in rejecting appellant's claim to the \$925 in question. If, as contended by appellant, it was not a profit made on a grain or stock wagering speculation, but actual cash deposited by him with Sharp as his broker as a margin to cover any loss that might result from such stock or grain speculation which the latter conducted or was to conduct for him, it should have been allowed by the court as a valid claim against the estate of Sharp; but, as appellant had his day in court, his hearing upon this and all other items of his account, the court's disallowance thereof on such hearing was a final judgment, and that judgment, not having been appealed from or reversed, could not, on a subsequent second application for the allowance of the same claim in that court, or on an appeal from the judgment rendered in disallowing it the second time, be collaterally attacked.

Judgment affirmed.

#### CHENAULT v. BANK OF ARLINGTON.

(Court of Appeals of Kentucky. May 20, 1914.)

#### APPEAL AND ERROR (§ 47\*)—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

That the damages claimed in the petition amounted to \$200 could not give the Court of Appeals jurisdiction, where all the evidence at the trial below clearly showed that the damage actually sustained was less than \$200.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-225; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Carlisle County.

Action by John W. Chenault against the Bank of Arlington. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Jesse F. Nichols, of Bardwell, for appellant. John E. Kane, of Bardwell, for appellee.

SETTLE, J. This is an appeal from a judgment entered upon a verdict in appellee's favor, returned by the jury on the trial of the case in the court below. The action was brought by appellant to recover of appellee damages claimed to have been sustain-

ed by him in the purchase from appellee of eight shares of its capital stock; it being in substance alleged in the petition that appellant paid for the stock \$125 per share, aggregating \$1,000, and that he was induced to make the purchase by the representations of appellee's president and board of directors that, by reason of its prosperous condition, the stock was worth that amount, when in fact it was worth \$200 less than appellant paid for it, because of the previous loss of \$2,769.16 of the appellee's assets, which loss was concealed by it from appellant and was unknown to him at the time of his purchase of the stock.

Appellee has entered a motion to dismiss the appeal upon the ground that the amount in controversy is not sufficient to give this court jurisdiction thereof. While the petition lays the damages sued for by appellant at \$200, the evidence introduced in his behalf on the trial, as furnished by the bill of exceptions, conclusively shows the damages, if any were sustained by him, to be for less than that amount, and that they did not exceed \$120. Indeed, the appellant's own uncontradicted testimony declares his damages to have been about \$100, and that they did not exceed \$120. In other words, that the eight shares of stock for which he paid \$125 per share were worth at the time of their purchase by him only \$113 per share, on this basis making a difference of \$96 between their actual market value and what he paid for them.

Appellant further testified that, if he had known at the time of purchasing the bank stock of the appellee's loss of \$2,769.16 of its assets, he would not have paid as much for the bank stock by 12 per cent. as it cost him. So, taking this statement as the basis in estimating his damages, they could not have exceeded \$120. It is manifest, therefore, from the appellant's own testimony, that the damages sustained by him fell far short of \$200; and that, if the jury had returned a verdict awarding him damages, they could not under the evidence have allowed him as much as \$200. The amount in controversy, therefore, is the amount of damages as fixed beyond question by the evidence which, being less than \$200, leaves this court without jurisdiction to entertain the appeal. *Craft v. C. & O. Ry. Co.*, 101 S. W. 342, 30 Ky. Law Rep. 1367; *Smith v. C. & O. Ry. Co.*, 118 Ky. 825, 82 S. W. 410, 28 Ky. Law Rep. 758; *K. & P. Lumber Co. v. Sledge*, 143 Ky. 187, 135 S. W. 1030.

The fact that the damages claimed in the petition amount to \$200 cannot give this court jurisdiction of the appeal, where the plaintiff's own evidence and all the evidence heard on the trial in the court below clearly shows, as in this case, that the damages actually sustained by him were less than \$200.

For the reasons indicated, the appeal is dismissed.

**W. S. WILSON & CO. v. DICKENSON COUNTY BANK.**

(Court of Appeals of Kentucky. May 20, 1914.)

**APPEAL AND ERROR (§ 47\*)—DECISIONS REMEDYABLE—AMOUNT INVOLVED.**

Where a bank, to which checks were sent by the payee, with directions to forward certified checks, retained them for two months, until after the drawer had disposed of his property in the state, and then refused to pay them, its liability could not exceed the amount of the checks with interest, and, where this was less than \$200, the Court of Appeals had no jurisdiction of an appeal from the judgment dismissing the petition, though plaintiff alleged that he was damaged in the sum of \$75 in addition to the amount of the checks, as there must be a real controversy involving an amount sufficient to give the court jurisdiction, and not merely allegations of damages made for the purpose of conferring jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-225; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Pike County.

Action by W. S. Wilson & Co. against the Dickenson County Bank. From a judgment dismissing the petition, plaintiffs appeal. Appeal dismissed.

J. M. Roberson, R. H. Cooper, and Robt. L. Miller, all of Pikeville, for appellants. York & Johnson, of Pikeville, for appellees.

CLAY, C. On November 11, 1909, L. A. Priode executed and delivered to W. S. Wilson and T. S. Bales, partners trading under the firm name of W. S. Wilson & Co., two checks, one for \$88.86, and the other for \$44.18, drawn on the Dickenson County Bank, whose chief place of business was at Clintwood, Dickenson county, Va.

This action was brought by W. S. Wilson & Co. against the Dickenson County Bank to recover the amount of the checks and interest. The petition as amended charges that the two checks were mailed to the bank, with directions to forward certified checks for same. Instead of paying the checks or notifying plaintiffs of their dishonor, the bank retained the checks for over two months. In the meantime the drawer, Priode, removed or otherwise disposed of all the property that he had in the state of Kentucky. Because of the unreasonable delay of the bank in retaining the checks, and not advising plaintiffs of their dishonor, plaintiffs were prevented from taking legal steps to collect the checks, which they could and would have done had the bank exercised reasonable diligence in advising them of their dishonor. The petition was twice amended. In the second amended petition plaintiffs alleged that by reason of the negligent act of the bank they lost their debt, and were thereby damaged in the sum of \$75 in addition to the amount of the checks. They therefore prayed for damages in the sum of \$207.54. The bank raised the question of jurisdiction. This plea being sustained,

plaintiffs' petition was dismissed. They appeal.

The first question presented is the jurisdiction of this court. The amount originally sued for was \$132.54, with interest from November 30, 1909. Subsequently plaintiffs increased their claim and asked for damages in the sum of \$75. It is well settled that there must be a real controversy between the parties involving an amount sufficient to give this court jurisdiction before an appeal will lie. A plaintiff cannot confer jurisdiction on this court by the mere allegation that he has been damaged in the sum of \$75, when the facts stated in his petition conclusively show that he has not been damaged in that amount, and under no circumstances could he recover the damages asked. Even if the bank were liable in this case, its liability could not exceed the aggregate amount for which the checks were drawn, together with interest thereon from the time they were drawn. It is apparent, therefore, that plaintiffs could not recover the additional item of \$75 by way of damages, and that this allegation was made merely for the purpose of conferring jurisdiction on this court. As the real controversy between the parties does not involve an amount sufficient to give this court jurisdiction, it follows that the appeal cannot be entertained. *Carnahan v. C. & O. Ry. Co.*, 145 Ky. 676, 141 S. W. 49; *Smith v. C. & O. Ry. Co.*, 118 Ky. 825, 82 S. W. 410, 26 Ky. Law Rep. 758; *Cumberland Telephone & Telegraph Co. v. Logsdon*, 142 Ky. 639, 134 S. W. 1159.

Appeal dismissed.

**BYERS v. FIRST STATE BANK OF MIDDLESBORO.**

(Court of Appeals of Kentucky. May 21, 1914.)

**ACKNOWLEDGMENT (§ 62\*)—PAROL EVIDENCE—CONTRADICTING NOTARY'S CERTIFICATE.**

Under Ky. St. § 3760, providing that unless, in a direct proceeding against himself or sureties, no fact officially stated by a notary in his certificate shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake of the notary, a wife, in the absence of allegations of such fraud or mistake, could not, in an action against her to foreclose a mortgage, show by parol that she never signed or acknowledged the mortgage; the notary's certificate stating that she did.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. § 62.\*]

Appeal from Circuit Court, Bell County.

Action by the First State Bank of Middlesboro against L. Byers. From a judgment for plaintiff, defendant appeals. Affirmed.

John Howard, of Middlesboro, for appellant. Chas. E. Herd, of Middlesboro, for appellee.

NUNN, J. This is a suit by the appellee bank to collect a \$1,000 note executed by ap-

pellant, L. Byers, and her husband, G. W. Byers; also to enforce a real estate mortgage simultaneously executed to secure its payment.

Appellant traversed all the allegations of the petition, being in effect a plea of non est factum. There was also an affirmative plea that the mortgaged property belonged to the wife in her own right, and not only had she never signed or acknowledged the note or the mortgage, but that she had never authorized anybody to sign same for her. Proof was heard on the issues joined, and the court rendered a judgment in favor of the bank for the amount of the note, and the enforcement of the mortgage. The mortgage, with the certificate of acknowledgment, was duly recorded, and the certificate is in the regular form prescribed by statute.

It will thus be seen that appellant's plea of non est factum is an attempt to impeach the verity of the notary's certificate, for the mortgage recites that it was given to secure the payment of the note in question, and the notary certifies that the appellant on that day produced the mortgage, and acknowledged same before him to be her act and deed. This certificate is of a character as described in section 3760, Kentucky Statutes. That section reads as follows: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

It will be noticed that this action was not one against the notary or his surety; but the plea does call in question the facts certified by him. There is no allegation of fraud or mistake in the answer. If it was a fraudulent or untruthful certificate, the appellee bank is the party benefited by it; but there is no allegation in the answer charging fraud on the part of the appellee or any one, nor is there a charge of even so much as a mistake on the part of the notary. In the absence of these allegations, there was no warrant for the introduction of parol testimony to contradict or impeach any of the facts recited in the certificate. Therefore they must be taken as true, and it follows, of course, that the officer's certificate sustained both the note and the mortgage given to secure it. The case of *Pribble v. Hall*, 13 Bush, 68, had this statute under consideration soon after its enactment, and the court in the following language gave application to it: "There is no allegation of fraud on the part of the Hunts in procuring the certificate of the feme's acknowledgment, or

of mistake on the part of the clerk. It is not alleged that the grantees, or either of them, were present when the acknowledgment was taken, or that they had anything to do with it. The fraud with which they are charged is wholly disconnected with the acknowledgment, and consisted in making representations which induced the appellant to consent to make the deed, and in no wise affects the certificate. The fraud which, under the statute, will let in an inquiry into the truth of the officer's certificate must relate to the obtaining of the certificate itself, and not to the making of the instrument acknowledged. The statute must therefore put to rest the perplexing question whether a certificate of the acknowledgment of a deed by a married woman, when regular on its face, can be impeached by parol evidence that the statute was not pursued in taking the acknowledgment. In a suit against the clerk or his sureties for a failure of duty on his part, the truth may be shown; but in every other case his certificate imports absolute verity, unless it be assailed for fraud on the part of the party benefited thereby in procuring it, or for mistake on the part of the clerk."

This ruling has been followed ever since, as is shown by a reference to the cases of *Dowel v. Mitchell*, 82 Ky. 47; *Cox v. Gill*, 83 Ky. 669; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947, 11 Ky. Law Rep. 712; *Davis v. Jenkins*, 93 Ky. 353, 20 S. W. 283, 14 Ky. Law Rep. 342, 40 Am. St. Rep. 197; *Duff v. Va. I. C. & C. Co.*, 136 Ky. 281, 124 S. W. 309; *Bebout v. Ky. Mfg. Co.*, 145 Ky. 756, 141 S. W. 406.

It is true that all of the cases above referred to arise on the plea that the signature was obtained by duress or coercion, or that there was no privity examination or explanation of the effect of the instrument, or that the acknowledgment was taken without the bounds of the officer's jurisdiction, and it is also true that the courts of some other states have held that a simple denial that the alleged grantor ever made any such acknowledgment is sufficient to let in parol evidence, without charging fraud or mistake; but in our opinion the provision of our statute above quoted is broad enough to include any attack made upon an officer's certificate. It provides that *no fact* officially stated by him shall be called in question, except upon the allegation of fraud or mistake. There should be a direct allegation of fraud or mistake, together with the facts constituting it.

All the questions raised by appellant are included within the one above considered, and, in view of the conclusion reached, it is unnecessary to refer to them.

The judgment of the lower court is therefore affirmed.

**HAIL et al. v. GRAGG et al.**

(Court of Appeals of Kentucky. May 19, 1914.)

**1. INTOXICATING LIQUORS (§ 34\*)—ELECTIONS—OFFICERS—QUALIFICATION.**

Though Ky. St. § 2555, requires the appointment of special officers to hold a local option election, the regular officers for the general elections are not disqualified, and may be appointed to hold a local option election.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.\*]

**2. INTOXICATING LIQUORS (§ 34\*)—ELECTIONS—OFFICERS—QUALIFICATION.**

Ky. St. § 2555, though requiring the appointment of special officers to hold a local option election, does not require an equal division in sentiment of the election officers, because of the absence of any statute giving to any individual or organization favoring or opposing the sale of liquor a right to demand recognition in the appointment of officers.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.\*]

**3. INTOXICATING LIQUORS (§ 34\*)—LOCAL OPTION ELECTION—OFFICERS—DE FACTO OFFICERS.**

Election officers, appointed by the county board having power to select officers, are de facto officers, and where they are not guilty of any fraud in conducting a local option election, and the vote as certified by them is correct, the election will not be disturbed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.\*]

**Appeal from Circuit Court, Pulaski County.**

Election contest by J. H. Hall and others against W. B. Gragg and others. From an order upholding the election, contestants appeal. Affirmed.

John W. Colyar, of Somerset, and J. N. Sharp, of Williamsburg, for appellants. Wesley & Brown and Denton & Flippin, all of Somerset, for appellees.

**NUNN, J.** On the 29th day of September, 1913, and by a majority of 57, the people of the city of Somerset, at a local option election, voted against the sale of intoxicating liquors within the corporate limits. Those favoring the sale filed contest papers, and, the contest board and circuit court having upheld the election, they prayed an appeal to this court. In order to have the matter disposed of, the contestees, that is, those opposed to the sale, being represented by the appellees, have brought the record here.

While the officers who conducted the election within the city were appointed by the county election commissioners, it is insisted by the contestants, appellants here, that the election officers were not appointed for the special purpose of holding the local option election, nor were they equally divided as to their preference for and against the sale. They argue: (1) That the election laws, as construed by this court, require a division of the election officers between parties favoring the sale of liquor and those opposed to it; and (2) that it was the duty of the county

election commissioners to appoint special officers to hold the local option election; (3) that these provisions of the law are mandatory, and that an election held in disregard of them is void. These are the only grounds of contest.

In the circuit court the case was submitted on demurrer, and on an agreed statement of facts should the court deem a consideration of them necessary for a proper adjudication of the case. While the lower court decided against the contestants on demurrer, we desire to notice the facts as shown by the agreed statement. It appears from the statement that the county election commissioners met on the 19th day of September for the purpose of appointing precinct officers for the local option election to be held on the 29th, and a copy of the record of the election commissioners, showing the appointment of the officers, is made a part of the statement. The commissioners' record shows that election officers were appointed to serve for the five precincts within which the city of Somerset is located, and appointments were also made at the same time for every other precinct within Pulaski county. The record makes no reference to the local option, or any particular election, but merely recites that the men named were selected "as officers of election for the various precincts of Pulaski county." Opposite each name appears the letter "D" or "R," and in equal proportions. It is not explained whether the letters signify that the officers are Democrats or Republicans, or whether they are adherents of the dry or rum side of the liquor controversy. So far as the record is concerned, we may presume that these officers were appointed to serve for one year, the statutory period, and the agreed statement shows that they were so appointed. It is also agreed that the officers possessed all legal qualifications "for precinct election officers"; that at no time did any person interested on either side of the local option controversy make any demand, or submit any list of names for the appointment of officers; that most of the officers who held the local option election were opposed to the sale of liquor in Somerset. It is agreed that the officers appointed held the election at the proper time, and in the manner required by law, and that they properly counted and certified the vote cast at their several precincts. It is further agreed that every voter who desired, and was entitled to vote in said election, was permitted to do so, and that all of the votes cast were counted as cast, and that no person who was entitled to vote was deprived of such right, and that the election was conducted honestly, and without fraud on the part of the officers, or any of them.

In view of these admissions as to the honesty of the election officers, and the fairness with which the election was conducted, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the correctness of the vote as certified, we revert to the question raised by contestants. And that is, Were special officers required to be appointed to hold the local option election, and was it necessary that those appointed be equally divided on the question of the sale of liquor, and, if so, did a failure to meet these requirements render the election void? Construing the agreed statement of facts, and the record of the county election commissioners, it seems to us that they appointed the regular election officers for the entire county, and as for the Somerset precincts, these same regular officers were also appointed to hold the special local option election. Contestants insist that where the agreed statement shows that the county commissioners met "for the purpose of appointing precinct officers for the local option election," that does not mean that they actually did meet, or carry out their purpose. But the agreed statement, in the language immediately following this quotation, shows that, when they met "for the purpose of appointing precinct officers for the local option election to be held September 29th," the meeting was also held for the purpose of appointing officers, "to serve for one year from the date of their appointment. That all of said officers had the legal qualifications prescribed by law for precinct election officers."

[1] This seems to us to show that the county election commissioners did exactly what contestants insist they were required to do under the law, and that is: They met for the dual purpose of appointing officers to hold the local election, and also to hold the general election. The fact that in the Somerset precincts the same officers were appointed to hold both elections did not disqualify them from holding the local option election. In *Erwin v. Benton*, 120 Ky. 536, 87 S. W. 291, 27 Ky. Law Rep. 909, 9 Ann. Cas. 264, special officers were appointed by the county commissioners to hold the local option election, and contestants objected to these special officers on the ground that theretofore regular officers had been appointed to serve for one year, and therefore they should hold all elections. We construed section 2555, Kentucky Statutes, to require the appointment of special officers to hold the local option election, but in the same connection we said "the ones selected for the general elections are not necessarily disqualified from the latter service" [from holding local option elections].

[2] Contestants insist that the election was void because the officers holding it were not equally divided in sentiment on the question of liquor sales. They rely on the case of *Denny v. Bosworth*, 113 Ky. 785, 68 S. W. 1078, 24 Ky. Law Rep. 554. The Democratic majority of the county election board, ignoring the single Republican member, attempted to nullify their former action in appointing election officers, and to substitute other officers, all of whom, or a majority at least,

were members of the Democratic party. This court decided that a mandatory injunction was proper remedy to require the board to meet and make all necessary orders for reinstatement of the election officers arbitrarily removed by them. It was held that the majority of the board, when they undertook to appoint officers without regard to the lists handed in by the two dominant political parties, were violating both the spirit and the letter of the statute. It was also held that these provisions of the statute requiring the county board to select the election officers from lists tendered by the two parties were mandatory. The question there is quite different from the one here. The statute plainly recognizes the right of the two dominant parties to suggest to the county commissioners names for appointment as election officers, and it is mandatory upon the commissioners to name the officers from these lists, taking an equal number from each. But if the political parties should fail to submit lists for appointment, certainly no one would contend the commissioners were thereby powerless to make their own selection; otherwise no election could be held, and a whole county might be disfranchised. No other parties are by statute considered as having a right to demand recognition in the appointment of officers, nor does the statute anywhere give to any individual or organization favoring, or opposing, any question submitted to the people such mandatory rights. This court, as a matter of fair play and in furtherance of honest elections, has held that the spirit of the law, if not the letter, required that special officers be appointed to hold local option elections, and that they should be divided between the parties favoring the sale and those opposed to it. *Puckett v. Snider*, 110 Ky. 261, 61 S. W. 277, 22 Ky. Law Rep. 1718. It was largely on account of this desire, to have elections conducted with an equal number for and against the question to be voted upon, that induced the liberal construction of section 2555 of the statute as to require the appointment of special officers for local option elections, because it was realized that officers appointed for one year terms to hold the general elections were by law required to be divided on questions of politics, and not necessarily on the question of the sale of liquor, but no sort of construction, or interpretation can render the statute a mandatory requirement for an equal division of the election officers on the question of the sale of liquor. This court favors the policy of equal division, but the statute does not give legal status to any organization either for or against the question, or the power to demand such division, and we have never held that a local option election was void because the officers were not so divided in sentiment, and it could not so hold in this case where it is admitted that no demand or request was ever made for such division.

[§] But in this case contestants admit that the officers who held the election were appointed by the county board who had the power to select them, so they were officers de facto, if nothing more; they were in possession, that is, they actually held the election, and they held it under color of title, and under conditions such as to indicate acquiescence of the public in their action. Such a person is recognized the country over as a de facto officer. *Wendt v. Berry*, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101. The rule with relation to de facto election officers is stated as follows in 10 Am. & Eng. Encyc. of Law (2d Ed.) page 670: "The general principle that the acts of an officer de facto are valid, so far as respects the public and third parties, applies as well to election officers as to others; and the question of irregularity of their appointment ought not to be entered into in an election contest."

In *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457, 9 Ky. Law Rep. 743, we held that: "Where an election is held within the hours and at the place designated by law, mere irregularities in the appointment of officers, or in their proceedings, will not vitiate the poll, nor disfranchise a legal voter, unless the merits of the case are affected, when the statute should be construed as mandatory." *Fidelity Trust & Safety Vault Co. v. Mayor, etc.*, of Morganfield, 96 Ky. 563, 29 S. W. 442, 16 Ky. Law Rep. 647, was an election contest involving the validity of bonds issued by the city to build waterworks. The officers who held the election were appointed by the city council, and it was said that: "Though the officers holding said election were not appointed by the proper authority, and were not, in fact, the identical officers who should have held said election, yet that an irregularity of this kind in this matter would not render illegal or invalid said election, nor the indebtedness created under same."

For the reason that the officers holding the election were at least de facto, and it being admitted that there was no fraud in their conduct of it, and that the vote as certified by them was a true expression of the will of the voters of the city on that question, we must affirm the judgment of the lower court; and it is so ordered.

#### COMMONWEALTH v. JENKINS.

(Court of Appeals of Kentucky. May 19, 1914.)

##### 1. LOTTERIES (§ 3\*)—SCHEMES PROHIBITED—POPULARITY CONTEST.

A popularity contest conducted by a newspaper, in which ballots intended to be cast for certain candidates were given to subscribers and advertisers, and also sold to merchants to be issued to their customers, the candidate receiving the highest number of such votes to be given an automobile, but where the price of the subscriptions and advertising of the merchandise was not increased, was not a lottery, which is defined to be a scheme for the distribution of

prizes by chance among persons who have paid or agreed to pay a valuable consideration for a chance to obtain a prize.

[Ed. Note.—For other cases, see *Lotteries*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4245-4252; vol. 8, pp. 7710, 7711.]

##### 2. LOTTERIES (§ 3\*)—SCHEMES PROHIBITED—POPULARITY CONTEST.

An agreement between the proprietor of a paper and an individual, whereby the latter took a 400-year subscription to the paper, receiving the votes therefor, and cast them in favor of his wife, who thereby secured the automobile, did not make the contest a lottery, however reprehensible morally, since it did not introduce an element of chance into the scheme, but rather eliminated it.

[Ed. Note.—For other cases, see *Lotteries*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Appeal from Circuit Court, Crittenden County.

S. M. Jenkins was indicted for promoting a lottery. From a verdict of "not guilty" under peremptory instructions of the court, the Commonwealth appeals. Affirmed.

James Garnett, Atty. Gen., Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth. J. W. Blue, Jr., of Marion, for appellee.

HANNAH, J. Appellee was indicted at the March term, 1912, of the Crittenden circuit court, for the crime of promoting a lottery, denounced by section 2573, Kentucky Statutes; the indictment being in part in the following language: "The said S. M. Jenkins, in the said county of Crittenden, on the 1st day of December, 1911, and before the finding of this indictment, did unlawfully, wickedly, and feloniously set up, carry on, conduct, manage, operate, draw, and otherwise promote a lottery and gift enterprise, whereby money and other thing of value was, and was pretended to be, disposed of, a further and better description of which said lottery and gift enterprise is to the grand jury unknown; and said S. M. Jenkins did sell, barter, exchange, dispose of, furnish, supply, procure, and cause to be supplied and procured, to various and divers persons to the grand jury unknown, certain tickets and writings, shares, parts of tickets, certificates, tokens, and devices purporting, designed, and intended to give and entitle the holder to money and to a prize, share, and interest in a prize in money and property of value, in a lottery and gift enterprise whereby money and other thing of value was, and was pretended to be, disposed of," etc.

Upon a trial, the lower court, after hearing the evidence introduced by the commonwealth, peremptorily instructed the jury to find the defendant not guilty. The commonwealth appeals, and asks a certification of the law of the case.

[1] It was shown in evidence that defendant was the editor and proprietor of a newspaper, the Crittenden Record-Press, published at Marion; that he inaugurated a scheme,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



commonly called a "popularity contest," whereby it was announced that persons paying for subscriptions to the newspaper, or for advertising therein, were to be given a certain number of votes for each dollar so paid, and the holder of such votes had the privilege of naming a candidate, and of casting these votes for such candidate, or for one already named; and the candidate obtaining the largest number of votes was to receive a Howard automobile, worth \$1,800.

In addition to the votes given out by the defendant when payments were made of subscriptions or for advertising, the defendant also arranged with certain merchants of Marion to purchase of him, and give to their customers, votes in this contest; no such merchant, however, to have the privilege of casting any of the votes so purchased, for himself or any member of his family; nor could the defendant himself, nor any of the participating merchants, nor any member of their families be a contestant or receive votes therein. These merchants gave out the votes so purchased from defendant, to their customers, in proportion to the amount of goods purchased; the merchants paying to the defendant, for the votes so bought by them from him and given away to their customers, three cents for each dollar's worth of goods sold by them.

It was also shown in evidence that the defendant and one Guess entered into a contract by which defendant agreed that, if Guess would pay him \$400 for a 400 years' subscription to the newspaper published by defendant, Guess should receive a Ford automobile, not the automobile offered as a prize in the "popularity contest." Guess took the 400 years' subscription to the paper, paid for same, and cast the votes (just how many is not shown) for his wife. She received the highest number of votes cast in the contest, and received the Ford car. It was further shown that, while the price of the Howard automobile was \$1,600, that of the Ford was but \$550; and that defendant still has the Howard car.

We have been directed to no authority holding that transactions like this "popularity contest" fall within the denunciation of the statute against lotteries. Every person who parted with money in such contest received a subscription to the newspaper, or merchandise from the merchant from whom he received the votes entitled to be cast in the contest. Neither the price of subscription to the newspaper advertising them, nor of the goods sold by the participating merchants, was advanced by reason of the scheme; and presumably when such person subscribed for the newspaper, or purchased goods from one of the participating merchants, he got his money's worth.

If, for the purpose of increasing the number of his subscribers, and thereby enhancing the value of his advertising space, the

publisher of a newspaper is willing to give away, to such person or persons as his subscribers may choose, an article of value, if the price of such subscription or of the goods sold by participating merchants is not advanced, we see nothing unlawful in such act. It is manifest that such a contest is not a lottery, within the meaning of the statute. A lottery is defined by Webster as a scheme by which one or more prizes are distributed by chance among persons who have paid or promised a consideration for the chance to win them. And in 25 Cyc. 1633, it is said that: "A lottery is a species of gambling which may be defined as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize."

The weight of authority is that the issue of trading stamps to purchasers of goods, entitling the latter to articles on exhibition at the store of the trading stamp company, is not a lottery. 25 Cyc. 1640. The trading stamp scheme is one by which the trading stamp company sells coupons to merchants at the rate of about \$3 or \$4 for the number of coupons which the merchant gives away with each \$100 worth of merchandise purchased from him. These coupons are redeemable at the place of business of the trading stamp company in cash or merchandise.

In the "popularity contest" in the case at bar, the votes which correspond to these trading stamp coupons were not redeemable in merchandise by the holder, but could be voted by the holder for the person of his choice, and, under the scheme as proposed, the person receiving the highest number of votes was to receive the automobile. The object is to increase and stimulate trade in a legitimate article of commerce. The prize is not necessarily to a ballot holder. Some person may receive the prize who never subscribed for the newspaper nor bought any merchandise from the participating merchants. The prize is supposed to go, not to the person holding the greatest number of ballots, but to that person for whom the greatest number of votes are cast. There is no awarding of prizes by lot or chance. *Quatsoe v. Eggleston*, 42 Or. 315, 71 Pac. 66.

[2] It is suggested by counsel for appellant that the transaction between defendant and the witness Guess "smacks to some extent of a lottery." Counsel for defendant argues that this agreement eliminated every element of chance. And with the latter we are inclined to agree. Under the arrangement between the defendant and Guess, the whole scheme became a game of "no chance" rather than one "of chance." All of the candidates except Mrs. Guess stood "no chance" to win, while she stood "no chance" to lose.

With the morality of the transactions mentioned we have no concern; but it is mani-

fest that, under the evidence, there was shown no violation of the statute denouncing lotteries; and the lower court properly directed the jury to find the defendant not guilty.

Judgment affirmed.

NUNN, J., not sitting.

BOSWORTH, Auditor, v. R. H. WOLFE & SON.†

(Court of Appeals of Kentucky. May 21, 1914.)  
STATES (§ 171\*)—CLAIMS—ALLOWANCE—STATUTE.

Under Acts 1912, c. 136, providing for the payment of claims representing the deficit incurred in the maintenance of the Houses of Reform prior to June 14, 1910, and that the auditor shall draw his warrant in favor of the respective persons to whom items of indebtedness are due, with interest from date thereof, claimants are entitled to interest only from June 14, 1910, and not from the date of the accrual of their claim; the word "items" referring, not to the items of the claim, but to the several claims themselves.

[Ed. Note.—For other cases, see States, Cent. Dig. § 162; Dec. Dig. § 171.\*]

Appeal from Circuit Court, Franklin County.

Mandamus by R. H. Wolfe & Son against H. M. Bosworth, Auditor. From a judgment for relators, respondent appeals. Reversed, with directions.

James Garnett, Atty. Gen., and M. M. Logan, Asst. Atty. Gen., for appellant. Brown & Nuckols, of Frankfort, for appellees.

HANNAH, J. Prior to June 14, 1910, the Houses of Reform were provided by law with an annual per capita allowance of \$100 per annum for each inmate, which, it appears, was inadequate to pay the expenses of the institution.

By section 2 of chapter 118 of the Acts of 1910, the annual per capita allowance was abolished; and it was provided that the expenses of the Houses of Reform should be paid out of the state treasury. This act went into effect on June 14, 1910.

The Legislature of 1910 also appropriated the sum of \$38,928.84 to pay the deficit which, during the years 1908 and 1909, arose by reason of the insufficiency of the per capita allowance. See section 2 of chapter 100 of the Acts of 1910. However, it appears that, after the disbursement of that sum, there still remained certain liabilities, which, with the expenses of the institution up to June 14, 1910, amounted on that date to the sum of \$37,928.09 in excess of the per capita allowance.

In December, 1911, a report of the unpaid accounts and names of the persons to whom same were owing on June 14, 1910, was prepared by the superintendent of the institu-

tion, and transmitted to the board of prison commissioners. This report states that the claims therein included were made out and submitted by the several creditors, at the request of the board, and that it represents the outstanding indebtedness in full, of the institution, to June 14, 1910. Included in this list of creditors was an item due appellees, R. H. Wolfe & Son, of \$3,500.

The Legislature of 1912 then enacted chapter 136 of the Acts of 1912, which is as follows:

"Whereas prior to the 14th day of June, 1910, the Houses of Reform (one for boys and one for girls) at Greendale, Kentucky, were operated upon a per capita basis; and whereas, the per capita then provided for was inadequate to maintain the institutions and clothe, feed, educate and treat the inmates; and such inadequate provision resulted in a deficit up to June 14, 1910, amounting to \$37,928.09, which deficit is represented by outstanding and unpaid claims against said institution; and whereas, it is just and proper that said indebtedness be paid: Therefore, be it enacted by the General Assembly of the commonwealth of Kentucky:

"1. That the auditor of public accounts be, and he is hereby authorized and directed, upon the proper certification and approval of the said claims representing said deficit by the board of prison commissioners, in the manner provided by law, to audit said claims and to draw his warrant upon the treasury therefor in favor of the respective persons and concerns to which said items of indebtedness are due, including interest on each from the date thereof until paid at the rate of six per cent. per annum; and the treasurer is authorized and directed to pay the same; and there is hereby appropriated out of the funds in the hands of the treasurer amount sufficient to pay said items constituting said deficit, not exceeding the sum of \$37,928.09, with six per cent. interest thereon from the date of each of said claims."

The auditor on July 22, 1912, in payment of the amount he conceived to be due appellees under this act, drew his warrant upon the treasury in favor of appellees, in the sum of \$3,862.25; whereupon appellees, claiming that the warrant so drawn was not in accordance with the provisions of the act, instituted this action of mandamus against the auditor in the Franklin circuit court, contending that under the act they are entitled to interest upon each item of their account from the date of each of said items until paid.

The itemized account, which is filed with the petition, shows that from July 1, 1906, to June 14, 1910, the appellees furnished to the House of Reform merchandise to the value of \$26,888.20, and that during the period from July 1, 1906, to March 20, 1911, they received payments aggregating the sum of \$23,389.10.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 16, 1914.

The lower court held that, under the act, appellees were entitled to interest upon each of the items comprising the account, from the respective dates thereof, and directed the commissioner of the court to state the account by fixing the last date of each calendar month as the date of the maturity of the items furnished in such month, and to allow the commonwealth credit for the payments made by it as of the respective dates of such payments; in other words, that the account should be computed by the rule of partial payments, with interest periods or new principal periods corresponding with the calendar months. The report of the commissioner having been filed, the court rendered judgment in accordance therewith; and the auditor of public accounts appeals from the judgment, seeking an interpretation of the act; the only question involved being the interest to which appellees are entitled thereunder.

The act in question was based upon the report of the superintendent of the House of Reform, which showed that the total outstanding indebtedness of the institution as of June 14, 1910, was \$37,928.09; that is the sum mentioned in the preamble of the act; and both the report and the act state that \$37,928.09 is the amount of the deficit to that date. The act directs the auditor to draw his warrants in favor of the persons to which "said items of indebtedness are due, including interest on each from the date thereof until paid"; and it further provides that there is appropriated "an amount sufficient to pay said items of the indebtedness constituting said deficit, not exceeding \$37,928.09, with 6 per cent. interest thereon from the date of each of said claims."

We think it manifest that the word "items," as used in the act, means items in the report of the superintendent of the House of Reform showing the outstanding indebtedness of the institution; that report exhibiting 43 creditors whose claims aggregate \$37,928.09, the exact amount mentioned in the act; and that the interest to be paid under the act is the interest on the sum due to each of said creditors, not upon each item in the account of each of said creditors, but upon the total of each of such accounts. This interpretation of the word "item," as used in the act, is further supported by the use of that word in that sentence which provides that there is appropriated "an amount sufficient to pay said items constituting said deficit." The items meant are undoubtedly the items of the report showing what the deficit consisted of, and to whom due.

The right of appellees to interest upon their account is fixed by the act; and it is only with the proper construction of the act and the legislative intent that we are here concerned. It seems to us that the Legislature understood that \$37,928.09, the amount mentioned in the act, was the full amount of the

deficit up to June 14, 1910, including everything, and intended that each claim should draw interest from June 14, 1910, until paid.

The judgment is therefore reversed for proceedings consistent with this opinion.

## TEATER v. TEATER.

(Court of Appeals of Kentucky. May 21, 1914.)

### 1. DOWER (§ 49\*)—DEEDS—FRAUD.

In a suit to set aside a deed of a widow's dower for fraud, the burden was on her to show by very substantial and satisfactory proof that the contract was procured by fraud or overreaching.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-174; Dec. Dig. § 49.\*]

### 2. DOWER (§ 49\*)—DEED—FRAUD—EVIDENCE.

In a suit to set aside a conveyance of a widow's dower, worth at least \$1,200, for \$300, evidence held to warrant a finding that she had been led to execute the deed by fraud, on the belief, induced by the grantee, that the consideration was \$1,200, and that she had no intention to convey her dower for \$300, the price named.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-174; Dec. Dig. § 49.\*]

Appeal from Circuit Court, Garrard County.

Suit by Mattie Teater against Henry Teater. Decree for complainant, and defendant appeals. Affirmed.

Lewis L. Walker, of Lancaster, for appellant. R. H. Tomlinson, of Lancaster, for appellee.

CARROLL, J. On August 31, 1912, the appellee, Mattie Teater, conveyed to the appellant, Henry Teater, her life estate in 21 acres of land that had been set apart to her as dower in the division of her husband's estate. The consideration recited in the deed was \$300, payable in equal installments of \$75 each, due respectively on January 1, 1914, 1915, 1916, and 1917, bearing interest from January 1, 1913.

On September 18, 1912, the appellee brought this suit against the appellant for a cancellation of the deed, upon the ground that it had been procured by fraud. After the issues were made up and the evidence taken, the case was submitted for hearing, and a judgment rendered canceling the deed and the four purchase-money notes. From this judgment, the defendant in the suit below, Henry Teater, prosecutes this appeal, and asks that the judgment be reversed, because the evidence introduced by the appellee was not sufficient to justify the court in canceling the contract.

It appears from the evidence that the appellee is the stepmother of appellant; that she married his father in 1881, when the appellant was quite a small boy, and lived with him until his death in 1885. After his death his land was divided, and the tract here in controversy set apart as her dower. Soon after this she moved to another part of the

county some distance from the land, and has since resided there, being at the time the deed was made about 59 years old.

It is further shown that she had little or no experience in business affairs, and that her dower was looked after by her brother, who rented it for a number of years for \$100 a year, and for several years previous to 1912 at \$80 a year. It is further shown that the appellant lived close by this piece of land, and for some time before the deed was executed had been anxious to purchase it, as he and his two brothers owned the land subject to the life estate of appellee.

The matter of purchasing the land had been discussed perhaps more than once between the appellant and John Ison, the brother of appellee, who had charge of the place, but they seem not to have been able to agree on a price for appellee's life estate. The evidence is conflicting as to the value of the fee in the land, some of the witnesses placing it as high as \$1,500, and others as low as \$700. Other land in that neighborhood was selling at high prices, but this tract had been very much neglected, and, although perhaps naturally good land, it had depreciated very much in value on account of the manner in which it had been worked and the little attention that was given to the care of the buildings, the fences, and the place generally. But, notwithstanding the run-down condition of the place, the appellee was getting \$80 a year rent for it, and her expectation of life was about fourteen years. So that, if she had lived her expected period, and had gotten an average rental of \$75 a year, she would have received from the land during that time about \$1,000. Or, if it should be estimated that, after the payment of taxes, repairs, and other incidental expenses, the net income would only be \$50 a year, she would have received in the fourteen years, as income from the land, \$700.

If, however, the contract should be sustained, we would have the appellee selling her interest for \$300 in four yearly payments of \$75 each, or not more than she could realize as rent from the land for 4 years, and at the end of 4 years she would not have any income from it or any other source, as it appears that this is the only property that she owns. It will therefore be at once seen that the trade was a bad one for the appellee, looking at the matter from any standpoint.

It might also be observed that the value of the fee in this land is not entitled to controlling importance. It is not so much what the fee was worth, but what income the appellee could derive from the land, that fixed its value as to her. If the fee had only been worth, as some of the witnesses said, \$700, this did not fix the value of the place to her, as the rent derived was not estimated at all on the value of the fee, but on what the land was worth to her.

[1] Under the law applicable to the transaction, the burden of proof was on the appellee to show that the contract was procured by fraud or overreaching of some kind, and we have written in a number of cases that, when a party undertakes to set aside a written contract, the evidence in his behalf must be very convincing, and the fraud or mistake established by substantial and satisfactory proof. *Chicago Building & Mfg. Co. v. Beaven*, 149 Ky. 287, 148 S. W. 37; *Crawford & Gatlin v. Livingston*, 153 Ky. 58, 154 S. W. 407, 44 L. R. A. (N. S.) 640. And we think the evidence sufficient to bring the case for appellee within the scope of this rule.

[2] It further appears from the evidence that a short time before the deed was written the appellant invited the appellee to come to his house and spend a few days, and that his wife or one of his children went after her; that on the same day that she arrived at his house appellant, who was very anxious to get her interest, brought up the subject of purchasing it, although she did not know that any efforts would be made to buy her interest on this visit.

She testified, in substance, that soon after she arrived at his home the appellant commenced talking to her about selling the place, but that she had not thought much about it, as her brother had always attended to it, but had a notion that her interest was worth about \$1,200; that the next morning the appellant went to Lancaster and came back with a deed and told her that the deed recited that he was paying her \$1,200 for the place; that she did not read the deed or hear it read; that she had implicit confidence in the appellant, and believed that he would not try to deceive her, and that the deed did, in fact, recite that he was paying her for her interest, \$1,200; that she did not read or hear read the notes for the purchase money, and that the appellant put them in an envelope and sealed them up and gave them to her to keep; that at the request of appellant she went with him the same day to a notary to acknowledge the deed, and that the notary asked her if she wanted it read, and she said, "No," that she was satisfied, as she was getting \$1,200 for the place, and that the notary did not read the deed to her; that a week or so afterwards she heard it rumored that the appellant said he was to pay her only \$300 for it, and when she heard these rumors she went to see a lawyer, and then for the first time discovered that the consideration recited in the deed was only \$300, and at once brought this suit.

The notary said that on the morning the deed was signed the appellant came to his house and asked him if he could go to his (appellant's) house and take an acknowledgment to a deed, and that he could not do it on account of some sickness in his family, whereupon appellant told him that he would bring the appellee over to his house; that

the appellant and appellee came to his house in the afternoon, and he asked the appellee if she wanted the deed read, and she said she did not; and that he did not read the deed as the appellant said it was all right. He further said: "I asked him how many acres in the place, and I asked him what the place cost, and he said, '\$1,200.' Q. At the time Henry mentioned paying \$1,200 for the land, what was said about that? A. Nothing, only he said he gave \$1,200. I asked him what the place cost and he said, '\$1,200.'"

The brother of appellee, who had been attending to the place for her, said that appellant had been trying to buy the place, and that he wanted \$1,250 for it.

Other witnesses testified to statements made by the appellant at different times tending to show his desire to buy the land and different statements he made as to what it had cost him.

The appellant's evidence was, in substance, that on the occasion of the visit the subject of his purchasing her interest, as well as that of his brothers, was brought up by the appellee, and that he told her he was going to buy the interest of his two brothers at \$300 apiece, and would buy her interest if he could get it at \$300, and she told him he could have it at that sum, and, after further talk, the payments were agreed on, and it was understood that he was to have the deed written the next morning and get her acknowledgment to it; that, when he came back with the deed on the next day, the matter was again discussed, and it was fully understood by the appellee that the purchase price was \$300, nothing being said about paying her \$1,200 for her interest, or that the deed recited a consideration of \$1,200. He further testified that he purchased the interest of his two brothers in the land for \$600, and that, if any statements were made about the land costing him \$1,200, these statements were made in estimating his own interest at \$300, the interest of his two brothers at \$600, and that of the appellee at \$300, making the total cost to him, \$1,200.

Other witnesses in his behalf, who were present at his house, testified that the appellee thoroughly understood that she was to be paid \$300 for her interest, and that she had sold it to appellant for that sum.

Without relating more of the evidence, it seems sufficient to say that, when all the facts and circumstances developed in the testimony are considered, there is sufficient to show in a very satisfactory way that the appellee did not know or understand that she was only getting \$300 for her interest, and the circumstances surrounding the execution of the deed conduce strongly to show that the parties were not dealing at arm's length in making this contract. There was a good deal of haste about it on the part of

the appellant and a seeming purpose to take advantage of the presence of appellee at his house and the absence of her brother who attended to all of her business. The relations between the parties, coupled with the confidence reposed by appellee in the integrity of her stepson, put on him the duty of dealing fairly with her.

Then, too, the great inadequacy of the price, considering the income derived by appellee from the land, taken in connection with the price that had been previously placed on her interest when appellant attempted to purchase it, are convincing circumstances that appellee must have been, whether intentionally or not, deceived into the belief that she was getting \$1,200; or, taking the view most favorable to appellant, she was misled, by his statement that the fee in the land would cost him \$1,200, into the belief that the \$1,200 mentioned was to be the compensation for her interest.

It is inconceivable that the appellee would, without consulting her brother, understandingly have taken \$300, payable in annual installments of \$75 each, when she was getting as rent \$80 a year for the place, and had a reasonable life expectancy of several years. The prompt action that she took upon discovering that she was only to get \$800 is another circumstance that tends to support her view of the transaction. It may be that appellant understood that he was only paying her \$300, but we think it certain that the appellee did not so understand it; and, looking at the matter from any standpoint, it seems quite clear that the parties to this contract did not understand each other, and that there was no meeting of minds.

Upon the whole case, we have reached the conclusion, as did the chancellor, that the ends of justice and right will be better satisfied by canceling the contract than they would be to enforce it, and that all the facts and circumstances shown in the record, many of which we have not related, were entirely sufficient to authorize the judgment under the rule that the burden of proof is on the complaining party in cases like this, and relief will not be granted unless there is satisfactory and convincing evidence, direct or circumstantial, that the contract should be set aside.

The judgment is affirmed.

MORGAN et al. v. PERKINS.

(Court of Appeals of Kentucky. May 20, 1914.)

1. **BILLS AND NOTES (§ 427\*)—PAYMENT—DEPOSIT OF AMOUNT IN BANK.**

The deposit of the amount of a note in a bank to the payee's order without the payee's authority was not a payment thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.\*]

## 2. BILLS AND NOTES (§ 427\*) — PAYMENT — PERSONS MAKING PAYMENT.

Where the maker of a note deposited the amount with a bank which appropriated it in payment of a debt due it from the payee's brother, and the brother thereafter sent a part of the amount to the payee to relieve him to that extent from the embarrassment arising from the appropriation, the amount so received by the payee should in equity be credited on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.\*]

Appeal from Circuit Court, Caldwell County.

Action by Henry L. Perkins against J. F. Morgan and others. From a judgment for plaintiff for an insufficient amount, defendants appeal, and plaintiff cross-appeals. Affirmed.

S. D. Hodge and Geo. G. Harralson, both of Princeton, for appellants. J. Elliott Baker, of Princeton, for appellee.

TURNER, J. On and prior to the 31st day of December, 1910, appellee Henry L. Perkins was the owner of a remainder interest in certain real estate in Princeton, Ky.; his mother, Mary C. Perkins, being the owner of a life estate therein. On that day they sold and conveyed the same to appellant J. F. Morgan; the consideration being \$1,500, of which \$400 was paid in cash, and two notes for \$600 and \$500, respectively, were executed, payable jointly to Mary C. Perkins and Henry L. Perkins. The \$600 note was paid, and the \$500 note was due on the 30th of June, 1911. On the 6th of June, 1911, Mary C. Perkins, one of the payees in the \$500 note, assigned all of her interest therein, by writing on the back thereof, to Henry L. Perkins, whereby he became the sole owner of the note. Appellee instituted this action seeking an enforcement of his purchase-money lien, and the lower court adjudged him the relief sought, except that it credited the \$500 note by \$250, and from that judgment Morgan appeals and Perkins prosecutes a cross-appeal.

Appellant's answer denied that appellee was the owner of the note or that same was assigned to him on the 6th day of June, 1911, and alleges that Mary C. Perkins was the sole owner of the same on the 3d day of July, 1911, at which time he paid same by depositing the amount thereof to her credit in the First National Bank of Princeton. To this appellee filed a reply denying the affirmative allegations in the answer, and in addition thereto alleging that after the note had been assigned to him Morgan had entered into a conspiracy with certain officers of the First National Bank for the purpose of defrauding him out of the money due on the note, and in pursuance of said conspiracy Morgan caused to be placed to the credit of Mary C. Perkins at said bank the sum of \$515 in or-

der that the bank might credit that amount on a note which it held against J. U. Perkins, and on which note the said Mary C. Perkins was surety, thereby enabling the bank to collect its debt against J. U. Perkins; and denying that the deposit in the bank to the credit of Mary C. Perkins was a payment of the plaintiff's debt. After the money had been placed to the credit of Mary C. Perkins, and had been credited by the bank on the J. U. Perkins note upon which she was surety, Henry L. Perkins, being unable to collect from Morgan anything on his debt, got in communication by wire with J. U. Perkins, who was his brother, presumably informing him that his (Henry L.'s) money had been appropriated to the payment of J. U. Perkins' note, and induced J. U. Perkins, a resident of Arkansas, to send him \$250, which he did, and this \$250 the lower court credited on the plaintiff's debt.

[1] The evidence to the effect that the assignment was actually made on the 6th day of June before the note became due is fairly satisfactory, and therefore Mary C. Perkins had no interest in the note on the 3d of July when Morgan claimed to have paid it; but, even if she had still an interest, such a deposit without authority from her would not operate as a payment, and no such authority is claimed in this case. The evidence is convincing that the deposit by Morgan in the bank to the credit of Mary C. Perkins was made as a result of some understanding between Morgan and the bank officials.

[2] It is apparent from the record that J. U. Perkins sent the \$250 to his brother in order to relieve him to that extent from the embarrassment arising from the temporary appropriation of Henry L. Perkins' money to the payment of J. U. Perkins' debt, and in equity and good conscience it should have been credited upon the debt sued on.

The judgment is affirmed on both the original and cross-appeal.

## KENTUCKY MIDLAND COAL CO. v. VINCENT.

(Court of Appeals of Kentucky. May 20, 1914.)

### 1. EVIDENCE (§ 477\*)—FACTS OR CONCLUSIONS — PERSONAL APPEARANCE.

In an action for personal injuries, witnesses could testify that plaintiff seemed to be suffering, judging from his general appearance when they visited him a few days after the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.\*]

### 2. APPEAL AND ERROR (§ 1048\*)—UNRESPONSIVE ANSWERS.

It was not reversible error for a witness who had testified that an injured person seemed to be suffering to add incidentally that he said he was suffering, where such statement was not called for by the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**2. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

A boy 17 years old, employed to drive a coal car in a mine sustained injuries confining him to his bed for three weeks, during which time he slept very little, and incapacitating him thereafter from doing the full work of a man. Though his leg was not broken, the muscles were seriously injured, the blood not circulating properly through it, and it was considerably larger than the other leg. *Held*, that a verdict for \$850 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

**4. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURIES—QUESTION FOR JURY.**

In an employee's action for injuries, caused by the mule which he was driving running away, his testimony that he was driving a mule which was shown to be vicious and dangerous made a question for the jury, though three other witnesses testified that he was driving a different mule which was gentle and docile.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Appeal from Circuit Court, Muhlenberg County.

Action by Nealle Vincent against the Kentucky Midland Coal Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

William H. Yost, of Madisonville, for appellant. Hubert Meredith, Doyle Willis, and W. J. Ross, all of Greenville, for appellee.

**TURNER, J.** Appellee, a boy 17 years of age, was employed by appellant to drive a coal car in its mines, and, having been injured while so driving, he instituted this action for damages, alleging that the defendant had furnished him a dangerous and vicious mule to drive, and represented to him that the mule was safe; that he was inexperienced in such work, and so notified the company's officers; and that, after he had been driving said mule a day or two, the same ran away with him in said mine and caused the injury.

The defendant in its answer denied the material allegations in the petition, and in another paragraph pleaded contributory negligence.

Upon the trial the jury found for the plaintiff a verdict for \$850, and, from a judgment on that verdict, this appeal is prosecuted.

[1, 2] The first ground for reversal urged is that incompetent evidence was admitted against the appellant; two witnesses for plaintiff were permitted to state that a few days after his injury they had visited him, and that he appeared to be suffering a good deal, as one of them said, and the other that he seemed to be complaining considerably; and, in answering a question, one of the witnesses said, "He appeared to be suffering; he said he was; I don't know;" and it is argued from this that the court permitted the statements of appellee, which were not a part of the *res gestæ*, to be introduced in his

behalf. But it is apparent that the statements of the witness as to what he said was not called for in the question, and was only incidentally added by the witness. The statements of the two witnesses, properly interpreted, were nothing more or less than statements that the plaintiff seemed to be suffering, judging from his general appearance.

[3] It is next insisted that the verdict for \$850 is excessive. The plaintiff's testimony showed that he was in bed for three weeks as a result of this injury; that he slept very little during that time; and that he had never been able since to do the full labor of a man. The evidence of the doctors was that, while the leg was not broken, the muscles therein were seriously and permanently injured; that the leg at the time of the trial was not in normal condition; that the blood did not properly circulate through it, and it was considerably larger in places than the other leg. With this evidence in the record, we cannot see the force of the contention that the verdict is excessive.

[4] Next it is contended that the verdict is not sustained by the evidence. There is, in fact, no serious conflict in the evidence, except as to whether appellee at the time of the injury was driving a large horse mule which is shown to have been vicious and dangerous, or whether he was driving a small black mare mule which is shown to have been gentle and docile. Appellee's own testimony is that he was driving a large horse mule, and the testimony of three others shows that he had been that morning driving a mare mule. But this question was submitted to the jury, and we are unable to see that the jury were not justified in accepting the appellee's statement.

The judgment is affirmed.

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**CLARK v. ROBINSON.**

(Court of Appeals of Kentucky. May 14, 1914.  
On Motion to Issue Mandate,  
May 15, 1914.)

**1. ELECTIONS (§ 288\*)—CONTESTS—PLEADING—AMENDMENT.**

Under Ky. St. § 1596a, subsec. 12, requiring a petition in an election contest to state the grounds of contest relied upon, and providing that no other grounds should afterward be asserted, an amendment to the petition, setting forth the names of additional voters who were shown by the evidence to have voted illegally, contains additional grounds of contest, and was properly refused, even though the grounds of illegality were the same as those charged against other voters in the original petition.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 280-283; Dec. Dig. § 288.\*]

**2. ELECTIONS (§ 299\*)—CONTESTS—CUSTODY OF BALLOT BOXES.**

Under Ky. St. § 1596a, subsec. 12, providing that all ballots, etc., concerning which there is any ground for contest may be removed to the court in which the contest is pending, the court had authority to order the county clerk to trans-

fer the ballot boxes and contents to the master commissioner of the court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.\*]

### 3. ELECTIONS (§ 305\*)—CONTEST—HARMLESS ERROR.

A contestee in an election contest cannot complain of a holding by the trial court that there was no election in a certain precinct, where the recount of the ballots showed that the contestant received a majority of the votes cast, even if those of the disregarded precinct be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.\*]

### 4. ELECTIONS (§ 298\*)—CONTESTS—ANNULMENT ELECTION.

Where there was evidence that illegal votes were cast in various precincts of a county, but the names of the illegal voters and the person for whom they voted were sufficiently established so that the votes could be eliminated, and there was no evidence of fraud or crime on the part of the officers, but only such irregularity as comes from honest mistakes, the election in such precincts will not be disregarded.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 303, 305; Dec. Dig. § 298.\*]

### 5. ELECTIONS (§ 288\*)—CONTESTS—PLEADING—AMENDMENT.

Where petition for an election contest alleged that certain voters voted openly, and not in secret, but did not allege that these voters had not made oath that they were physically unable to mark their ballots or could not read English, upon the making of which oath they could legally vote openly, the amendment of the petition by the addition of an allegation that the voters had not made such oath did not set forth additional grounds of contest, but only perfected and made more definite the grounds set up in the original petition, and such amendment was properly allowed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 280-283; Dec. Dig. § 288.\*]

On Motion to Issue Mandate.

### 6. ELECTIONS (§ 305\*)—MANDATE—TIME FOR ISSUANCE—ELECTION CONTEST.

Where a judgment sustaining the contest by a candidate for school superintendent was affirmed a few days before the time for the examination of school teachers, and the issuance of certificates to them, and the public interests require that the decision of the case be not delayed, the mandate will be issued immediately, and not stayed for 30 days, as ordinarily.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.\*]

Appeal from Circuit Court, Carter County.

Election contest by W. E. Robinson against L. P. Clark. Judgment for the contestant, and contestee appeals. Affirmed, and motion to issue the mandate immediately sustained.

G. W. E. Wolford, of Grayson, for appellant. Theobald & Theobald, J. G. Morris, and W. C. Kozee, all of Grayson, for appellee.

NUNN, J. Clark as Republican and Robinson as Democrat were the nominees and candidates of the two dominant parties in Carter county at the last election for the office of superintendent of common schools. Mrs. Shay was the candidate of the Progressive party. The election commissioners canvassed the returns from the several precincts of the county, and there were 19 of them, and

it showed that Clark had, on the face of the returns, a plurality of 18 votes over Robinson. Thereupon the commissioners issued and awarded to Clark a certificate of election. Within the statutory period Robinson filed his petition in the circuit court contesting the election. The petition set out with detail the names of many persons in each precinct who were permitted to vote, although not entitled to. The grounds of illegality in each case were specifically set forth. They consisted of nonresidency, nonage, open voting, and disclosure of the ballot after voting, and others laboring under conviction for felony. The charge also went to each precinct in the county of fraud and mistake on the part of the election officers in receiving, tabulating, counting, and certifying the vote cast, with the claim that, if the ballots were recounted, it would show that Robinson was elected, and had a majority of the votes cast. The greatest number of illegal votes cast and the most serious irregularities charged against the officers have reference to precinct No. 15, known as Brickyard. It is claimed that here there was such fraud and corruption as to render the election void in that precinct. About 175 illegal and fraudulent votes are specified as having been cast for Clark in the whole county. As soon as the petition was filed, and according to its prayer the circuit judge entered an order directing the county clerk to surrender possession to the master commissioner of all the ballot boxes. Clark traversed every material allegation, and also made countercharges of a similar nature, affecting about an equal number of votes throughout the county. The issues were made up and the proof taken. On cross-examination of Clark's witnesses, Robinson discovered the names of 49 other people who had voted for Clark, and against Robinson, either in an illegal way, or without any right at all to vote. Robinson tendered an amendment setting up in detail these additional illegal votes. When the case came for trial, Clark moved the court to vacate the bench, supporting his motion with an affidavit. This motion prevailed, and another regular judge of a distant district was sent by the Governor, as provided by law, to try the case.

[1] The first ruling of the court was to refuse permission to Robinson to file the amendment setting up the 49 additional names of illegal votes and voters. This ruling of the court was proper, because the amendment could not in any sense be considered as an attempt to more accurately set forth or to perfect the original grounds relied upon. It was essentially an effort to plead additional grounds of contest. It is true it was merely adding to the list of illegal voters and votes relied upon in the first instance as grounds of contest, but the fact that they were similar to the original grounds does not signify they were not additional, nor warrant a reli-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes



ance upon them after the time for filing a contest petition has passed. Subsection 12, § 1596a, of the Kentucky Statutes, with reference to election contests, requires that the petition "shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied on." See, also, *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867, 20 Ky. Law Rep. 1001.

After it had been established that the ballot boxes, and their contents had been safely preserved, the court had them opened, and the votes recounted. The recount showed that Robinson had a plurality over Clark of 74 votes. The court then counted in Clark's favor three questioned ballots, which had been returned by the election officers uncounted. This reduced Robinson's plurality to 71 votes. It should be noted here that this result came from a recount and tabulation of the vote of every precinct in the county, including the Brickyard precinct, No. 15, but the court, being so impressed with the irregularities shown in the conduct of the election in that precinct, also adjudged that the election in that precinct was void, and should be disregarded and held for naught. This served to still further and very materially increase Robinson's plurality. It should also be noted that this result is reached without taking into consideration any of the illegal votes or voters complained of by either party.

It therefore appearing that Robinson was elected, the certificate theretofore awarded to Clark by the election commissioners was canceled, and Robinson declared elected, and entitled to qualify as superintendent of common schools of Carter county.

[2] Clark accepts without a word of complaint or criticism the fairness and accuracy of the recount, but insists that the court had no right to make a recount, because the ballot boxes and contents had been taken, the day the petition was filed, from the custody of the county court clerk, which officer, as Clark claims, was the proper and only officer to keep them. A reference to section 1596a, subsec. 12, Kentucky Statutes, shows that the court had the power to transfer the custody of the ballot boxes from the county court clerk to the master commissioner of the circuit court. This section, among other things, provides: "All ballots, poll books, stubs or other papers concerning which there is any ground for contest may be removed to the court in which the action is pending."

[3] Clark insists that the court erred in holding there was no election in precinct No. 15. In the sense that the result was not affected by counting or by rejecting the returns from this precinct, Clark's contention is correct, but, for the same reason, he should not complain. From a sense of disgust at the flagrant disregard of nearly all the election laws by the officers, the court must have felt impelled to make this ruling. The testimony

shows that the election was held there in a space about eight feet square, and that neither Robinson nor his party had a real representative among the officers, challengers, or inspectors from the time the polls were opened until the vote was counted and certified. One of the judges was perhaps a loyal supporter of Robinson, but he was old, and physically unable to be of service to the commonwealth, the voters, or any candidate in the way of securing a fair election. Ordinarily this alone would not be ground for disregarding an election in a precinct, for the political parties and candidates can usually be relied upon to select officers who will safeguard their interests, but the proof in this case makes it apparent that the situation with reference to the officers was studied and premeditated by certain of Clark's avowed friends. A vacancy was arranged, and a substitute agreed on ten days before the election, and without reference to the county election commissioners. This old man was brought there on the morning of the election, hardly knowing why, to take the place of a regularly appointed officer who had refused to serve, for reasons that are suspicious.

All of the challengers and inspectors were supporters of Clark, with perhaps one exception, and, in view of the glaring fraud perpetrated under his supposed inspection, there is grave doubt as to him. In this eight-foot square space there was a table and two goods boxes used as tables, and upon one of them the clerk prepared the ballots for the men to use, while upon another the sheriff prepared the ballots for use by the 118 women who voted in the school superintendent's race. The fact that the clerk did not write his name on the ballots prepared by the sheriff did not deter the other officers from depositing them in the box, notwithstanding the inhibition of section 1476 of the statute. Two voting booths stood next to the side wall, and for some one's convenience a space about four inches square was cut through the wall just above the top of each, and for further convenience there was a platform on the outside of the room, and just under these holes. Just why these booths were so placed is not clear. There is no proof that any one used the platform on the outside to inspect the ballot as the voter marked it, or held it to the opening. Indeed, in view of the conduct of the election by the officers, there is no reason why any one should go to this trouble, for not many of the men, and not more than eight of the women went to the booths at all. The voters came into the room as they pleased, and as fast as space was found by them. The officers very accommodatingly inquired for whom they wished to vote, and, on learning this fact, the officers marked the ballot by stencil, regardless of who was looking on. We take it for granted that the officers marked the ballots as the voters requested. There is no proof to the contrary, and nobody but the officers know, for in

many cases the voter never saw, or had hands upon, the ballot. Where the officers did not mark the ballots, the voters, and especially the ladies, without going into the booth, spread the ballot on the table in full view of all present, and marked it. In no case where the officers marked the ballot was the voter sworn as to his disability so to do; and in some instances—two at least—if the voter could not come within the polling place, or did not care to, some officer carried the ballot or ballot book outside to him. Of the 118 women voting in that precinct, not more than eight went into the booth, or attempted to mark, or cast a ballot secretly. The ballots for all the others were cast openly and on the table, and in no instance was an oath required of them in order to make that character of voting necessary or proper. It is proven that at least two of the officers and one of the challengers were electioneering for Clark a good part of the day, either in sending for voters or, as is related of one of them, "dictating voters." It is conceded that one of the challengers was too "officious." In *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149, 20 Ky. Law Rep. 1024, the court refers to a situation similar to the one in this precinct as follows: "It was in no sense a secret ballot. The secrecy of the ballot is the fundamental idea of all elections, and this is required by the Constitution as well as by statute. This central idea being disregarded in this precinct, and a practical viva voce election held, as the proof shows, we are of the opinion that the returns therefrom should be disregarded."

Notwithstanding all these irregularities and total disregard of the law as to secrecy of the ballot, it still might be claimed that the voters were nevertheless expressing their will and preference, but, when the recount, as made by the court, is compared to the count as certified by the officers, the iniquity of the whole thing is made so clear as to cause the court to distrust their every other act, and to render uncertain everything certified by them, unless it is the fact that the vote, as they certified it, is nothing more than an expression of their will, instead of the voters.

On the recount it was found that Clark only received 292 votes, instead of 365, as certified by the officers. Robinson received 58, instead of 23, as certified by the officers, and Mrs. Shay received 54 votes, instead of 20, as certified by the officers. It cannot go in justification nor mitigation of this situation to say that there was no other public building in this Olive Hill precinct in which to hold the election—this was not a public building; nor will it do to say that the election had been held there before—the platform on the outside, the holes in the wall and the limited space within is abundant reason why an election should have never been held there again; nor will it do to say that the

old man above referred to had served as election officer before, for perhaps his decrepit condition was the reason for his service then as now.

[4] Clark insists that, if this precinct is disregarded, then the election in every other precinct should be disregarded. In other words, that it be declared that there was no election in the county. There was evidence that some illegal votes were cast at most all the other precincts in the county, and that the ballots of some legal voters were cast in an illegal manner, but the identity of these voters, and the person for whom they voted is sufficiently well established, so that if they, or any of them, affected the result, they could be eliminated. There is no evidence of fraud or crime on the part of the officers elsewhere, and the irregularities are such as ordinarily come from honest mistakes.

As above indicated, the recount of the ballots in open court settles this contest, and the result is not affected by either considering or disregarding the vote in precinct No. 15; nor is it affected by a consideration of the illegal and irregular votes cast in other precincts. About an equal number were complained of by each side, and, giving to Clark the most favorable view of the proof, the irregular and illegal votes were substantiated by each side in about equal proportions.

[5] Another error of the court which Clark complains of we will consider, although, in view of what has been said above about the recount by the court, it is hardly necessary; anyhow, Clark complains that in the original petition, setting forth in detail the names of voters who had been permitted to vote openly, or, as it is commonly referred to, upon the table, the contestant failed to allege that this manner of voting was allowed by the officers without requiring the voter to swear that he was physically disabled. As illustrating this form of pleading, we quote from his allegation as to precinct 3, where, after naming the voters, it is said they "exposed their ballots at the time of voting in the view of other persons, and did not vote by secret ballot at all, but out in the open, in full view of other persons, without any secrecy at all, contrary to law, and each of them voted for L. P. Clark, and their votes were so counted."

This form of pleading applies to all the precincts, except No. 4 and 15, where most of this kind of voting is alleged to have occurred, and as to these two precincts the allegation is made that the voters did not take the oath. When the case was submitted, and they were proceeding to trial, Clark moved the court to strike from the petition all allegations of this form of voting, except as to precincts 4 and 15, because it did not appear that the voters had not been sworn, and therefore on the face of the pleading there was nothing improper in that manner of voting. The court indicated an intention of sustaining the motion, when appellant offered, and the court permitted him, to file an

amendment to perfect the pleading, and which is as follows: "Now comes the plaintiff, and by leave of court amends his original petition herein for the purpose of making the allegations thereof more definite and specific and certain, and to conform to the proof, in accordance to the ruling of the court herein; and for such amendment states that each and every name set out and alleged in said original and amended petition of persons who are charged in said petition and amended petition as having voted openly at the election in controversy, and whose votes were cast and counted for the defendant, L. P. Clark, as set out in said petition and amended petition, are each and all made a part of this amendment, and that each and all of said persons and voters who so voted, as set out in said petition and amended petition, did so vote openly, without first declaring on oath that, by reason of inability to read the English language, he or she was unable to mark his or her ballot, or that any of them were blind or physically disabled, so as to be unable to mark his or her ballot, or that any of them made any oath as to any of these disabilities or disqualifications at all, and they did not qualify themselves to vote openly, nor did any of them qualify themselves to vote openly by making oath before the election officers, or declaring on oath, or at all, before said election officers that any of them were, by reason of inability to read the English language, unable to mark his or her ballot, or were so physically disabled as to be unable to do so, or were blind."

Clark objects to this, claiming that the amendment set forth additional grounds of contest. It will be noticed that this amendment does not bring in the names of any other voters, or make any charge of additional irregularities. It merely undertakes to do what it purports; that is, to perfect and make more definite and specific the grounds set up in the original petition. The ruling of the court in permitting the amendment to be filed is supported by the case of *Wilson v. Hines*, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148, 18 Ky. Law Rep. 233, where, in considering this question, we said: "Under this statute a contestant is not allowed to set up, by way of amendment, an entirely new ground of contest, in addition to those stated in his notice, but he is not thereby precluded from amending and making more specific and definite any ground that is embraced in the notice. This may be allowed, and, in fact, it may be required to be done under the Civil Code of Practice (section 134), which applies to proceedings of this kind as well as to regular actions, and under which it was proper for the board and the lower court to permit the contestants to amend, as was done, in such a manner as to make definite the charge that the act under which the election was held was not in force

and the reasons for it. That did not in this case make a new or additional ground of contest, but simply made more definite and certain one of the grounds of contest stated in the notice." To the same effect is the case of *Adams v. Roberts*, 119 Ky. 364, 83 S. W. 1035, 26 Ky. Law Rep. 1271.

We are of opinion that the judgment of the lower court is correct, and it is therefore affirmed.

#### On Motion to Issue Mandate.

HOBSON, C. J. [6] The judgment in this case having been affirmed, the appellee has entered a motion that the mandate issue immediately, to which the appellant objects. Under the statute governing cases involving contested elections, the case must be heard and determined as speedily as possible, and shall have precedence over all other cases. It has been held that the code provisions as to the docketing of cases do not apply to cases involving contested elections, and we have also held that in primary election cases the mandate may issue immediately. *Graham v. Graham*, 113 Ky. 743, 67 S. W. 1004, 24 Ky. Law Rep. 20; *Price v. Russell*, 154 Ky. 824, 159 S. W. 573. As this case involves the office of school superintendent and the examination of teachers, and the giving of certificates to them must be attended to in the next few days, the public interests require that the decision of the case should not be delayed. Our conclusion is that in such cases the mandate may be issued immediately when, in the judgment of the court, this is necessary for the public interest or to prevent great injury. The issuing of the mandate will not prevent appellants from filing a petition for rehearing, and will not prevent the court from taking such action on the petition as the ends of justice require; but, in our judgment, the mandate in this class of cases should not be held up 30 days, when, in the judgment of the court, the earlier issuing of the mandate is necessary.

The motion that the mandate issue immediately is sustained.

#### BENNETT v. MILLER et al.

(Court of Appeals of Kentucky. May 20, 1914.)

##### 1. WITNESSES (§ 161\*)—COMPETENCY—TESTIMONY OF PARTY INTERESTED AGAINST PERSON DECEASED.

In an action by a wife upon a note, the court properly permitted defendants to testify as to an agreement between them, plaintiff, and her deceased husband that the note was to be paid in legal services; Civ. Code Proc. § 606, subsec. 2, prohibiting any party interested from testifying against any deceased person, etc., not rendering such testimony incompetent, because plaintiff herself was present, and, besides, plaintiff, though not holding the burden of proof, first testified herself as to the same transactions.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 700; Dec. Dig. § 161.\*]

**2. BILLS AND NOTES (§ 453\*)—DEFENSE—NOTE TO BE PAID BY SERVICES.**

Where a note, by the direction of a husband, was made payable to his wife, and the wife understood that the agreement between the husband and the makers was that it was to be paid by legal services to be rendered by the makers, she was estopped to recover on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.\*]

**3. DESCENT AND DISTRIBUTION (§ 156\*)—LIABILITIES OF DISTRIBUTORS—DEBTS OF INTESTATE.**

Where a wife received \$3,500 from her husband's estate in excess of what the laws entitled her to take as widow, she was liable in an action by a creditor to the extent of the excess received.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 529; Dec. Dig. § 156.\*]

Appeal from Circuit Court, McCracken County.

Action by Oda Bennett against John G. Miller and another. From a judgment for defendants, plaintiff appeals. Affirmed.

David Browning, of Paducah, for appellant. Miller & Miller, of Paducah, for appellees.

SETTLE, J. April 15, 1911, the appellant, Mrs. Oda Bennett, filed suit against the appellees, John G. Miller, Sr., and John G. Miller, Jr., in the McCracken circuit court on a note of \$250, of date May 1, 1909, executed by them to her, and due eight months after date, bearing interest from date. Appellees, by joint and separate answer, made a counterclaim and set-off, admitted the execution of the note, but denied that it was the property of the appellant, Oda Bennett, and alleged that it belonged to the estate of her deceased husband, H. B. Bennett; and, further, that about the time of the execution of the note appellant and her husband, H. B. Bennett, then residents of Illinois, employed appellees, who were and are practicing law as partners under the firm name of Miller & Miller, to defend him in an action of malicious prosecution, for \$50,000 damages, brought against him and certain lawyers in the Lyon circuit court by N. W. Utley, which grew out of a previous suit brought by H. B. Bennett, through the lawyers referred to, against Utley and others, charged by him with assaulting and beating him and destroying his property in Lyon county during a reign of lawlessness, inaugurated by persons known as Night Riders, the latter suit having been dismissed as to Utley; that at the time of appellees' employment by appellant and her husband for the purpose stated it was not known to the latter or to appellees how long the litigation in which appellees were to represent them would continue, or precisely what services would have to be performed by appellees, but that it was then agreed between them, appellant, and her husband that for their services appellees should

be reasonably compensated, and, in any event, that their fee would not be less than \$250, nor more than \$500; and thereupon appellant's husband, in her presence and with her consent, agreed to pay appellees \$250 of their fee in advance, but, in paying them this sum, required that they execute to his wife, the appellant, Oda Bennett, the note of \$250 sued on, and appellees then received the \$250, and executed the note, with the understanding and agreement between themselves, appellant, and her husband that, upon the termination of the action in which they were employed, a settlement would be made between the parties, the note surrendered to appellees, and the further amount, not exceeding \$250, due them for their entire services would then be paid.

It was further alleged in the answer, counterclaim, and set-off that at the time of receiving the \$250 for which the note in question was executed the appellant and her husband, Henry B. Bennett, were doing business and employing lawyers jointly; that the latter was insolvent, having conveyed or otherwise put all his money and other property into the hands of his wife for that purpose and to defraud his creditors, and that she took, held, and used the same for the purposes mentioned, and after his death continued to hold it; that, pursuant to the contract of employment thus made with the appellant and her husband, appellees rendered, as attorneys for the latter in the action brought against him and others by Utley, the services thereby required of them and all that were necessary to the successful defense of H. B. Bennett in the action and its dismissal as to him, which services were reasonably worth \$500. By the prayer of their answer, counterclaim, and set-off appellees asked judgment against appellant for a fee of \$500, and their costs, to be credited by the amount of the note sued on.

All affirmative matter of the answer, counterclaim, and set-off was controverted by appellant's reply, and the cause, on appellees' motion, was transferred to the equity docket. Thereafter appellees filed an amended answer, counterclaim, and set-off, in which it was alleged that the appellant had, following the death of her husband in Illinois, the state of his residence, received, as a distributee of his estate, \$3,500 to \$4,000 in money and personal property in excess of what the laws of that state entitled her to take as widow, for which excess she had never accounted. The averments of this amendment are neither denied by reply nor controverted of record.

By the judgment rendered the circuit court held that the note of \$250 sued on was executed by appellees under an agreement made with them by appellant and her husband, H. B. Bennett, that it would be paid in legal services to be rendered by appellees as attorneys in defending for the latter the

action instituted against him and others in the Lyon circuit court by N. W. Utley; and that it was so paid, appellees' services as such attorneys in H. B. Bennett's behalf in that case being reasonably worth as much as the amount of the note; hence appellant's petition was dismissed at her cost. She complains of the judgment, and by this appeal seeks its reversal.

[1] Her first complaint is as to the admission of the testimony of the appellees in respect to transactions between them and H. B. Bennett, deceased, including the alleged agreement made with him when the note sued on was executed that it was to be paid in legal services rendered for H. B. Bennett by appellees in the suit of Utley against Bennett and others in the Lyon circuit court; it being contended that, because of the death of H. B. Bennett, section 606, subsec. 2, Civil Code, rendered appellees' testimony as to the transactions with him incompetent. This contention overlooks two important facts appearing in the record: First, that appellant, as well as H. B. Bennett, was present and a party to the transactions with respect to which appellees were permitted to testify; second, that appellant, though not holding the burden of proof, first testified herself as to the same transactions, in view of which section 606, subsec. 2, Civil Code, presented no obstacle to the admission of the evidence in question, therefore its admission by the trial court was not error. *McHarry v. Irvin*, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800, 9 Ky. Law Rep. 245; *Schnute Holtman Co. v. Sweeney*, 136 Ky. 773, 125 S. W. 180; *Kuhn v. Kuhn*, 69 S. W. 1077, 24 Ky. Law Rep. 787; *Carpenter v. Rice*, 78 S. W. 458, 25 Ky. Law Rep. 1704.

In our opinion, the first ground of defense set up by appellees' answer, counterclaim, and set-off—namely, that, though the note sued on was made payable to the appellant, the money obtained from her by its execution belonged to the husband, and that the note was executed under an agreement between appellees, appellant, and her husband, H. B. Bennett, that it was to be paid in services rendered by the former as attorneys for her husband in the Utley suit—is supported by the weight of the evidence. It is manifest from the evidence that the legal services appellees contracted to render H. B. Bennett in satisfaction of the note extended through an entire year, and were so faithfully performed as to cause a dismissal of the action as to him. The services in question were rendered in the Lyon circuit court and in the United States District Court for the Western District of Kentucky. As the nature of these services is fully set forth in an agreed statement of facts appearing in the record, further comment upon them is unnecessary. It is equally apparent from the evidence that the services rendered by appellees exceeded in value the amount of the note executed by

them to appellant. This was shown not only by the testimony of appellees themselves, but also by that of James Campbell, Charles K. Wheeler, and W. F. Bradshaw, Jr., attorneys at law, who fixed the value thereof at from \$500 to \$1,000; but, as the judgment of the circuit court limited the value of appellees' services to the amount of the principal and interest due upon the note at the time the judgment was rendered, and appellees have not prosecuted a cross-appeal, we are not required to determine whether, upon their counterclaim, they should have recovered for their services an amount in excess of that due upon the note.

[2] If, as the weight of the evidence conduces to prove, H. B. Bennett had placed in appellant's hands the money received of her by appellees when the note was executed, to be used in employing and paying them for the services they were to render as his attorneys in the Utley suit, and the note was by H. B. Bennett's direction made payable to her, with the understanding that it would be paid by their services in that case, and it was so paid, it follows that the circuit court did not err in rendering the judgment complained of by appellant; for, as, according to the evidence, appellant was a party to this arrangement and a participant in carrying out the transaction, she was estopped to recover anything upon the note.

We think it apparent, too, from the evidence as a whole that appellant, at the time of the execution of the note to her by appellees, had in her possession not only the amount then received of her by them, but a much larger sum, and all the money of which H. B. Bennett was the owner, that had been placed by him in her hands to prevent the collection of a judgment that he feared Utley would recover against him in the action for damages brought by the latter. Such being the situation, it serves to explain why the employment of appellees to defend him in the Utley Case was made by the arrangement testified to by the latter and evidenced by the execution of the note.

[3] In addition to the reasons already given for not disturbing the judgment of the circuit court, it can properly be sustained upon yet another ground. If, as claimed by appellant, the note sued on in this case was not executed under the agreement set up by the answer, counterclaim, and set-off of the appellees, but was her property and executed for money of her own loaned appellees, if her husband became indebted to appellees for legal services rendered by their employment in defending the action brought against him and others by Utley, as it was alleged in appellees' amended answer, counterclaim, and set-off, and not denied by appellant, that all the estate owned by the husband at the time of his death was situated in Illinois, and, following his death, the whole of it was received by appellant, and it amounted to

\$3,500 or \$4,000 in excess of what the laws of that state entitled her to take as widow, and this excess she yet holds, she might by the judgment have been made to account therefor to appellees as creditors of the husband's estate for the value and to the amount of the legal services they rendered for him in the Utley Case; this equity and right of action therefor being asserted by way of counterclaim and set-off, as allowed by section 434, Civil Code, which provides: "Legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative as prescribed in the preceding section; and that liability shall continue during the same period that the liability of the personal representative would have continued but for said discharge." Section 2084, Kentucky Statutes; *Rubel v. Bushnell*, 91 Ky. 251, 15 S. W. 520.

Here it is shown that there has been no appointment in Kentucky of an administrator of the H. B. Bennett estate; that there is no property in Illinois or elsewhere belonging to the estate of the decedent, except the personal estate left by him, which went into appellant's hands and is yet held by her.

The record presents no ground for disturbing the judgment, wherefore it is affirmed.

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COMMONWEALTH ex rel. ATTORNEY  
GENERAL v. YUNGBLUT,  
Circuit Judge.†

(Court of Appeals of Kentucky. May 19, 1914.)

1. PROHIBITION (§ 10\*)—JURISDICTION OF INFERIOR COURTS — ISSUANCE OF WRIT BY COURT OF APPEALS.

Where the circuit court has no jurisdiction of an appeal from the county court, the Court of Appeals may issue prohibition against the judge of the circuit court to restrain him from hearing and determining the appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.\*]

2. CRIMINAL LAW (§ 1004\*)—APPEAL—RIGHT OF APPEAL.

The right of appeal from a conviction of a statutory offense is purely statutory.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1004.\*]

3. CRIMINAL LAW (§ 1022\*)—APPEAL—STATUTORY PROVISIONS.

The act in force in March, 1910 (Laws 1910, c. 76), punishing persons contributing to the delinquency of children, and conferring on the county courts exclusive jurisdiction of cases within the act, and authorizing the court to suspend sentence and release accused on probation, gives the county court exclusive jurisdiction of offenses under the act, and no appeal lies from a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2581, 2582; Dec. Dig. § 1022.\*]

Application for writ of prohibition by the Commonwealth, on the relation of the Attor-

ney General, against Charles W. Yungblut, Judge of the Seventeenth Judicial Circuit, to direct the Judge to dismiss an appeal to the circuit court for want of jurisdiction. Writ granted.

Blaine McLaughlin, of Newport, and Jas. Garnett, Atty. Gen., and M. M. Logan, Asst. Atty. Gen., for petitioner. R. W. Nelson, of Newport, for respondent.

CARROLL, J. This is an application by the commonwealth on the relation of the Attorney General for a writ of prohibition against the Hon. Charles W. Yungblut, judge of the Seventeenth judicial district. It appears from the petition that one Chris Whitehead was cited to appear before the judge of the Campbell county court to answer the charge of contributing to the delinquency of Millie Baier, a female under 18 years of age. When the case came on for trial before the judge of the county court, Whitehead pleaded not guilty, but on a trial was found guilty of the offense charged and was adjudged to pay a fine of \$100 and sentenced to imprisonment in the county jail for a period of 50 days. On the same day that the judgment was rendered, Whitehead prosecuted an appeal to the circuit court of Campbell county and executed a supersedeas bond before the clerk of the circuit court, in the manner and form provided in section 365 of the Criminal Code when an appeal is taken from the judgment of an inferior court in a misdemeanor case to the circuit court. When the record of the proceedings in the county court was filed in the circuit court, the clerk thereof issued a certificate as provided in section 364 directing the judge of the county court to suspend proceedings upon the judgment rendered in his court, and thereupon, as provided in section 365 of the Code, the judgment of the county court stood suspended. The effect of the appeal, supersedeas bond, and certificate of suspension being to transfer the case as an original case to the circuit court for trial, as it is provided in section 366 of the Code that "upon the appeal the case shall be tried anew, as if no judgment had been rendered." Thereafter the commonwealth moved Judge Yungblut in the circuit court to dismiss the appeal for want of jurisdiction upon the part of the circuit court to entertain the appeal, which motion was overruled. It further appears from the petition filed in this court that Judge Yungblut is threatening to and will take jurisdiction of the case and will hear and determine it as an ordinary criminal case pending on appeal unless prohibited from doing so by this court. On this application it is the contention of the commonwealth that the circuit court of Campbell county has no jurisdiction of an appeal from the county court in a case like this, and therefore the judge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 19, 1914.

of the circuit court, in entertaining jurisdiction of the appeal and in declaring his purpose to hear and determine the case on the appeal, was acting outside the jurisdiction of the court over which he presides.

[1] If the Campbell circuit court did not have jurisdiction to entertain the appeal, then this court may issue its writ of prohibition against the judge of the court to restrain him from hearing and determining the appeal. *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; *Jenkins v. Berry*, 119 Ky. 350, 83 S. W. 594, 26 Ky. Law Rep. 1141.

[2] It will thus be seen that the single question presented is: Does an appeal lie to the circuit court from a judgment of the county court in cases like this? The right of appeal in this class of cases is purely a statutory right. It is not a right guaranteed to either the commonwealth or the accused by the Constitution. The Legislature, in creating an offense, and in prescribing the punishment therefor, and how the offender shall be tried, has full authority to say what court shall have jurisdiction to hear the case and give judgment therein and may or may not, in its discretion, grant an appeal from the judgment of the court that is given jurisdiction to hear the case. *Re Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *Saylor v. Duel*, 236 Ill. 429, 86 N. E. 119, 19 L. R. A. (N. S.) 377; *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; *Chattanooga v. Keith*, 115 Tenn. 588, 94 S. W. 62, 5 Ann. Cas. 859; *Miller v. Com.*, 127 Ky. 387, 105 S. W. 899, 32 Ky. Law Rep. 249; *Carey v. Sampson*, 150 Ky. 460, 150 S. W. 531. So that we must look to the act creating and describing this offense for the purpose of determining whether or not an appeal lies in this class of cases.

Two views of this question are presented. Counsel for the respondent say that the case comes within the meaning of section 362 of the Criminal Code, in which it is provided that "if a judgment against a defendant on a trial before a county judge, or in a justice's court, or in a city or police court, unless otherwise provided in the statutes creating or regulating it, be for imprisonment or for a fine of twenty dollars or more, he shall have the right of appeal to the circuit court of the county in which the judgment is rendered," and therefore, as the judgment of the county court imposed a fine of \$100 and a jail sentence of 50 days, the defendant had the right to appeal to the circuit court; while counsel for the petitioner urge that the act under which the proceedings were had in the county court confers upon the county court final and exclusive jurisdiction to hear and determine the case, and it does not come within the scope of the section of the Code.

[3] The proceeding in the county court was had under an act that became a law in March, 1910 (Laws 1910, c. 76), providing for

the punishment of persons responsible for or contributing to conditions that would render a child dependent, neglected, or delinquent. Section 1 of this act provides, in substance, that a parent or guardian or person having the custody of any dependent, neglected, or delinquent child, or any other person who shall knowingly and willfully encourage, aid, cause, abet, or connive at such state of dependency, neglect, or delinquency, or shall knowingly or willfully do any act or acts that directly produce or contribute to the conditions which render such child a dependent, neglected, or delinquent child, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not more than \$100, or by imprisonment in the county jail or workhouse for not more than 50 days, or both by such fine and imprisonment; and further provides: "That, instead of imposing the punishment hereinbefore provided, the court shall have the power to enter an order suspending sentence and releasing the defendant from custody on probation, for the space of one year, upon his or her entering into a recognizance, with or without sureties, in such sums as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so within a year, and shall provide and care for such dependent, neglected, or delinquent child in such manner as to prevent a continuance or repetition of such state of dependency, neglect or delinquency or as otherwise may be directed by the court, and shall further comply with the terms of such order, then the recognizance shall be void, otherwise it shall remain in full force and effect. If the court be satisfied by information or due proof, under oath, that at any time during the year the defendant has violated the terms of such order, it may forthwith revoke such order and sentence him or her under the original conviction. Unless so sentenced, the defendant shall, at the end of such year, be discharged and such conviction shall become void."

"Sec. 2. In trials under this act, the person proceeded against shall have the right to a trial by jury which shall be granted as in other cases, unless waived. If the finding of the jury be against the person tried, their verdict shall so state, in which event the court, in its discretion, may enter such judgment as to it seems needful in the premises.

"Sec. 3. The county courts of the several counties of the state shall have exclusive jurisdiction of all cases coming within the provisions of this act.

"Sec. 4. This act shall be liberally construed in favor of the state for the purpose of the protection of the child from neglect, or omission of parental duty toward the child by its parents, and further to protect the child from the effects of the improper

conduct or acts of any person which may cause, encourage or contribute to the dependency, neglect or delinquency of such child—although such person is in no way related to such child."

This act is one of a series of acts passed by the Legislature in recent years for the purpose of protecting minor children who are dependent, neglected, or delinquent, and for the further purpose of punishing any person who aids, causes, or contributes to conditions that may or do render a child dependent, neglected, or delinquent. The act was designed to give the county court of each county a general superintendency and control over dependent, neglected, or delinquent children and persons who brought about or contributed to their dependency, neglect, or delinquency, and to invest these courts with such power and authority as in the exercise of a reasonable discretion they might consider necessary and proper to protect the child described and to punish the person who caused the conditions set forth in the act. The act is not purely a penal statute. It is more in the nature of a reformatory or corrective statute. The punishment of the offender by the infliction of a fine or a sentence of imprisonment is not the whole aim of the statute. Indeed, the punishment that is authorized is only a minor means by which the wholesome purpose of the law may be made effective. To save children from becoming outcasts, to protect them from neglect, to prevent them from becoming a charge on the commonwealth, and help them to be useful and worthy men and women, was the chief purpose of the act. In ordinary criminal cases the statute creating the offense prescribes the penalty that shall be visited on the offender, and in this class of cases, when there has been a trial and judgment and the penalty provided for has been imposed, the court rendering the judgment has no power to suspend it and no discretion to exercise in the execution of it. The defendant must either satisfy the judgment as it stands or prosecute an appeal to some other court, if an appeal is allowed.

It will be observed, however, that this act clothes the county judge with large discretion not only in the imposition of the punishment authorized by the act, but in respect to the execution of the judgment after it has been entered. When a person is proceeded against under this act, it is provided that the court, after hearing the case, if a jury trial is waived, may refrain from imposing the punishment authorized by the act and suspend the sentence and release the defendant from custody on probation upon his entering into a recognizance that he will do and perform the things specified in the recognizance and be obedient to the orders of the court during the time specified. It further provides that, when there has been a trial by jury and a verdict of guilty, the court need not, as in other criminal cases, enter

a judgment in conformity with the verdict, but may "enter such judgment as to it seems needful in the premises." Although the jury may find the defendant guilty and assess his punishment within the limits of the act, the court may suspend the imposition of the sentence for the time and in the manner provided in section 1 of the act, and may enter such judgment in its discretion as will accomplish the purpose of the act.

It seems very clear from these provisions that, to enable the county court to effectively carry out the purpose of the act, its jurisdiction must be exclusive, and this does not merely mean exclusive jurisdiction to hear and determine the case in the first instance, or that the power of the court is limited to original jurisdiction, but it means that the court shall have full, exclusive, and final jurisdiction over the case in all of its aspects, so that the court may be in a position at all times to do, in the exercise of a sound discretion, and in the light of all the facts and circumstances developed on the hearing, whatever may seem best for the interest of the child and the reformation of the offender.

If it had been intended that the jurisdiction of the court should end with a trial and judgment and that an appeal should be allowed as in other criminal cases, obviously there would have been no reason for inserting in the act the provision giving to the court the large discretionary power conferred, because, if appeals were allowed under the provisions of the Code as in other cases, the court would have no jurisdiction over the person of the defendant and no authority to control or suspend the punishment imposed by the judgment, as when an appeal was taken all the power and authority over the case and the person of the accused would be transferred to the circuit court.

If the Legislature had intended that in this class of cases appeals might be prosecuted or that the judgment of the county court might be set aside or suspended by some other tribunal, or if it had been the purpose to let this class of cases take the same course as other prosecutions for misdemeanors, it seems apparent that the Legislature would not have given to the county court the power to suspend or modify or remit the sentence that a jury might assess against the defendant. To allow an appeal would take from the county court all control of the case and deprive it of the right to exercise a superintending and corrective control over the defendant, and limit its jurisdiction to the mere right to hear and determine the case. The act does not give to the circuit court any discretion, and in that court the case would necessarily be disposed of as are other penal prosecutions.

It therefore seems manifest that if the important parts of the act, that give to the county judge the large discretion allowed in suspending, controlling, and reducing the



judgment, are to have any meaning or effect, the county court must have not only exclusive but final jurisdiction, and we so construe the act.

It is very true that this construction gives large power to the county court and the right to impose heavy penalties in this class of cases, but this is what we conceive the Legislature intended to do in the enactment of this law, and it is not to be presumed that the county courts will exercise in an unreasonable or arbitrary way the discretion conferred by the act; but if they should the Legislature of the state and not this court must afford a remedy by appeal. *McInteer v. Moss*, 144 Ky. 667, 139 S. W. 842.

We have been cited by counsel for the respondent to several cases in which the words "exclusive jurisdiction" have been construed to mean "exclusive original jurisdiction"; but this construction was adopted in construing acts very different from this one, and in an effort to arrive at the legislative intent. It is, too, a matter of common occurrence in the construction of laws to give to the same words or phrases a different meaning in different legislative acts; the construction in each case having in view a desire to conform to the context and give expression to the legislative will. *Hodge v. Bryan*, 149 Ky. 110, 148 S. W. 21; *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008; *James v. U. S. Fidelity & Guaranty Co.*, 133 Ky. 299, 117 S. W. 406; *Mechanics' Savings Bank v. Com.*, 128 Ky. 190, 108 S. W. 263, 32 Ky. Law Rep. 1022; *Com. v. Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892, 32 Ky. Law Rep. 1293, 16 Ann. Cas. 761; *Katzman v. Com.*, 140 Ky. 124, 140 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359.

In *Marlowe v. Com.*, 142 Ky. 106, 133 S. W. 1137, we had before us a question quite similar to the one we are now considering. In that case the construction of a certain section of an act of 1908, now section 331e of the Kentucky Statutes, relating to dependent, neglected, and delinquent children, was involved, and one of the questions was whether an appeal could be taken from the judgment of the county court declaring a minor child to be delinquent within the meaning of the act and committing her to custody. The statute did not make any provision for an appeal, but it was insisted that, in view of the importance of permitting the review of a judgment of an inferior court taking from a parent the custody of his child, an appeal should be allowed; but we said it was the purpose of the Legislature to leave the exclusive control of matters like this in the hands of the county court, and that, as the Legislature did not in express terms make provision for an appeal, none would be allowed. A similar conclusion was reached in *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

It is true that in those cases no pe-

nal punishment was imposed, but this circumstance does not detract from the authority of those cases as controlling precedents in this one. In both of them the legislative purpose, to invest the county courts with full and final authority over the administration and execution of the system of laws relating to dependent, neglected, and delinquent children, was fully recognized.

For the reasons stated, we think the Campbell circuit court had no jurisdiction of the appeal, and therefore a writ of prohibition will issue directing the judge of the Campbell circuit court to dismiss the appeal for want of jurisdiction.

#### CITY OF LOUISVILLE et al. v. STOLL et al. (Court of Appeals of Kentucky. May 22, 1914.)

**MUNICIPAL CORPORATIONS (§ 414\*)—"ORIGINAL CONSTRUCTION" OF STREET—LIABILITY OF ABUTTING PROPERTY—STATUTORY PROVISIONS.**

Under Ky. St. §§ 2833, 2834, declaring that when the improvement of a street is the "original construction" thereof it shall be made at the exclusive cost of the adjoining property owners, a street has not been originally constructed until the abutting property has once been compelled to pay the cost of its improvement, and, where a fill to protect a city from overflow and the improvement thereof with macadam were paid from the proceeds of a bond issue without cost to abutting property owners, a subsequent improvement of the street by granite pavement was an original construction of the street within the statute, and the abutting property was liable for the cost thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1008, 1017; Dec. Dig. § 414.\*

For other definitions, see *Words and Phrases*, vol. 6, p. 5056.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the City of Louisville and others against C. C. Stoll and others. From a judgment of dismissal, the city appeals. Reversed and remanded.

Pendleton Beckley and Leon P. Lewis, both of Louisville, for City of Louisville. J. V. Norman and John Bryce Baskin, both of Louisville, for Louisville Point Lumber Co. Kinney & Thomas, of Louisville, for appellees Stoll and others. Robert F. Vaughan, of Louisville, for appellee Barrett Mfg. Co.

**HOBSON, C. J.** The city of Louisville in 1872 under legislative authority issued bonds for the purpose of raising the grade of Fulton street east of Preston street. The work was done and was paid for out of the proceeds of the bond issue. The chief purpose of the work was to make a fill to protect the city from overflow. After the fill was completed, the street was improved with macadam. This was also paid for out of the proceeds of the bond issue without cost to the abutting property owners. The street was

used as a street of the city from that time until 1911, when the city by proper ordinance ordered the construction of Fulton street from Mill to Cabel streets; the construction involving a granite pavement. The cost was apportioned against the property owners. This suit was brought to enforce the apportionment warrants. The circuit court dismissed the petition upon the ground that the work was reconstruction. The city appeals.

By section 2833, Ky. St., when the improvement is the original construction of any street, it shall be made at the exclusive cost of the adjoining property owners, to be apportioned as therein directed; and by section 2834, Ky. St., a lien on the respective lots shall exist for the cost of original improvement of public ways. In a number of cases construing this statute, we have laid down the rule that, until the abutting property has once been compelled to bear the burden, it has not constructed originally the street, which in justice to all other property owners within the city, and upon an equal basis under the statute, it should do. *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645, 18 Ky. Law Rep. 473; *City of Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064, 25 Ky. Law Rep. 161; *Lindsey v. Brawner*, 97 S. W. 1; *Sparks v. Barber Asphalt Co.*, 129 Ky. 769, 112 S. W. 830, 22 L. R. A. (N. S.) 877, 130 Am. St. Rep. 492. Were the rule otherwise, certain streets in the city or certain parts of a street might be constructed at the cost of the abutting property owners, while other parts were constructed at the cost of the city, and the owners of the abutting property thereon thus escape all liability for the improvement. It is true a different rule was laid down in *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 23 Ky. Law Rep. 827; *Id.*, 111 Ky. 588, 65 S. W. 125, 23 Ky. Law Rep. 1609, and the circuit court seems to have followed that opinion. But that case was in effect disapproved in *City of Catlettsburg v. Self*; it is in conflict with the subsequent cases, and is overruled.

The conclusion we have reached makes it unnecessary for us to consider the other questions presented on the argument.

Judgment reversed, and cause remanded for a judgment as above indicated.

#### PHOENIX-JELLICO COAL CO. v. GRANT. (Court of Appeals of Kentucky. May 20, 1914.)

##### 1. PLEADING (§ 237\*)—AMENDMENT OF PETITION—ACTION ON SUPERSEDEAS BOND.

Under Civ. Code Prac. § 134, authorizing the trial court at any time to permit a pleading to be amended in the furtherance of justice, the court properly permitted plaintiff, in an action upon a supersedeas bond for damages in keeping him out of possession of coal mining property, at the close of his evidence to amend his petition so as to specify the items

of damage by showing the amount of coal it could have mined during the period, etc.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

##### 2. CONTINUANCE (§ 44\*)—AFFIDAVIT—NECESSITY—SURPRISE AT TRIAL—AMENDMENT OF PETITION.

The trial court did not err in overruling defendant's motion for a continuance upon the filing of an amended petition, where the motion was not supported by affidavit showing the grounds therefor.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 128; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Laurel County. Action by W. R. Grant against the Phoenix-Jellico Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 136 Ky. 751, 125 S. W. 165.

Sam C. Hardin, of London, for appellant.  
H. C. Clay, of London, for appellee.

MILLER, J. This is an action by appellee upon a supersedeas bond. In August, 1905, appellant leased to Grant several hundred acres of undeveloped coal lands in Laurel county for a term of four years and nine months, under a contract which bound appellant to furnish Grant with mine cars, tracks, tiphouse, and timber for mining purposes, and for which Grant was to pay. By an amended supplementary contract of June 1, 1906, Grant admitted an indebtedness to appellant of \$2,239.22, which he agreed to pay in monthly installments of \$100, and in case of his failure to pay two monthly installments the leasehold and property should be treated as sold to appellant for its debt of \$2,239.22, as above related. Grant having defaulted in his payments, appellant took possession of Grant's leasehold and property on October 6, 1906, and proceeded to operate the mine. On June 29, 1907, Grant sued appellant, charging that the amended contract of June 1, 1906, had been procured by fraud, and that it had only been intended to give appellant a lien for its advancements. In that case Grant was successful in the circuit court, whereupon appellant appealed and superseded the judgment by a bond dated July 5, 1909. The judgment of the circuit court was affirmed by this court on February 15, 1910 (136 Ky. 751, 125 S. W. 165), and appellant's petition for a rehearing was overruled on April 28, 1910. On June 9, 1910, this action was instituted upon the supersedeas bond, for \$4,500 damages based upon appellant's act of obtaining "an extension of time in which to file a petition for rehearing and in that way caused said supersedeas to remain in force until April 28, 1910." Grant recovered a judgment for \$2,500, and the company appeals, alleging two grounds for a reversal: (1) That the trial court improperly permitted Grant to file an amended petition at the end of his evidence; and (2) that it again erred in refusing appellant a continuance after the amended petition had

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been filed. There is no bill of exceptions here. Appellant insists, however, that the errors complained of can properly be raised in the absence of the evidence.

[1] 1. The amended petition specified, in appropriate terms, the items of appellee's damage by showing the amount of coal he could have mined during the period stated in the original petition, and the profit thereon. Appellant insists this was a variance and that the court should have rejected the amendment. We do not so consider it. Both petitions were based upon appellee's loss in his mining business by reason of appellant's keeping him out of the possession of his property; the amendment being only a more specific statement of the loss. The original petition was sufficient under the rule that damages, which necessarily and generally result from the wrongful act which is the subject of the action, may be recovered under a general claim for damages. *Moore v. Linne-man*, 143 Ky. 231, 136 S. W. 232; *Perkins v. Ogilvie*, 148 Ky. 314, 146 S. W. 735; *Smith v. Perry*, 13 Ky. Law Rep. 683. That being true, an amendment specifying the items of damage did not constitute a departure from the original cause of action, and was properly admitted under section 134 of the Civil Code of Practice, which authorizes the trial court, at any time, to permit a pleading to be amended in the furtherance of justice.

[2] 2. Neither did the trial court err in overruling appellant's motion for a continuance, upon the filing of the amended petition, for the reason that no ground was shown for a continuance. If appellant was surprised by the filing of the amendment and was not prepared to meet it by reason of the absence of witnesses, or for any reason, the motion for a continuance should have been supported by an affidavit showing the ground therefor, and if for the absence of witnesses it should have complied with section 315 of the Civil Code. Appellant offered no affidavit in support of its motion for a continuance. After an action has been regularly called for trial, be it either an ordinary or an equitable action, the verbal statement that a party is not ready for trial is no ground for a continuance. If his opponent calls for an affidavit showing his grounds for a continuance, it is the trial court's duty to require it in order that the showing of diligence may be passed upon, and that it may be met by other affidavits if they be deemed advisable. And if the loser fails to support his motion for a continuance with the proper affidavit, there is nothing to show any error upon the part of the trial court in overruling his motion, and consequently, nothing for this court to review. In speaking of section 136 of the Code, in *Troendle Coal Co. v. Morgan Coal C. & M. Co.*, 114 S. W. 313, we said: "Under this provision, when an amended plead-

ing is filed on the eve of the trial, or during the trial, or out of the regular order of procedure, the adverse party, if he desires a continuance, should inform the court by affidavit or otherwise why the amended pleading is of such a nature as that he cannot be ready for trial in consequence thereof, so that the court may know the reasons for asking a continuance and rule intelligently thereon. As counsel for defendant did not observe this practice, we are not disposed to say that the court erred in refusing to grant a continuance upon this ground."

Judgment affirmed.

BIG BRANCH COAL CO. v. SANDERS.  
(Court of Appeals of Kentucky. May 21, 1914.)

1. MASTER AND SERVANT (§ 150\*)—INJURIES TO SERVANT—DUTY TO WARN.

Where the master's foreman inspected the place in which plaintiff was at work and discovered a danger, the master is liable for his failure to report the danger to plaintiff, even though plaintiff, who was enlarging the tunnel in a mine, was hurt by the fall of slate over coal which he had removed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.\*]

2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In a personal injury action by a coal miner, who claimed that defendant's foreman had discovered the danger in the entry in which he was working, but failed to report it, and the evidence on that issue was sharply conflicting, the question is one for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

3. MASTER AND SERVANT (§ 189\*)—INJURIES TO SERVANT—LIABILITY OF MASTER.

Where the foreman of the operator of a mine, who had authority to discharge any one employed therein, was negligent, the operator is liable to servants of contractors, who mined the coal under an arrangement whereby they furnished the labor, and the operator of the plant power and machinery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 427-435, 437-443; Dec. Dig. § 189.\*]

4. DAMAGES (§ 132\*)—PERSONAL INJURIES—MEASURE.

An award of \$1,000 in favor of plaintiff whose leg was broken, where he was confined for a month and by reason of the break one leg was rendered shorter than the other, is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Pike County.

Action by Joel Sanders against the Big Branch Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Auxler, Harman & Francis, of Pikeville, for appellant. Childers & Childers, of Pikeville, for appellee.

HANNAH, J. Joel Sanders was injured by falling slate in the mine of the Big Branch

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Coal Company in Pike county, and instituted this action in the Pike circuit court against the coal company to recover damages for his injury. Upon a trial thereof, the jury returned a verdict in his favor, and the coal company appeals.

There are two parallel passages in the mine, running back into the hill; the right passage being the main entry, and the left, an air course. The main entry and the air course are connected at intervals by passages known as breakthroughs, so that between the main entry and the air course is a series of blocks of coal, each bounded on one side by the main entry, on another side by the air course, and on the other two sides by breakthroughs. A cross-entry, known as Fifth Left, was turned off of the air course, to the left and at right angles to the air course, immediately opposite one of these breakthroughs; and the coal company then proceeded to enlarge the breakthrough opposite the mouth of the cross-entry so turned off, so that the mules used in drawing the coal buggies could pass from the main entry through this breakthrough and across the air course and into the Fifth Left cross-entry, thus virtually converting this breakthrough into a part of the Fifth Left cross-entry. In doing this work, it became necessary, in order that a track might be laid from the main entry into the Fifth Left cross-entry, to round off a corner of the block of coal between the main entry and the air course at the point where the particular breakthrough mentioned connected with the main entry. A machine operator undercut the coal at that point, and the plaintiff and a companion had shot the coal down and were engaged in loading it into a mine car standing on the train in the main entry, when a piece of slate fell upon plaintiff and injured him. The slate had previously been taken down from the roof of the main entry in order to make the entry high enough for the mules used in drawing the coal buggies; but, as the breakthroughs were for ventilating purposes only, it was not necessary to take down the slate from the roofs thereof, and in this particular breakthrough, the slate had not been taken down. The slate that fell upon plaintiff came partly from the roof of the breakthrough and partly from the place from beneath which the coal had just been removed.

It was shown in evidence that while plaintiff was working there, after the coal had been shot down and a short time before he was injured, the foreman of the mine visited the place where plaintiff was working, and sounded the top. And, it was also shown that immediately after plaintiff was injured, and while he was lying on the ground, this mine foreman came up and stated that he learned when he sounded the top that the slate was loose, and had intended to tell them about it, or to have it taken down, but forgot to do so. Plaintiff claimed that as

the foreman sounded the top and did not say anything about it being unsafe, he assumed that it was safe and proceeded with his work, relying upon the inspection which the foreman had made.

[1] 1. It is contended by appellant that this case falls within and is controlled by the rule that the master is not responsible for a danger which the servant creates in the progress of the work. And, had it not been shown that the mine foreman visited the working place and sounded the roof, and had the master been charged with no duty to inspect the place in question, the case might fall within the rule contended for by appellant. But it is plaintiff's theory, supported by sufficient evidence to authorize its submission to the jury, that the mine foreman undertook to make an inspection of the working place, that upon making that inspection the mine foreman became aware that the place was unsafe, and that he failed to disclose this knowledge to the servant. There is some evidence tending to show that it was the duty of the mine foreman under the custom of the mine to inspect the place where plaintiff was working; but, whether the foreman was under any duty to inspect the place where plaintiff was injured at the time he was injured, or not, when he did inspect it, the master was charged with the knowledge thus acquired by the mine foreman of the dangerous condition of the working place, and for the failure of the mine foreman to impart this knowledge, or to take such other steps as would have relieved it from the consequences and responsibilities imposed by reason of such knowledge, the master is liable. Where the master knows of a danger, he is required to impart the information to the servant; and for his failure so to do he is liable, unless the danger is one that the servant in the exercise of ordinary care could discover. *Ballard & Ballard v. Lee's Adm'r*, 131 Ky. 412, 115 S. W. 732.

[2] It is true that the evidence upon the issue as to whether the mine foreman did actually make this inspection and acquire knowledge of the danger was sharply contradicted; but that was a matter peculiarly for the jury.

[3] 2. It was shown in evidence that plaintiff was working for Jordan Ratliff and John Bryan; that they had a contract with the defendant company whereby they delivered the coal into buggies and drove entries for a stipulated price, paying plaintiff and one or more other men out of the contract price, the earnings of their assistants being credited upon the books of the company, and payment therefor being made by the company, that the company furnished machines, power, and equipment, and that the mine foreman had authority to discharge any one employed in the mine. Defendant company pleaded in its answer that plaintiff was the servant of an independent contractor; but

this matter has not been pressed upon appeal. It has repeatedly been held that the operator of a mine cannot escape liability for negligence by such an arrangement. *Employers' Indemnity Co. v. Kelly Coal Co.*, 156 Ky. 74, 160 S. W. 914; *Interstate Coal Co. v. Trivett*, 155 Ky. 795, 160 S. W. 731.

[4] 3. Appellant also contends that the verdict is excessive. Plaintiff's leg was broken; he was confined for a month; and the injured leg by reason of the breaking was rendered shorter than the other. The jury's finding was \$1,000. It may be liberal, but we cannot say it is so altogether disproportionate to the injury as to indicate passion or prejudice; and it will not be disturbed.

Judgment affirmed.

### KENTUCKY MIDLAND COAL CO. v. VINCENT.†

(Court of Appeals of Kentucky. May 22, 1914.)

#### 1. EVIDENCE (§ 598\*)—MASTER AND SERVANT (§ 286\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a mine employe's action for injuries, caused by an elevator starting while he was passing through it to the other side of the shaft, the testimony of three witnesses, including plaintiff, that they heard no warning by the foreman that a signal to start the elevator was about to be given made a question for the jury and supported a verdict for plaintiff, though a larger number of witnesses testified that such warning was given.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598; Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

#### 2. TRIAL (§ 253\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In a mine employe's action for injuries, sustained by the starting of an elevator while he was passing through it, where there was uncontradicted evidence that a coemploye warned plaintiff that a signal to move the elevator was about to be given, an instruction to find for plaintiff if the elevator was suddenly raised by the boss without notice or warning and the refusal of an instruction to find for defendant, even though no warning was given by the boss, if it was given by the coemploye, was error, as the jury might well have believed from the instruction given that they could not consider the warning given by the coemploye.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

#### 3. MASTER AND SERVANT (§ 133\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—WARNING.

If a mine employe, injured by the starting of an elevator while he was passing through it, was warned that a signal to start the elevator was about to be given, it was immaterial whether this warning was given by one in authority or by a coemploye.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 268; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Muhlenberg County.

Action by L. A. Vincent against the Kentucky Midland Coal Company. Judgment

for plaintiff, and defendant appeals. Reversed, with directions.

Taylor & Eaves, of Greenville, and Browder & Browder, of Russellville, for appellant. Newton Belcher and Belcher & Sparks, all of Greenville, for appellee.

**TURNER, J.** This is an action for personal injuries received by appellee while at work in appellant's mine. He recovered a judgment for \$2,000, and the company appeals.

Appellant operates in connection with its mine a shaft which is about 180 feet deep, and in this shaft there is an elevator or loft divided into two divisions called the north and south cages; this elevator is operated by machinery at the surface, and is so arranged that when one cage goes up the other comes down; the cages are about 4 or 5 feet wide and 10 or 12 feet long, and have floors which, when they are at the bottom, are level with the car tracks in the mine, so that coal cars may be put on or removed from the cages. Appellee and one Gish were in charge of the loading and unloading of these cages at the bottom of the shaft, and were known as bottom cagers. Signals are given from the bottom for the lowering or raising of these cages by pulling a bell cord at the bottom of the shaft, which rings a bell in the engine room above.

The cages were known as the north and south cages, and the south cage is used for the purpose of taking employes in and out of the mine, as well as for other purposes.

The duties of appellee and Gish required them to work on both the north and south sides of these cages, and the only passageway from one side to the other when a cage was at the bottom was through the floor of the cage.

Appellee was injured late in the afternoon at about "quitting time," and a number of the employes had gathered there for the purpose of being taken out of the mine by the cage. The foreman, Hughes, along with other workmen in the mine, was there. Vincent was at work on the north side, where the cage was just prior to the time that Hughes gave the signal for the south cage to come down and take the men out, which necessarily meant that the north cage would start up as the south cage started down.

Appellee was injured while in the north cage by the striking of his head against the timbers, which knocked him down, whereby his legs were caught, and one broken near the hip, and the other mashed or bruised about the ankle.

It is the contention of appellee that the foreman gave the signal without notice or warning to him, and that he had no other way to get from the north to the south side of the shaft, except through the floor way of the north cage. And it is the contention of appellant that appellee was given full notice

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 19, 1914.

and warning not only by the foreman, but by his co-worker Gish, before giving the signal for the cage to move, and that appellee, knowing the cage was about to move or was moving, undertook to go in one end of it and get out at the other before it reached the timbers above, while it was moving.

[1] The appellant earnestly contends that it was entitled to a peremptory instruction, but to this we cannot agree. Three witnesses, including appellee, who were present at the time, and two of whom were very near the foreman, testified, in substance, that if any warning was given appellee by the foreman they did not hear it, and that they were in position to have heard it. It is quite true that a larger number testified that such warning was given by the foreman, but it is not the province of this court to usurp the functions of a jury and say that the jury should have believed one set of witnesses as against the other, although one set gave only negative evidence, and the other positive evidence. And for the same reason the contention that the verdict is not supported by the evidence and is flagrantly against the evidence will not be sustained.

[2] The court instructed the jury, in substance, upon the question of warning or notice, that, if they believed that the plaintiff "had occasion to and did pass over one of the said cages, and that, while he was doing so, the defendant company's bank boss negligently caused said cage to be suddenly raised or lifted without any notice or warning to plaintiff," they must find for the plaintiff.

On the trial the appellant asked the court to give an instruction, which was refused, that, even if the notice or warning was not given by the bank boss or foreman, yet, if they believed from the evidence that said notice or warning was given by Gish, then they must find for the defendant.

The uncontradicted evidence of Gish, supported by one or more witnesses, is that he (Gish), before the mine foreman is alleged to have warned the plaintiff, told him to stay back, and warned him that the signal to move the cage was going to be given. This statement is not denied even by the plaintiff.

Under the instructions as given, the jury might well have believed, and doubtless did, that the mine foreman or bank boss alone was authorized to warn the plaintiff, and that any warning given by Gish was not to be considered by them.

[3] The essential thing is, of course, whether a warning was given which reasonably notified the plaintiff that the signal was about to be given and that the cage was about to move; it cannot be material who gave this warning, and there seems to be no reason why it cannot be given by one person as well as by another, whether he be in authority or not.

We are of opinion that the court erred in not making its instruction embrace a warning given by any person to the plaintiff. We perceive no other error; but, for the error indicated, the judgment is reversed, with directions to grant appellant a new trial with further proceedings consistent herewith.

**BEST v. CITY OF ST. JOSEPH.**  
(No. 10,647.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**1. JUDGMENT (§ 251\*)—ACTS OF NEGLIGENCE—PLEADING AND PROOF—CONFORMITY.**

Plaintiff may not recover for an act of negligence not included in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

**2. MUNICIPAL CORPORATIONS (§ 816\*)—SIDEWALKS—DEFECTS—VARIANCE.**

Where plaintiff, who was injured by falling on a sidewalk, alleged that the walk was dangerous by ice forming in lumps and ridges thereon, and the proof showed such defect and that it had remained so long enough to enable the city to know of it by ordinary care, and plaintiff's right to recover was based in the instructions on a finding of such facts, a contention that plaintiff was allowed to recover on the ground that the walk itself was rough and uneven having been constructed of cement blocks laid loosely on the ground with large and irregular cracks between them, which the evidence also tended to show, was unsustainable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.\*]

**3. MUNICIPAL CORPORATIONS (§ 822\*)—INJURIES TO PEDESTRIANS—DEFECTIVE SIDEWALKS—INSTRUCTIONS.**

In an action for injuries to a pedestrian by falling on ice and snow on a city sidewalk, an instruction that before the jury could find for plaintiff they must believe that the ridges and lumps of snow and ice constituted an obstruction, rendered the walk dangerous, and were the direct cause of the alleged fall, necessarily included the defense that the defective condition of the walk itself, and not the snow and ice, caused the injury, and it was not error to omit to charge that the jury, in order to find for plaintiff, must also find that the defective condition of the walk as constructed did not cause the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**4. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST—INSTRUCTION GIVEN.**

It is not error to refuse requests to charge which are covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**5. APPEAL AND ERROR (§ 171\*)—REVIEW—ASSUMED FACTS.**

Where an action for injuries on a defective sidewalk was tried throughout on the theory that the fact that the walk was in the city and was a city sidewalk was not a disputed issue, a judgment for plaintiff would not be reversed because there was no testimony that the walk in question was located in the city.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Carrie Best against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank B. Fulkerson, L. E. Thompson, and Herman Hees, all of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

**TRIMBLE, J.** Plaintiff sued the city of St. Joseph for injuries received from a fall upon a sidewalk in said city. Her petition charged that at the point in question rough, knotty, uneven, and slippery ridges of ice had formed and remained for a long time prior to the accident and had rendered the sidewalk dangerous and unsafe. There was evidence tending to fully support every issue raised by the petition, and the jury found a verdict for her in the sum of \$1,000.

Plaintiff's evidence also showed that the walk itself was rough and uneven, having been constructed of blocks of cement laid loosely upon the ground with large and irregular cracks between them. It is defendant's contention that it was the defectively constructed sidewalk that caused the injury, and not the accumulation of snow and ice in ridges or hummocks; and that, the petition having charged one specification of negligence, plaintiff ought not to be allowed to recover upon another and different ground.

[1, 2] There is no doubt that a plaintiff should not be allowed to recover for an act of negligence not included in the petition. But in our opinion this was not done in this case. Plaintiff did not plead one ground and recover upon another. She charged that the sidewalk was rendered dangerous and unsafe by reason of the ice forming in lumps and ridges, and the proof showed, or tended to show, that such was the case, and that it had remained thus for a sufficient length of time to have enabled the city to know of it in the exercise of ordinary care. Her instructions to the jury predicated her right to recover solely upon the finding of such facts by the jury.

[3] It was not necessary for plaintiff's instruction No. 1 (complained of by defendant) to embrace the defense that the defective condition of the sidewalk itself, and not the snow and ice, caused the injury, because the instruction by its very terms necessarily included it. The instruction told the jury that, before plaintiff was entitled to recover, the jury must believe that the ridges, knots, and lumps of snow and ice, if any, constituted an obstruction, rendered the walk dangerous and unsafe, and was the direct and immediate cause of the alleged fall. Before a verdict for plaintiff could be returned, the jury were required to find that there was an accumulation of snow and ice forming an obstruction on the sidewalk rendering it dangerous and that the obstruction caused the fall. It was therefore not only unnecessary, but might have been misleading, to tell the jury that they must also find that the defective condition of the walk, as constructed, did not cause her to fall; for, if the obstruction of snow and ice was the proximate cause of the fall, the city could not escape liability by showing that the dangerous condition of the walk was increased by its faulty con-

struction. In other instructions the jury were told that the mere fact that plaintiff fell and was injured at the point in question did not render defendant liable or entitle plaintiff to recover; also that the burden was on plaintiff to show that the walk was in a dangerous or defective condition by reason of snow and ice having been permitted to accumulate and remain thereon in uneven ridges or masses.

[4] The court did not err in refusing defendant's instruction lettered A, since it was fully covered by defendant's given instructions numbered 5 and 9.

[5] It is true there is no witness who testifies affirmatively that the point in question on Charles street was in the city of St. Joseph, Mo. And while we cannot consider the alleged admission of the attorneys in the opening statement that the place was inside the city (since the opening statement was not preserved in the record), yet it is plainly apparent from the questions and answers, the instructions asked by and given for both sides, and from the manner in which the case was tried, that the fact that the walk was in the city and was a city sidewalk was not a disputed issue, but was assumed by all parties. We are therefore not justified in reversing and remanding the case upon this ground.

There being no error in the record, the judgment is affirmed. All concur.

LEWIS et al. v. SMITH et al. (No. 11,089.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

REPLEVIN (§ 123\*)—REPLEVIN BOND—DISCHARGE OF SURETIES—ACTS CONSTITUTING.

Where defendant obtains a judgment in replevin against plaintiff and the sureties on the replevin bond, and accepts in payment thereof a check signed by a corporation by plaintiff as president, and obtains the money thereon, and then notifies the sureties that they are released, he thereby releases the sureties, though afterwards compelled to refund the money to the corporation, where, at the time of the rendition of the judgment, the plaintiff was solvent, so that the sureties could protect themselves, and subsequently he became insolvent.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 481-486; Dec. Dig. § 123.\*]

Appeal from Circuit Court, Miller County; J. G. Slate, Judge.

Action by Emmett M. Lewis, individually and as administrator of the Peterle Drug Company, a partnership estate, against George E. Smith and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. S. Pope and W. C. Irwin, both of Jefferson City, and W. S. Stillwell, of Tusculumbia, for appellants. L. N. Musser, of Kansas City, and H. L. Donnelly, of Tusculumbia, for respondents.

JOHNSON, J. In 1908 the defendant George E. Smith prosecuted an action in replevin in the circuit court of Miller county against Emmett M. Lewis, as administrator of a partnership estate. Judgment was rendered against Smith and the sureties on his replevin bond, the present defendants Walker, Koenig, and Austin. Lewis elected to take the value of the property, which was assessed at \$450, and the judgment was rendered accordingly against Smith and his sureties. On October 8, 1908, Smith gave Lewis a check on a bank in St. Louis for \$463, the amount of the judgment and interest. The check was signed, "St. Louis Charcoal Company, by George E. Smith, President." Smith was the president of that company, and had authority to draw checks in the name of the company, but had no authority to use its funds to pay his individual debts. Plaintiff, who is a lawyer, accepted the check and deposited it for collection in a bank in Miller county, and in due time it was presented to the St. Louis bank and paid. The proceeds came to the hands of Lewis, who accounted for them as administrator and distributed them under the orders of the probate court. Lewis also satisfied the judgment against Smith and his sureties, and the sureties were informed that the judgment had been paid by Smith, their principal. At the time they signed the replevin bond, and when judgment was rendered against them, Smith was solvent, and the evidence shows the sureties were in position to protect themselves against loss, but, relying upon the reported payment of the judgment, they considered themselves absolved from liability, and made no effort to protect themselves. Afterward Smith became insolvent and retired from the presidency of the charcoal company. His successor discovered that he had paid his individual debt out of the funds of the corporation, and caused a suit to be brought by the corporation against Lewis to recover the proceeds of the check. This was ten months after Lewis had cashed the check, and long after he had distributed its proceeds among the creditors of the partnership estate which was insolvent. The charcoal company lost the suit in the circuit court; but on appeal we reversed the judgment and remanded the cause, on the ground that, since the check was drawn on the account of the corporation by the president for the payment of his individual debt, "the face of it carried notice of its irregular and illegal character, and, if used by the creditor, he runs 'the risk of being called upon to restore it.'" Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716. After remanding the cause, judgment was rendered against Lewis in the circuit court, and he was thereby compelled to restore the proceeds of the check to the charcoal company. He brought this action in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the nature of a bill in equity to set aside the satisfaction of the judgment. After hearing the evidence, the court rendered judgment for defendants, and plaintiff appealed.

The real issue in the case is whether or not the acceptance of the check operated as a release of the sureties. Plaintiff testified that when he accepted the check he knew of its infirmity, and that he did not release the judgment until after he received the proceeds and became satisfied that the corporation would make no point of the misuse of its funds. We think plaintiff voluntarily assumed all the risk of being called upon to restore the money to the corporation, and discharged the sureties whose character, as such, had not been altered by the fact that judgment had been rendered against them. *Rice v. Morton*, 19 Mo. 264; 23 Cyc. 1477.

We held, in *Hogan v. Kaiser*, 113 Mo. App. 711, 88 S. W. 1128, that the mere acceptance by the creditor of a worthless check given by the principal obligor will not discharge the sureties when it is not shown and does not appear that the sureties were injured. *Bank v. Lillard*, 55 Mo. App. 675; *Bank v. Danckmeyer*, 70 Mo. App. 168. But this is not that kind of case. Here the creditor, with notice of the infirmity in the check, accepted it and received and used its proceeds, knowing that at some future time he might be called upon to refund them. He did this without the knowledge or consent of the sureties, and informed them by releasing the judgment that he had been fully paid, and by such acts lulled them into a feeling of security. The rule is well settled that, "when a creditor who knows that one occupies the relation of surety to the principal debtor notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken, and which he otherwise would have taken, he is discharged." *Bank v. Lillard*, 55 Mo. App. 675; *English v. Seibert*, 49 Mo. App. 563; *White v. Smith*, 174 Mo. loc. cit. 203, 73 S. W. 810; *Lakenan v. Trust Co.*, 147 Mo. App. loc. cit. 58, 126 S. W. 547. The present case falls under this rule, and the circuit court committed no error in holding that the sureties were discharged.

Affirmed. All concur.

#### DAVIS v. CREAMER. (No. 11,092.)

(Kansas City Court of Appeals. Missouri. May 4, 1914.)

#### 1. JUSTICES OF THE PEACE (§ 36\*)—JURISDICTION—ACTIONS INVOLVING TITLE TO REAL PROPERTY.

An action by a vendee to recover of a vendor a payment on the purchase money according to a contract of sale between them, which the vendor had abandoned, did not involve the

title to real estate, and hence the justice court had jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 83-87; Dec. Dig. § 86.\*]

#### 2. INTEREST (§ 66\*)—RECOVERY—ALLEGATIONS AS TO INTEREST.

When interest is not asked in the petition, none should be assessed—not even from the date of the institution of the suit.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 147; Dec. Dig. § 66.\*]

Appeal from Circuit Court, Maries County; J. G. Slate, Judge.

Action by Edwin Davis against T. J. Creamer. From a judgment for plaintiff, defendant appeals. Affirmed, on condition.

W. S. Pope, of Jefferson City, and John Terrill, of Vienna, for appellant. Leslie B. Hutchison, of Vienna, and John A. Watson, of Rolla, for respondent.

**JOHNSON J.** This suit was begun in a justice court to recover the sum of \$100 plaintiff alleges he paid on the purchase price of a farm defendant sold him and afterward refused to convey. A trial in the circuit court, where the cause was taken by appeal, resulted in a verdict and judgment for plaintiff, and defendant appealed.

In September, 1912, the parties entered into an oral contract, by the terms of which defendant sold a farm in Maries county to plaintiff for \$8,000, and agreed to execute and deliver a deed conveying the fee-simple title and to give possession of the farm to plaintiff on or before the 1st day of the following January. Plaintiff agreed to pay \$100 of the purchase price at once, and the remainder of \$5,900 when the deed was delivered and possession of the land given. The initial payment was made as agreed, but before the date fixed for the consummation of the sale defendant informed plaintiff of his purpose to abandon the contract unless plaintiff would agree to a substantial alteration of its terms. The parties do not agree about the substance of the proposed modification. Defendant states he demanded a further payment on the purchase price, while plaintiff insists that he demanded a larger price for the farm. Plaintiff refused to alter the contract, demanded the return of the down payment, and, on the refusal of that demand, began this suit.

[1, 2] Defendant is in error in the view that the action did not fall within the jurisdiction of a justice court because it involved title to real estate. The same point was before us in *Adams v. Ellis*, 86 Mo. App. 343. We held the suit was "to recover money paid on a contract which defendant is charged with abandoning. The fact that it was necessary to prove that defendant had sold the land to another did not involve a question of title. It was merely a matter of evidence in proof of a fact." The action is for money had and

received, and the proof of defendant discloses a lack of even a semblance of an excuse for keeping the money which was paid to him pursuant to the oral contract. He admits he refused to carry out the terms of that contract, and it is too plain for argument that he could not repudiate the contract and still be entitled to retain its fruits. The demurrer to the evidence was properly overruled. No error is found in the instructions, except in one particular; i. e., no claim of interest was made in the petition, but the instructions authorized the assessment of interest from the date of demand, and interest was allowed in the verdict and judgment. This was error. Where interest is not asked in the petition, none should be assessed—not even from the date of the institution of the suit. *Van Riper v. Morton*, 61 Mo. App. 440; *Shockley v. Fischer*, 21 Mo. App. 551. Counsel for plaintiff confess the error, and offer in their brief to file a remittitur of the amount of the interest. This may be done. *Shockley v. Fischer*, supra.

On condition that a remittitur of the interest be filed within ten days, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded. All concur.

TRIMBLE et al. v. STAMPER. (No. 10,408.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

1. STATUTES (§ 289\*)—OF SISTER STATES—PROOF.

The statutes of a sister state must be proved as prescribed by Rev. St. 1909, §§ 6281, 6282, by the printed statute books of the sister state, and parol proof of a statute of a sister state is inadmissible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.\*]

2. JUDGMENT (§ 942\*)—FOREIGN JUDGMENT—ACTION THEREON.

A plaintiff, suing on a foreign judgment rendered by a statutory court of limited jurisdiction, must, where defendant pleads the invalidity of the judgment, show that the court of the sister state had jurisdiction of the subject-matter and of the person of defendant, and, until he does so, the judgment is not entitled to full faith and credit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1781; Dec. Dig. § 942.\*]

Appeal from Circuit Court, Platte County; Alonzo D. Burnes, Judge.

Action by N. H. Trimble and another, partners, as Trimble Brothers, against J. C. Stamper. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. D. Gresham, of Platte City, and R. A. Chiles, of Mt. Sterling, Ky., for appellants. Wilson & Wilson, of Platte City, and Hughes & Whitsett, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff sued upon a foreign judgment. The transcript thereof discloses that the judgment purports to have been rendered by the Montgomery quarterly court of Montgomery county, Ky. Defendant

pleaded that the judgment was invalid; that it was obtained by fraud; that defendant had a good defense thereto, but had been prevented from presenting the same through fraud and deceit. No attack or objection was made to this defense. A reply was filed denying these allegations, a jury was waived, and the cause was tried by the court. Plaintiffs introduced the transcript of the judgment and rested. Thereupon defendant, without objection, introduced his testimony in support of the issues raised by the answer, and plaintiffs offered testimony in rebuttal. The court found for defendant. No declarations of law nor findings of fact were asked or given.

[1, 2] Defendant is a resident of Platte county, Mo. The foreign judgment purported to have been rendered by the Montgomery quarterly court. Kentucky is a common-law state, and such court must be a statutory court, and not a common-law court of general jurisdiction. Being a statutory court, its jurisdiction is limited and defined by the statute creating it. There was no proof of such statute, nor of the jurisdiction of said court. Oral proof was offered, but this was excluded by the court. The statutes of another state cannot be proved in this manner. Sections 6281, 6282, R. S. Mo. 1909. The statute should be introduced. *Smith v. Aultman*, 120 Mo. App. 462, 96 S. W. 1034; *Lee v. Railroad*, 195 Mo. 400, 92 S. W. 614. It was incumbent upon plaintiffs to show, not only that a judgment was rendered in that court, but that said court had jurisdiction of the subject-matter and of the person of the defendant. The judgment of a foreign court of statutory limited jurisdiction is not entitled to full faith and credit unless these matters are shown. *Thomas v. Robinson*, 3 Wend. (N. Y.) 267; *Kelley v. Kelley*, 161 Mass. 111, loc. cit. 117, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389; *Hofheimer v. Losen*, 24 Mo. App. 652, loc. cit. 659. The fact was overlooked that the judgment was rendered by a foreign court of inferior statutory jurisdiction not proceeding according to the course of the common law. In such case nothing can be presumed in its favor. A reading of the transcript discloses that jurisdiction of the person does not affirmatively appear on the face of the record.

There are other reasons why the judgment of the trial court should be affirmed, but the foregoing are sufficient. Its affirmance is therefore ordered. All concur.

LINDSAY v. SMITH. (No. 10,919.)  
(Kansas City Court of Appeals. Missouri.  
March 2, 1914. Rehearing Denied  
April 6, 1914.)

1. APPEAL AND ERROR (§ 1054\*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

Where evidence was admissible on one cause of action alleged in the petition, but the court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.; Key-No. Series & Rep'r Index

trying the case without a jury ignored the evidence in determining the other cause of action alleged, the admission of the evidence was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.\*]

**2. DEEDS (§ 112\*)—DESCRIPTIONS—REFERENCE TO MAPS OR PLATS.**

A reference to a map or plat in the description of a lot conveyed incorporates the map or plat in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 323, 324; Dec. Dig. § 112.\*]

**3. VENDOR AND PURCHASER (§ 343\*)—REPRESENTATIONS AS TO QUANTITY OF REAL ESTATE SOLD.**

A purchaser of a lot from a vendor, who has made and recorded a plat, as required by Rev. St. 1909, § 10,290, requiring one platting land to make out an accurate map thereof, setting forth the parcels by boundaries, course, and extent, may rely on the correctness of the recorded plat and assume as true the facts recited therein as to the boundaries and size of the lots, and statements therein of dimensions are covenants of warranties, and in case of a shortage the purchaser may recover therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1023-1029; Dec. Dig. § 343.\*]

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Action by D. V. Lindsay against F. W. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

McBaine & Clark, of Columbia, for appellant. Harris & Finley, of Columbia, for respondent.

JOHNSON, J. Plaintiff sued to recover damages for an alleged deficiency in the area of land defendant conveyed to him by warranty deed. The cause pleaded in the first count of the petition is a breach of warranty, and in the second false and fraudulent representations respecting the acreage of the tract. A jury was waived, and, after hearing the evidence, the court found for plaintiff on the first count, and for the defendant on the second. Judgment was rendered accordingly, and defendant appealed. The judgment is founded on the conclusion that the land was warranted in the deed to contain 19½ acres, while, in fact, it fell 2 acres short.

The land in question is part of a larger tract platted by defendant as an addition to the city of Columbia under the name of "F. W. Smith's subdivision of part of southwest quarter of section 14, township 48, range 13." The plat filed August 9, 1910, was made, acknowledged, and filed by defendant in accordance with the provisions of chapter 97, Rev. Stat. 1909, and purported to give an accurate map of the addition, "particularly setting forth and describing: First, all parcels of ground within the addition reserved for public purposes by their boundaries, course, and extent; and, second, all lots for sale by numbers, and their precise length and width." Thirty-seven lots are shown, and

their respective positions, dimensions, and areas are given. Our concern is with lots one (1) and fifteen (15) which, together, occupy the entire north end of the addition to a width of approximately 7 chains. Lot one (1) is in the northeast corner of the addition, and is stated to contain 6.5 acres, and to be bounded by lines of the following respective lengths: On the east 7.10 chains; on the north 8.63 chains; on the west 7 chains; and on the south 9.50 chains. Immediately west is lot fifteen (15), stated on the plat to contain 13¼ acres. The lengths of the boundaries of this lot are also shown, and it may be said that the stated dimensions of both lots indicate a total area of 19½ acres. The only monument shown on the map or referred to in the appended description is the center of the section, from which point the survey was begun. With the exception of the south end of the west boundary, the addition is shown to be surrounded by streets or roads. A street just south of lot one (1) penetrates the addition from the east a distance of 10 chains or more, turns south, and continues on to the south boundary, where it enters one of the mentioned roads.

Following the platting of the addition, defendant on January 7, 1911, entered into a written contract with plaintiff, by the terms of which he sold and conveyed the lots in controversy for the consideration of \$4,250. The description in the contract was "lots Nos. one (1) and fifteen (15) of F. W. Smith's subdivision of part of southwest quarter of section fourteen (14), township forty-eight (48), range thirteen (13) west, containing in all 20 acres."

It will be observed that the agreed consideration was at the rate of \$212.50 per acre. In a letter accompanying the delivery of the abstract of title, defendant spoke of having discovered that the tract contained 19½ acres, instead of 20 acres, as stated in the contract, and said: "We will adjust this when we settle." Afterward defendant executed, acknowledged, and delivered to plaintiff a general warranty deed, in which, for an expressed consideration of \$6,000, he conveyed the title to the lots described in the deed as "lots one (1) and fifteen (15) of F. W. Smith's subdivision of part of southwest quarter of section fourteen (14), township forty-eight (48), range thirteen (13) west, as same appears of record in the office of recorder of deeds in and for Boone county, Missouri."

The actual consideration paid by plaintiff was \$4,196.87, or at the rate of \$212.50 per acre for a tract containing 19½ acres. Afterward plaintiff had the lots surveyed, and inaccuracies were discovered in the dimensions shown on the plat which reduced their actual area to a fraction less than 17½ acres. The court, however, put the shortage at 2 acres,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

and awarded damages on a valuation of \$212.50 per acre.

[1] We are indebted to counsel for briefs and arguments presenting the respective positions and contentions of the parties with singular clearness and ability. Plaintiff concedes the point of defendant that as to the cause on which the judgment was recovered—I. e., a breach of warranty—the evidence of prior or contemporaneous oral or written agreements was inadmissible, since such agreements became merged in the deed which must be accepted as the final and exclusive contract between the parties. *Hendricks v. Vivion*, 118 Mo. App. 417, 94 S. W. 318, and cases cited. But the evidence against which the point is directed was relevant to the cause pleaded in the second count, was properly admitted at a time when that cause was under judicial inquiry, and, since it appears that the court ignored it in solving the issues involved in the first count, its admission cannot be regarded as prejudicial to any right of defendant.

[2] Point is made by defendant and conceded by his adversary "that reference to a map or plat in the description of a lot or tract of ground incorporates such map or plat in the deed"—citing *Shelton & Heatherly v. Maupin*, 16 Mo. 124; *Dolde v. Vodicka*, 49 Mo. 98; *Nichols v. Furniture Co.*, 100 Mich. 230, 59 N. W. 155; *Bank v. Stewart*, 93 Va. 447, 25 S. E. 543; *Quade v. Pillard*, 135 Iowa, 359, 112 N. W. 646; *Railroad v. Antalics*, 81 N. J. Law, 685, 80 Atl. 469; *Neumeister v. Goddard*, 125 Wis. 82, 103 N. W. 241. Other points made by defendant and conceded by plaintiff thus are stated in the brief of the latter: "Where a description in a deed contains a statement of quantity, courses, and distances and monuments, in case of a conflict, the monuments will control, and in such case proof that distances or quantities are short does not prove that the grantee does not get what his deed calls for. Where the description in a deed shows a sale in gross, and the grantee gets all the land called for, there is no warranty of quantity in the absence of a special warranty, even though the quantity stated is not contained in the land actually described. Where land is described as bounded by the lands of others, as called for in such description, the lines of the land of the adjoining owners will control a call for distance or quantity. We admit the correctness of the ruling in the case of *Hendricks v. Vivion*, 118 Mo. App. 417, 94 S. W. 318, to the effect that, where a description is by metes and bounds, by sections, or quarter sections, according to government survey, followed by the number of acres, the description controls, and an erroneous statement of the number of acres in the land conveyed does not constitute a breach of warranty. We also agree with counsel for appellant in the following statement: 'We concede that if the deed described actually, or by reference (which is the

same thing), a tract of land or lots that plaintiff did not get, there has been a breach of warranty.' And this appeal having to do with the first count of the petition only, which is an action at law for breach of warranty, we likewise agree that 'plaintiff's rights must be determined by the deed to the land in question.'" These concessions of legal propositions proceed from a proper view of the law, and reduce the debatable ground of the case to a very narrow compass.

Taking the deed and the recorded plat which it adopts and incorporates as embracing all of the determinative facts of the case, the final question for our decision is this: Conceding for argument that reference is made in those instruments to monuments, and that ordinarily boundaries fixed by monuments must prevail over statements of distances or quantities, should that rule obtain in a case where the grantor is the person who executed and filed the plat to which express reference is made in the deed?

[3] Paraphrasing what was said in *City of Cleveland v. Bigelow*, 98 Fed. loc. cit. 249, 39 C. C. A. 47, it has been the policy of legislation in this state for many years to encourage the making and recording of plats for cities, towns, and villages, and for additions to such municipalities. Section 10,290, Rev. Stat. 1909, requires that in platting a city, or an addition thereto, the proprietor "shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing: First, all parcels of ground within such town, village, or addition reserved for public purposes by their boundaries, course, and extent, whether they be intended for avenues, streets, lanes, alleys, commons, or other public uses; and, second, all lots for sale, by numbers, and their precise length and width." The next section provides for the acknowledgment and recording of the plat by the proprietor and the approval thereof by the city.

These provisions impose on the proprietor in the most positive terms the duty of making an accurate map or plat, and among the things that must be stated and accurately stated are "the precise length and width" of each lot to be offered for sale. A subsequent purchaser of a lot from a proprietor charged with the performance of such duty has a right to rely upon the fidelity of the recorded plat and to assume as true facts the law demands shall be stated in the plat with accuracy. He is not required to employ a surveyor to test the accuracy of such compulsory statements. As was well said in *McCall v. Davis*, 56 Pa. 431, 94 Am. Dec. 82: "It is a most graceless answer on the part of the founder that he (the purchaser) might have tested the accuracy of the plan before he bought. To ask the purchaser of each lot to survey a whole village plan \* \* \* would be to disappoint the expectation of the founder himself, for he would make but few sales on such terms. In such a case, the

absence of willful fraud on the part of the vendor will not relieve him from the injury his mistake has entailed upon others."

Our own Supreme Court has settled the question adversely to the position of defendant in the case of *Whitehead v. Atchison*, 136 Mo. loc. cit. 496, 37 S. W. 931: "Between the purchaser of a lot and one who promulgates a plat describing and defining the lots thereof, the purchaser will not be held at his peril to ascertain whether or not the plat agrees with the original survey of the land subdivided and platted; but he is justified in assuming that the plat is correct, and that the lot or lots purchased by him are of the dimensions, and bounded by the courses and distances, as indicated on the plat, to which, for particulars, his deed must refer, when the lot number alone is given in the deed. Every prompting of fair dealing, as every consideration of equitable estoppel, operates to deny defendant the benefit of the alleged secret, hidden corner stones to establish the lot line between lots 1 and 4 as against the boundary indicated by the courses and distances named in the plat, as well as in the description in the deeds affecting said lots, referring to that instrument for particulars."

So in the present case every prompting of fair dealing, as every consideration of equitable estoppel, operates to deny defendant the benefit of monuments referred to in the recorded plat, to destroy and rob of all legal significance and effect statements of dimensions and of consistent areas made by the proprietor in avowed compliance with a most positive statutory mandate. Such statements must be regarded as being in the nature of covenants or warranties, instead of mere representations. In legal effect, defendant covenanted with his grantee that the courses and consequent areas of the lots were accurately described on the plat, and plaintiff is entitled to recover for the shortage, regardless of whether the errors were due to design or mistake.

The judgment is for the right party, and is affirmed. All concur.

# SALING v. AMERICAN CHICLE CO. (No. 9737.)

(Kansas City Court of Appeals. Missouri.  
March 2, 1914. On Rehearing.)

## 1. MASTER AND SERVANT (§ 121\*)—LIABILITY FOR INJURIES—FAILURE TO GUARD MACHINERY.

Rev. St. 1909, § 7828, requiring machinery to be safely and securely guarded when possible, does not make the employer an insurer against injury, or require that the guard shall be such as to absolutely prevent injury, but only requires such a guard as within the bounds of reason will protect employes who themselves are using ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

## 2. MASTER AND SERVANT (§ 228\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

An employe guilty of contributory negligence cannot recover for injuries due to an employer's failure to guard machinery as required by Rev. St. 1909, § 7828.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

## 3. MASTER AND SERVANT (§ 121\*)—LIABILITY FOR INJURIES—FAILURE TO GUARD MACHINERY—"SUFFICIENTLY GUARDED."

A rolling machine in the factory of a manufacturer of chewing gum consisted of two steel rollers and a feed board, upon which sheets of gum were placed preparatory to pushing them between the rollers. About six inches from the rollers and about one inch above the feed board, was a guard or fender an inch and a half wide. An iron or steel hood came down over the rollers to within about two inches of the top of the guard. *Held*, that the rollers were sufficiently guarded within Rev. St. 1909, § 7828 though an employe's hand in some way was drawn or placed through the opening between the guard and the hood, and between the rollers.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Jackson County; R. B. Middlebrook, Judge.

Action by Mary E. Saling against the American Chicle Company. From a judgment for plaintiff, defendant appeals. Reversed.

Warner, Dean, McLeod & Langworthy, of Kansas City, for appellant. Bird & Pope, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for injury received by having her fingers and hand partially crushed by a machine belonging to defendant, and which she was operating in the performance of her duty as one of its employes. She recovered judgment in the circuit court.

Defendant's business was the manufacture of chewing gum. The ingredients composing the gum were cooked until it came to a certain consistency, when it was cooled, divided into seven-pound lumps, and then kneaded something after the manner of dough in the making of bread, except that powdered sugar was used instead of flour. After being kneaded, it was pressed by a machine into cakes about six by eight inches and one inch thick. These cakes were then turned over to female employes who operated several machines which roll the cakes down to the proper thickness for the market. After being rolled, the gum is marked, dried, broken into sizes, and then wrapped as found when sold at retail.

One of these rolling machines was operated by plaintiff. It consisted of two steel rollers (operated by a belt and pulley) revolving together so as to draw the cake or sheet of gum between them, thus rolling and thinning it down by spreading and lengthening it. These rollers were subject to adjust-

ment by turning a small wheel at the end, so that, when the cake or sheet, one inch thick, went through the first time, the rollers were brought closer together, and the process repeated to the fifth rolling, when the requisite thinness would be obtained. There was a feed board upon which these sheets would be placed by the operator preparatory to pushing them forward with her left hand to be caught by the rollers. Parallel with the rollers, and about six inches in front of them, was a metal guard or fender, an inch and a half wide and a little more than an inch above the feed board. An iron or steel hood came down over the rollers to within about two inches of the top of this guard, thus leaving that space between the hood and the guard, through which one, by stooping, could look in at the rollers and could observe the movement of the sheets of gum, and through which plaintiff says her hand passed to the rollers.

She had been engaged at this work, without trouble, for near five months and on the day of her injury some sheets or cakes had been turned over to her for thinning down through the pressure of the rollers. She testified that the one she took up was too soft for proper manipulation through the rollers, and that it had a lump near the end which somewhat obstructed her pushing it under the guard towards the rollers, that in her effort to push it along her hand sunk into it to some extent, when it suddenly was caught by the rollers and jerked forward, carrying her hand against the guard *and over it*, through the space between it and the hood and into the rollers, crushing it.

That the injury could have occurred in the way testified to by plaintiff challenges one's belief. How her hand, resting upon the sheet of gum, pressing it forward under the guard where it seemed to be obstructed, could be jerked against the iron guard and then, fingers foremost and straight out, over the guard, and through the narrow space between the guard and the protecting hood, straight ahead six inches to the rollers, is scarcely within the bounds of reason. This need not imply that plaintiff purposely misstated the occurrence. The sudden movement of the gum she says jerked her hand against the guard. It might be that in nervous fright she ran her hand in the space toward the rollers. But how her hand, flat on the flat surface of the gum, could, after being jerked against the protecting guard, leap the guard and go on over between the guard and hood six inches beyond, is difficult to comprehend. But, as our decision is not to be based on these suggestions, we will not pursue them further.

[1, 2] The charge is that the rollers were not guarded under the terms of section 7828, R. S. 1909, wherein it is required that machinery "shall be safely and securely guarded" when possible, and, when that cannot be done, "then notice of its danger shall be

conspicuously posted." This statute does not require that the guard shall be such that an injury absolutely could not happen. The nature of the machine and its surroundings where used, the use to which it is put, etc., will determine what an intelligent, careful, and prudent man would do in guarding his machinery and protecting his employees. While the statute makes it negligence *per se* for the proprietor not to have the guard when possible, or a notice when not, it does not contemplate that he shall be an insurer against injury. He must construct or procure such guard as, within the bounds of reason, will protect his employees who themselves are using ordinary care, for, if they are guilty of contributory negligence, they cannot recover. *Simpson v. Witte Iron Works Co.*, 249 Mo. 376, 155 S. W. 810; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

[3] The evidence in the case shows that these rollers were so guarded and so securely protected from outside contact as to render an accident to an employé well-nigh impossible. The guard bar extended across the feed board slightly more than an inch above it, and six inches out in front of the rollers, so that one pushing the gum under could not possibly get her fingers caught in the rollers by that act. Then the steel hood rounded over the rollers, coming down six inches out in front of them to within two inches of closing on top of the guard. Thus they were entirely housed or closed in except for this small space. It seems to us that defendant, instead of being condemned for neglect in guarding the machine, should be commended for its security against any accident within the range of probability.

The judgment should be reversed. All concur.

#### On Rehearing.

TRIMBLE, J. A motion for rehearing was sustained in the above case, and it has been again argued and submitted and thoroughly and carefully considered in all of its phases and bearings. A re-examination of the case, however, convinces us more strongly than ever that, as a matter of law, plaintiff is not entitled to recover. The foregoing opinion by ELLISON, P. J., states the facts and expresses the views of the court so clearly that it is unnecessary to write another opinion herein.

It may be proper, however, to say that we have given careful heed to the complaint made by plaintiff that the machine which, by stipulation of parties, was considered at both arguments of the case and offered in evidence at the trial was not the same machine plaintiff used, or was not in the same condition as at the time of the accident. But unquestionably it was the same machine, and, even if there had been the difference plaintiff contends there was, it would not

have been sufficient to have convicted the defendant of a violation of the statute by reason of a failure to guard. The statute was fully complied with, and, when that is done, defendant must not be held liable.

The former opinion is adhered to, and the judgment is reversed. All concur.

### HIGBEE v. WESTERN UNION TELEGRAPH CO. (No. 11,041.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 4, 1914.)

#### 1. TELEGRAPHS AND TELEPHONES (§ 78\*)—DELAY IN DELIVERY—STATUTORY PENALTY.

The sender of a telegram is entitled to recover the penalty imposed by Rev. St. 1909, § 3330, for delay in a telegram message, the charges on which had been prepaid, where the message contained the word "alright" written as one word and counted as such by defendant's agent in estimating the charges, since, if it should have been counted as two words, the agent was acting within the scope of his authority in determining the charges and the company is bound by his act, in the absence of intent of the sender to defraud.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 79-81; Dec. Dig. § 78.\*]

#### 2. TELEGRAPHS AND TELEPHONES (§ 33\*) — CHARGES—AUTHORITY OF AGENT.

The rule that a railroad company is entitled to recover the rate of freight posted with the Interstate Commerce Commission, even though its agent agreed to accept a less rate, does not apply to a charge made by the agent of a telegraph company for a telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Adair County; C. D. Stuart, Judge.

Action by Paul D. Higbee against the Western Union Telegraph Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Fred S. Hudson, of Chillicothe, for appellant. Higbee & Mills, of Kirksville, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to recover of the defendant telegraph company the statutory penalty of \$300 for failure to deliver a telegram to the person to whom plaintiff addressed it. The answer was a general denial. He obtained judgment in the trial court.

The statute (section 3330, R. S. 1909) makes it the duty of a telegraph company, receiving a message and upon payment or tender of its usual charge as established by its rules, "to transmit and deliver the same to designated address and to use due diligence to place said dispatch in the hands of the addressee, by the most direct means available, without material alterations, promptly and with impartiality and good faith under a penalty of three hundred dol-

lars for every neglect or refusal. \* \* \* Two-thirds of the amount recovered to be retained by the plaintiff and one-third to be paid into the county school fund," etc.

Plaintiff was on a railway train at Pattonsburg, Mo., and desired to send a telegram to his brother at Lancaster in the same state. While the train was stopped at the station, he went into defendant's office and gave to its agent the following dispatch written on the back of a blank bank check: "Pattonsburg, Mo. 4/27/12. Walter Higbee, Lancaster Mo. Everything alright. Home on 19. No time to phone. Paul D. Higbee." The agent received the dispatch from plaintiff, read it, looked up the rate, and said the charge would be 25 cents, which sum plaintiff immediately paid him and then got back upon the train. This was about 1 o'clock in the afternoon. The agent sent the message, and it was received by defendant's agent at Lancaster at 3:30 the same evening, but was not delivered to the addressee, who was known to the agent and who was at his office, until the next morning. No reason or excuse appeared for not delivering promptly, during the remainder of the day of its receipt.

[1] It is claimed by defendant that the written expression, "alright," should be counted as two words, and that each figure in "19" should be counted as one word; and that, thus counted, there were eleven words, the rate of charge for which, under the rules of the company, was 27 cents, and, that amount being two cents more than plaintiff paid the agent for transmission and delivery, the duty imposed by the statute for prompt delivery did not arise. We need not ask whether there is such single word as "alright" or "alright," or whether "all right" is one compound word or two separate words. The fact is that defendant's agent received and accepted the message and stated and accepted his charge for its transmission and delivery as it was written; and whether he counted "alright" as one or two words was of no concern to plaintiff. For all practical contractual purposes in the matter of receiving messages and receiving compensation for their transmission and delivery, he was the defendant itself.

[2] But defendant says that, even though its agent knowingly accepted the money demanded of plaintiff as in full payment for the message as written, if it was not correct, if it was less than the charge authorized by its rules, it did not relieve him from a necessity to pay the amount which its rules required. The cases of *Dunne v. Railroad*, 168 Mo. App. 372, 377, 148 S. W. 997; *Sutton v. Railroad*, 159 Mo. App. 685, 140 S. W. 76; and *Railway v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, are cited in support of that assertion. They have no application. They are cases involving the question of a right to charge a different rate of freight

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Ir.

from that posted with the Interstate Commerce Commission, and upholding the right of the railway to receive the authorized rate even though its agent had agreed to a less rate.

It is true, the statute itself conditions defendant's duty upon the payment of the charges prescribed by its rules. And, in an opinion by Judge Trimble, we said that a plaintiff, "in order to recover, must bring himself clearly within its terms and provisions, and show that his case comes clearly within its manifest spirit and intent," and that "the liability to the penalty is made to rest on the failure to promptly transmit on payment or tender of the usual charges." *Adcox v. Telegraph Co.*, 171 Mo. App. 331, 337, 157 S. W. 989, 990. But, in the absence of knowledge upon the part of the sender of a message as to the rate chargeable under the rules of a telegraph company, the sender has a right to rely upon the charge made, received, and accepted by the company's agent as being the correct charge under its rules.

Furthermore, if plaintiff, without intent to defraud (and there is no pretense that he had such intent), thought the expression "alright" was one word, and defendant's agent so accepted it and made the charge on that basis, he was acting out the purposes for which defendant kept him in its service; he was within the scope of his employment, and defendant was bound.

There was no error, and the judgment is affirmed. All concur.

#### HARDWICKE v. BARNES. (No. 11,055.)

(Kansas City Court of Appeals. Missouri. May 4, 1914.)

##### 1. MORTGAGES (§ 188\*)—MORTGAGEE IN POSSESSION—RIGHT TO POSSESSION.

Where the owner of land placed in possession one who held notes which were valid obligations, and were secured by a deed of trust, such person is entitled to possession as against the owner and all others except a prior lienor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 469, 471-475, 479-481; Dec. Dig. § 188.\*]

##### 2. MORTGAGES (§ 308\*)—DISCHARGE.

Where a mortgage is given to secure the debt of another for which the mortgagor assumes liability as surety, a judgment in an action on the principal obligation which discharged the surety because of an extension of time also discharges the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 874; Dec. Dig. § 308.\*]

##### 3. JUDGMENT (§ 678\*)—CONCLUSIVENESS—RIGHTS OF JUNIOR LIENOR—ACTIONS.

A judgment discharging a surety who had also given a mortgage for security is not res inter alios acta as to a second mortgagee, for the second mortgagee was privy in representation with the surety and could assert any defense against the first mortgage available to the surety.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1195-1199, 1221; Dec. Dig. § 678.\*]

##### 4. LIMITATION OF ACTIONS (§ 167\*)—STATUTES—APPLICABILITY.

Acts 1891, p. 184 (Rev. St. 1909, § 1892), providing that there shall be no action to foreclose a mortgage after the debt is barred, does not apply to a mortgage executed before its enactment, where the note to secure which it was given was not due until after its enactment.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 651-653; Dec. Dig. § 167.\*]

##### 5. ADVERSE POSSESSION (§ 40\*)—REAL ACTIONS—SUITS TO QUIET TITLE.

An action in equity for the cancellation of a deed to land on the ground that it was a mortgage executed by plaintiff's grantor as surety for the payment of the debt of another, and that plaintiff's grantor had been discharged, is in the nature of a suit to quiet title, and can be barred only by ten years' adverse possession by the mortgagee.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 148-153; Dec. Dig. § 40.\*]

Appeal from Circuit Court, Platte County; A. D. Burnes, Judge.

Action by Claude Hardwicke against Richard S. Barnes. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 253 Mo. 6, 161 S. W. 744.

Fyke & Snider, of Kansas City, for appellant. Guy B. Park, of Platte City, for respondent.

JOHNSON, J. This is an action in equity begun in the circuit court of Clay county January 22, 1908, for the cancellation of a certain deed to land which is alleged in the petition and shown by the evidence to have been in reality a mortgage executed by the grantor as surety for the payment of a debt of another.

Plaintiff, whose title to the land is derived through a subsequent deed of trust executed by the same grantor, alleges the discharge of the surety and consequent extinguishment of the lien of the first mortgage, which, however, has not been released of record, and is the basis of the claim of title asserted by defendant, who for six years before the commencement of this suit had been in possession of the land. The action was tried in Platte county, where it was sent on change of venue, and judgment was rendered for plaintiff. An appeal was allowed defendant to this court; but we transferred the case to the Supreme Court on the ground that it involved title to real estate. The Supreme Court thought differently and retransferred it. See *Hardwicke v. Barnes*, 253 Mo. 6, 161 S. W. 744.

The facts of the case are as follows: December 17, 1880, the Thornton Distilling Company, as principal, and Henry P. Linderman and others, as sureties, executed and delivered a promissory note to defendant for \$7,000, due 18 months after date. On the same date the company, which had been operating a distillery in Clay county, executed and de-



livered to S. J. Sandusky, trustee, a trust deed in the nature of a mortgage conveying certain real and personal property to secure the payment of the note. And on the same date Linderman, who, as stated, signed the note as surety, executed and delivered to defendant a deed in the form of a warranty deed conveying 10 acres of land in Clay county owned by him for the recited consideration of \$5,000. This deed, as shown by its face, was in substance a mortgage to secure the payment of the note, and provided that, "upon the payment of a certain note for \$7,000, this day executed by the Thornton Distilling & Milling Company to the said Richard S. Barnes, and which note was signed by said H. P. Linderman, the real estate aforesaid is to be deeded by said Richard S. Barnes back to said Linderman." This deed was not filed for record until August 3, 1891. The 10 acres conveyed in it is the land involved in the present controversy.

Afterward Sandusky, as trustee, and defendant, as cestui que trust of the trust deed executed by the company, brought suit as plaintiffs in the circuit court of Clay county, returnable to the October term, 1892, to recover judgment on the \$7,000 note, and to foreclose the lien of the deed of trust. Linderman was joined as a defendant and duly served with process. The record of that case, including the judgment rendered therein, was received in evidence over the objection of defendant, who insisted and still insists that it was *res inter alios acta*.

The record of the hearing and judgment discloses that the merits of the cause were adjudicated doubtless in accordance with an agreement the parties had reached before the hearing. It was adjudged that there was still due on the \$7,000 note a remainder of \$1,921, and personal judgment was rendered in that sum in favor of Barnes (the present defendant) against the distilling company, the principal obligor of the note, and a foreclosure of the lien of the mortgage of the company securing the note was adjudged. But judgment was rendered in favor of the sureties on the note, including Linderman, on the ground, as we understand the record, that they had been released by an extension of time Barnes (the payee) had granted to the distillery company without the consent of the sureties.

Defendant's claim of title is based on the deed from Linderman, which, as we have shown, was in reality a mortgage to secure a debt upon which his liability was that of a surety, and from which he was subsequently released by the judgment of a court of competent jurisdiction. We now turn to the facts on which the claim of plaintiff is founded.

On January 28, 1891, Linderman and his wife executed and delivered to Samuel Hardwicke, as trustee for W. C. Lemon, a deed of trust conveying 10 acres of land above mentioned to secure notes of Linderman to Lem-

on amounting to \$1,400. Hardwicke, the trustee, was the father of plaintiff, and father and son were practicing law in Liberty as partners, and incidentally were doing business as loan brokers. Linderman, who was in financial difficulties, and was threatened with a forced sale of some of his property, applied to Hardwicke & Hardwicke for relief, and they had him execute the notes and the trust deed to Lemon, who had his office with them, in the hope that they might sell the notes for the benefit of Linderman. They were disappointed, and afterward they themselves advanced about \$900 for the account of Linderman and on the security of the notes and trust deed. Lemon, as payee, indorsed the notes without recourse and delivered them to Hardwicke & Hardwicke, who continued to hold them and the trust deed as security for Linderman's debt to them. Hardwicke, Sr., died in 1895, and plaintiff succeeded to his interest in the transaction. In 1892 Linderman, becoming completely submerged in his financial difficulties, surrendered possession of the 10 acres to Hardwicke & Hardwicke, and they remained in possession, by tenants, until the death of Hardwicke, Sr., when the possession was continued in plaintiff by his tenants until 1901 or 1902. At that time defendant obtained possession of the land and has since kept it. There are other facts in the record; but those stated control the disposition of the case.

[1, 2] There can be no question of the validity of plaintiff's claim to the possession of the land as against Linderman and all others except defendant. The Lemon notes were valid obligations of Linderman to the extent of the advances plaintiff made upon those notes and the deed of trust securing them, and the subsequent delivery of possession of the land to plaintiff invested him with the right to hold possession against Linderman and all who might claim under him, except the holder of a lien prior to that of the Lemon deed of trust. The controlling issue in the case is the validity of defendant's claim founded on the deed in the nature of a mortgage which Linderman executed and delivered to defendant more than a year before the date of the Lemon notes and trust deed. We shall ignore the fact of the withholding of that deed from record, and, treating it as though filed before the beginning of the Lemon transaction, we hold that it gave defendant a lien on the land superior to that subsequently created in favor of plaintiff. But that lien was for the security of the obligation Linderman had incurred as surety for the distillery company. It was incidental to the contract of suretyship, and, when the obligation created by that contract was released, the incidental mortgage lien *ipso facto* was released. Anything that would discharge a surety from personal liability to pay the debt of his principal would discharge his property from a lien securing his contract of suretyship. *Johnson v. Bank*, 173 Mo. 17

73 S. W. 191; *White v. Smith*, 174 Mo. 186, 73 S. W. 610; *Higgins v. Harvester Co.*, 181 Mo. 301, 79 S. W. 959.

The rule thus is stated in 27 Cyc. 1413: "Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of the debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor, will discharge the mortgage, unless the mortgage itself contains provisions authorizing such arrangements to be made."

The record in the foreclosure suit brought against the distillery company and the sureties on the \$7,000 note shows a final judgment on the merits discharging the sureties, including Linderman. It is true the lien sought to be foreclosed was not the same as that created by Linderman's mortgage; but the debt for which personal judgment was prayed was the same, and, the effect of that judgment being the complete discharge of Linderman from the obligation he had assumed as surety, the discharge of the incidental lien followed as a matter of course, and thereafter no claim of title or possession could be predicated of the extinguished lien.

[3] It is idle to speak of that suit as *res inter alios acta* because plaintiff was not a party to it. As the holder of the junior lien he was privy in representation to Linderman, and could assert any defense to the first mortgage available to Linderman. *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106; *Storage Co. v. Glasner*, 169 Mo. 48, 68 S. W. 917; *Jones on Mortgages* (2d Ed.) § 746.

[4, 5] We do not sanction the contention that this suit was not begun until limitations had barred the action. The notes held by plaintiff matured in January, 1892, and the act of 1891, p. 184 (section 1892, R. S. 1909), is not applicable. This, being an equitable action, prosecuted by the holder of an equitable title, to quiet title, is in the nature of a real action which could be barred only by 10 years' adverse possession. *Mylar v. Hughes*, 60 Mo. 105; *Norfleet v. Hutchins*, 68 Mo. 597; *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760.

Plaintiff was not dispossessed until 1902, and this action, being instituted in 1908, was not barred, since limitations did not begin to run until the dispossession of plaintiff.

The judgment is affirmed.

ELLISON, P. J., concurs. TRIMBLE, J., not sitting, having been of counsel.

#### WATSON v. MATSON. (No. 13,094.)

(St. Louis Court of Appeals. Missouri. May 5, 1914. Rehearing Denied May 21, 1914.)

#### 1. BOUNDARIES (§ 37\*)—ACTIONS—EVIDENCE.

In an action for damages for trespass, where the boundary between the respective tracts

of plaintiff and defendant was in dispute, evidence held sufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

#### 2. BOUNDARIES (§ 54\*)—SURVEY—SUFFICIENT SURVEY.

Plaintiff and defendant traced their title from a common source, and none of plaintiff's title deeds, except one made in partition after his ancestor had acquired possession, designated a given point as the place to commence running plaintiff's lines. A survey by the county surveyor, introduced by defendant, tended to support a more recent survey running the boundary line between the tracts of plaintiff and defendant which began plaintiff's line at the given point. Held, that the refusal of a declaration of law, in an action involving the disputed boundary line, that there was no authority in plaintiff's chain of title for beginning at the given point, was error, for surveys made by the county surveyor are official in character and prima facie correct.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 263, 268-277; Dec. Dig. § 54.\*]

Appeal from Circuit Court, Ralls County; Charles E. Rendlen, Special Judge.

Action by Fountain Watson against Enoch G. Matson. From a judgment for plaintiff, defendant appeals. Affirmed.

David H. Ely, of Hannibal, and R. F. Roy, of New London, for appellant. Hays & Heather and Ben E. Hulse, all of Hannibal, for respondent.

NORTON, J. This is a suit for damages accrued through an alleged trespass. Plaintiff recovered a judgment of \$20, and defendant prosecutes the appeal.

The controversy pertains to the value of four trees which stood in the public road and were cut down by defendant as though they belonged to him. It appears plaintiff and defendant own adjoining farms, but a public road passes between them. Plaintiff's land lies north of that of defendant, and it is said a portion of the public road is upon it. On the other hand, defendant insists that all of the public road is located on his land. The several trees involved here were standing in the road and, according to the evidence of plaintiff, on his side of the land line; while, according to the evidence of defendant, they stood upon his land, for, indeed, he says all of the public road was platted thereon. The sharp issue of fact in the case relates to the location of the land line dividing the estate of the one party to the suit from the other, and this, it seems, turned upon the evidence of Mr. Ely, the county surveyor, who had recently surveyed the land.

It appears that Auguste F. Delauriere is the common source of title, for at an early day he owned the land belonging to both parties to the suit. On October 27, 1837, he conveyed to Stephen Glascock a tract of land containing 491.81 acres, described by metes and bounds. On March 20, 1838, the same grantor conveyed to G. D. Hawkins 120 acres immediately south to that conveyed to Glas-

rock. In 1855 James D. Watson, plaintiff's father, became the owner of 320 acres of the land so theretofore conveyed by Delauriere to Glascock, and in 1856 defendant became the owner of the 120 acres which had been conveyed to Hawkins. A number of deeds are in evidence. On April 1, 1873, partition deeds were made among the heirs of James D. Watson. By one of these deeds plaintiff acquired a portion of the land theretofore owned by his father and such land adjoined that of defendant on the south; and thereafter plaintiff acquired two other small tracts of land which were theretofore parcel of that owned by Glascock, and these two adjoined the 120 acres owned by defendant on the south. In 1861 the county court of Rails county ordered the public road changed, with a view of placing all of it on defendant's land, but adjacent to the south line of the land now owned by plaintiff. Whether the road was thus located precisely is uncertain on the record before us, and, evidently, according to the view of the trial court, it was not. It does not appear that any survey was made of any of these lands prior to 1886, and the dividing line between the properties of plaintiff and defendant was not definitely ascertained. Plaintiff claimed a portion of the roadway, and defendant claimed it all. By the partition deed through which plaintiff acquired title to a portion of his land on April 1, 1873, reference is made to a point 12 chains north of the corner of sections 2, 3, 10, and 11, township 55, range 5 west, as a point of beginning with respect to the line of his property. It appears this point was subsequently reckoned with by the county surveyor, Ely, in establishing the line between plaintiff and defendant, and the principal argument advanced for a reversal of the judgment relates to this fact. Shortly before the institution of this suit, the county surveyor, Ely, surveyed the line between plaintiff and defendant, and, according to the line thus surveyed, the trees cut by defendant in the public road stood on the land of plaintiff; that is to say, a portion of the public road on which the trees stood is on plaintiff's land. Manifestly, the judgment of the trial court in favor of plaintiff was influenced by this survey. There is evidence on the part of plaintiff tending to prove that plaintiff owned the land on which the trees stood, as there is an abundance of evidence, too, on the part of defendant to the contrary.

[1] It is difficult, indeed, to ascertain, with certainty, all of the facts in the record for the reason there are so many descriptions in the numerous deeds introduced and some of them rather inartificial and all by metes and bounds and measurements. However, it is clear enough that on consideration of the entire record there is substantial evidence in support of the judgment.

[2] A jury was waived and the issues tried before the court, who gave several instructions requested by defendant, but refused the

one marked defendant's No. 2. The instruction thus refused is as follows: "The court declares the law to be that there is no authority shown in the plaintiff's chain of title for beginning at the southeast corner of section 3, and measuring north 12 chains for the beginning point of said plaintiff's land." It is argued that, as it appears the case really turned on the evidence of the county surveyor and the survey so recently made by him, and that the surveyor chose as his point of commencement the southeast corner of section 3 and measured therefrom 12 chains north, from whence he surveyed to the westward, this instruction should have been given. It is said that none of the deeds in plaintiff's chain of title designate such to be the starting point for the ascertainment of the line between his land and that of defendant, save the partition deed of date April 1, 1873, and that, at most, the parties assumed in that deed such as the point of commencement. It is to be conceded that no other deed in plaintiff's chain of title refers to the particular point mentioned as a point on the line between the two tracts of land, but it may not be said peremptorily as a matter of law, as the instruction requested suggests, that there is no authority shown in plaintiff's chain of title for beginning at that point when the several deeds are looked to in connection with the several surveys in evidence. Though it be that the surveyor, Ely, testified he measured from the corner of section 3 to the point called for in the deed referred to, it appears, too, that he had before him the field notes and data of prior surveys and that he made his measurements by these as well. Moreover, he had before him the survey and notes of the prior county surveyor, Wells, who surveyed a part of plaintiff's land on this line in 1886. This survey of the prior county surveyor was introduced in evidence by defendant and appears not to be challenged by other evidence introduced on his part, though an argument is directed against it in the brief. All of these surveys made by the county surveyor are official in character, and therefore prima facie correct. *Carter v. Spracklin*, 246 Mo. 116, 151 S.W. 451. Moreover, the survey of Wells, the county surveyor, made in 1886, and so introduced by defendant, reveals certain measurements and distances which, when computed, tend to prove the subsequent survey made by Ely, beginning at the point mentioned, to be correct. We do not say such survey is correct, but the measurements it reveals tend to prove that Ely commenced his survey at a proper point. The case concedes that Ely utilized the notes and the measurements of the Wells survey, together with the partition deed in ascertaining the point of beginning. This being true, it may not be said that there is nothing in the chain of title, when viewed in connection with the survey so introduced by defendant, tending to prove that it was proper to commence at a point

12 chains north of the section corner, for it appears Elly utilized the measurement and data theretofore made by his predecessor, Wells, in ascertaining the point of beginning. It is certain that the chain of title of both parties, appearing as it does in deeds purporting to convey lands described entirely by metes and bounds, must be construed in connection with the surveys and measurements employed to ascertain and locate such metes and bounds and by these the dividing line.

In this view, the court did not err in refusing the instruction above set forth, and the judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

**PHENIX NAT. BANK OF NEW YORK v. HANLON et al. (No. 13,603.)**

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**1. BILLS AND NOTES (§ 243\*)—LIABILITY—INDORSEMENT BEFORE DELIVERY.**

Under the express provisions of Rev. St. 1909, § 10,033, a person who placed his name on the back of a negotiable note before delivery was an indorser, where there was nothing to indicate that he intended to be bound in any other capacity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553; Dec. Dig. § 243.\*]

**2. BILLS AND NOTES (§ 256\*)—RELEASE OF INDORSER BY RELEASE OF MAKER—"EXPRESSLY RESERVED."**

Under Rev. St. 1909, § 10,090, providing that a person secondarily liable on a negotiable instrument is discharged by the discharge of a prior party or by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved, where the payee of a note received a part payment in full settlement and indorsed on the note an acknowledgment of its receipt in full settlement of the liability of the maker, an indorser was discharged, though he indorsed on the note a consent to the release of the maker, since the right of recourse against the indorser was not "expressly reserved," this term having been evidently employed to require an express, as distinguished from an implied, reservation of the holder's right of recourse.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 581-599; Dec. Dig. § 256.\*]

Appeal from St. Louis Circuit Court, J. Hugo Grimm, Judge.

Action by the Phenix National Bank of New York against Sarah A. Hanlon and another, administrators of Richard Hanlon, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Morton Jourdan, of St. Louis, for appellant. Leahy, Saunders & Barth, of St. Louis, for respondents.

ALLEN, J. This is an action commenced against Richard Hanlon, deceased, to recover the balance alleged to be due plaintiff upon a certain note. The cause was tried

below before the court without a jury, resulting in a judgment for defendant, and the plaintiff appealed to this court. The defendant died while the appeal was pending, and the cause has been revived against his estate. The note in question was originally for the sum of \$5,000, dated July 19, 1906, payable five months after said date, with interest after maturity. It was executed by the Richard Hanlon Millinery Company, a corporation, and indorsed by the defendant Richard Hanlon. After maturity, to wit, on June 1, 1907, the sum of \$2,500 was paid plaintiff by the Richard Hanlon Millinery Company, and the following indorsements made upon the note, viz.:

"We acknowledge the receipt of twenty-five hundred dollars, \$2,500, in full settlement of liability of Richard Hanlon Millinery Company on within note. Phenix National Bank, New York, by," etc.

"I consent to the above release of the obligation of the Richard Hanlon Millinery Company on this note. Richard Hanlon."

Plaintiff's action proceeds upon the theory that, although the Richard Hanlon Millinery Company, the principal debtor, was fully released, nevertheless, under the circumstances, the defendant Richard Hanlon still remained bound upon the instrument and obligated to pay the balance, principal, and interest, remaining unpaid upon the note.

[1] But we think it quite clear that the release of the principal debtor released the defendant Hanlon, and that the trial court properly found the issues in defendant's favor. The rights of the parties are controlled by the provisions of the Negotiable Instruments Law, adopted in this state in 1905. One provision of this act (section 10,033, Revised Statutes 1909) is as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

The effect of this section was to alter the rule previously existing in this state, to the effect that one who placed his name on the back of a negotiable promissory note, before delivery, was to be considered prima facie as a comaker. See *Bank v. Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086. In the case before us there is absolutely nothing to indicate that the defendant's intention was to be bound in any capacity other than as an indorser; and hence, under the statute, he is to be treated as such. And under section 10,161, Rev. St. 1909, it is clear that defendant is a party "secondarily liable" on the instrument.

[2] Section 10,090, Revised Statutes 1909, is in part as follows: "A person secondarily liable on the instrument is discharged: '(1) By any act which discharges the instrument; \* \* \* (3) By the discharge of a prior par-

ty, except when such discharge is had in bankruptcy proceedings; \* \* \* (5) By a release of the principal debtor, *unless the holder's right of recourse against the party secondarily liable is expressly reserved.*" (Italics ours.) In this connection, see, also, sections 10,089 and 10,092, Rev. St. 1909.

That the defendant became bound in the capacity of an indorser, and secondarily liable upon the instrument, does not appear to be disputed. Appellant's sole contention is that, though the principal debtor was released, the holder's right of recourse against the defendant was "expressly reserved," within the meaning of section 10,090, *supra*. And it is said that this appears from the fact that the defendant's consent to such release was obtained, and that the note was not surrendered and cancelled, but was retained by plaintiff.

But it seems quite clear that plaintiff cannot be said to have thereby "expressly reserved" its right of recourse against the indorser. On the contrary, in order to hold that plaintiff reserved such right, we must have resort to inferences arising from the acts and conduct of the parties; whereas the statute makes it necessary for the holder to expressly reserve such right; otherwise a party secondarily liable will be discharged. By plaintiff's indorsement upon the note, at the time of the payment of the \$2,500, plaintiff *unconditionally* released the principal debtor. No right of recourse whatsoever against the defendant indorser was in any manner reserved. The fact that the defendant consented to such release is wholly without influence; for the effect of plaintiff's unconditional release of the principal debtor is in no way altered or qualified by reason of defendant's assent thereto.

The common-law rule existing in this state prior to the enactment of the Negotiable Instruments Law, and which had become a thoroughly settled doctrine of our courts, was to the effect that, where a holder of a note released the maker, such release operated to discharge all subsequent parties thereto, including an indorser; and that the consent of the indorser to such release in no wise affected the application of the rule. See *Eggemann v. Henschen*, 56 Mo. 123; *Bank v. Schmucker*, 7 Mo. App. 171; *Brown v. Croy*, 74 Mo. App. 462; *Laumeier v. Hallock*, 103 Mo. App. 116, 77 S. W. 347.

This doctrine obtained for the reason, as stated by Judge Story, that "otherwise the remedy of the subsequent parties over against the released party would, upon payment by them, be gone, or, if they could recover the same, the release of the antecedent party would become virtually inoperative by the act of the holder." And the fact that the indorser assented to the discharge was held to be wholly immaterial. See *Eggemann v. Henschen* and *Brown v. Croy*, *supra*. The statute, therefore (section 10,090, *supra*), did

not have the effect of altering the rule prevailing in this state in respect to the matter in hand. The statute, however, is clear and unmistakable in its terms, and leaves no room for doubt as to the effect of an unconditional release of the principal debtor upon the holder's right of recourse against parties secondarily liable.

We are referred by learned counsel for appellant to cases construing the word "expressly" as used in other connections (see *Lightfoot v. Bass*, 2 Tenn. Ch. 677; *Magone v. Heller*, 150 U. S. 70, 14 Sup. Ct. 18, 37 L. Ed. 1001; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21), but such authorities are not here persuasive. When the statute provides that a party secondarily liable is discharged by a release of the principal debtors, unless the holder's right of recourse against such party is expressly reserved, it must be taken to mean precisely what it says, and that a reservation of such right of recourse cannot be implied from the acts and conduct of the parties, in the face of an unconditional release of the principal debtor. Indeed, the term "expressly reserved" is evidently employed in the statute in order to leave no room for doubt as to this very matter, and to require, under the circumstances, an *express*, as distinguished from an *implied*, reservation of the holder's right of recourse against a party secondarily liable.

It follows that the judgment must be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

# MONTGOMERY v. SCHWALD et al. (No. 10,889.)

(Kansas City Court of Appeals. Missouri.  
Jan. 19, 1914. Rehearing Denied  
Feb. 16, 1914.)

## 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

The appellate court is bound to accept findings of fact of the trial court, where there is substantial evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

## 2. BILLS AND NOTES (§ 92\*)—CONSIDERATION—SUFFICIENCY.

Defendants, being sureties on the note of a corporation, the payment of which was being demanded, executed to plaintiff, a judgment creditor of the corporation, their individual notes for the amount of his judgment, so that the note upon which they were sureties could be paid out of certain money which had come into the hands of the corporation, and plaintiff thereupon assigned to defendants the notes upon which his judgment was based. *Held*, that there was a good consideration for the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. § 92.\*]

## 3. EVIDENCE (§ 444\*)—PAROL EVIDENCE—BILLS AND NOTES.

Where notes promised unconditionally to pay certain sums of money, the maker, in an

action thereon, could not show by parol evidence that they were conditioned upon the payee taking a trust deed, etc., as this would contradict the written instrument; and, there being evidence of a consideration, it could not be done under the guise of showing a failure of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

Appeal from Circuit Court, Cooper County; G. A. Wurdeman, Special Judge.

Action by James T. Montgomery against Leon K. Schwald and another. From a judgment for plaintiff, defendants appeal. Affirmed.

George F. Longan, of Sedalia, for appellants. James T. Montgomery and Charles E. Yeater, both of Sedalia, for respondent.

TRIMBLE, J. In this case suit is brought on two promissory notes admitted to have been executed by the defendants. Their defense is failure of consideration. A jury was waived, and the cause tried before the court. Judgment was rendered for plaintiff on both counts. Defendants appealed.

Some time in 1908 all the parties to this suit were interested in a corporation called the "Mexican Gulf Land & Development Company, Limited," which was organized to buy 75,000 acres of land in the Republic of Mexico, and which bought said land largely on credit. The company sold treasury stock as far as it could, and used the money to make payments on the land. Needing more money for this purpose, and not being able to raise it otherwise, the remaining amount necessary to be raised was divided into various sums, and different groups of men in the corporation gave their notes and raised the respective amounts agreed to be raised by each group. The defendant Schwald obtained four notes of \$1,440 each, payable to the company, and indorsed in blank by it, and endeavored to sell them in order to put the money into the company's coffers. Failing in this, he and plaintiff executed a note to a Sedalia bank for \$5,760, and put up the four notes as collateral, and the money was used by the company. This was in August, 1908. The following February plaintiff severed his connection with the company.

The note to the Sedalia bank was renewed from time to time, and at one of these renewals it was signed by plaintiff and both defendants. At last the bank demanded its money, and, as plaintiff was the only one on the note who could pay at that time, he raised the money and paid it off, taking into his possession the four collateral notes. The defendant Schwald paid plaintiff some of the interest, and then Schwald, who was plaintiff's only coprincipal on the note to the Sedalia bank (Moore having signed as security for both), gave plaintiff his note for \$2,847, being one-half of the amount he had paid the

Sedalia bank, and put up with plaintiff, as collateral security, \$9,400 of notes secured on land in Ripley county, Mo. Plaintiff then brought suit against the Mexican Land Company, hereinabove mentioned, on the four collateral notes he had obtained when he paid the Sedalia bank, and in this suit plaintiff recovered judgment against said Mexican Land Company in the sum of \$6,415.40 March 20, 1911. Plaintiff endeavored to obtain payment of this judgment but could not do so. On October 18, 1911, the defendant Schwald wrote plaintiff, sending him \$47.50 interest on his \$2,847 note, and telling him to be in Kansas City on a certain date as the representatives of a New Mexico company, the Soto La Marina Land & Water Company would be there with money to pay for 14,000 acres of land it was going to buy of the Mexican Land Company, and plaintiff could then get all or at least part of his money. The price agreed upon between the two companies for this land was \$31,000. But, when plaintiff met the buying company's representatives at their conference with the selling company, the former could pay only \$18,600 down, leaving \$12,400 yet due. The selling company needed the entire \$31,000 to pay off its debts, among which was plaintiff's judgment. As there was only \$18,600 cash in sight, the men interested in the selling company (the Mexican Gulf Land & Development Company) wanted it used to pay such of its debts as they were security for, and plaintiff also wanted his judgment paid.

The two defendants in this case were sureties on a note of the selling company to a trust company in Kansas City for about \$12,000, counting interest due. Suit had been commenced on this note, and they proposed to plaintiff that he allow this \$12,000 indebtedness to be paid out of the \$18,600 cash fund and let them give their notes to him (plaintiff), with a year's time, in payment of the Mexican Land Company's debt or judgment to him.

Plaintiff finally agreed that if they would pay him \$1,000 out of the cash to be received from the buying company, and give him their notes for the balance due him, to wit, \$6,029, he would allow this to be done. (As he had a judgment against the selling company, it could not convey the 14,000 acres to the buying company so as to obtain the \$18,600 to pay its other debts, unless he consented thereto.) This was agreed to, and thereupon the defendants in this suit executed to plaintiff the two notes sued on herein. The \$12,000 note, on which suit was then pending against defendants herein as sureties, was then taken up with the money received from the buying company, and defendants herein were released therefrom.

During the negotiations a question arose about how defendants, and others who were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taking up other indebtedness of the company, could be secured. And both the selling and buying company agreed that the 14,000 acres bought by the latter should be deeded to a trustee to hold for the benefit of such parties, and, as the buying company made payments on the balance due from it, the trustee would apply it on the debts of the selling company, and thus those who were its sureties would be protected. Plaintiff was asked to become such trustee, and he finally consented and drew up the trust deed. This was never executed, as will be set forth later.

When defendants herein executed and delivered to plaintiff the notes sued on, the latter offered to return to Schwald his \$2,847 note given for half the original indebtedness (which plaintiff had paid to the Sedalia bank), and also the collateral \$9,400 Ripley county land notes and the four collateral notes for \$1,440 on which he had recovered judgment against the Mexican Gulf Land & Development Company. They were not turned over at that time, however, but by agreement were left with plaintiff until later, when he did on February 17, 1912, turn over the \$9,400 of Ripley county notes and the four \$1,440 collateral notes, as shown by receipts signed by both defendants. Plaintiff also at this time, and in the presence of all, canceled Schwald's \$2,847 note by tearing it up and throwing it in the waste basket. The two notes sued on were executed November 9, 1911.

There is not a great deal of conflict in the testimony except as to plaintiff's presence and participation in a meeting of July 25, 1912, at which it was agreed that the selling company should convey the 14,000 acres direct to the buying company instead of to the trustee. This deed to the trustee, as hereinbefore stated, was never executed, but the land was conveyed direct to the buying company, the Soto La Marina Land & Water Company. It is defendant's contention that the debt represented by the two notes sued on was a debt of the Mexican Gulf Land & Development Company, as plaintiff knew, and that they (the defendants) signed the notes sued on herein upon an understanding with plaintiff that he would take, as trustee, the deed to the 14,000 acres and hold the same as security for these notes and all others. Their contention is further that plaintiff was present at the meeting held on July 25, 1912, and consented and urged that the 14,000-acre tract be conveyed direct to the buying company whereby that security was lost to them; that the agreement to execute the notes and the agreement to hold the land as trustee was all one transaction, and plaintiff has no title to the notes, and they are not valid, unless all the elements and portions of the transaction have been completed; that, as the agreement to take the land as trustee was not kept, the consideration for said notes has failed.

As to whether plaintiff consented to the

elimination of the trust deed, there is, as stated, a sharp conflict in the evidence. Plaintiff says he was not at the meeting, and it is shown that when he discovered that the trust deed had not been made, but the land had been conveyed to the new company direct, he demanded that they execute it to him, but they did not do it. It was certainly to his interest to get it, as it gave him additional security for his debt, and no plausible reason is given why he should voluntarily consent to give up that security. It is not necessary to analyze the testimony, however, since the court, sitting as a jury, found that plaintiff was not at the meeting and did not consent or urge that the trust deed to him be dispensed with.

[1] The court found for plaintiff on both counts. If there was substantial evidence to support that finding, we are bound to accept it. *Bozarth v. Legion of Homer*, 98 Mo. App. 564, loc. cit. 567,<sup>1</sup> and cases there cited. The court gave for plaintiff the following declaration of law: "If the court shall believe from the evidence that the consideration of the notes sued on has not failed in whole or part, then the finding and judgment shall be for the plaintiff." No declaration of law was asked on the part of the defendants. Consequently, unless the evidence shows indisputably that the consideration for the notes has failed (that is, shows this as matter of law), the judgment must stand.

[2] Plaintiff, by paying the Sedalia bank the amount of the note executed by him and defendant Schwald, with the defendant Moore as surety for the two, and receiving the four collateral notes payable to the Mexican Company and having its indorsement, became a creditor of the land company. Schwald, to pay his one-half of the amount so paid by plaintiff to the Sedalia bank, gave plaintiff his note for \$2,847 and ten Ripley county land notes for \$9,400 as collateral. Suit was brought and judgment recovered against the Mexican Company on its four notes. Both defendants herein were on another note amounting to \$12,000, owned by the company, and suit had been brought. The permission given by plaintiff to use the \$18,600 cash coming from the Soto La Marina Land Company to pay this \$12,000 indebtedness, and thus relieve defendants of liability thereon, and the extension of another year's time, were good considerations for the execution of the two notes sued on herein. As to Schwald, there was a further consideration of the cancellation of his note of \$2,847 and the returning to him of the Ripley county notes. When the \$2,847 note was torn up by plaintiff, it was discharged. Section 10089, R. S. Mo. 1909. And, although he did not make a formal release or assignment of the judgment held by him on the Mexican Land Company, he did turn over to defendants the notes on which that judgment was based, and has made no attempt to claim said judgment as his. He was not asked to formally

assign the judgment to them; and, if turning over to them the notes on which it was based was not an equitable assignment of the judgment, certainly the allowance of the use of the funds in paying other debts was, to that extent at least, a giving up of his rights under his judgment. In the absence of any attempt on his part to claim said judgment as his, and in the further absence of any demand to release or assign said judgment, or expectation that he would do so, it is not seen how the failure to formally release said judgment can operate to destroy the consideration for the notes.

It is therefore apparent that there is substantial evidence showing a good consideration for the two notes sued on, independent of the question whether plaintiff consented to the elimination of the trust deed or not, because defendants' release from liability on the \$12,000 indebtedness was a benefit accruing to them without regard to the security afforded by the trust deed. But be this as it may, as there is substantial evidence of a good consideration, and also evidence that the plaintiff did not agree to forego the trust deed, we cannot say, as a matter of law, that there was no consideration for the notes or that the same has failed.

It is suggested that the circumstances urged by defendants to show a failure of consideration create, to some extent at least, an equitable defense, and therefore we should treat the case as one in equity and review the entire evidence. While we do not agree with this suggestion, yet it may be said that, if this could be done, we are not so impressed with the facts or with the view that the equities are so much on defendants' side as to compel us to disagree with the conclusion reached by the learned trial judge. Defendants' claim that they would not have executed the notes sued on, had they known the deed of trust would not be given, does not carry a great deal of weight when we see that both defendants, by giving the notes, were getting rid of a \$12,000 indebtedness for which they were liable and on which they were then being sued. In addition to this, Schwald was already liable to plaintiff on a \$2,847 note. The two notes they gave plaintiff were approximately only \$3,000 each. Were we entitled to weigh the evidence, we cannot say we would disagree with the trial judge, when all the circumstances are considered together, with the interest the various parties had in doing what was done, the correspondence had, and the written receipts given in evidence.

[3] As stated before, there is not much dispute over any of the facts except as to the presence of plaintiff when it was decided to forego the trust deed. But in one view of the case, even if he were present and consented to this, this would not necessarily destroy the notes sued on. The notes were ex-

ecuted before this alleged consent or decision to forego the deed of trust was given. They were executed before the trust deed was to be executed. The condition that they were to be valid only upon the contingency that a deed of trust should be taken and held by the payee was not expressed in the note but, if made at all, was a mere oral condition to be performed after the execution of the notes, and that too by a party over whom the payee of the notes had no power or control.

The testimony offered to show this oral condition was objected to on the ground that it was an attempt to contradict or vary the terms of a written instrument by parol testimony. The written instruments promised absolutely and unconditionally to pay certain sums of money. The evidence showed a consideration for the giving thereof. The evidence offered by defendant would have had the effect of showing that the promise to pay was not unconditional but was conditioned upon the payee taking a trust deed to the 14,000-acre tract. This would contradict the unconditional terms of the notes, and, where a consideration has been otherwise shown, this cannot be done under the guise of showing a failure of consideration. *Christian University v. Hoffman*, 95 Mo. App. 488, 60 S. W. 474; *Garvey v. Marks*, 134 Mo. 1, loc. cit. 7, 34 S. W. 1108, 38 S. W. 79; *Third Nat'l Bank v. Reichert*, 101 Mo. App. 242, loc. cit. 253, 73 S. W. 893; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

So that, from whatever angle the case may be viewed, we think the judgment of the trial court was right, and should be affirmed.

It is so ordered. All concur.

#### ORISS v. UNITED RYS. CO. OF ST. LOUIS. (No. 13,620.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

#### 1. STREET RAILROADS (§ 117\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to the driver of a wagon struck by a street car, evidence held to make questions for the jury as to the motorman's violation of city ordinances requiring the keeping of a vigilant watch and the stopping of the car on the first appearance of danger, and prohibiting a greater rate of speed than ten miles an hour.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

#### 2. STREET RAILROADS (§ 103\*)—LIABILITY FOR INJURIES—HUMANITARIAN RULE.

The negligence of a person struck by a street car does not absolve the motorman from keeping a lookout and endeavoring to avoid injuring him, unless there is no time to avoid a collision after such negligence becomes apparent to the motorman.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.\*]

#### 3. STREET RAILROADS (§ 99\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

Where the driver of a heavily loaded wagon, before attempting to cross street car tracks, sat-



issed himself that in the usual course of things, considering the distance of an approaching car, his own rate of travel, and the lawful rate of travel allowed the car, he could cross in safety, he was not negligent.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

#### 4. APPEAL AND ERROR (§§ 978, 1005\*)—REVIEW—QUESTIONS OF FACT.

Whether a verdict was against the weight of the evidence or in disregard of the instructions were questions for the trial court, not open to consideration on appeal, where the trial court was satisfied with the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. §§ 978, 1005.\*]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Joseph Criss against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest and R. E. Blodgett, all of St. Louis, for appellant. Earl M. Pirkey, of St. Louis, for respondent.

REYNOLDS, P. J. Comparing the evidence in the case as set out in the abstract with the statement as prepared by counsel for respondent, we find the latter statement so concise that we follow it with some additional statements taken from that of counsel for appellant, and a few of our own, with the premise that the accident occurred in the city of St. Louis and within what is designated as the Central District, the speed in which is not to exceed ten miles per hour, and that the streets referred to are streets of that city.

Eleventh street runs north and south. Chouteau avenue runs east and west. The next street south of Chouteau is Hickory street. Between Hickory street and Chouteau avenue there is an alley running east and west. About ninety-four feet south of the alley and on the east side of Eleventh street is a large building occupied at the time by the American Manufacturing Company, which, until passed, obstructs the view of Eleventh to the south. The plaintiff was a teamster in the employ of the Standard Transfer Company, which at the time was doing the teaming for the American Manufacturing Company. The defendant operates a double track on Eleventh street between the two streets mentioned, over which tracks it runs two lines of cars, known as the Cherokee and Tower Grove cars, these cars running north on the east track and south on the west track. Eleventh street, at the alley, is fifty feet wide from building line to building line. The alley is twenty-four feet, ten inches wide. From the building line on the east side of the street at the alley to the east rail of the north bound track the distance is seventeen feet, four inches. The north line of the alley is five hundred and

sixty-seven feet north of the north line of Hickory street, its south line five hundred and forty-three feet, two inches north of the north line of Hickory street. The north line of the alley is one hundred and sixty-six feet south of Chouteau avenue. The cars on each line run about three or four minutes apart each way. From Hickory street to Chouteau avenue is slightly down grade.

On the 24th of October, 1911, at about half past one o'clock in the afternoon, the day being clear, plaintiff was driving his wagon from the premises of the American Manufacturing Company out of the alley north of the building of that company and along that alley, intending to go to a scale west of Eleventh street. The wagon was drawn by two horses and was loaded with what are called "patches." With its load the wagon weighed between 12,000 and 13,000 pounds. The body of the wagon was about twelve feet long, the tongue some ten or twelve feet additional. Plaintiff was well acquainted with the location, having driven out of this alley from time to time for some six or seven years. According to his own testimony, on the day of the accident as he drove along the alley, and before he passed the building line, he stopped his team and listened but heard no car. He then drove further so that he could see south past the building and toward Hickory street, and there stopped his team, the heads of his horses then being about three feet east of the east or north bound track. That put him, seated in his wagon, about fifteen feet from the east track, and two feet clear of the building line. He looked south and saw a north bound car at Hickory street, but he could not tell whether the car was moving or had stopped. So that when he saw the car it was about five hundred and forty-two feet and two inches south of him, south of the south line of the alley out of which he had driven. He then started to cross the tracks, driving at the rate of about two miles an hour. When his horses had crossed the west rail of the east tracks he again looked toward the south and saw the car about forty feet from him and coming toward him at a rate of speed which plaintiff estimated at from twenty to twenty-five miles an hour. That is, while plaintiff had travelled about eight feet the car had covered about five hundred feet. Plaintiff immediately started to whip up his horses, and when the front wheels of his wagon were about at the west rail of the north bound or east track, the street car struck the wagon about at the front wheel, hurled it and the horses bodily off the track and around to the northeast corner of the alley, where the wagon struck against an iron lamp post, which it broke; the horses were thrown down and plaintiff was thrown to the street and sustained injuries on account of which he brought this suit. The car ran about ten feet further before it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer.

stopped. The noise of the collision was so loud that it was heard by persons at some distance.

All of the witnesses testifying for plaintiff, as well as plaintiff himself, testified that the car had neither sounded any gong nor slackened up any immediately before the collision. Other witnesses than plaintiff, testifying for him, stated that the street car at the time of the collision was running between twenty and twenty-five miles an hour. There was testimony to the effect that when the team was going off of the west rail of the east or north bound track, the street car was then about 150 or 200 feet south of there and coming on at a rapid rate, at from twenty to twenty-five miles an hour, as they testified. All of the witnesses testifying for plaintiff, and there were a number of them, testified that the street car failed to slacken its rate of speed at any time before the collision but was then running at a rate of from twenty to twenty-five miles an hour. Counsel for appellant in their statement of the case admit that there was evidence in the case tending to show that the car was 150 feet from the wagon when the front wheels of the latter reached the east rail. Testimony of witnesses, introduced as experts, was to the effect that a car running at a rate of speed of twenty miles an hour could be stopped in 120 feet; at 25 miles an hour in 125 feet, but that with the type of car in question a very steep grade was necessary to obtain a speed of 20 miles an hour. One of these witnesses, a former motorman in the employ of defendant, testified that he could stop a car going at the rate of 20 miles an hour in 85 feet, and when going at 30 miles an hour in 125 feet.

On the part of defendant there was evidence tending to show that while the car was approaching the alley at the rate of 8 or 10 miles an hour, plaintiff drove from the alley immediately in front of the car and so close thereto that the car could not be stopped in time to avert a collision. There was also testimony on the part of defendant to the effect that as soon as the motorman in charge saw the position of the team, which was then, as he said, some 40 feet from him, he endeavored to check up but was unable to prevent the collision, and that when he first saw the wagon and team the horses were then about to cross the north bound track.

The allegations of negligence are failure to sound a warning, violation of the so-called "vigilant watch" ordinance, or "humanitarian doctrine," and violation of the speed ordinance of the city. Both of these ordinances were introduced in evidence by plaintiff, the so-called "vigilant watch" ordinance providing that the conductor, motorman, or other person in charge of each car should keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving toward it and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the short-

est time and space possible, and the "speed ordinance" providing that street cars operated within what is known as the "central district" shall not be propelled at a greater rate of speed than ten miles per hour. The allegation of negligence based on a failure to sound a warning was taken from the jury by an instruction of the court. Defendant interposed demurrers at the close of the testimony for plaintiff and again at the close of all the testimony in the case, which were overruled and exceptions saved.

The only instruction asked on behalf of plaintiff was as to the measure of damages.

At the instance of defendant the court gave ten instructions. First, that plaintiff was not entitled to recover upon the assignment of negligence involved in failure to sound the gong. It will serve no useful purpose to repeat all of the remaining nine. It is sufficient to say that they placed the case before the jury in the most favorable light possible for defendant. Thus the third told the jury that their verdict must be for defendant, if they found from the evidence that plaintiff was aware of the approach of the car and thereafter could have stopped his team before he got upon the track, but that he knowingly drove upon the track immediately in front of the approaching car and so close thereto that the motorman could not, with the means and appliances at hand, stop the car in time to avert the collision.

The fourth told the jury that if they believed that the motorman in charge of the car was keeping a vigilant watch for vehicles approaching the track and that he stopped the car within the shortest time and space possible with the means and appliances at hand, after he saw plaintiff approaching the track, plaintiff could not recover.

The fifth told the jury that although they might believe from the evidence that the car could have been stopped in time to have averted the collision after the motorman saw, or by the exercise of ordinary care, could have seen plaintiff in a position of danger, and that he failed to stop the car in time to avoid the collision, yet if the jury further believed from the evidence that plaintiff saw the car approaching before he drove upon the track, and that by stopping his team he could have remained off the track and thereby avoided the collision, and that he drove upon the track knowing that the car was approaching and immediately in front of the car, he was not entitled to recover.

The remaining instructions were equally favorable to defendant. We make no ruling as to the correctness of these instructions.

Of its own motion the court gave an instruction that the burden of proof was upon plaintiff to establish by the preponderance or greater weight of evidence, the facts necessary to a verdict in his favor under the instructions, the court defining burden of proof and preponderance of evidence. The court also gave the usual instruction as to the

credibility of witnesses and the number of jurors necessary to concur in a verdict.

In addition to the instructions in the nature of demurrers to the evidence, which were refused, defendant asked the court to withdraw from the jury the assignment of negligence based on a violation of the vigilant watch ordinance.

Defendant also asked the court to withdraw from the jury the assignment of negligence founded on the speed ordinance.

These were refused, defendant excepting. The jury returned a verdict in favor of plaintiff, and judgment following, defendant has duly perfected its appeal to this court, making three points. First, that the demurrer to the evidence should have been sustained, claiming under this that the failure to sound the gong could not be considered; that the case should not be submitted on the violation of the vigilant watch ordinance or humanitarian doctrine, and that the violation of the speed ordinance would not support a recovery on account of the contributory negligence of plaintiff, as a matter of law. The second and third assignments of error are to the refusal of the court to give the two instructions last above referred to.

[1] We have before noted that the negligence charged in failing to sound the gong was taken from the jury. As concerning the other two propositions under this first assignment, namely, that the case should not have been submitted on violation of the vigilant watch ordinance or humanitarian doctrine, and on violation of the speed ordinance, it is urged that the testimony will not support a recovery on either of these grounds, because of the contributory negligence of plaintiff, as a matter of law. We are unable to agree with learned counsel for appellant on these propositions. As a matter of course, in considering the evidence in this case, plaintiff is entitled to the benefit of all the evidence which he introduced and to every reasonable inference that the jury can draw from that evidence. There was substantial evidence here, first, that the motorman in this instance had not observed the vigilant watch ordinance. According to his own testimony he did not see this team until the horses had crossed the west rail of the north bound track. But the team had then travelled toward that track for about 21 feet from the building line and while going over that distance was in plain sight. There was no direct evidence as to what the motorman was doing during the whole time that he was moving his car a distance of some 500 feet from Hickory street, and during all of which time plaintiff was obviously intending to drive across the track. The jury had a right to infer from this that the motorman was not keeping a vigilant watch for wayfarers or teams on the track ahead of his on-coming car. It was a clear day, broad daylight, and how it was possible for any man, who was attending to his business,

to have travelled that distance on a car, no matter at what speed it was going, and not have seen this team of horses and large truck wagon, until he got within 40 feet of it, certainly would tax the credulity of any ordinary jury. He could not help seeing that plaintiff was in a place of danger; that he was attempting to cross this track, either unconscious of his danger, or in an effort to avoid it. A witness blurted out, in testifying, that he, seeing the team crossing and the car approaching at a rapid rate, said to a companion: "That motorman must be asleep." Of course this was stricken out as improper testimony, but it looks to us very much as if that was near the truth.

The physical facts in evidence are against appellant on the assignment of a violation of the speed ordinance. We have stated the space covered and the facts attendant upon the occurrence. A loaded wagon, weighing 12,000 or 13,000 pounds, and two horses and the driver are thrown completely off of the track and across the street, landed against an iron lamp post, which was broken in the collision, and yet the car ran some ten (10) feet further! To say that this could have resulted from impact with a car running at a rate of not to exceed ten (10) miles an hour seems hardly probable.

[2] Even if it may be said that plaintiff contributed to his hurt by not being sufficiently cautious and careful, this, under an application of the humanitarian doctrine, did not absolve the motorman from looking out for a possible wayfarer and endeavoring to avoid injuring him. The rule as to this is very well stated in a recent decision by the Kansas City Court of Appeals, *Peterle v. Metropolitan St. Ry. Co.*, 164 S. W. 254. There it is said that the bare knowledge of one driving a wagon on to the track of the approach of a street car could only make the driver guilty of contributory negligence, which can prevent the operation of the humanitarian rule, if, after such negligence became apparent to the motorman, there was no time for him to avoid a collision; the driver's knowledge of the car's approach only affecting the humanitarian rule, if such knowledge became apparent to the motorman, in which case he could assume that the driver would not intentionally go into a place of danger on the track.

[3] We see no evidence here of such contributory negligence as would free the employees of defendant from the force of the humanitarian doctrine. Ordinary care did not require plaintiff to constantly look both ways—even if that is possible—when approaching tracks along a street crossing and while upon the track. It is sufficient if, before he attempted to cross, he satisfies himself that in the usual course of things he can cross in safety; that is, considering the distance from him of an approaching car, knowing his own rate of travel and the lawful rate of travel allowed the car.

*Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, loc. cit. 254 and 257, 61 S. W. 635, 852, 84 Am. St. Rep. 710; *Strauchon v. Metropolitan St. Ry. Co.*, 232 Mo. 587, loc. cit. 596, 135 S. W. 14.

[4] So looking at the evidence we cannot agree to the other assignments of error going to the refusal of the court to give the two instructions asked by defendant. There was evidence of violation of both ordinances, and to have given them would have been in total disregard of evidence before the jury. When we consider the instructions given in this case at the instance of defendant, it surely cannot be pretended that the case was not submitted to the jury by the court in the most favorable aspect possible to defendant. In the light of these instructions to hold that the verdict of the jury should be overturned, would, in effect, be to hold that the jury had disregarded them and had rendered a verdict contrary to the instructions of the court. That is a matter for the determination of the trial court and as he was satisfied with the weight of the evidence and that there was no disregard of the instructions given, neither question is open to us, as we are satisfied from an examination of the testimony in the case that there was substantial evidence warranting the jury in arriving at the verdict reached by them in this case.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

KANSAS CITY MASONIC TEMPLE CO. et al. v. YOUNG et al. (No. 10,976.)

(Kansas City Court of Appeals. Missouri. May 4, 1914.)

1. APPEAL AND ERROR (§ 671\*)—QUESTIONS REVIEWABLE — ABSENCE OF MOTION FOR NEW TRIAL OR ARREST OF JUDGMENT.

On appeal from a judgment taken without motions for new trial or in arrest of judgment, the court is confined to the record proper, and, unless the judgment is outside of or not based on the issues raised by the pleadings, it will not be disturbed, however irregular it may be.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

2. JUDGMENT (§ 259\*)—MOTION IN ARREST—GROUNDS.

The office of a motion in arrest of judgment is to call the attention of the court to error patent of record, and not outside the record, and the error must be one of substance and not of form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 457-460, 465, 466; Dec. Dig. § 259.\*]

3. PARTIES (§ 96\*)—PLEADING (§ 406\*)—PETITION—DEFECTS—WAIVER.

A defendant, who answers the petition and goes to trial, thereby waives, as provided by Rev. St. 1909, § 1804, objections that the peti-

tion is multifarious, and that plaintiffs are improperly joined.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 167-177; Dec. Dig. § 96.\* Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.\*]

4. EQUITY (§ 148\*)—PLEADING—MULTIFARI-  
OUSNESS.

A petition in an action by a company erecting a building for a masonic lodge and the members thereof, which seeks to enjoin defendant from issuing a publication prior to and at the time of the dedication of the lodge building, and from soliciting subscriptions on the representation that it was authorized by and would benefit the lodge, in which all of the plaintiffs were interested, was not objectionable as multifarious because plaintiffs had a common interest in suppressing the publication and stopping the untruthful representations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

5. INJUNCTION (§ 118\*)—PLEADING—SUFFI-  
CIENCY.

A petition in an action by a company erecting a masonic lodge building and the members of the lodge, which alleged that defendant was about to issue a publication at the time of the dedication of the building purporting to be an official publication authorized by the company to be distributed as a souvenir of the dedication, that defendant solicited subscriptions by representing that he was authorized by the company to do so, and that defendant had agreed to contribute one-half of the proceeds to the furnishing of the building, all of which was untrue, and that defendant's purpose was to injure the company and the lodge members in their business and property rights, stated a cause of action for equitable relief on the theory that the company and the lodge members could protect themselves against the acts of defendant which would subject them to criticism or bring them into disrepute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Jackson County; Jos. A. Guthrie, Judge.

Action by the Kansas City Masonic Temple Company and others against Alfred E. Young and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. S. Marley, of Kansas City, for appellants. Jamison, Hutchison & Ostergard, of Kansas City, for respondents.

TRIMBLE, J. [1,2] This is an appeal from a decree making permanent a temporary injunction theretofore granted. No motion for new trial nor in arrest of judgment was filed. The appeal was taken without them. In such case, while the appeal can be thus taken, there is nothing before us but the record proper. *Newton v. St. Louis & San Francisco Railroad Co.*, 168 Mo. App. 199, 153 S. W. 495; *R. S. Mo. 1909, §§ 2040, 2041, and 2083*. The office of a motion in arrest is to call the court's attention to error patent of record; and such error must be intrinsic to, and not dehors, the record; and the error must be one of substance and not of form. The most to be said of a motion in arrest is that, if one be not filed and passed upon by the trial court, an appellate court will not

consider matter of error to which the trial court's attention could only be called by a motion in arrest. *Stid v. Railroad*, 211 Mo. 411, loc. cit. 415, 109 S. W. 663. However, as section 2083, R. S. Mo. 1909, requires us to examine the record, we must do so; but unless the petition is wholly insufficient to support any judgment of the nature rendered, or unless the judgment is outside of or not based upon the issues raised by the pleadings, we are not authorized to disturb it, however irregular it may be, in view of the fact that the attention of the trial court was in no way called to such irregularities or errors of form, and no opportunity was given said court to correct them. For fatal error apparent on the face of the record, such as that the court has no jurisdiction of the cause or parties, or that the petition fails to state a cause of action, the court will reverse, but not for mere defects and irregularities. *McIntire v. McIntire*, 80 Mo. 470, loc. cit. 473. The Supreme Court has refused to reverse for errors of misjoinder of parties and causes of action. *Ames v. Gilmore*, 59 Mo. 537. Proceeding then to the question of whether the record discloses errors fatal to the judgment, we find none. The court clearly had jurisdiction of the subject-matter and of the parties. Consequently, unless the petition wholly failed to state any cause of action, or unless the judgment is entirely outside of, and not based upon, nor authorized by, the pleadings, the decree must stand.

[3-5] The amended petition on which the case was tried alleged that the Kansas City Masonic Temple Company was erecting a building of \$150,000 in value, wherein the various Masonic lodges in Kansas City, and the members thereof, might hold meetings; that the personal plaintiffs are members of such lodges, and as such are interested in the Kansas City Masonic Temple Company; that, when said structure is completed, it is to be dedicated at some date in the near future not yet known; that defendants, as managers and owners of the Masonic World Publishing Company, are about to issue a publication immediately prior to and at the time of the dedication of said temple and thereafter, purporting to be an official publication authorized by said temple company and to be sold and distributed as a souvenir of the occasion of such dedication, containing a picture of said temple, with a description thereof, and portraits and biographical sketches of the officials and other leading Masons throughout the state; that defendants were soliciting subscriptions to said publication from various members of the Masonic orders and representing to them that defendants were authorized by the temple company to do so; that defendants had agreed to contribute one-half of the proceeds to the furnishing of said temple, all of which was untrue; that said temple company, not only had not given defendants such authority, but had refused to give it; that said defendants'

purpose to put in said publication sundry advertisements, all without the authority, supervision, or control of plaintiffs, or any of them, to the injury of plaintiffs and their business and property rights, particularly of the said temple company; that other members and persons were being induced to subscribe and pay money to defendants by representations that the temple would get one-half of their subscriptions; that not only are plaintiffs' property rights being infringed upon, but the issue and publishing of such publication, with the pictures and biographies proposed to be published in connection with the promiscuous advertising, would tend to injure and bring into contempt and ridicule plaintiffs and each of them; that they were without adequate remedy at law and would suffer irreparable injury if said publication be permitted to issue. Wherefore an injunction was prayed to stop the solicitation of subscriptions and the representations that the publication was by the consent or under arrangement with the building committee of the temple company and the representations that said temple company would get one-half of such subscriptions, etc.

The answer was a general denial, a plea that plaintiffs' petition stated no equity, and that they had an adequate remedy at law.

The objections going to the petition, when boiled down to their last analysis, are that the temple company and the personal plaintiffs are improperly joined, and that the petition is multifarious. If this be true, nevertheless defendant, having answered and gone to trial, waived the same. R. S. Mo. 1909, § 1804; *Jordan v. Transit Co.*, 202 Mo. 418, 101 S. W. 11. But we do not think the petition is multifarious, or that it wholly fails to state a cause of action, or that the judgment is outside of the issues raised by the pleadings. The plaintiffs all had a common interest in having the publication suppressed and the untruthful representations stopped. The bill was not therefore multifarious. 14 Ency. of Pl. & Pr. 200, 201. It is only when the interests of plaintiffs are conflicting that their joinder is objectionable; and where one general right is claimed, and there is one common interest among all the plaintiffs, their joinder is proper. 10 Ency. of Pl. & Pr. 906. Even though the manner in which the various plaintiffs' rights arise may be in a sense distinct, yet, if they have a common interest as to the point at issue, the bill is not multifarious. *Perkins v. Baer*, 95 Mo. App. 70, 68 S. W. 939. See, also, *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559; *Westinghouse Air Co. v. K. C. Ry. Co.*, 137 Fed. 26, 71 C. C. A. 1.

An analysis of plaintiffs' petition clearly shows that they all are seeking the same object, the suppression of the publication, and the stopping of the unauthorized solicitation of subscriptions on the strength of the representation that it was authorized by, and would benefit, the temple, in which all of

the plaintiffs were interested. The personal plaintiffs' right to have the publication stopped may be in a sense distinct (that is, have a different source) from the right of the temple company to have it stopped, but it is not necessary that their rights should all spring from the same source. It depends upon their unity and community of right to have it stopped. By one and the same wrongful act the injury comes to all.

The petition stated a cause of action. All of the plaintiffs had a right to protect themselves from entanglements that would subject them to criticism or bring them into disrepute. They had the common right to prevent their names and pictures from being used as a means to induce persons to subscribe money to defendants' schemes. Not only would the temple company and the other plaintiffs be blameworthy if they allowed defendants to secure subscriptions under such false representations, but the ability of the temple company and the members of the Masonic orders (which are social and benevolent in their nature) to raise money for the prosecution of their benevolences would be seriously impaired. In addition to this, the representation that the temple company had authorized and would profit by it was a fraud on the public, and the proposed publication could be enjoined on that ground. 22 Cyc. 844; *Gaines & Co. v. Fruit & Wine Co.*, 107 Mo. App. 507, 81 S. W. 648; *Goodyear v. Goodyear*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Grocers' Journal Co. v. Midland Publishing Co.*, 127 Mo. App. 356, 105 S. W. 310; *Cemetery Ass'n v. Cemetery Ass'n*, 246 Ill. 416, 92 N. E. 912; *Avenarius v. Kornel*, 139 Wis. loc. cit. 267, 121 N. W. 336.

If the petition stated a cause of action at all, however defectively, it is sufficient to sustain the judgment. We think that the petition showed that the plaintiffs not only had a common interest and right to be conserved and protected, but that it grew out of one and the same act which all sought to prevent.

The judgment is affirmed. All concur.

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**KELLEY v. MORTON et al.** (No. 11,061.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**MUNICIPAL CORPORATIONS (§ 296\*)—GRADING STREETS—ESTIMATE OF COST—TAX BILLS—VALIDITY—CONSTITUTIONAL PROVISIONS.**

Rev. St. 1909, § 8838, providing for street grading, and requiring the board of public works to submit to the council an ordinance for the work, with plans and estimates, does not make an accurate estimate a condition precedent to the letting of a contract for the work, and the estimate is advisory only, and tax bills issued for the cost of the work are not void merely because they exceed the estimated cost; the contractor performing his work in good faith.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 792-795; Dec. Dig. § 296.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by D. B. Kelley against Joseph Morton and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Joseph Morton and H. K. White, both of St. Joseph, for appellants. Frank B. Fulkerson and Frederick D. Fulkerson, both of St. Joseph, for respondent.

**TRIMBLE, J.** Plaintiff brought this suit to enforce the lien of four special tax bills for grading a street on which defendant's lots fronted. Said tax bills were issued by the city of St. Joseph February 28, 1911. The objection made to the validity of the tax bills is to the estimate made by the city engineer prior to the passage of the ordinance authorizing the work. In all other respects the steps taken by which the work was authorized and the tax bills issued are deemed to be regular. Nor is any contention made that the plaintiff did not do the work in the manner and within the time prescribed by the ordinance and contract. No objection was made at any time to the manner of the grading, nor is there any showing of fraud connected therewith. After the contractor had spent his money and performed the work in accordance with the ordinance and contract, defendant refused to pay said tax bills. After they had drawn interest for some time, and shortly before suit was brought, defendant tendered \$70 in full payment of the bills, which was not quite one-half the face of the bills, not taking into consideration the interest due thereon. This tender was refused, and suit was brought. The case was tried by the court, a jury being waived. Judgment was rendered for the full amount of the tax bills, enforcing same upon the property described therein. Defendant appealed.

The objection concerning the engineer's estimate is not that no estimate at all was filed, but that the one that was filed was inaccurate; that when the board of public works of St. Joseph approved the proposed ordinance to authorize the work, and transmitted it to the common council of said city, the estimate accompanying it, prepared by the then city engineer and filed in the office of said board, stated that the work to be done under said ordinance would amount to 16,070 yards, costing \$4,018; that the work actually done under the contract amounted to 29,827.45 yards at 33½ cents per cubic yard, aggregating \$9,992.20. It is thus seen that the estimated cost was only 42 per cent. of the actual cost. The question is, in the absence of any fraud, violation of the contract, or variation in the manner of the performance of the contract, Does the fact that the estimate made by the city engineer varies so widely from the actual cost render the tax bills void? If not, does it, or can it, have the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

effect of reducing the amount recoverable by plaintiff down to the corresponding proportion of the actual cost?

The only reference made by the city charter to any "estimate" appears in section 8838, R. S. Mo. 1909. That section provides that all petitions for grading shall be addressed and presented to the board of public works, which shall speedily hear and determine same. The section further provides that the board upon its own motion may, and, if a petition signed by a majority of the front feet is presented, "shall prepare an ordinance for the improvements contemplated, and submit such proposed ordinance, together with such petition or a copy thereof for such improvements, if there be a petition, together with all objections thereto or copies thereof that may have been filed with the board, with such recommendations as it may desire to make to the common council, with the full plans and estimates of the costs of the improvement contemplated." The section further provides that, before such ordinance shall be submitted, all persons shall be notified of the time and place when and where objections will be heard, and such notice shall contain a description of the improvement contemplated.

There is nothing in the statute saying that the actual cost shall not exceed the estimate; nor does it say that the estimate, if not accurate, will invalidate the tax bills. The accuracy of the estimate is not a condition precedent to the letting of the contract. *Probert v. Garth*, 155 Mo. App. loc. cit. 390, 137 S. W. 321. In that case *Ellison, J.*, in speaking of an objection that, although the area had been greatly reduced, still the actual exceeded the estimated cost, said: "This goes to show that the estimate was a poor one, but we do not see how it can affect the validity of the tax bills. There are cases holding bills to be void if the work was let at a price in excess of the estimate, but those were where the work was done in cities whose charters forbid contracts in a sum beyond the estimate. No such restriction appears in the charter of cities of the second class, to which St. Joseph belongs."

Where the statute does not restrict the amount of the final assessment to the amount of the preliminary estimate, the latter is advisory merely. 2 *Page and Jones on Taxation by Assessment*, § 819; *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178; *Moran Bros. v. Jersey City*, 58 N. J. Law, 144, 35 Atl. 950. Being advisory only, it cannot, by reason of its being a poor or inaccurate estimate, defeat and render invalid an assessment. Unless the statute is violated, it would be unjust to deprive the contractor of the rewards of his work, after he has honestly and faithfully performed his contract, merely because the advice given by the city's engineer was not accurate. As said in *Sheri-*

*dan v. Fleming*, 93 Mo. loc. cit. 325, 5 S. W. 814: "The contractor has nothing to do with the estimate; and to say that he must go unpaid because of a mistake of the commissioners in a matter over which he has no control is manifestly unjust. The law contemplates no such results."

Of course, where the statute in express terms prohibits the letting of a contract for a public improvement in excess of its estimated cost, a different question is presented, and decisions based on such statutes are not applicable. *State ex rel. v. Bates*, 235 Mo. loc. cit. 283, 138 S. W. 482. Neither are those cases in point involving the failure to have any estimate at all when the statute says there must be one.

If the tax bills are not rendered void on account of the actual exceeding the estimated cost, we do not see upon what principle this or any other court could scale down the price to be paid the contractor for his work. If the tax bills are valid and he has performed his work according to contract, he is entitled to his pay. If we are without authority to declare the tax bills void in toto, where is our authority to declare them partially void?

We have no such authority. The judgment as rendered must therefore be affirmed. All concur.

ROBERTS et ux. v. TRUNK. (No. 11,060.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

1. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

An instruction, though unnecessarily long and verbose, and thus tending to obscure the real issues, etc., was not prejudicial error where there was no inaccuracy or vagueness in the application of the legal rules to the ultimate evidentiary facts, which were clearly and succinctly stated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

2. HIGHWAYS (§ 181\*) — CARE REQUIRED IN USE OF HIGHWAY—AUTOMOBILES.

Rev. St. 1909, § 8519, enjoins upon autoists the duty of running at reasonable speed; section 8517, of keeping a vigilant watch for all vehicles drawn by animals, and of stopping and taking reasonable precautions to avoid injuring the occupants of such vehicles, etc. *Held*, that if an injury is the proximate cause of the violation of any of such provisions, the autoist is liable for all resultant damages.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 469; Dec. Dig. § 181.\*]

3. HIGHWAYS (§ 181\*) — CARE REQUIRED IN USE OF HIGHWAY—AUTOMOBILES — "VIGILANT WATCH."

"Vigilant watch," as used in Rev. St. 1909, § 8517, enjoining upon autoists the duty of keeping a vigilant watch for all vehicles drawn by animals, includes not only the looking ahead for animal-drawn vehicles, but, while approaching them, to keep a sharp lookout for any exhibitions by such animals of fright.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 469; Dec. Dig. § 181.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. DEATH (§ 93\*) — USE OF HIGHWAY FOR TRAVEL—ACTIONS FOR DEATH—DAMAGES.

Under Rev. St. 1909, § 8523, providing that in case of injury resulting from the operation of an automobile in disregard of the provisions of the statute, the owner or operator shall be "liable in damages" for such injury, and in case of death damages may be recovered as provided by section 5425, a recovery of the penalty of not less than \$2,000, nor more than \$10,000 provided by the latter section may not be had, in an action for wrongful death under the former section, but a recovery may be had only for the damages recoverable under section 5425.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.\*]

#### 5. APPEAL AND ERROR (§ 1066\*) — USE OF HIGHWAY FOR TRAVEL—ACTION FOR INJURY—INSTRUCTIONS.

Error, in an instruction on the measure of damages in an action for negligence in the operation of a private automobile, by including the penal features of Rev. St. 1909, § 5425, providing for penalty and damages in cases where one is injured by a public conveyance, made applicable by section 8523 as to damages only to injuries or death by an automobile, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by Claudde Roberts and wife against Benj. W. Trunk. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

O. C. Mosman, of Kansas City, Mo., and Vinton Pike, of St. Joseph, for appellant. Thompson & Griswold, of St. Joseph, for respondents.

JOHNSON, J. Plaintiffs, who are husband and wife, sued to recover damages in the sum of \$10,000 for the death of their infant child, which they allege was caused by negligence of defendant in the operation of his automobile. The answer is a general denial. The jury returned a verdict for plaintiffs, assessing their damages at \$3,000, and on the overruling of his motion for a new trial defendant appealed.

The death of the child, who was five years old, was caused by the fright of a horse attached to a buggy in which she was riding with her parents. The horse was being driven westward on a public road in Buchanan county, and became frightened at an automobile coming at high speed from the opposite direction. The horse, though spirited, was accustomed to motor vehicles, but the sudden appearance of the car on the crest of a hill, and its rapid approach in a dense cloud of dust, caused the animal first to exhibit keen anxiety and then uncontrollable terror. Finally it whirled around, upset the buggy, kicked itself loose, and ran away. The child received injuries from which she died the following day. The car was occupied by defendant, who was driving, and several companions. It is conceded that the

fright of the animal was apparent, and was observed by defendant when the car was at the top of the hill. Defendant and his companions say the horse was plunging and showing other signs of being uncontrollable at their first view of him, and that his fright must have had some other cause, since it began before he could see the automobile. Further, they state that defendant immediately stopped his car at a distance, afterward ascertained by measurement, of 335 feet from the place of disaster. On the other hand, the evidence of plaintiff tends to show that the sudden apparition of the car and the enveloping cloud, which advanced swiftly with it, frightened the horse, and that the continued approach of the terrifying specter at unabated speed caused him to become unmanageable.

For present purposes we must accept the evidence of plaintiffs, which not only accuses defendant of negligence, but of a most reckless indifference to the rights of the occupants of the buggy, whose lives were put in the greatest jeopardy by a cause within his control.

[1] The first point to receive our attention is defendant's criticism of the first instruction given at the request of plaintiff, which, it must be confessed, is entirely too long. As observed by counsel for defendant, it was not necessary to incorporate in the instruction the entire legislative code on the subject of the various duties of autoists to others rightfully using the public highways, nor to include conceded facts in the hypothesis on which a verdict for plaintiffs was directed. Such faults have a tendency to obscure the real issues, and to divert the thoughts of the jury into erroneous or, at least unprofitable channels. But in the present instance we do not find the defects noted rise to the dignity of prejudicial error. What we may call the charge in the instruction directed a verdict for plaintiffs only upon the hypothesis that the injury of the child was due to negligence of defendant: First, in driving the car at unreasonably high speed; second, in failing to keep a vigilant watch; and third, in failing to stop or check speed after the peril of the occupants of the buggy became apparent.

[2, 3] There was evidence tending to show that the injury was caused by one or more of such acts of negligence. If any one of them was the proximate cause of the injury, defendant would be liable for the resultant damages under the provisions of chapter 83, R. S. 1909, which enjoin upon autoists the duties of running at reasonable speed (section 8519), of keeping "a vigilant watch for all vehicles \* \* \* drawn by animals" (section 8517), and of stopping and taking reasonable precautions to avoid injuring the occupants of such vehicles on the appearance of danger to them. The term "vigilant watch" in-



cludes, not only the task of looking ahead for animal-drawn vehicles, but while approaching them to keep a sharp lookout for exhibitions by such animals of fright or uneasiness which if disregarded might endanger the lives or safety of human beings. The statutory duty of the autoist is to "use the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over \* \* \* such public roads." Section 8523. We do not believe the jury could have been misled by the unnecessary verbosity of the instruction into a misconception of the legal duties of defendant towards the child, and, as we have shown, there was no inaccuracy or vagueness in the application of the legal rules to the ultimate evidentiary facts, which were clearly and succinctly stated.

[4] The instruction on the measure of damages, given at the request of plaintiffs, is as follows: "The jury are instructed that if you find a verdict for the plaintiffs herein, you will assess their damages at such sum as you may believe from the evidence they have sustained on account of the death of their child, in an amount not less than \$2,000 nor more than \$10,000, in the discretion of the jury, and, in determining the amount, you may take into consideration the amount, if any, that you may find from the evidence plaintiffs have sustained on account of the loss of any earnings of their infant child prior to her reaching the age of 18 years, less the expense of her support and maintenance during said time, and you may also take into consideration the facts constituting negligence, if any, on the part of the defendant, causing the death." It will be observed that this instruction embraces the penal features of the remedy afforded by section 5425 of the statutes which provides that in cases where the death of a person is caused by the negligence, unskillfulness, or criminal intent of the operator of a public conveyance (including automobiles), the owner or operator of such public conveyance "shall forfeit and pay as a penalty, for every such person \* \* \* the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury," etc. The history and interpretation of this remedial provision, which first appeared in an amendment of the statute enacted in 1905, have received exhaustive attention in a number of recent decisions of the Supreme Court and Courts of Appeals. There has been much discussion and difference of opinion over the question of whether the remedy is penal, compensatory or both penal and compensatory, but that question has been definitely settled in the decision of the Supreme Court in *Boyd v. Railroad*, 249 Mo. 110, 155 S. W. 13, where it is held that a recovery under

section 5425 is penal up to the sum of \$2,000, but that the extent to which a plaintiff may recover, if at all, in excess of that sum up to \$10,000 is remedial and compensatory, and the jury and court, where a sum in excess of \$2,000 is demanded, in exercising the wise and just discretion which the statute authorizes, should consider evidence of the age, condition of health and earning capacity of the deceased, and the consequent loss to the plaintiff, together with the circumstances attending the killing, overruling, so far as conflicting, *Young v. Railroad*, 227 Mo. 307, 127 S. W. 19, and *Boyd v. Railroad*, 236 Mo. 54, 139 S. W. 561.

Section 5425 by its terms applies only to public conveyances, and could have no application to the case in hand, where the automobile was being used as a private conveyance, but for a provision in section 8523, which, referring to private motor vehicles, makes the owner or operator of such vehicle "liable in damages to a person \* \* \* injured by the failure of the owner, operator or person in control of an automobile, to use such degree of care, and in case of the death of the injured party, then damages for such injury or death may be recovered as provided in section 5425," etc.

[5] The absence from this statute of any reference to a penalty similar to that prescribed in section 5425 led the St. Louis Court of Appeals, in the case of *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 248, to the conclusion that only compensatory damages, and not a penalty, are recoverable in actions falling within the purview of section 8523. We are impressed with the reasoning supporting the conclusion, and refer to that decision for a full and complete expression of our own views on the subject. Plaintiffs are entitled only to compensatory damages, and in fixing a minimum limit to the recoverable damages, and in directing the jury to "take into consideration the facts constituting negligence, if any," the instruction erroneously included the penal features of section 5425, which, as we have shown, have no application to an action for negligence in the operation of a private conveyance. The error was prejudicial, since we cannot know whether, or to what extent, the verdict which exceeded the minimum assessment allowed by the instruction is responsive to the punitive direction to take into consideration the facts constituting negligence. We must assume the jury were influenced by that charge, and that the damages assessed in their verdict were not entirely compensatory as they should have been. Since the case must be remanded and may be retried, we admonish plaintiffs to avoid repeating the faults we have noted in the first instruction.

The judgment is reversed and the cause remanded. All concur.

**GOODE v. CENTRAL COAL & COKE CO.**  
(No. 11,045.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 4, 1914.)

**1. TRIAL (§ 139\*)—TAKING CASE FROM JURY—  
DEMURRER TO EVIDENCE.**

A demurrer to plaintiff's evidence was properly overruled, where, though the preponderance of the evidence favored defendant, there was sufficient evidence to the contrary to justify submission to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

**2. MASTER AND SERVANT (§ 264\*)—INJURIES  
TO SERVANT—ACTIONS—ISSUES, PROOF, AND  
VARIANCE.**

Where the substantial point of controversy was whether a coal miner was killed at his working place, where he was required to repair the roof, or elsewhere, an allegation in the petition that he was killed between 15 and 25 feet from his working place did not require proof that it was within the exact distances specified.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

**3. PLEADING (§ 387\*)—ISSUES, PROOF, AND  
VARIANCE—VARIANCE BETWEEN ALLEGA-  
TIONS AND PROOF.**

While one who specializes in his petition should be particular in his proof, the rule refers to the substance of the charge and not to matters of no consequence which could not affect the meaning of what is alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.\*]

**4. MASTER AND SERVANT (§ 291\*)—INJURIES  
TO SERVANT—INSTRUCTIONS.**

An instruction, in an action for the death of a coal miner, which submitted whether deceased was killed by a fall of rock because of defendant's negligence, without reference to whether it was at his working place, where he was required to repair the roof, which was the main point in controversy, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

**5. MASTER AND SERVANT (§ 293\*)—INJURIES  
TO SERVANT—ACTIONS—INSTRUCTIONS.**

In an action for the death of a coal miner, an instruction submitting to the jury the question whether deceased was killed where defendant was required to repair the roof, without defining such duty in that or any other instruction, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**6. APPEAL AND ERROR (§ 665\*)—RECORD—AB-  
STRACTS—CONCLUSIVENESS.**

Under Rev. St. 1909, § 2048, providing that if appellant's abstract is unsatisfactory the respondent shall file an additional one, a respondent who failed to challenge the correctness of the instructions in appellant's abstract by her additional abstract could not object that they were not the instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2860; Dec. Dig. § 665.\*]

Appeal from Circuit Court, Macon County;  
Nat M. Shelton, Judge.

Action by Catherine Goode against the Central Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

B. R. Dysart and Walter C. Goodson, both of Macon, and Burns & Burns, of Brookfield, for appellant. Hughes & Hughes, of Macon, for respondent.

ELLISON, P. J. Plaintiff's action is to recover damages for the death of her husband, who was a miner engaged in mining coal for defendant. The judgment in the trial court was for the plaintiff. This is the second appeal. The first is found reported in 167 Mo. App. 169, 151 S. W. 508, to which we refer for a general statement of the case. The petition charges that deceased, while eating his noon lunch "at a point in the mine from 15 to 25 feet north of his working place," was killed by a large and heavy rock falling from the roof upon him. The usual allegations of negligence were charged, in that defendant failed to support and protect the roof at that point.

[1] Defendant demurred to the evidence in the trial court and insists here that it should have been sustained. It is conceded that, if deceased was killed at his working place, there can be no recovery, since it was his duty to look to the safety of the roof at such place. We have examined the testimony in detail, and find that while it may fairly be said to preponderate in favor of defendant's theory that deceased was killed at his working place, thereby exonerating it from blame, yet there was sufficient evidence to the contrary to justify the trial court in leaving the question to the jury, and so we held when the case was here the first time.

[2, 3] Much of defendant's argument as to failure of plaintiff's proof has been based on the idea that she was compelled literally to sustain the allegation in her petition that deceased was killed between 15 and 25 feet from his working place. There is no good reason for this. The substantial point of controversy was whether deceased was killed away from his working place, where defendant would be liable for the condition of the roof; or, at his working place, where he was supposed to look out for himself and it would not be liable. If he was not at his working place when killed, it is of no consequence whether he was 5 feet or 20 feet away. It is true that when one specializes in his petition he should be particular in his proof. But that rule refers to the substance of the charge, and not to matters of no consequence which could not affect the meaning of what is alleged. If the exact distance affected defendant's liability on the main charge, then it would be proper enough to require proof of plaintiff's specification.

[4] Plaintiff's instructions Nos. 2 and 3 are erroneous. The former submits the hypothesis that deceased "was struck by a large slab of rock falling from the roof and side of one of the entries of said mine because of the negligence of the defendant," etc., but omits to submit that it was not his working place.

Thus omitting the main controversy between the parties.

[5] The other instruction submitted to the jury that if they found from the evidence "deceased was killed in that part of the entry in which it was the duty of the defendant company to keep the roof in repair and that defendant failed," etc. There was thus left to the jury to say what part of the roof the law cast the duty upon defendant to repair. No other instruction defined such duty. The instruction should have stated the place so as to hold the jury to a decision whether he was, or was not, killed at a point which was not his working place. This was the sharply contested issue of the trial.

[6] But plaintiff insists that these were not the instructions given at the trial and has filed affidavits in this court to that effect, and has objected to them in her brief. The instructions appear regularly and properly in defendant's abstract of the record. Plaintiff challenged its correctness as to some evidence and filed an additional abstract, setting out that evidence; but she did not question the instructions, and we must therefore accept them as the record. The statute (section 2048, R. S. 1909) clearly points out that, if an appellant's abstract is not satisfactory to the respondent, the latter shall file an additional abstract. If this is not accepted by the appellant, he must specify his objection in writing, and the original record will be ordered up for inspection by the court.

The judgment is reversed, and the cause is remanded. All concur.

# UHRICH et al v. GLOBE SURETY CO. OF KANSAS CITY. (No. 10,852.)†

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

## 1. CONTRACTS (§ 187\*)—PARTIES — RIGHTS OF THIRD PERSONS — AGREEMENT FOR BENEFIT OF THIRD PERSON.

A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit, though the third party is not named in the contract, and was not in privity to the consideration; but the benefit to such third person must be intended by the parties to the contract, and not merely incidental or indirect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

## 2. CONTRACTS (§ 147\*) — CONSTRUCTION—INTENT OF PARTIES.

In construing a written contract, the court must give effect to the intention of the parties as expressed in the instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780, 743; Dec. Dig. § 147.\*]

## 3. CONTRACTS (§ 169\*)—CONSTRUCTION — INTENT OF PARTIES — EXTRINSIC CIRCUMSTANCES.

In ascertaining the intent of the parties, a contract should be read in the light of the circumstances of the parties at the time of its

execution, where there is uncertainty or ambiguity in the language.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 762; Dec. Dig. § 169.\*]

## 4. MECHANICS' LIENS (§ 313\*) — PARTIES—RIGHTS OF THIRD PERSONS—BUILDING CONTRACTOR'S BOND.

A building contractor's bond which binds the contractor and his sureties to pay for all materials used in the building, to preserve the building from liens, is intended for the benefit of the owner of the property, and not for the benefit of materialmen, and the latter cannot sue thereon.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 656; Dec. Dig. § 313.\*]

## 5. SUBROGATION (§ 1\*)—PERSONS ENTITLED—MATERIALMEN.

Materialmen furnishing materials for a building are not entitled to be subrogated to the rights of the owner against the contractor and his sureties on a bond which was intended for the benefit of the owner, since to allow such subrogation would be to make a new contract for the parties.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

Appeal from Circuit Court, Clay County; Frank P. Divilbliss, Judge.

Action by Oscar W. Uhrich and others against the Globe Surety Company of Kansas City. Judgment for the defendant, and plaintiffs appeal. Affirmed.

New & Krauthoff and John Taylor, all of Kansas City, for appellants. Haff, Meservey, German & Michaels, of Kansas City, and Ralph Hughes and M. E. Lawson, both of Liberty, for respondent.

JOHNSON, J. This is an action on a building contractor's bond to recover for materials purchased by the contractor, and used in the construction of the building for which the bond was given. The court sustained the demurrer to the petition filed by defendant, the surety on the bond, plaintiffs refused to plead further, judgment was rendered for defendant, and plaintiffs appealed.

The material facts alleged in the petition are as follows: Lena G. Hill entered into a contract in writing with George W. Huggins, a building contractor, by the terms of which he agreed to build an addition to, and make certain alterations in, a hotel building in Excelsior Springs, at a cost of \$52,775. The following quotations from the contract contain all of its provisions relating to the obligation of the contractor to pay for labor and materials employed and used in the construction of the building:

"The said contractor covenants and agrees to and with the said owner to make and erect, build, and finish, \* \* \* pay for all labor and material in a certain addition to the Royal Hotel as called for in the original plans and specifications. \* \* \* The said owner agrees and binds herself, for and in consideration of the erection of said buildings as aforesaid, to pay unto the said contractor the sum of \$52,775.00, \* \* \* pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

vided \* \* \* that all those employed by or furnishing materials to the said contractor shall have been paid and satisfied, so that they shall have no lien upon the buildings or works, and, in case the said contractor shall fail so to pay and satisfy all and every claim and demand against said buildings as aforesaid, the said owner may, if she deems proper so to do, retain from the money due and coming to said contractor enough to pay and satisfy such claims and demands; it being, however, understood that nothing herein contained shall in any way be construed as impairing the right of the said owner to hold the said contractor or securities liable on his bond for any breach of the conditions of the same.

"Subcontractors and parties furnishing materials on account of this contract may be paid by the owner pro rata, as above stated, upon order from the contractor, or on presentation of O. K. bills from the contractor, and all such payments to be charged to account of this contract. All payments by the owner to the contractor, or to his orders, to be made upon written certificates from the architects, based on the amount of labor performed and materials in and about the premises. Final payment will be made within ten days after this contract is fulfilled."

The bond in suit was executed by the contractor as principal and defendant as surety to the owner as sole obligee on the expressed condition "that, if the said contractor shall duly perform said contract and fulfill all the several stipulations therein provided, then this obligation is to be void, but, if otherwise, the same shall remain in full force and virtue. It is hereby expressly agreed that the said L. G. Hill may make payments in any amounts to the contractor, subcontractor, and materialmen and laborers, and such payments shall in no wise limit, affect, or reduce our liability hereunder."

The contractor purchased materials of plaintiffs, used them in the construction of the building, and failed to pay for them. Plaintiffs filed a materialman's lien against the building and brought a suit, which is now pending, against the contractor and owner for the enforcement of the lien. The present suit on the bond was instituted during the pendency of that action.

The grounds of the demurrer to the petition are (1) a defect of parties, (2) that a cause of action is not stated against the defendant surety company, and (3) that the pending suit to enforce the mechanic's lien is a bar to the present action. In the view we take of the case it will not be necessary to discuss the first and third grounds.

Plaintiffs say in their brief: "The theory of the action is that, while plaintiffs are not named in said contract and bond, they are entitled to sue thereon because they are parties for whose benefit said contract and bond were made." Or, to state it differently, the

pleaded cause is based on the theory that, since the building contract compelled the contractor for the stated consideration to preserve the property which was the subject of the contract from the liens of mechanics and materialmen who should furnish labor and material for the improvements, at the request of the contractor, and since the obligation imposed on defendant in the condition of the bond was coextensive with that the contractor assumed towards the owner under the building contract, the bond should be deemed to have been taken for the benefit of such mechanics and materialmen, for the reason that the payment of debts the contractor might incur in the construction of the improvements is shown by these contractual agreements to have been a direct, instead of an incidental, object of the contracting parties, including defendant, the surety on the bond.

[1] The rule is well settled that: "A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his benefit. This is so though such third party be not named in the contract, and though he was not privy to the consideration. It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. *City to Use v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Rogers v. Gosnell*, 58 Mo. 590; *State ex rel. v. Gaslight Co.*, 102 Mo. 482, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; *Ellis v. Harrison*, 104 Mo. 276, 16 S. W. 198; *Lumber Co. v. Schwartz*, 163 Mo. App. 659, 147 S. W. 501.

This rule, as we observed in the recent case of *Bank v. Chick*, 170 Mo. App. 343, 156 S. W. 743, has well-defined limitations. In *Porter v. Woods*, 138 Mo. loc. cit. 554, 39 S. W. 798, the Supreme Court quoted with approval the following excerpt from the opinion in *Simson v. Brown*, 68 N. Y. 355: "It is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person; he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited."

It is said in *Burton v. Larkin*, 36 Kan. 246, 18 Pac. 898, 59 Am. Rep. 541: "The rule is not so far extended as to give a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it." This statement of the exception to the general rule also received the sanction of our Supreme Court in the opinion to which we have just referred. The same idea is expressed in the more recent case of *Beattie Mfg. Co. v. Clark*, 208 Mo. loc. cit. 108, 106 S. W. 34, where it is said: "If it appear from the contract itself that it was made for the

benefit of the contracting parties therein, and no other, an action by a third party cannot, of course, be maintained thereon."

[2, 3] In solving the question of whether the parties to the bond had their own benefit for their sole object, or purposed to include as contractual beneficiaries parties who were not in privity with the contract or the consideration, we must endeavor to ascertain and then enforce the intention of the parties as expressed in the contract evidenced by the bond. In the judicial interpretation of written contracts the most important rule is that which requires the court to give effect to the mutual intention of the parties as expressed in the instrument, and, in ascertaining the true intention, the contract should be read in the light of the circumstances of the parties at the time of its execution, in instances where there is uncertainty or ambiguity in the language of the instrument. *Bank v. Chick*, supra.

[4] Applying the rules we have stated to the contract in hand, we find ourselves unable to join with plaintiffs in the conclusion that the payment of debts of the class to which that of plaintiffs belongs was intended by the parties to the contract to be one of its direct objects. We think the payment of such debts was only incidental to the object of protecting the property of the owner from liens for debts the contractor would be compelled to pay in order to perform his agreement to construct the improvements at his own charge and expense. The owner of the property was confronted with the possibility that the contractor might fail to perform the contract and thereby subject her property to the burden of numerous mechanic's liens. It was to protect herself against such contingency that she required the bond. The mechanic's lien statutes would protect the future creditors of the contractor by affording them resort to her property for the payment of their demands. She was interested in the payment of such demands only to the extent of her own protection. That such interest was the only one the parties had in mind is shown by their omission to insert an express provision giving mechanics and materialmen a right to sue on the bond. In all of the cases in this state relied on by plaintiffs we find, either that such provision appeared in the contract, or that the bond was given to secure the performance of a contract for a public improvement upon which no mechanic's lien could attach, and contained a provision requiring the contractor to pay for the labor and materials used in such improvement.

An example of the first class is the case of *City to Use v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695, where the bond contained the express agreement that "the same may be sued on at the instance of any materialman, laboring man, or mechanic," etc.; and an illustration of the second class

is the recent case of *Lumber Company v. Schwartz*, 163 Mo. App. 659, 147 S. W. 501, where a bond given to secure a contract for a public improvement required the contractor to deliver the building to the board "free from all debts and liens of every character on account of materials furnished or labor performed in and about the said building." We held that, inasmuch as the mechanic's lien law afforded no protection to mechanics and materialmen in such instances, the provision quoted must have been intended to be for the benefit of such parties, since it could not have been of any benefit to the state. We said in the opinion: "To hold that the bond in question was not intended for the protection of third persons would be to say that its second clause is meaningless, and for all practical uses should be stricken from the instrument. One of the canons of construction is that, if possible, effect must be given to all parts of the instrument. On defendant's theory, what effect could be given the obligation 'to deliver the work \* \* \* free from all debts or liens of every character on account of materials furnished or labor performed'? This being a public building, no debts made by the contractor could become a lien or charge on the building or impose any liability on the board. So far as the protection of the building and of the board was concerned, those words were superfluous; but they were pregnant with meaning, if their purpose was to benefit third persons. Manifestly it was the intention of the parties to insert a condition similar to that required by the statute, to compel the contractor to pay for material and labor that entered into the construction."

The reasons we gave for holding the sureties liable in that case are sufficient to exonerate the surety from liability in the case in hand. This being a contract for the construction of a private building which was entered into with reference to the protection the lien statutes would afford mechanics and materialmen, the absence from the bond of an express provision giving such persons a right to sue thereon clearly evidenced the intention of the contracting parties that the bond should be for the sole benefit of the obligee.

[5] In answer to the final argument of plaintiffs that they should be allowed to recover under the equitable doctrine of subrogation, it suffices to say that to accede to that view would be to declare that the expressed intention of the parties to the contract to exclude plaintiffs and their kind as beneficiaries must be swept aside and substituted by a court-made contract of opposite purpose. The doctrine of subrogation never has been, and should not be, applied to interfere with the right of persons to make their own contracts and have them enforced as made.

The judgment is affirmed. All concur.

## CUSHING v. PETRIE et al. (No. 11,062.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

## MUNICIPAL CORPORATIONS (§ 314\*)—STREET IMPROVEMENT PROCEEDINGS—SELECTION OF MATERIAL—TIME.

Laws 1903, p. 62, § 8, provides that the board of public works of cities of the second class, of its own motion or on petition of a majority in front feet of the resident real estate property owners, may propose an ordinance for street paving and advertise for 5 days in the official paper, notice to all persons interested, of the time and place for hearing objections, and, if the board shall overrule the objections, then the matter shall be continued 15 days, within which time the owners of a majority of front feet shall select in writing any material they desire to be used, which selection shall be embraced in the ordinance. A majority of property owners along a street to be paved filed a petition for paving with the board on December 19, 1907, which named the material desired. No action was taken on this, but on May 28, 1908, the board of its own motion ordered a proposed ordinance with plans and specifications for paving and directed that 5 days' published notice be given. On June 4th thereafter the board overruled objections and continued the matter 15 days for the selection of paving material by property owners, but on the same day the board received the original petition for paving, and on June 8th directed that it be refiled, and then made a finding that within the 15 days allowed by law the material had been selected by a majority in front feet of the property owners. *Held*, that such finding involved a presumption that the majority of the property owners originally signing the petition remained a fixed body up to the time of the adoption of the ordinance, when in fact all the property owners were entitled to 15 days after objections had been overruled in which to act on the kind of materials to be used, and hence the proceedings were invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 827, 828; Dec. Dig. § 814.\*]

Appeal from Circuit Court, Buchanan County; C. H. Mayer, Judge.

Suit by F. J. Cushing against W. A. Petrie and others. Judgment for defendants, and complainant appeals. Affirmed.

Spencer & Landis, of St. Joseph, for appellant. W. A. Petrie and John S. Boyer, both of St. Joseph, for respondents.

ELLISON, P. J. Plaintiff's action is to enforce the lien of a special tax bill issued by the city of St. Joseph, a city of the second class. The judgment in the trial court was against the validity of the bill.

The bill was issued for street paving as authorized by the Laws of 1903, p. 60. It is provided in section 8 of that act that the board of public works of its own motion, or on petition of "a majority in front feet of the resident real estate property owners," may propose an ordinance for the paving and shall advertise for five days in the official paper notice to all persons interested, of the time and place when and where the board will hear objections to the proposed ordinance. "And if the board shall overrule

such objections, then the matter shall be continued for fifteen days, and within that time the owners of a majority of front feet, \* \* \* shall have the right to select, in writing, any material they may desire to be used in making said improvement, and such selections only shall be embraced in the ordinance. \* \* \*"

It seems that a majority in front feet of property owners filed with the board on the 19th of December, 1907, a petition for the paving and, though not required by the statute, named the material they desired. It appears that no action was taken on this, but that on the following 28th of May, 1908, the board of its own motion ordered a proposed ordinance, with plans and specifications for the paving, and directed that five days' published notice for objections be given, and this was done. Then, on the 4th of June thereafter, the board met and overruled the objections made and continued the matter for fifteen days for the selection of the paving material by the property owners as required by the statute. Then, on the same day (June 4th), the board received from some one (it not appearing who) the petition for the paving which had been presented in the first instance, in December, 1907, and on June 8th ordered it refiled. Thereupon, on the same day (June 8th), the board made a finding that within fifteen days granted, within which property owners might select, in writing, the material with which said improvement should be made had been filed by a majority in front feet of the resident real estate owners. The trial court found that these defendants had no knowledge of the refiled of the petition, and that there was no evidence that any petitioner ever requested it to be refiled, and that there was no evidence of the selection of material by the property owners except as here stated.

From the foregoing it appears that, after expiration of the five days' notice to property owners to appear and make objections, the board overruled such objections and continued the matter for fifteen days as required by the statute, in which "time the owners of a majority of front feet abutting on the highway, or public place sought to be improved and owned by residents of said city, shall have the right to select, in writing, any material they may desire, \* \* \* and such selection only shall be embraced in the ordinance." But instead of waiting for the expiration of the fifteen days' time given to the property owners, the board, on the very day of making the order of continuance, found that the selection of material had been made by the refiled of the petition as above stated. Passing by any question as to this refiled having been made by the board itself without request from the petitioners, the board evidently thought, as the petitioners for the paving (though at a time not contemplated by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

law) had named the material six months before, that constituted a selection of the material. The view of the board necessarily assumed that the majority of property owners originally signing a petition to have paving done was a fixed body and remained a majority afterwards when the time, designated by law, arrived in which to choose the material for such paving; and thus have cut out a right to take part in the selection of material of all that body of property owners who did not sign the original petition. It is manifest that those in the minority when the petition was signed have a right at the lawful time, viz., within fifteen days after objections are overruled, to mingle with, and exchange views with, the signers as to the kind of material to be used. Opinions may be formed, changed, or modified at this time. To adopt the view of the board would be, in effect, to say, as a matter of law, that no one, on the original petition in which he expresses a choice not then legally proper to make, could make a selection at the time the statute directs it shall be made.

We have examined the cases of *Webb v. Strobach*, 143 Mo. App. 459, 127 S. W. 680, and other cases, cited by plaintiff, and find them inapplicable on the facts and conclusions of law drawn therefrom.

But in addition to the foregoing views, we have the ruling of the Supreme Court in *Sedalla v. Montgomery*, 227 Mo. 1, 22, 29-31, 88 S. W. 1014, 127 S. W. 50, that the board and the city council had no power to act since they violated the provisions of the statute necessary to confer jurisdiction. No jurisdiction was conferred upon the board of public works to propose an ordinance to the council, nor upon the council to pass it until the property owners had had the statutory period in which to make a choice of the material.

The judgment is affirmed. All concur.

RACKLIFFE-GIBSON CONST. CO. v.  
ZEILDA FORSEE INV. CO.  
(No. 11,064.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

MUNICIPAL CORPORATIONS (§ 429\*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—PROPERTY SUBJECT—FRONTAGE—STATUTES.

Rev. St. 1909, §§ 8709, 8710, provides that the cost of all work on streets shall be charged as a special tax on lands on both sides of an adjoining street, and, when the work shall be completed, the city engineer may compute the cost and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel with its proper share of such cost according to the frontage of the property. *Held* that, where only a narrow strip of a tract of unplatted land fronted on a street improvement, the statute did not contemplate the division of the tract or parcel for purposes of special assessment, but the whole tract was subject to assessment, though the estimated

benefits must be confined to the portion fronting on the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1039; Dec. Dig. § 429.\*]

Appeal from Circuit Court, Buchanan County; William D. Rusk, Judge.

Action by the Rackliffe-Gibson Construction Company against the Zeilda Forsee Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 170 Mo. App. 93, 156 S. W. 66.

Brown & Eastin, of St. Joseph, for appellant. Frank B. Fulkerson, Joshua A. Graham, and Hugh C. Smith, all of St. Joseph, for respondent.

JOHNSON, J. This is an action to enforce the lien of a special tax bill issued by the city of St. Joseph for the paving of Twenty-Second street, under an ordinance duly passed for that purpose. The street runs north and south, and the land owned by defendant against which the tax bill was issued consisted of an irregular, unplatted tract or parcel of land, the body of which was 1,017 feet 9 inches long from north to south, and of an average width of about 400 feet. The whole of the tract was west of Twenty-Second street, and all of it except a narrow strip we shall describe was separated from the street a distance of 224 feet by an intermediate tract not owned by defendant, and known as the Huggins Terrace, which was 990 feet long and 224 feet wide. The strip just mentioned, which was 17 feet 9 inches wide, bounded the Huggins Terrace on the north and connected the body of defendant's tract with Twenty-Second street, having a frontage of 17 feet 9 inches on that street. Had the described lands been platted, the strip would have constituted a part of Marion street, an east and west street; but neither the Huggins Terrace nor defendant's land was platted at the time of the improvement and the issuance of the tax bill. The north end of the improvement as fixed in the ordinance was opposite the north boundary line of defendant's land. Some time after the tax bill was issued, defendant platted the whole tract, and the city accepted the dedication of the streets and alleys as shown on the recorded plat. The whole of the strip was included in the land platted and dedicated as Marion street.

The defense to the tax bill is that its lien could not be extended south of the narrow strip abutting on the street, i. e., a strip 17 feet 9 inches wide off of the north end of defendant's tract, and, since that strip has been dedicated to public use, the lien has failed entirely, at least as far as the land retained by defendant is concerned.

As stated by counsel for defendant "the sole question raised at the trial was whether or not the plaintiff could have a lien against a large tract of land situated as the tract

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index—166 S.W.—54

described in the tax bill simply because a strip 17 feet 9 inches wide extended like an arm out to, and bordered upon, the street." In their brief and argument counsel advance the proposition that "only that portion of the land abutting upon Twenty-Second street can be subjected to the tax," and apply this rule in a way to restrict an assessment against a lot, tract, or parcel of land to an area of no greater width than that of the frontage of such lot or tract on the improved street.

The pertinent statutes provide: "The cost of all work on streets \* \* \* shall be charged as a special tax on lands on both sides of and adjoining the street" (section 8709, Rev. Stat. 1909), and, "when any work \* \* \* shall be completed under authority herein granted, the city engineer shall compute the cost thereof and apportion the same among the several lots or parcels of land to be charged therewith and charge each lot or parcel of property with its proper share of such costs, according to the frontage of the property" (section 8710).

As we said in *Chillicothe v. Henry*, 136 Mo. App. loc. cit. 472, 118 S. W. 486, the term "frontage" is but an expression of the "front-foot rule," and under such rule no other property than that abutting on the street improved can be assessed. But where a lot or parcel of land has a frontage on the improvement, the quoted language of the statutes would seem to contemplate that the whole lot or parcel should be subject to assessment in the proportion of its frontage on the street. Each lot or parcel so abutting is treated as an assessable unit or entity, and no statutory provision is made for the subdivision of such units to meet the exigencies of particular cases. The right of municipalities to assess private property to pay the costs of public street improvements is purely statutory, as is also the method and procedure for making an apportionment of the burden. The statutes must be strictly construed, and implied provisions inconsistent with those expressed could not be read into them by the courts without invading the province of the Legislature. Large as it was, the whole tract owned by defendant was but a single parcel—a taxable entity—and it was enough to subject it to an assessment that it stretched out an arm which ended in a street frontage. So far as we are advised or have been able to ascertain, the point is new in this state, and the only cited authority in other jurisdictions which may be said to touch the precise question is the case of *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692. In that case the Supreme Court of Rhode Island said of an instance where only a portion of the land assessed abutted on the street; the rest being separated from the street by the land of another person: "We think the correct construction of the several statutes relating to the subject \* \* \* is that the entire es-

tate, in so far as it lies within the area of the assessment, is subject to assessment, if any portion of it abuts upon the street where the sewer is laid, though, of course, only the abutting portion is subject to assessment for frontage."

The case of *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487, relied upon by defendant, presented a different situation from that in the present case. There a 40-acre tract abutted on a street which was improved less than half the distance of the whole frontage. The Supreme Court of Washington held that "the estimate of the benefits and assessment must be confined to that portion of the land fronting on the improvement," doubtless for the reason that the remainder of the land would be subject in the future to assessment for the cost of extending the improvement the entire length of the frontage. It must be admitted that the decision does not treat a single parcel of land abutting upon the improvement as an assessable unit, and, since it contains no reference to pertinent statutes, and they are not before us, we have no means of knowing that the rule pronounced was not authorized by the statutory law of that state.

Our own statutes, as we have observed, do not contemplate the division for the purposes of such special assessment of single lots or parcels of land, and we are bound to enforce the statutory law as we find it. We agree with the learned judge who tried the case that the tax bill was properly issued against the entire tract.

The judgment is affirmed. All concur.

STARK v. CHICAGO, R. I. & P. RY. CO.  
et al. (No. 10,407.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 4, 1914.)

1. CARRIERS (§ 318\*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by one who came to a railroad station to meet a passenger and was injured by leaning against a defective truck, held sufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

2. CARRIERS (§ 316\*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTIONS—BURDEN OF PROOF.

The burden was on the plaintiff, in an action for injuries received by him from leaning against a defective truck on defendant's station platform, where he was waiting to meet a passenger, to show that his injury was caused by defendant's negligence; that is, by the culpable neglect of some duty defendant owed him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

3. CARRIERS (§ 304\*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—PERSONS AWAITING ARRIVAL OF PASSENGERS.

One waiting at defendant's station to meet a passenger was not a trespasser nor mere licensee, but was there by implied invitation, and,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



while defendant did not owe him the extraordinary duty owed a passenger, it owed him the duty of exercising ordinary care to maintain its station buildings and platforms in reasonably safe condition for such use.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. § 304.\*]

**4. CARRIERS (§ 304\*)—CARRIAGE OF PASSENGERS — PERSONAL INJURIES — PERSONS AWAITING ARRIVAL OF PASSENGERS.**

A railroad company was liable to a boy who, while waiting on the station platform for the arrival of his father on a train, leaned against a loaded truck, from which the support at one end had been broken off, and was injured by its coming down on his leg, as it was bound to anticipate that persons so waiting might sit upon or lean against the truck, and the premises could not be said to be safe when necessary to guard against such traps.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. § 304.\*]

Ellison, P. J., dissenting.

Appeal from Circuit Court, De Kalb County; A. D. Burnes, Judge.

Action by Andrew J. Stark, Jr., by his guardian, Andrew J. Stark, against the Chicago, Rock Island & Pacific Railway Company and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

John E. Dolman, of St. Joseph, and R. A. Hewitt, of Maysville, for appellant. K. B. Randolph, of St. Joseph, and E. G. Robison, of Maysville, for respondent.

JOHNSON, J. [1] Plaintiff, by his guardian, sued defendant for injuries received by a loaded truck falling upon him while he was waiting on defendant's station platform at Amity for the arrival of a train. A trial by jury resulted in a verdict and judgment for plaintiff, and defendant railroad company appealed. The main question for our decision is whether or not the verdict is supported by sufficient evidence. Plaintiff was 14 years old, and lived with his parents at Amity, a short distance from, and in sight of, defendant's station. Late in the afternoon of January 6, 1911, he went to the station to meet his father, who was expected to arrive at the station on a freight train from the East. A large truck kept by defendant at the station for the movement of freight and baggage was standing in a prominent place on the platform. Earlier in the day a merchant had loaded the truck with two wagonloads of sacked flour for shipment on the train for which plaintiff was waiting. The platform of the truck was 12 feet long, and was supported by two large wheels in the center. It had been provided at each end with a short leg ending in a small wheel, but one of these legs had been broken off some time before, leaving that end of the truck without support. The sacks of flour covered the top of the truck, and the load was so evenly distributed that it required a pressure

of only 15 or 20 pounds to cause the unsupported end to sink down to the floor. While waiting for the train, plaintiff lounged against that end of the truck, and it tipped down to the floor, catching and breaking his leg. The defect had existed two or three months, but the truck had been continued in service on that platform, which was provided for the use of passengers and others having business with defendant. The station agent received the shipment from the merchant, and, we think, had knowledge that the flour was loaded on the crippled truck, preparatory to shipment.

[2] The burden is on plaintiff to show that his injury was caused by negligence of defendant—i. e. by the culpable neglect of some duty defendant owed him—and it is the contention of counsel for defendant that it owed him no duty to provide a truck for him to lean against. In other words, that the truck itself proclaimed to persons rightfully using the station platform on the express or implied invitation of defendant that it was designed for use only in the transportation of freight, baggage, and express, and not as a seat or resting device for such invitees.

[3, 4] Plaintiff was using the station platform on the implied invitation of defendant, and was neither a trespasser nor a mere licensee. As we observed in the recent case of *Winscott v. Railroad*, 151 Mo. App. loc. cit. 381, 131 S. W. 74, a person has a right to go on station premises for the purpose of escorting an outgoing passenger or of meeting one whose arrival is expected. To such a person the railroad company does not owe the extraordinary care it owes a passenger, but does owe him the duty of ordinary care to maintain its station buildings and platforms in a reasonably safe condition for such use. *Doss v. Railway*, 59 Mo. 27, 21 Am. Rep. 371; *Langan v. Railway*, 72 Mo. 392; *James v. Railroad*, 107 Mo. 480, 18 S. W. 31; *Railroad v. Best*, 66 Tex. 116, 18 S. W. 224; *Gillis v. Railroad*, 59 Pa. 129, 98 Am. Dec. 317. The duty of defendant towards plaintiff was to exercise reasonable care to maintain the station platform it had provided for the use of patrons in a reasonably safe condition, and it cannot be said that such duty would be discharged if defendant maintained concealed traps or pitfalls on the platform in places where its unwary invitees might be expected to become ensnared and injured by them, and it would be a strange doctrine that would excuse defendant from liability on the specious argument that the invitee should have kept away from the trap because it was not designed or intended for his use or convenience. While the truck obviously was not intended to be used as a seat or resting place, defendant was bound to anticipate that persons doomed to the wearisome task of waiting for a train at a country station might lean against, or even sit upon, so convenient an object as a platform truck. In the perform-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ance of its duty, defendant was required by law to take into consideration common human habits and customs, and had no right to place its invitees in a situation where they would have to be on the alert to protect themselves from injury. A place is not reasonably safe if it compels one to put a guard over his every action to keep from falling into some trap or snare.

The cases cited by defendant which relate to the proper use of fences, banisters, and similar barriers in public or private passageways—e. g., *Kelley v. Lawrence*, 195 Mo. 75, 92 S. W. 1158; *Stickney v. City of Salem*, 3 Allen (Mass.) 374; *Orcutt v. Bridge Co.*, 53 Me. 500; *Kinney v. Onsted*, 113 Mich. 96, 71 N. W. 482, 38 L. R. A. 665, 67 Am. St. Rep. 455—are not in point. As was said in *Winscott v. Railroad*, supra, we are not dealing with a case where the plaintiff, traveling on a way prepared only for travel and intended to be used for no other purpose, is injured on account of another use he makes of the place, but with an instance where the plaintiff is injured while using the place for the very purpose for which it was intended and prepared. Plaintiff's business was that of waiting, in a place provided by defendant for that particular use, and it was not to be expected that he would stand in one particular spot for fear of moving, or that he would regard every object on the platform that offered some means of rest or relaxation as being loaded with concealed danger. He had a right to assume that a truck loaded with freight was not a hair-trigger trap that would go off and kill or maim him if he but casually touched or leaned against it. The evidence of plaintiff tends to show that a negligent breach by defendant of its duty to exercise proper care to maintain the station platform in a reasonably safe condition was the proximate cause of his injury. The demurrer to the evidence was properly overruled.

The objection urged against an instruction given at the request of plaintiff is not well taken.

The judgment is affirmed.

TRIMBLE, J., concurs. ELLISON, P. J., dissents.

SMITH v. DELANO et al. (No. 11,069.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

# 1. APPEAL AND ERROR (§ 440\*)—JUDGMENT—AMENDMENT AFTER APPEAL.

In view of Rev. St. 1909, § 1851, providing that after final judgment the court may amend, in affirmance of the judgment, any record, entry, or return, by adding or striking a party, or correcting a mistake in the name of a party, or in any other respect, and the judgment shall not be annulled therefor, the trial court may order its records amended from proper data, so that it could, after appeal and the filing of the transcript in the Court of Appeals, in an action

against the receivers of a railroad company, amend the judgment for plaintiff, which was entered against defendants individually, so as to make it run against them as receivers, and require the amount awarded to be satisfied out of the property in defendant's hands as such.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198-2201; Dec. Dig. § 440.\*]

## 2. CARRIERS (§ 318\*)—PASSENGERS—ACTIONS FOR ASSAULT—SUFFICIENCY OF EVIDENCE.

Evidence in an action against receivers of a railroad company for assault by an employé upon a passenger held to sustain a finding for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

## 3. CARRIERS (§ 319\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Evidence in a railroad passenger's action for personal injuries caused by an assault by the porter held not to show that an award of \$500 actual damages and \$500 punitive damages was excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.\*]

Appeal from Circuit Court, Ray County; Frank P. Divilbiss, Judge.

Action by Turner E. Smith against Fred-eric A. Delano and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Lavelock & Kirkpatrick, of Richmond, and J. L. Minnis, of St. Louis, for appellants. Hamilton & Herndon, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is based on an assault and battery by one of defendant's servants. The judgment in the trial court was for plaintiff.

[1] It appears that the Wabash Railway Company was in possession and was being operated by the three defendants as receivers, and that, as such, they operated the road as an ordinary common carrier of passengers. The judgment for plaintiff was entered as though rendered against the defendants individually, and this seems not to have been discovered until after defendants' appeal to this court had been taken and the transcript filed here. When discovered, plaintiff filed a motion in the trial court for an entry of a proper judgment against defendants in their capacity as receivers, and that the amount thereof be satisfied out of the property of the railway corporation in their hands as receivers. *Proctor v. Railway Co.*, 42 Mo. App. 124. This motion, after due hearing, was sustained. After citing authority on the proposition that receivers of a corporation cannot be "sued individually for acts done officially, and that personal judgments, where sued as receivers, are unenforceable," defendant seeks to hold plaintiff to the record of the judgment before the change made by the nunc pro tunc order. It is insisted that the corrected record of the judgment could not be made after an appeal

had been taken and the transcript of the record filed in the appellate court.

We think this is an erroneous view. It is true that, after an appeal is taken, jurisdiction of the cause is transferred with the appeal to the appellate court; but the trial court still retains jurisdiction over its records and may order them amended from proper data. Section 1851, R. S. 1909; *De Kalb Co. v. Hixon*, 44 Mo. 841; *Ross v. Railway Co.*, 141 Mo. 390, 88 S. W. 926, 42 S. W. 957, and cases cited; *Reed v. Bright*, 232 Mo. 399, 415, 134 S. W. 653; *Jackson v. Fulton*, 87 Mo. App. 228. We therefore have concluded that defendants' objection to the judgment as last entered, including that part of the objection that it was error to include in the amendment the direction to make the money out of assets and property of the corporation in defendants' hands, should be overruled.

[2, 3] The only other complaint is that the verdict is against the weight of the evidence, and that it is excessive, and thereby discloses passion and prejudice on part of the jury. The evidence in behalf of plaintiff, in view of the verdict in his favor, must be accepted as showing the facts in the case. From this evidence it appears that plaintiff had purchased a ticket on defendant's road at the ticket office in Kansas City, and had showed it to the gatekeeper, who passed him out to the tracks at the station to get upon his train. He saw a negro porter standing at the entrance of the steps to one of the chair cars in the train, and asked him if there was a smoking car towards the front end. To this inquiry he received an insulting answer in tone and manner. Plaintiff got upon the platform between the smoker and chair car, saw the smoker was pretty well filled, and turned towards the chair car. Then some request was made by the porter to see plaintiff's ticket, which he, being up on the platform, refused to show to the porter, but did show to a brakeman. When he descended from the car, and started away to another car, more words followed, when the porter called him a vile name and started after him. Plaintiff threw his grip forward and at the approaching negro in defense of his threatened assault. A fight ensued amid a crowd of onlookers, which resulted in some injury to both. Plaintiff was knocked down and received several bruises. Finally the negro "ran for a policeman" and the affair ended.

Accepting plaintiff's version of the matter, as we must, it is manifest that no other verdict could have been rendered than one in his favor. The question of prejudice is but a part of the point made as to excessive amount of the damages, \$500 actual and \$500 punitive. These amounts seem reasonable enough, they have met the approval of the trial judge, and we would not be justified in reducing them. The punitive sum might have been materially more without passing beyond

reason. The actual damage is justified on the ground that plaintiff was hurt, though not permanently, yet severely, and the evidence showed he suffered from the nervous shock resulting from the encounter.

On the whole record, there is no ground for our interference, and we affirm the judgment. All concur.

## STATE v. JOHNSON. (No. 11,076.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

### 1. CRIMINAL LAW (§ 1106\*) — APPEAL—DISMISSAL—DELAY IN FILING TRANSCRIPT.

Where an appeal in a criminal case operates as a stay of proceedings, and the duty of making and filing the transcript with the clerk of the Supreme Court devolves on the clerk of the circuit court under the express provisions of Rev. St. 1909, § 5308, his delay in performing this duty is not ground for dismissing the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.\*]

### 2. COURTS (§ 231\*)—COURTS OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

The constitutionality of the local option law is no longer an open question, and appeals from convictions thereunder are within the jurisdiction of the Courts of Appeals, notwithstanding an attack on the validity of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

### 3. INTOXICATING LIQUORS (§ 33\*)—LOCAL OPTION ELECTION—NOTICE OF ELECTION.

Under Rev. St. 1909, § 7238, relative to local option elections, which prescribes the qualifications of voters, and section 7240, relative to the publication of the notice of election, the notice of election need not be addressed to the qualified voters, and an election was not affected by the failure to address the notice to them; the statutes not so providing, and the general public, including qualified voters, being interested in such elections.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 40, 41; Dec. Dig. § 33.\*]

### 4. INTOXICATING LIQUORS (§ 238\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

On a trial for violating the local option law, evidence held sufficient to take the case to the jury, and hence a demurrer to the evidence was properly overruled.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.\*]

### 5. CRIMINAL LAW (§ 368\*) — EVIDENCE — HEARSAY.

On the trial of a restaurant proprietor for violating the local option law, testimony that the prosecuting witness, while in the restaurant, but not in the hearing of defendant, said he had bought or was going to buy some whiskey from defendant was not a part of the res geste, but pure hearsay, and should have been excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. § 368.\*]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

G. W. Johnson was convicted of violating the local option law, and he appeals. Reversed and remanded.

W. H. Childers and John W. Clapp, both of Milan, and Earl F. Nelson, of Jefferson City, for appellant. J. M. Wattenbarger, Pros. Atty., of Milan, for the State.

JOHNSON, J. [1] Defendant appealed from a conviction in the circuit court of Sullivan county for a violation of the local option law. A motion to dismiss the appeal was filed by respondent and overruled, but the point still is urged, and we are cited to *State v. Dempsey*, 168 Mo. App. 298, 153 S. W. 1064, as sustaining it. In that case the appeal did not operate as a stay of proceedings, and we held that section 5309, Rev. Stat. 1909, applied, and imposed on the appellant the duty of filing the transcript in proper time. In this case, as shown by the record, the appeal operated as a stay of proceedings, and, under section 5308 of the statutes, the duty of making out and filing the transcript devolved on the clerk of the circuit court. The motion is found to relate to a negligent performance of that duty for which the appellant should not be held accountable, and was properly overruled.

[2] Counsel for defendant assails the local option law on the ground that it is unconstitutional. A similar attack moved us to transfer the case of *State v. Campbell*, 214 Mo. 362, 113 S. W. 1081, to the Supreme Court, but that court refused to take jurisdiction, and retransferred the case, saying the constitutionality of the local option law no longer may be considered an open question. Following that decision, we hold the point is without merit, and cannot be considered as affecting our jurisdiction over this case.

The record discloses that the local option law had been legally adopted in Sullivan county long before the date of the alleged offense.

[3] Objection is offered to the published notice of the election, on the ground of its failure to state that it was addressed to the qualified voters of the county. The title of the notice was "Notice of Local Option Election," and, beginning with the recital that it was a notice of special election "to be held under the provisions of article 3 of chapter 22 of the Revised Statutes of Missouri 1899, commonly known as the local option law, to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of Sullivan county, in the state of Missouri," proceeded to give the record history of the proceedings, and ended with the order of the court for holding an election. Defendant argued that a notice, to be effective, must be directed to the person, persons, or class of persons intended to be notified (29 Cyc. 1118; *Watson v. Walker*, 23 N. H. 471),

and that the statutes (7238 and 7240, Rev. Stat. 1909) contemplate that the notice shall be addressed to the persons qualified to vote at the election. The statutes do not say so in express terms, nor do we think such restricted meaning should be read into them by implication. The general public—i. e., all classes of citizens, including qualified voters—are interested in such elections, and the law intends that the notice shall be for the information of all, and not for that of any particular class. The objection to the sufficiency of the notice is not well grounded.

[4] Defendant was the proprietor of a restaurant, and had procured a license from the federal authorities to sell intoxicating liquors. The prosecuting witness stated that he and a companion had breakfast in the restaurant on the morning in question, and that before leaving the place he purchased three pints of whisky from defendant, for which he paid \$2.25. Defendant denied making the sale, and gave testimony which, if believed, would lead to the conclusion that the accusation against him was prompted by hatred or malice. The testimony of the prosecuting witness was not self-contradictory nor inherently weak, and, standing alone, was of sufficient probative force to overcome the presumption of innocence. Neither the trial judge nor the jury were bound to believe defendant, either as to his denial of the sale or his counter attack on the credibility of the accuser. The court did not err in overruling the demurrer to the evidence.

[5] The companion of the prosecuting witness introduced by defendant testified that he did not see or know of any sale of liquor being made at the time. On cross-examination, he was allowed to state, over the objection of defendant, that the prosecuting witness, out of the hearing of defendant, said he had bought or was going to buy some whisky from defendant. Such evidence was pure hearsay, and should have been excluded. Whether such conversation occurred in or outside the restaurant, or before or after the alleged sale, is immaterial. Not occurring in the presence or hearing of the defendant, it was not a part of the *res gestæ* (*State v. Pollard*, 174 Mo. 616, 74 S. W. 969), but was *res inter alios* (*Commonwealth v. Harwood*, 4 Gray [Mass.] 41, 64 Am. Dec. 49), and its admission was highly prejudicial to defendant.

Further, we think the court erred in not sustaining the objection of defendant to certain improper remarks in the argument of the prosecuting attorney to the jury, but, since the judgment must be reversed for the error just discussed, we do not deem it necessary to do more than admonish the prosecuting attorney to refrain from repeating such remarks at a subsequent trial.

The judgment is reversed, and the cause remanded. All concur.

**MINOR v. WOODWARD et al.** (No. 11,002.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**1. APPEAL AND ERROR (§ 882\*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE—ABSENCE OF FACTS.**

A party, procuring by his objection the exclusion of competent evidence proving a fact, cannot on appeal complain of the insufficiency of the evidence received without objection to establish the fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. BONDS (§ 62\*)—ORIGINAL AGREEMENT TO PERFORM OBLIGATIONS OF LEASE—EXTENT OF LIABILITY.**

A lease of a building to a corporation bound the corporation at the end of the term to pay the lessor the reasonable cost of changing a floor to the street grade, but not in excess of \$2,500. Subsequently individuals executed a bond acknowledging themselves indebted to the lessor in the sum of \$2,500 on condition that, if the lessee complied with the lease, the bond should be void, otherwise to remain in effect. This bond was executed in consideration of the lessor releasing her lien on property in the leased building. *Held*, that the bond was an original agreement of the individuals to pay the lessor the reasonable cost of placing the floor of the building on the street grade, not to exceed \$2,500, and the mere fact that the lessor changed only a part of the floor at a cost of \$2,500 did not release the individuals from their liability to pay \$2,500.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 59-72; Dec. Dig. § 62.\*]

**3. PRINCIPAL AND SURETY (§ 142\*)—LIABILITY OF SURETY.**

A surety, who binds himself in terms as a principal in the obligation, thereby waives the rights of a surety, and is liable as a principal, and may not set up a defense arising out of the relation of principal and surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 390, 391; Dec. Dig. § 142.\*]

**4. ESTOPPEL (§ 22\*)—RECITALS IN BOND.**

Parties who sign a bond conditioned on a lessee performing the obligations imposed by the lease are estopped from denying the facts recited in the bond as to the terms and obligations of the lease.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.\*]

**5. BONDS (§ 117\*)—ORIGINAL OBLIGATION—CONDITION PRECEDENT.**

Where a lease of a building to a corporation bound the corporation to pay the cost of changing a floor to street grade, not to exceed \$2,500, and thereafter for a valuable consideration individuals executed a bond reciting the obligations imposed by the lease, and agreed to save the lessor harmless by reason of any breach of the conditions of the lease, the liability of the individuals on the bond was not conditioned on the lessor first changing the floor to street grade, but the lessor could recover thereon on the lessee failing to perform.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 135, 136; Dec. Dig. § 117.\*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Laura B. Minor against O. D. Woodward and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. A. Loomis, of Kansas City, for appellants. Scarritt, Scarritt, Jones & Miller, of Kansas City, for respondent.

**TRIMBLE, J.** Suit upon a bond in the sum of \$2,500, executed by defendants to plaintiff on May 3, 1906. In the circuit court plaintiff obtained judgment for the full amount of said bond, and defendants appealed.

The bond and the reason for defendants giving it originated in this wise: In November, 1904, the plaintiff, Mrs. Laura B. Minor, was preparing to erect a three-story business building, with basement thereunder, at the southeast corner of Tenth and McGee streets in Kansas City, Mo. The building was to face McGee street (which ran north and south), and was to run back east along the south side of Tenth street. The front entrance and first floor were to be on a level with the grade of McGee street. A corporation, known as the I. W. Dumm Publishing Company, and certain individuals connected therewith, Mr. Dumm, Mr. Clark, and Mr. Horn, were engaged at that time in publishing a newspaper, and desired to rent suitable quarters for the company, and therefore proposed to Mrs. Minor that she lease the building, proposed to be erected, to it. The nature of its business, however, did not require the ground floor and entrance to be on the grade of McGee street, and did require that said ground floor should be three feet above said grade, as that would give more height and light and air to the basement. Mrs. Minor did not care to erect a building with its ground floor so much above the grade of the principal street on which it was located, thereby making the building suitable for a particular business only, unless she was sure of a long-time rental well secured, or would be reimbursed for the expense necessary in changing the ground floor and front entrance back to the grade of McGee street. The publishing company, and the men named as connected therewith, agreed to these terms, and thereupon, on November 12, 1904, a lease was executed by Mrs. Minor, as first party, to the I. W. Dumm Publishing Company, and said individuals, as second parties, for a term beginning April 1, 1905, and ending March 31, 1910. She agreed therein to erect and complete the building as soon as practicable, and to raise the ground floor and change the plans of the outside walls and front so that said floor would be three feet above the normal grade. Permission was given to sublet said building. And the second parties agreed that "if this lease is not renewed at the end of the first term hereof as hereinbefore provided, or in case this lease is terminated or possession of the leased premises taken by the party of the first part or her representatives for any cause, except total destruction by fire, prior to April 1, 1910, then second parties will pay the first parties or her legal rep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

representatives the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls and front of said building, so as to make the same complete and workmanlike and to conform to the change in the elevation of the floor; provided, however, that if the first party prior to or at the time of the surrender of the possession of said premises by second parties, shall lease said premises to a third party who will not require the elevation of said first floor to be lowered to the normal or street grade at an annual rental satisfactory to first party, then the first party will waive the claim for making such changes; provided, that in no event shall the cost of making such changes to be charged against second parties exceed the estimate now made by said architects, to wit, \$2500.00." The lease further provided that: "The party of the first part shall have until the termination of this lease a lien upon all the erections, improvements, machinery and fixtures of second parties that may during the term of this lease be placed on or in said land and building, to secure the payment of the rent and the performance of the stipulation and agreements herein contained."

The building was duly erected, and the publishing company entered and took possession under its lease, and the printing presses and other machinery and personal property placed therein by it became subject to Mrs. Minor's lien for the rent and for the performance of the other terms of the lease. Just how long the publishing company continued therein and to pay rent is not known. Plaintiff attempted to prove that it continued in business only about a year and a half, and that then Mr. Woodward, one of the defendants, came into control of the business and began paying the rent on the building. Defendants objected to this as being immaterial, and their objection was sustained. Plaintiff then offered to show that, at the time the bond herein sued on was executed by the defendants to plaintiff, Mr. Woodward was in charge of the business, paid the rent on the building, and that the bond in suit was accepted at his request. Defendants objected to this, and were again sustained.

[1] Notwithstanding these adverse rulings of the court, there is enough in the record to show that Dumm, the president of the company, and Horn left the country and that in some way, either through financial embarrassment or otherwise, the publishing company fell into the hands of Mr. Woodward, and that thereafter he, Woodward, paid the rent. The defendants are in no position to assert or complain that the evidence is not definite enough to show a formal legal transfer, sufficient to pass title of the assets of the publishing company, or of the lease to the defendants and their associates, because they, by objecting to such showing, succeeded in getting the trial court to refuse it admission

to the record. But, with the explicit evidence on these points excluded, there is still enough in the record, coupled with the bond itself, from which the conclusion can be reasonably drawn that the defendants were giving the bond for themselves and in their own interest, and not as mere sureties for the publishing company.

[2] At any rate on May 3, 1903, just 1 year 5 months and 19 days after the execution of the lease, the bond in question was executed. At this time Mrs. Minor held the lease on the building and a lien on an "Optimus" printing press therein for the performance of all the terms of the lease. The defendants were desirous of selling this printing press, and to get it released from Mrs. Minor's lien, they agreed to give her the bond in question. The terms of the bond are as follows: "We, the undersigned, O. D. Woodward and Willis Wood, of Kansas City, Missouri, do hereby acknowledge ourselves indebted unto Laura B. Minor in the sum of two thousand five hundred dollars (\$2,500.00), for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors, administrators and assigns. The condition of this bond is such that whereas \* \* \*

[here follows a statement that the I. W. Dumm Publishing Company leased the property on November 12, 1904]; \* \* \* and whereas, it is provided in that lease \* \* \*

[here follows a statement that the front and outside walls were to be changed and the floor raised three feet above the street grade]; \* \* \* and whereas, it is further provided in said lease that 'if this lease is not renewed at the end of the first term thereof as hereinbefore provided, or in case this lease is terminated or possession of the leased premises taken by the party of the first part or her representatives for any cause except total destruction by fire, prior to April 1st, 1910, then second parties will pay first party, or her legal representatives, the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls and front of said building so as to make the same complete and workmanlike and to conform to the change in the elevation of the floor'; and whereas, said I. W. Dumm Publishing Company in order to secure the performance of the said provisions of the said lease did mortgage or convey unto said Laura B. Minor one Optimus printing press, manufactured for it by the Barnhardt Bros. & Spindler Co., of Chicago, and which was placed in the building on the property, aforesaid; and whereas, the first parties desire to have said mortgage released so that said press may be sold and conveyed free from the lien of said mortgage; and whereas, said Laura B. Minor has consented to release and satisfy said mortgage in consideration of this bond: Now, therefore, if the said first party shall faithfully perform and keep the provisions of said lease in re-

spect to the matters hereinbefore set forth and will save the said Laura B. Minor entirely harmless by reason of any breach of such conditions of said lease then this undertaking shall be null and void; otherwise to remain in full force and effect. In witness whereof, we have hereunto set our hands and seals this 3rd day of May, 1908. O. D. Woodward. [Seal.] Willis Wood. [Seal.]

The publishing company is not a party to the bond. And it nowhere says it is given as surety for said company. Upon the face of the bond the defendants contract as principals, and the bond is given, not for the benefit or accommodation of another, but for defendants' own benefit and advantage, because they want to sell the printing press free from Mrs. Minor's lien. The undertaking and agreement is not to pay in case the lessees named in the lease do not pay, but the condition of the bond is that if they, defendants, shall faithfully perform and keep the provisions of said lease, then the undertaking is to be null and void. The provisions of said lease were: First, to pay rent; second, to pay to the extent of \$2,500 for changing the ground floor front and walls if the lease was not renewed and plaintiff could not rent the building with the floor above the street level. The defendants performed the first-mentioned provision by paying the rent. At the end of the term provided in the lease, March 31, 1910, Mrs. Minor could not lease the building with the floor as it was. Mr. Woodward, at the time he paid the last month's rent, demanded a release from further obligation, but this was refused, and demand was made that the expense of changing the floor be paid according to the terms of the bond. Mrs. Minor, having taken possession of the building at the end of the leasehold term, was unable to find a tenant who would rent the building with the floor thus raised, and, after demanding of defendants that they bear the expense of changing it in accordance with their bond, she had the floor changed.

Owing to the great increase in the price of labor and materials between 1904 and 1910, it was found in 1910 that the cost of lowering the whole first floor to the McGee street level would greatly exceed the amount estimated therefor in 1904. The plaintiff, therefore, did not lower the entire floor from the front on McGee street back to the end of the building. To have done so would have cost a very large sum, much in excess of what she did do. Instead of lowering the entire floor at this large expense, she lowered only one-third of the store to the McGee street level, and she lowered the next one-third only to the grade of Tenth street at that part, and the rear one-third was left as it was. The evidence clearly showed that this cost *much less than to lower the whole floor*, but the reasonable cost of changing the floor, even in this less expensive or more economical way, cost \$3,829.24 or nearly \$1,500 in excess

of the bond given by defendants. That is, the expense of changing the floor in the way plaintiff did change it cost more than the bond in question, but was still much cheaper than if she had lowered the whole floor, instead of only one-third all of the way, and another third only part of the way.

The defendants offered no testimony. The jury found a verdict for plaintiff for the full amount of the bond, \$2,500, and judgment was rendered thereon.

It is the contention of defendants that they are in the position of mere sureties for the publishing company, and that their liability on said bond is therefore strictissimi juris, of the strictest right or law. Their position is that they are not liable for any amount thereon unless plaintiff put the whole of the first floor down to the McGee street grade, notwithstanding the fact that the reasonable cost of lowering it as she did was less than the cost of lowering the whole and was more than the amount of the bond. The language of the bond itself shows that it is an original undertaking of defendants to pay Mrs. Minor the reasonable cost of placing the first floor of said building upon the street grade, including the cost of changing the outside walls and front of said building to conform to said change, if the lease is not renewed, and provided she cannot rent it with the floor above grade, the amount to be paid by them, however, not to exceed \$2,500.

[3] "Where a surety binds himself in terms as a principal in the obligation which he signs, he will be held as principal, and will be entitled to none of the rights of a surety. There is no rule of law which prohibits a surety from waiving the right which belongs to him as such. Such a waiver has nothing in itself offensive to the policy of the law. The express terms of the obligation in such case exclude the idea of suretyship, and the creditor has a right to avail himself of the contract his vigilance has obtained."

1 Brandt on Suretyship, § 51.

"A surety may contract as 'a principal,' and by so doing will renounce the right of setting up a defense arising out of the relation of principal and surety." Picot v. Signiagi, 22 Mo. 587; McMillan v. Parkell, 64 Mo. 286; Sprigg v. Bank, 10 Pet. 257, 9 L. Ed. 416; Derry Bank v. Baldwin, 41 N. H. 434; Menaugh v. Chandler, 89 Ind. 94.

In the above case of Picot v. Signiagi, 22 Mo. loc. cit. 593, our Supreme Court said: "The defendant might have become a mere surety to the contract, but when he renounced that character and expressly bound himself as principal, with what face can he afterwards insist that he is only a surety?"

[4] Parties having signed a bond are estopped to deny the facts recited therein. Brown v. Ligon (C. C.) 92 Fed. 851; 1 Brandt on Suretyship, § 52; Monteth v. Commonwealth, 15 Grat. (Va.) 172. The mere fact that defendants bound themselves to pay if the lease was not renewed, and

Mrs. Minor could not lease the building with the floor as it was, did not make defendants sureties, but was an original undertaking on their part that if the specified contingencies arose, they would pay her the reasonable cost of changing the floor, walls, and front to the extent of \$2,500. *Academy of Music Co. v. Davidson*, 85 Wis. 129, 55 N. W. 172. And on the strength of this undertaking on their part, Mrs. Minor released her mortgage on the printing press, and allowed defendants to sell it.

[5] The bond does not require, as a condition precedent to her right to be paid the reasonable cost of changing the floor, that Mrs. Minor must first do the remodeling. The lease says: "If this lease is not renewed at the end of the first term thereof \* \* \* then second parties will pay first party or her legal representative the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls," etc. The bond quotes this clause, and says that as Mrs. Minor holds a lien on the printing press to secure performance of the terms of the lease and as they want to get rid of this mortgage and sell the press, and Mrs. Minor is willing to release "in consideration of this bond," therefore if they save Mrs. Minor entirely harmless from loss by reason of any breach of such terms, then the undertaking was to be null. Suppose at the end of the lease no tenant could be found who would take the floor as it was, and that Mrs. Minor had no funds with which to change it, would defendants' obligation under the terms of the bond cease? Unless the terms of the bond make the doing of the work a condition precedent to a right or cause of action thereon, the obligee in the bond is not required to do it before bringing suit. *Farley v. Moran*, 3 Cal. Unrep. Cas. 572, 31 Pac. 158.

In *Fuller Co. v. Doyle* (C. C.) 87 Fed. 687, a contractor, Doyle, agreed to erect a building for plaintiff, and gave bond which provided that if the contractor did not fulfill the contract, plaintiff could enter upon the premises and cause the work to be completed. The contractor abandoned the work, and plaintiff finished it. The court held that plaintiff's cause of action accrued when the contractor abandoned the job, and held, further, that the variations made by the plaintiff from the original plans did not invalidate the bond or release the surety because its liability became fixed when the contractor abandoned the contract, and the mere fact that plaintiff, in doing the work contracted to be done, did some other things for which no claim was made could not change the matter.

In the case at bar, while the cost of remodeling the building was \$10,036, yet the cost of lowering the two-thirds of the floor that was lowered (the first one-third being lowered the full three feet to the level of

McGee street, and the next one-third not quite so low) was kept separate from the other expense, and was \$3,829.24, which was still more than the bond. So that it is not seen wherein defendants have any right to complain because Mrs. Minor did not go to still further expense and lower the remaining third of the floor. She was compelled to lower the front third down the full three feet to the level of McGee street, and the next one third a part of that distance, and to conform the front and walls to such change, all of which cost less than to lower the entire floor. The liability of defendants became fixed when the lease was not renewed and no new tenant was found. Mrs. Minor had a right to sue then for the reasonable cost of lowering the floor. She did lower two-thirds of it, and in doing so spent more money than the bond was given for, but less than it would have cost to lower the entire floor. What right have defendants to complain if she did not lower the remaining one-third? Their liability was fixed before she lowered any part of it, and the limit of the amount they obligated themselves to pay was passed in doing the part she did.

In *Spear v. Stacy*, 26 Vt. 61, the defendant gave plaintiff a bond to complete a building, but failed to finish it. The plaintiff brought suit, and it appeared that some of the work plaintiff did in finishing the building was not done until after the institution of the suit. The court held that the finishing of the building was not a condition precedent to plaintiff's recovery, but that there had been a breach of the bond when defendant failed to complete the building, and that plaintiff's cause of action accrued then. The same doctrine is held in *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427.

The petition is not drawn upon the theory that the doing of the work by plaintiff in lowering the floor is a condition precedent to her right to recover upon the bond. Neither does the allegation that she lowered the floor and expended thereon, in doing so, the sum of \$3,600, which was the reasonable cost of doing the work, constitute a pleading that she lowered the *whole* floor so as to make proof of lowering two-thirds thereof a variance from the pleading. It will not do so unless we are to consider the pleading with as much or more strictness than an indictment under the old common-law procedure. The allegation that she had done the work was a proper, though perhaps not a necessary, allegation, since evidence that the work was done and of its cost would be an excellent showing as to the extent and reasonableness of such cost. There was nothing in the petition limiting the plaintiff to a right to recover upon showing, as a condition precedent, that she had lowered the whole floor rather than a part of it.

The plaintiff is not suing for work of an entirely different character from that spec-



fied in the bond. She is suing for the very work covered by it. She is entitled to recover. And the judgment should be affirmed. It is so ordered.

### LOVE v. SCOTT. (No. 10,865.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

#### 1. EVIDENCE (§ 213\*)—ADMISSIONS—ATTEMPTED COMPROMISES.

Admissions made by a party during a controversy with the adverse party, but not in an effort at compromise, may be shown against the party, though proof of an unsuccessful attempt at compromise is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-751, 753; Dec. Dig. § 213.\*]

#### 2. CHATTEL MORTGAGES (§ 240\*)—AGREEMENTS TO SELL BEFORE BREACH OF MORTGAGE—RIGHTS OF PARTIES.

Where a chattel mortgagor, before condition broken, and the mortgagee agreed to an immediate sale of the mortgaged chattels, and in consideration of receiving immediate payment, the mortgagee agreed to release the chattels and to look to the proceeds for his security, and a third person was appointed to make the sale, who obtained the proceeds, the chattels were released from the mortgage, and the mortgagee could look only to the proceeds, and the mortgagor, purchasing at the sale, could dispose of the chattels in any way except to defraud the mortgagee holding an open account and other creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 505, 506; Dec. Dig. § 240.\*]

#### 3. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered under proper instructions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Action by M. G. Love against F. H. Scott. From a judgment for defendant, plaintiff appeals. Affirmed.

John D. Taylor, of Keytesville, for appellant. J. A. Collet, of Salisbury, for respondent.

**JOHNSON, J.** This suit was begun in the circuit court of Chariton county November 27, 1912, to replevin two horses, one mare, one farm wagon, one disc harrow, one corn planter and two sets of harness, of the total value of \$500. Verdict and judgment were for defendant, and plaintiff appealed.

Plaintiff, who lived in Illinois, owned a farm of 160 acres in Chariton county, Mo., near Mendon, and early in the year 1912 entered into an agreement with defendant, who also lived in Illinois, to remove to the farm and occupy it during the ensuing crop year as his tenant. A written lease was entered into, which fixed the rental for the year at \$864, and defendant executed and delivered to plaintiff his promissory note for that sum,

to become due and payable without interest on February 20, 1913. Defendant owned some live stock and farm implements, but had no money, and plaintiff advanced him money for removal expenses, to purchase needed implements and tools, and to live on until harvest. The sum of all such advances was about \$1,900, and plaintiff received a promissory note from defendant for a portion thereof, amounting to \$1,025. This note was dated April 4, 1912, and matured February 20, 1913. It bore interest from date, and was secured by a chattel mortgage on all of defendant's personal property. The remainder of the advances was left in the form of an open account. About October 1, 1912, and before the maturity of either of the described notes, defendant became dissatisfied, and resolved to give up the farm and return to Illinois. His total indebtedness to plaintiff was \$2,740.22, consisting of the rent note of \$864, which was secured by a landlord's lien on the crops, the note of \$1,025, secured by the chattel mortgage covering all of defendant's personal property on the farm, and the unsecured open account for the remainder. Also he owed a debt of \$329.35 to a Mr. Stewart for some property he purchased for use on the farm and some other small debts to merchants. In furtherance of his purpose to terminate the tenancy defendant entered into negotiations with plaintiff, which culminated in an agreement to sell at public sale all the property covered by the landlord and chattel mortgage liens. Both notes were to be treated as due for the purposes of the sale and the distribution of the proceeds, and plaintiff agreed to release all the property from his liens, which were to attach to the proceeds of the sale. The property bought of Stewart was to be sold at the same time, and its proceeds applied, first, to the payment of his claim. A clerk of the sale was agreed upon, and invested with the duty of receiving the proceeds and distributing them in accordance with the agreement of the parties. There is no dispute in the evidence over any of these facts, but there is a sharp and vital controversy over the terms of the agreement relating to the share of the proceeds plaintiff was to receive. He contends that first they were to be applied to the payment of his entire demand, including the open account, and that defendant was to have the remainder. On the other hand, the evidence of defendant discloses an agreement that the proceeds were to take the place of the property and be subject only to the discharge of the liens, which were merely transferred from the property to its proceeds, and that the unsecured open account was to remain as it was. In other words, the clerk of the sale, who was made a trustee of the proceeds, was to apply them, first, to the discharge of the liens, amounting to about \$1,900, and then pay the remainder to de-

defendant. The evidence of defendant on that issue is substantial, indeed is so strong that if we were sitting as triors of fact we would say, as did the jury, that he had the better of the controversy. The sale was made and the property covered by the liens was sold under the announcement of plaintiff that he released it from his liens. Exclusive of the Stewart debt, which was paid out of the proceeds of the property defendant had purchased of him, the proceeds realized from the property and paid to the clerk amounted to about \$2,300, a sum greater than was required to discharge both liens, but not enough to pay the open account held by plaintiff. Shortly after the sale defendant gave plaintiff a written order on the clerk for the proceeds, but on reflection concluded he had acted unwisely and countermanded the order, but not until after plaintiff had obtained \$1,000 on it. In addition to this payment plaintiff received \$444 from the sale, making a total of \$1,444, which, if applied on the two lien notes, would have reduced the amount due on them to \$498.56. Instead of doing this, he applied these payments, first, to the discharge of the open account, and then brought suit against the clerk of the sale to recover all of the fund remaining in his hands. Also he began the present action against defendant to recover property covered by the liens, but bought at the sale by friends of defendant for defendant's benefit. Plaintiff states it was agreed before the sale that there was to be no "by-bidding," but this is denied by defendant.

[1] While the sheriff was executing the writ of replevin there was a tempestuous meeting of the parties, convoked by the attorney for defendant for the purpose of ascertaining the amount due on the lien debts in order that defendant might tender payment of such amount and costs out of the fund in the hands of the clerk and thus end the litigation. On learning the amount defendant offered payment of it, and the accrued costs out of the proceeds held by the clerk, and repeated the offer in the answer he subsequently filed. There is much discussion in the briefs over the question of the sufficiency of these offers to constitute a "tender" within the legal meaning of that term; but, in the view we have of the whole case, it would be fruitless to enter into that discussion, and for present purposes we shall omit from consideration all of the evidence bearing on that subject.

Objection is urged by counsel for plaintiff against the admission of testimony relating to the conversation the parties had at their meeting following the bringing of this suit. The objection is based on the idea that the meeting was the result of an effort to compromise and settle the differences between the parties, but, as we understand the evidence, neither party was actuated by such peaceful motive. Thinking it important for defendant to make a tender of the amount of the

lien notes still unpaid, his attorney called the meeting for that sole purpose, and while at the interview there was much acrimonious discussion of the respective positions of the parties, there was no suggestion of an amicable adjustment of their differences. The law is very zealous in the encouragement of peaceful settlements of disputes, and to that end will not allow proof of unsuccessful attempts at compromises, but where, as in the present instance, the parties meet, not to compromise, but to give battle, the rule does not apply, for obvious reasons. Defendant thought to secure a strategical advantage by a tender of the amount due on the notes, and his adversary met him with the assertion of a claim to a lien on the proceeds of the sale for the open account and to a lien on the replevined property under the chattel mortgage. In the course of the wordy contest plaintiff, so defendant states, made certain admissions of evidentiary value to defendant about the agreement for the sale. The court did not err in admitting testimony of such admissions, since they were not made in an effort at compromise, but in the course of the controversy.

[2] At the time of the sale the open account was not a lien on the property, and neither of the notes secured by liens thereon was due. There had been no breach of the conditions of the chattel mortgage nor of the landlord's lien. Plaintiff had no right to the possession of the property until condition broken, nor could defendant have sold it unincumbered of the liens without the consent of plaintiff. Thus situated, the parties agreed to an immediate sale of the property, and in consideration of receiving immediate payment of debts that would not mature for four months, plaintiff agreed to release the property from his liens and to look to the proceeds of the sale for his security. His interest in the property was measured by his liens; and, unless he procured the consent of defendant to include the open account in his right to a lien on the proceeds, we think he had no interest in or right of possession to the replevined property, since the proceeds of the sale were more than sufficient to discharge the two notes in full. If the clerk of the sale who became trustee of the proceeds has funds that should be applied to the payment of these notes, plaintiff has his remedy against him. When the clerk became possessed of enough funds to pay the notes in full, plaintiff's interest in the remaining property ended and it is immaterial to him that defendant had that property bought in for his own benefit. After the notes were paid the remaining property was defendant's completely subject to his *jus disponendi*. Of course he had no right to dispose of it in a way to defraud his creditors, including plaintiff, who was still a creditor to the extent of his open account, but he had a right to take it free of incumbrances, unless, as we have

said, the agreement for the sale included the open account as a demand secured by a lien on the proceeds.

[3] The only issue in the case was whether the agreement made the open account a lien demand. Plaintiff says it did; defendant that it did not. The evidence of each is substantial, and since the agreement was not reduced to writing, the issue became one of fact for the jury to determine. The jury, under appropriate instructions, have solved that issue in favor of defendant, and with the fact established that the open account was to remain unsecured, and that only existing liens were to attach to the proceeds, we hold that plaintiff's special interest in the property was satisfied, and that he must look to the trustee for the fund he elected to accept as security in lieu of his liens on the crops and other personal property of defendant. The agreement, as stated by defendant, did not lessen the extent of the liens. Plaintiff surrendered no part of his security, and was to receive the benefit of a speedy discharge of his secured claims. He would have realized that benefit if he had refrained from his unjust attempt to force the payment of his unsecured demand in violation of his agreement.

Defendant was not required to make a tender of the amount remaining unpaid on the two notes, out of the fund in the hands of the clerk. He had no control over that fund, and, despite his wishes, or anything he might do, it was the duty of the clerk, the trustee, to dispose of the fund in accordance with the trust agreement. To defeat plaintiff's claim to the property in suit it was enough for defendant to show that the mortgage lien had been shifted by agreement to the fund, and that the fund was sufficient to discharge that lien.

The judgment is affirmed. All concur.

# FURNITURE HOSPITAL v. DORFMAN. (No. 11,207.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

## 1. TRADE-MARKS AND TRADE-NAMES (§ 88\*) —UNFAIR COMPETITION—NATURE OF UNFAIR COMPETITION.

No exclusive proprietary interest in a trade-name is necessary to relief on the ground of unfair competition, while in trade-mark cases an exclusive right is necessary.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 98; Dec. Dig. § 88.\*]

## 2. TRADE-MARKS AND TRADE-NAMES (§ 3\*) —INFRINGEMENT AND UNFAIR COMPETITION —TRADE-NAMES.

Nonexclusive trade-names or names which are publici juris, or open to use by all the world, because descriptive of the goods, name of the maker, etc., may nevertheless, by long-continued use in connection with the goods, business, etc., of a particular trader, come to have a secondary meaning as designating the goods of that particular trader; and, though the pri-

mary meaning of the word is publici juris, its secondary meaning is not, since its use in its secondary meaning would constitute unfair competition as passing off the goods of one for those of another.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 8.\*]

## 3. TRADE-MARKS AND TRADE-NAMES (§ 99\*) —UNFAIR COMPETITION—QUESTION FOR JURY.

Whether such a name has come to have a secondary meaning as designating the goods of a particular trader depends upon the proof, and is always a question of fact.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 113; Dec. Dig. § 99.\*]

## 4. TRADE-MARKS AND TRADE-NAMES (§ 3\*) —UNFAIR COMPETITION—DESCRIPTIVE NAMES.

Names which are mere descriptive terms of the business and generic in their nature, and which may be used by every one in an honest and nondescriptive manner, are not capable of being appropriated, and there can be no unfair competition in the use of such names.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.\*]

## 5. TRADE-MARKS AND TRADE-NAMES (§ 71\*) —UNFAIR COMPETITION—TRADE-NAMES.

Names which are mere descriptive terms, if they be odd, unusual, fanciful, or striking, may by long use become identified in the minds of the public with the business of a particular trader, and in such case it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. § 71.\*]

## 6. TRADE-MARKS AND TRADE-NAMES (§§ 3, 99\*) —UNFAIR COMPETITION—TRADE-NAMES.

The name "Furniture Hospital," though descriptive of a business, was yet so odd, unusual, and so likely to catch the public fancy and be retained in the memory, as to be capable of being appropriated as a nonexclusive trade-name with a secondary meaning, and it could not be said, as a matter of law, that the addition of the words "New York" thereto so distinguished it as to remove danger of deception.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7, 113; Dec. Dig. §§ 3, 99.\*]

Appeal from Circuit Court, Jackson County; Wm. O. Thomas, Judge.

Action by the Furniture Hospital against Samuel Dorfman. From a judgment on demurrer for defendant, plaintiff appeals. Reversed and remanded.

T. A. Frank Jones, of Kansas City, for appellant. Block & Block, of Kansas City, for respondent.

TRIMBLE, J. This is a suit by the Furniture Hospital, a corporation, to enjoin defendant from the use of the name "New York Furniture Hospital" in connection with his business of furniture repairing at No. 1704 Troost avenue, Kansas City, Mo., on the ground that the name "New York Furniture Hospital" by the respondent was an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

unlawful use of plaintiff's trade-name the "Furniture Hospital," and constituted unfair competition as against the appellant herein. The circuit court sustained a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, and, on plaintiff's refusing to plead further, rendered judgment in favor of the defendant, and plaintiff thereupon appealed.

The petition alleged that it was a corporation, and since 1904 it had been conducting at 1301 East Twelfth street, Kansas City, Mo., the business of furniture repairing under the name of the "Furniture Hospital," and that about March, 1913, defendant began a similar business about a quarter of a mile distant from plaintiff's shop which he carried on under the name of the "New York Furniture Hospital"; that, by reason of plaintiff's long use of the name "Furniture Hospital," and its advertisement thereof, and the consequent identification of plaintiff's business with that name in the mind of the trading public of Kansas City, plaintiff is entitled to the exclusive use of the name "Furniture Hospital" in Kansas City for the business of repairing furniture; "that the use of the name 'Furniture Hospital' was intended by defendant, and apart from his intention was likely to and did confuse and mislead the trading public and attract plaintiff's customers to defendant's shop; and that it constituted unfair competition, and is contrary to equity and good conscience." The petition further stated that by such unfair competition, and by the wrongful assumption and use of plaintiff's trade-name, defendant is diverting to his shop many of plaintiff's customers deceived by his use of the name, and has obtained business which would have come to plaintiff amounting to \$1,000.

[1] There is no claim on the part of plaintiff that there has been a violation of a technical trade-mark, but that under the circumstances plaintiff has a right to designate his business by the name "Furniture Hospital," and that defendant has no right to give his business such a similar designation as will enable him to deceive and mislead the public into thinking they are dealing with plaintiff. In other words, plaintiff claims that defendant is violating the rule against unfair competition which consists in passing off, or attempting to pass off, the goods or business of one person as and for the goods or business of another. In such case no exclusive proprietary interest in the trade-name is necessary to relief, while in trade-mark cases an exclusive right is necessary, and this seems to be the principal distinction between the two. 38 Cyc. 763.

[2] Trade-names are divided into exclusive and nonexclusive trade-names. The former are protected upon the same principles that trade-marks are. Nonexclusive trade-names are such names as are publici juris; that is, open to or exercisable by all persons in their

primary sense, but which in a secondary sense have come to indicate the business of a particular trader. 38 Cyc. 765. The name which plaintiff in this case seeks to protect is that of a nonexclusive trade-name in its secondary meaning. In 38 Cyc. 769, it is said: "Words or names which have a primary meaning of their own, such as words descriptive of the goods, or the place where they are made, or the name of the maker, and which are not capable of exclusive appropriation as a trade-mark, may nevertheless, by long use in connection with the goods or business of a particular trader, come to be understood by the public as designating the goods or business of that particular trader. Such words have both a primary and secondary meaning. In their primary descriptive sense they are publici juris, and all the world may use them; but they must be used in such a way as not to falsely convey the secondary meaning, for this would constitute unfair competition as tending directly to pass off the goods or business of one man as and for that of another. This is what is known as the doctrine of secondary meaning. Its perception by the courts was the genesis of the law of unfair competition as distinguished from technical trade-marks. In all this class of cases, where the word, name, or other mark or device is primarily publici juris, the right to relief depends upon the proof. If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning so as to indicate his goods or business, and his alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof, he is not entitled to relief. There is an exclusive right to the secondary meaning of a name, which has been deemed a property right, in the same sense that technical trade-marks are property. This exclusive right is strictly limited to the secondary meaning of the word."

[3] As to what will constitute unfair competition by the unlawful use of a nonexclusive trade-name in its secondary meaning, no inflexible rule can be laid down. Each case is, in a measure, a law unto itself. Unfair competition is always a question of fact. The question in every case is whether or not, as a matter of fact, the name adopted by defendant has previously come to indicate plaintiff's business, and whether the public is likely to be deceived. 38 Cyc. 779; Sartor v. Schaden, 125 Iowa, 696, loc. cit. 701, 101 N. W. 511; Atlas Assur. Co. v. Insurance Co., 138 Iowa, 228, loc. cit. 232, 112 N. W. 232, 114 N. W. 609, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189; O'Grady v. McDonald, 72 N. J. Eq. 805, loc. cit. 807, 66 Atl. 175.

[4] Of course this rule is qualified by the further rule that names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated by any one. Hence, if the name

sought to be protected and claimed to be infringed upon and unfairly used is one which may be used by every one in an honestly descriptive and nondeceptive manner, the court may declare, as matter of law, that there can be no unfair competition in the use of such terms. For instance, no one could appropriate the name of "Swedish Snuff Store" or "Felt Hat Store," "Law Book Store," "Divinity Book Store," or any such name as would simply notify the public that a particular class of business or merchandise was carried on or kept there. *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476.

[5] But even descriptive terms may by long use become identified in the minds of the public with the business of a particular trader, and in such case it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other. 38 Cyc. 800. If the name adopted be an odd, unusual, fanciful, or striking name, it may be appropriated by a trader, even though it be descriptive of the business he carries on. If, for its description of the business, it depends upon a figure of speech or an association of ideas, and is not merely a literal description thereof, it is a name that is subject to appropriation within the limits of the territory which the business serves. Such a name is one likely to catch the public notice and fancy, to stick like a burr in the memory, and is therefore of great value in advertising a public business. There is in it an element of originality which will entitle the originator thereof to its use as against one adopting it for the purpose of securing business by reason of the similarity of the name. Because such a name may be descriptive of the business is no reason for another and subsequent trader adopting it and thereby appropriating to himself the fruits of the other's ideas and labor in building up a trade thereon. As said in 38 Cyc. 801: "It is unnecessary for the subsequent trader to use such terms in such a manner as to give his goods the same short name, or trade-name, in the market as that of the prior trader's goods, for it is easy to use such terms in some other honestly descriptive way without injury to any right of either party. Accordingly such a use of descriptive terms is unfair, and will be enjoined." And in the same work, 38 Cyc. p. 794, it is said: "A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in, or the common use of terms which are publici juris, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing

name, label, or dress of goods constitutes unfair competition. Where there is no reason for using a particular name other than to trade upon another's good will, such use of the name constitutes unfair competition, and will be enjoined." In other words, it is not necessary for the subsequent trader to adopt the odd, unusual, and striking name of the prior trader to describe the goods or business of the former. He can use descriptive terms which will not confuse the public as to the identity of the business carried on. And when this is the case, the former name is not unqualifiedly publici juris merely because it may be descriptive of the business, but is susceptible of being a nonexclusive trade-name with a secondary meaning; that is, a meaning that carries with it the significance that it is the business of a particular owner.

[6] Now, an examination of the petition will disclose that it contains all the allegations necessary to state a case of unfair competition in the use of a nonexclusive trade-name having a secondary sense or meaning, provided the trade-name set out in the petition is not one so absolutely publici juris as to be incapable of appropriation by any particular trader. And whether or not the demurrer should have been sustained would seem to depend upon the answer to this question. Consequently the case, at this stage, comes down to the question whether or not the name "Furniture Hospital" is merely descriptive of the business, and so entirely devoid of novelty, originality, and striking characteristics as not to be capable of being appropriated as a trade-name. For, if it is so odd, unusual, striking, and likely to catch the public fancy and be retained in memory as to be capable of being so appropriated as a nonexclusive trade-name with a secondary meaning, then it cannot be said, as a matter of law, that by the words "New York" defendant has so clearly distinguished his name from that of plaintiffs as to remove all danger of deception to the public and injury to plaintiff's business. The mere addition of such geographic names as "North America," "Africa," "Asia," etc., cannot be declared, as matter of law, to constitute such a difference as to make the name so altered free from complaint. *Creswill v. Grand Lodge*, 133 Ga. 837, 87 S. E. 188, 134 Am. St. Rep. 231, 18 Ann. Cas. 453. Whether the business of a subsequent trader has been so distinguished as to prevent any actual or probable confusion and deception is a question of fact in each case. While it is presumed that the public uses its senses and takes note of differences, yet it must be remembered that it is by the adoption of some such addition rendering the name similar, but not identical, that unfair competition is usually attempted to be perpetrated. Similarity will deceive almost as effectually as precise identity, and it is well known that

nice and careful discrimination between names cannot be expected from a busy public. 38 Cyc. 790.

So that, upon the question of whether a demurrer to the petition should have been sustained, the case comes down to the inquiry whether or not the name "Furniture Hospital" is one that in law is capable of being appropriated as a trade-name with a secondary meaning. In our opinion it is, or at least it is not such a name so purely descriptive of the business as to be wholly publici juris, and to be declared such as a matter of law. In the first place it is shorter, more euphonious, and striking than the prosy words "repair shop," suggestive of dust and dingy, battered old articles of uncertain age and still more uncertain, doubtful origin and history. There is a novel, figurative suggestion and association of ideas in the name "Furniture Hospital," bringing to the mind, not only the idea of a homely broken article being merely mended and repaired, but also of its being tenderly cared for with a loving appreciation of its innate beauty, and the possibility of restoring it to its former finish and perfection. A lover of restored antique furniture, much in vogue nowadays, would be much more quickly attracted to the name "Furniture Hospital," and more apt to take his ancient mahogany there for restoration, than he would to an ordinary "repair shop." He would remember the name longer, too. If the evidence shows that plaintiff has built up a trade under such an attractive and catchy name, and that the name has not come into such common and general use as to lose its power of identifying plaintiff's particular business, and that defendant by the use of that name is confusing the public as to the identity of his business with that of plaintiff's, and the latter is being injuriously affected thereby, it would seem that he ought to be protected in its use in the locality coextensive with and limited to plaintiff's market. At least he ought to have the opportunity of presenting his evidence on these questions, and not be foreclosed by a demurrer to his petition.

The judgment is reversed, and the cause remanded. All concur.

# **SPEAKS v. METROPOLITAN ST. RY. CO.** et al. (No. 11,200.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

## **1. CARRIERS (§ 287\*)—CARRIAGE OF PASSENGERS—NEGLIGENCE.**

For a motorman of a street car to suddenly accelerate its speed after leaving a stopping place is not negligence as to one who attempted to board the car while in motion and while the gates were being closed, unless the motorman knew, or had reason to believe, that a passenger had attempted to board the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. § 287.\*]

## **2. CARRIERS (§ 318\*)—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE.**

In an action for the death of plaintiff's husband, who fell from defendant's elevated car, which he attempted to board while it was in motion leaving the station, evidence held insufficient to show that the motorman knew of, or could have anticipated, his presence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

## **3. WITNESSES (§ 317\*)—CREDIBILITY—CONTRADICTORY STATEMENTS.**

Statements by a witness irreconcilable with the remainder of his testimony cannot be taken as substantial evidence of the facts testified to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.\*]

## **4. APPEAL AND ERROR (§ 837\*)—REVIEW—TAKING CASE FROM JURY—CONSIDERATION OF EVIDENCE.**

In determining whether there was any evidence which would justify a verdict for plaintiff, defendant's evidence should be considered as well as that of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

## **5. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.**

One who, at an elevated station where the street railway company maintained a sign warning persons not to board moving cars, attempted to board a car in motion, the gates of which were partly shut, is not a passenger; for, even in the case of a street railway, there must be circumstances from which can be implied an offer to be carried on the part of one desiring to become a passenger and an acceptance on the part of the carrier before the relation of passenger and carrier comes into existence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

## **6. CARRIERS (§ 334\*)—CARRIAGE OF PASSENGERS—WARNINGS.**

The public are charged with notice of conspicuous warnings maintained by a street railway company at an elevated station without proof of actual knowledge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1355; Dec. Dig. § 334.\*]

## **7. CARRIERS (§ 282\*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.**

One who boards a moving street car contrary to the street railway company's express rules is not a passenger, and, though he be in a position of danger, the street railway company's servants are bound only to use ordinary care to avoid injuring him after discovering his peril.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.\*]

## **8. CARRIERS (§ 328\*)—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

One who attempted at an elevated station to board a moving car, the gates of which were being closed, is guilty of contributory negligence as a matter of law, where the step of the car was within a few feet of the end of the platform, at which point the company maintained a sign warning the public against boarding moving cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1367-1369; Dec. Dig. § 328.\*]

## **9. CARRIERS (§ 339\*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.**

Where plaintiff's intestate negligently boarded a moving car which was just leaving an elevated station, and before he could get into

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a position of safety on the steps the jerk of an acceleration of speed threw him off and he was killed, his own contributory negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1858; Dec. Dig. § 839.\*]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

Action by Emma Speaks against the Metropolitan Street Railway Company and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Lingsdale & Howell, of Kansas City, for appellant. John H. Lucas, of Kansas City, for respondents.

TRIMBLE, J. Plaintiff, as the widow of Orville Speaks, sues for damages sustained by reason of her husband's death, which, she charges, was caused by defendants' negligence. The jury found in favor of one of the defendants and for plaintiff in the sum of \$2,000, presumably against the other, upon which judgment was rendered against the receivers of both. A motion for new trial was filed, which the court sustained, on the ground that under the evidence plaintiff was not entitled to recover, and that the court erred in not sustaining defendants' demurrer. Plaintiff appealed, and the correctness of the court's ruling is now the question before us.

The husband's fall and death occurred shortly after midnight on September 3, 1911, at the Mulberry street station on the elevated street railway, between Kansas City, Mo., and Kansas City, Kan. The platform and station house is about 30 feet from the ground. It is reached by a stairway leading from the ground to the south side of the station or shelter house, the station platform being on the north side thereof, so that one coming up the stairway must go through the shelter house and through a doorway opening on to the platform, and then out upon the platform before reaching the track upon which cars pass and where they stop to let off and take on passengers. At the east end of the platform there was a railing or fence extending from the southeast corner of the station house to the track, and approaching so closely and at right angles to it that a passing car comes within 8 or 9 inches of the end of the fence. From the door of the station to this guard rail or fence nearest the track is 16 feet and 10 inches. On this fence was a sign bearing these words in letters 3 inches high: "Warning! Do Not Attempt To Board Car While In Motion."

The car which deceased attempted to board was 44 feet long, and the station platform 49 feet in length. The car was therefore almost long enough to occupy the entire length of the platform when fully on it with its front end even with the guard rail or fence at the east end. And this was its proper and usual place to let off and take on passengers at that

station. Different cars bound for different points and sections of the city ran over this track and passed this station, so that persons on the platform would not board a car at that point unless it was the particular car they wanted. The car which deceased attempted to board, and from which he fell and was killed, was an east-bound car.

Deceased, in company with his two brothers, came up the stairway in single file to the station house. Deceased was in front, and went through the station house out on to the platform. His brother Arthur was a step or a step and a half behind him and the other brother, William, a similar distance behind Arthur.

At the rear end of the car was a step from which a boarding passenger could reach the rear platform or vestibule, and from thence pass on into the car proper. At the edge of the rear platform or vestibule was a gate made of iron network, movable on its joints, so that it could be opened by pushing it together to one side, or could be closed by stretching it across the opening and fastening it there, thus forming a fence or barrier to an entrance upon the platform or vestibule of the car.

It is undisputed that plaintiff's husband got upon the step of the car while it was moving, and shortly before the rear vestibule or car platform had passed the fence or guard rail at the east end of the station platform, and that, just after the rear vestibule of the car passed this fence or guard rail, he fell 30 feet to the ground below, and was instantly killed.

There were three specifications of negligence in the petition, the first two of which charged the conductor of the car with negligence. These, however, could not be relied upon, as the testimony of plaintiff's own witnesses did not support either of them, and the court very properly instructed the jury that no negligence of the conductor had been shown. The conductor could not be guilty of negligence in ordering the car to start, since all the testimony shows the car was in motion and leaving the station platform before plaintiff's husband attempted to board it by getting upon the rear step of the car.

[1] The third and remaining specification of negligence was against the motorman, charging him with starting the car forward *suddenly*, thereby causing plaintiff's husband to lose his balance on the step or runboard of the car and fall to the pavement below. And, since it was admitted that the car was in motion and at least three-fourths of the car had passed beyond the east edge of the elevated station platform at the time deceased stepped upon the runboard, the sudden starting of the car complained of was not its initial starting, but was a starting up of the car from a slow to a more rapid movement, and made at a time when the rear end

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 166 S.W.—55

of the car was at or near the guard rail or fence at the edge of the station platform—that is, while the car was moving away from and had almost left the station platform—at which time the motorman had a right to presume that the gate to the rear vestibule of said car was closed, according to rule, and that no one would attempt at that perilous place to get upon the car while in motion in violation of the rule of the company and the warning not to do so, conspicuously posted on the guard rail. A sudden acceleration of the speed of the car at that time would not be negligence on the part of the motorman, unless he knew, or had reason to believe, that a passenger had attempted to board, or was in the act of boarding, a car at that point and under those dangerous circumstances, and had not yet had time to get safely inside of the car.

[2-4] We have examined the evidence offered in plaintiff's behalf carefully to see if there is any substantial evidence tending to show, or from which an inference could be drawn, that the motorman knew, or had reason to believe, those facts, and we must hold that there is none.

It must be borne in mind that the motorman was on the front or east end of the car, wholly unable to see plaintiff's husband at the time he got upon the rear step of the car. Even if plaintiff's husband was standing by the track on the station platform as the front end of the car, containing the motorman, passed the station house door so that the motorman saw or might have seen him, yet, as it is conceded that the track was used by cars going in the same direction, but bound for different destinations, and as it is further conceded that deceased did not signal the motorman or give him any intimation that he desired to board that particular car, and as plaintiff's witnesses say the car did not stop at the station, and therefore the motorman would have a right to proceed and also to presume the rear gate was closed according to rule. It would be requiring superhuman powers of the motorman to charge him with the duty of knowing that deceased would attempt to board the car at such a place and under such dangerous circumstances, when every intimation to the motorman was to the contrary. And, unless the motorman had reason to believe that deceased would and did board the car, and must therefore have a reasonable time to get safely upon it before the speed of the car could be accelerated, it was not negligence for him to resume the ordinary speed of his car usual between stations. But a careful examination of all the testimony offered in behalf of plaintiff convinces us that there is no substantial evidence tending to show, or from which an inference could be drawn, that the motorman either saw or might have seen deceased on the platform as the motorman passed. It is true, in answer to a request made to the witness Arthur Speaks to indicate

on a photograph of the station platform "just about where your brother Orville was standing when the front end of the car passed," the witness indicated a point about even with the east edge of the station house doorway. And to a lengthy similar question asked of William Speaks he said Orville was, he judged, about even with the doorway. Even if these answers be accepted at their fullest value, they do not show that the motorman saw or should have seen him. The car, according to their testimony, was moving, and did not stop. It was the motorman's duty to look to the front and take in what would reasonably come within the range of his vision on either side of the track, but this did not require him to keep a lookout directly at right angles to the side of the car, under the circumstances we have above detailed. But, however this may be, the entire evidence of the two brothers shows beyond question that Orville was not standing by the track when the motorman passed the door.

Arthur Speaks testified that the car pulled into the station just as the three brothers reached the top of the stairway; that Orville was in front a step or two or a step and a half ahead of him, and he about that distance ahead of his brother. The car was 44 feet long, and the station platform 49 feet. The doorway from the station house was slightly nearer to the east end of the station platform than to the west end, it being 16 feet from the doorway to the guard rail at the east edge of said platform. Arthur Speaks further testified that the car never stopped, but was going slow, "just barely moving; a man could walk slow and catch it." He then testified that as Orville came out of the doorway of the station the back end of the car was about even with the door; that as Orville came out of the door he had to go in a northeast direction to catch the car and move fast enough to overtake it. This being true, Orville was not "standing" by the side of the track as the front end of the car passed him. Afterwards, when reminded that he had said the rear end of the car was about even with the doorway as his brother came out, he said that he had misunderstood the question, and that when Orville came out of the doorway the rear end of the car was "a little west of him." Even with this correction, this did not show or support an inference that the motorman saw or could have seen Orville, because the point indicated by Arthur as the position of his brother on the platform was slightly east of or even with the east edge of the doorway, and with the car 44 feet long, and the rear end only a little west of Orville, it would still put the motorman where he could not have seen, or would not be required to see, Orville as he came from the doorway. And it is difficult to perceive what it was that the witness failed to understand when he testified that the rear end of the car was about even with the doorway as Orville came out, be-



cause on this point his testimony was as follows: Q. "So his (Orville's) direction from the doorway would be about northeast? A. Yes, sir. Q. Now, in moving towards the car to jump on the steps—I'll say step on the steps—he would have to move in that direction to do that? A. Yes. Q. The car was moving as he moved along in that northeasterly direction—the car kept moving at the same time? A. Yes. Q. And he had to move fast enough to overtake the car? A. Yes, sir. Q. When he came out of the doorway of the station where was the back end of the car? A. Well— Q. Well, which way was it? About where was it from the door? A. At the time that he came out of the door? Q. Yes, sir. A. It was about even with him. Q. The door of the car was about even with the door of the station? A. Yes, sir; *the back end of the car was about even with the door.*"

If the car was going as slowly as Arthur Speaks said it was, and the front end of the car passed Orville while he was standing on the platform at a point even with the east edge of the door, why was it necessary for Orville to go in a northeast direction to catch the car, since he could have stepped on the rear step as it passed him? The witness said at one place that the back end of the car was 5 or 6 feet east of the doorway at the time Orville got upon the step. This made him get on at a point much nearer the guard rail at the east edge of the station platform and within 10 or 11 feet thereof. And yet at another place the witness says that the car started up suddenly, "just as fast as a car can when the current is all on" right at the point where, and moment when, Orville got on, and then further on the witness says the car made this sudden increase of speed when the rear end was about 2 or 3 feet inside of the guard rail. According to this, therefore, the deceased boarded, or attempted to board, the car at about the place where defendants' witnesses said he did, namely, a few feet inside the guard rail and just before the rear vestibule of the car left the station platform. And to reach the point where he attempted to board the car he went from the doorway in a northeast direction. All of which shows that the motorman could not have seen deceased, and could not have had any reason to believe that he would board the car.

Plaintiff's only other witness as to what took place on the platform was the other brother, William. His testimony is that he was just going through the door at the top of the stairs on the opposite side of the station house from the station platform when the rear end of the car was about even with the doorway of the station house; that he was in the station doorway in the act of coming out on the platform when his brother Orville stepped on the rear car step; that Orville did so at a point not over 4 or 5 feet from the guard rail; and that the car was

in motion. This tends to corroborate the version of defendants' witnesses as to what took place on the platform, and shows that the motorman could not have seen or anticipated that Orville would attempt to board the car.

Plaintiff's other witness was a negro woman standing on the street below, who claims to have seen the man fall; that he was standing "like as if he was in the door of the car"; that the car gave a jerk, and he fell backwards to the street. She said she had noticed how cars increased their speed and felt them jerk as they did so, but could not say whether the jerk this car gave was anything unusual or not. She did not testify to anything occurring on the platform.

Under this state of the evidence, there was no proof that the motorman was, or should have been, cognizant of the fact that Orville Speaks had attempted or would attempt to board the car, and hence there was no negligence on the part of the motorman shown. No one says the motorman saw him, or that any sign was given to indicate an intention to board the car. And, while, in answer to a lengthy question in which the front end of the car is placed as passing the doorway, the brothers locate the deceased as standing about even with the doorway, yet their entire testimony shows that he was not standing there when the front end of the car passed, and the answer to each of said two questions cannot be taken as any substantial evidence of that fact. *Oglesby v. Mo. Pacific*, 177 Mo. 272, loc. cit. 296, 76 S. W. 623; *Brosius v. Sunflower Lead & Zinc Co.*, 149 Mo. App. 181, loc. cit. 187, 130 S. W. 134.

The substance and effect of plaintiff's testimony is to confirm the evidence given by defendants' witnesses as to what took place on the platform. Defendants' witnesses consisted of the motorman, the conductor, two persons on the station platform at the time, a young lady and gentleman waiting for a different car, and two men who were passengers on the car. Of the six who testified for the defendants as to what happened, four had no connection with either side, and were therefore disinterested. According to the testimony given by defendants' witnesses, the car came into the station and stopped at its regular stopping place. This put the front end of the car about even with the guard rail at the east edge of the station platform, and the rear end of the car in about five feet of the west end of the station platform. The door of the station house opening on the platform was not quite in the middle thereof; that is, it was about eight feet nearer to the east end than to the west end of said platform. Defendants' testimony further showed that, at the time the car stopped, there was no one on the platform, except the young lady and gentleman at one side thereof, who made no effort or move to board the car; that the gate on the rear vestibule was shut, and no one attempted to get off the car;

that after the car started up, and as the rear end of the car was passing the doorway of the station house, the deceased came out of the doorway and ran after the moving car, "catacornered" across the platform, and jumped on the rear step; that the conductor called to him not to get on, but when he did get on the step the conductor, realizing his dangerous situation, hurriedly attempted to open the gate, and reached out to help the deceased into the vestibule, but, before the conductor could reach him, the deceased's body struck the guard rail a slight blow, and he fell to the pavement below; that he fell from the car at a point three or four feet east of or outside the guard rail. Of the foregoing, the motorman testified only that the car stopped at its regular and proper place; that there were only the young lady and her escort, the young man, on the platform as the car reached it; that he never saw deceased, but could have seen him had he been there; and that he did not know that deceased came out and attempted to get on the car. Of course, in determining whether there was any evidence upon which plaintiff could base a recovery, regard must be had only to the evidence in plaintiff's behalf, but the evidence of defendant's witnesses may be considered in order to determine whether it does not help out plaintiff's testimony. In this case it does not, and it is only important in the light of the fact that the effect of plaintiffs' evidence is to confirm that of defendants'.

Under the testimony, there was no showing of negligence on the part of the motorman.

[5-7] The evidence also fell short of establishing the relation of passenger and carrier. Even in the case of a street railway there must be circumstances from which can be implied an offer to be carried on the part of the one desiring to become a passenger and an acceptance on the part of the carrier. *Mathews v. Metropolitan St. Ry.*, 156 Mo. App. 715, loc. cit. 723, 137 S. W. 1003; *Stager v. Railroad*, 119 Pa. 70, 12 Atl. 821; *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, loc. cit. 672, 29 S. W. 712; *Schaefer v. St. Louis & Suburban Ry. Co.*, 128 Mo. 64, 30 S. W. 331. The mere fact that deceased ran or went toward and jumped or stepped on the moving car did not create the relation of carrier and passenger. 1 *Nellis on Street Railways* (2d Ed.) §§ 249, 258. There was no evidence anywhere that there was any act indicating an acceptance of deceased as a passenger. The petition itself states that the defendant company's rule was that the gate should be kept closed while the cars were in motion and to open the gate only when the cars were still. And it also had a rule forbidding passengers from boarding the car while in motion, and the warning not to do so was painted in large letters on a sign at the very point where deceased attempted to board the car. It was not necessary to bring

home to the deceased actual knowledge of the rule if the rule is so conspicuously posted as to lead to the reasonable inference that notice is given of its existence. 1 *Nellis on Street Railways* (2d Ed.) § 291. The brothers also testified that deceased had ridden to and from his work over this line for six years, and he was undoubtedly familiar with the elevated platform and railway. There is therefore nothing in the testimony tending to show an invitation on the part of the company to deceased to board the car, and no waiver of the rule against boarding it while in motion; consequently the relation of passenger and carrier did not come into existence. The case is wholly unlike that of *Nolan v. Metropolitan St. Ry. Co.*, 250 Mo. 602, 157 S. W. 637, because in that case the person intending to become a passenger signaled to the motorman, and the latter replied with a nod and slackened speed, all of which was absent in the case at bar. Nor is it within the rule announced in *Spencer v. Transit Co.*, 111 Mo. App. 653, 86 S. W. 593, since there was no signal to stop, and plaintiff's husband was bound to know that the motorman was not slowing down to stop, since, at the time he got on, even the plaintiff's testimony is to the effect that at least three-fourths of the car had left the platform, and was beyond the guard rail at the edge. As the deceased did not obtain the status of a passenger, the only duty defendants owed him was to use ordinary care to avoid injuring him after it was discovered, or should have been discovered, that voluntarily and uninvited he had placed himself in a place of danger. *Mathews v. Railway*, *supra*. But no failure in this respect was pleaded or shown.

[8] In addition to all this, the deceased was clearly guilty of contributory negligence as matter of law. According to plaintiff's own evidence, it was past midnight. The car was in motion and leaving an elevated station platform, and three-fourths of the car was off of it. The gate of the rear vestibule was either closed or two-thirds closed. Arthur Speaks said the gate was not entirely shut, and at first said it was two-thirds shut, and then afterwards it was two-thirds or one-third open, "or something like that; I couldn't say exactly"; and that he didn't know when it was opened. The deceased got on the step, under these circumstances, at the farthest, only ten feet from a fence or guard rail running up to the track and on which was a huge sign warning him of the danger. William Speaks says the deceased was not over four or five feet from the guard rail when he got on. If an attempt to board a moving car, under these circumstances, will not constitute contributory negligence as matter of law, then it would be difficult to conceive of one where it would. It is true it is not negligence per se for an able-bodied man to board a slowly moving car, and the question is one of mixed law and fact, to be de-

termined by the triers of the facts under proper instructions from the court. But, as said in the Mathews Case, 156 Mo. App. 724, 137 S. W. 1006: "This rule applies only in cases where the act is not attended by unusual and extraordinary dangers." In *Joyce v. Railroad*, 219 Mo. loc. cit. 374, 118 S. W. 21, under circumstances almost identical with these at bar, the Supreme Court held that, if a person undertook to board a car after it started to leave an elevated platform and was struck and thrown down by a guard rail at the edge thereof, he could not recover.

[8] But plaintiff says his attempt to get upon the car did not cause him to fall; that only the sudden starting up of the car caused that; and consequently his contributory negligence, if any, had nothing to do with his fall. The trouble with this contention is that, according to all the evidence, deceased never was safely on the car. Even plaintiff's evidence shows he only had one foot on the step and the other on the vestibule floor, and was outside the partly closed vestibule gate, holding to it with one hand and to the rear handhold of the car with the other. He was therefore in a position of great peril, and, instead of his contributory negligence in getting on the car having nothing to do with his fall, it had everything to do with it, and was the proximate cause thereof.

Viewing the case from every possible angle and in the light of the testimony most favorable to plaintiff, and giving it the benefit of every intendment and inference which it will reasonably support, it clearly appears that plaintiff had no case, and the trial court was correct in holding that the demurrer to the evidence should have been sustained.

The judgment is therefore affirmed. All concur.

HILLER et al. v. DAMAN et al. (No. 13,600.)  
(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**1. CONTRACTS (§ 275\*)—BUILDING CONTRACTS—BREACH—LIABILITY.**

Where the plans and specifications for a building contract required the contractor to install plate glass mirrors for the medicine cases in the bathrooms, and the contractor installed inferior mirrors, he was liable to the owner for his damages.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1207; Dec. Dig. § 275.\*]

**2. MECHANICS' LIENS (§ 312\*)—BUILDING CONTRACTS—PAYMENTS TO PREVENT LIENS—INDEMNITY.**

Where a building contract provided that, if there should be any claim which might be established by mechanic's lien "after all payments" were made by the owner, the contractor should refund to the owner all moneys which he was compelled to pay in discharging such claim, though the owner had a small balance due the contractor in his hands when he was served with notice of such a claim, he was entitled to recover from the contractor the amount paid by him in excess of such balance.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 655; Dec. Dig. § 312.\*]

**3. CONTRACTS (§ 300\*)—BUILDING CONTRACTS—TIME FOR COMPLETION—EXTENSION OF TIME OF PERFORMANCE.**

Where a building contract provided that, if the contractor was delayed in the prosecution or completion of the work, the time for the completion thereof should be extended for a period equivalent to the time lost, but that no such allowance should be made unless a claim was presented in writing to the architect within 48 hours of the occurrence of the delay, the contractor was not entitled to an extension of time because of matters causing delay, where no claim was presented as required.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1372–1381; Dec. Dig. § 300.\*]

**4. CONTRACTS (§ 300\*)—BUILDING CONTRACTS—TIME FOR COMPLETION—EXTENSION OF TIME OF PERFORMANCE.**

Within a building contract, providing that if the contractor was delayed in the prosecution or completion of the work by the act or neglect of the owner or architect, or by any casualty for which the contractor was not responsible, the time for completion should be extended accordingly, but that no such allowance should be made unless a claim was presented in writing to the architect within 48 hours of the occurrence of the delay, a delay in commencing work, due to the act of a third party in placing macadam on the lots, was such a delay as required the contractor to make claim in writing as a basis for an extension.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1372–1381; Dec. Dig. § 300.\*]

**5. CONTRACTS (§ 300\*)—BUILDING CONTRACTS—TIME FOR COMPLETION—EXTENSION OF TIME OF PERFORMANCE.**

Where a building contract contemplated that in the work of excavation filled ground might be encountered, and fixed the prices for extra work in excavating such filled ground, the doing of such excavation was within the terms of the contract, and was not such extra work as entitled the contractor to an extension of time for completion of the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1372–1381; Dec. Dig. § 300.\*]

**6. CONTRACTS (§ 345\*)—BUILDING CONTRACTS—ACTIONS—PLEADING—ISSUES.**

In an action against a building contractor, the petition declared upon the contract, and alleged a breach thereof, consisting of a delay in completing the work, and the contract was filed therewith as an exhibit. The answer admitted the execution of the contract, and pleaded that the time limit prescribed in the contract was waived because of several matters causing delay. Plaintiff filed merely a general denial by way of reply. *Held*, that, notwithstanding his failure to allege it in his reply, plaintiff could rely on a provision of the contract requiring claims for an extension of time to be made in writing within 48 hours of the occurrence of the delay, since the admission of the execution of the contract not only ran through the whole defense, but was indisputable on the trial of other issues.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1717; Dec. Dig. § 345.\*]

**7. PRINCIPAL AND SURETY (§ 100\*)—DISCHARGE OF SURETY—CHANGE IN CONTRACT.**

Where a building contract contemplated that in the work of excavation filled ground might be encountered, and specified the prices for excavating it, such excavation was not an alteration of the contract discharging the contractor's sureties.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 162–165; Dec. Dig. § 100.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indr

# 8. PRINCIPAL AND SURETY (§ 100\*)—DISCHARGE OF SURETY—CHANGE IN CONTRACT.

Where a bond given to insure performance of a building contract provided that the parties might make such changes and alterations in the work as they deemed proper, not exceeding the cost of \$1,000, and that the sureties accorded their consent thereto in advance, they were not discharged by slight changes made by consent of the owner and contractor, not entailing an expense of \$1,000, though the contract did not authorize the making of changes.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 162-165; Dec. Dig. § 100.\*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by J. C. A. Hiller and others against William Daman and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

S. Mayner Wallace and Barclay, Orthwein & Wallace, all of St. Louis, for appellants. Wm. F. Heideman, of St. Louis, for respondents.

**NORTONI, J.** This is a suit for damages alleged to have accrued through several breaches of a building contract. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff is the owner of the buildings, and defendant William Daman is the contractor, while defendants John C. Timmerberg and Maggie Daman are sureties on his bond for the faithful performance of the contract. A jury was waived, and the case tried before the court, which found the issue for plaintiff and gave judgment against all the defendants, from which they jointly prosecute the appeal. The contractor, Mr. Daman, interposed a counterclaim for certain alleged extra work, but the finding and judgment were for plaintiff and against him on that as well.

It appears that the items involved in the counterclaim pertain to certain matters covered in the contract for which compensation has been made in accordance with the contract terms, and therefore it will be unnecessary to consider the counterclaim separate and apart from the question arising in plaintiff's case.

There are a number of points made in the brief for a reversal of the judgment, but it will not be necessary to discuss them all. Some of them are obviously without merit, and others are concluded by our view of the contract and the obligation it imposes.

It appears that on April 20, 1908, defendant William Daman entered into a written contract with Frank A. J. Hiller, whereby he agreed to provide all of the materials and perform all of the work for the completion of two two-story brick buildings situate on a lot at the southwest corner of Clayton and Taylor avenues in St. Louis. One of the buildings contemplated in the contract was designed for a store building with flats over-

head, while the other was a double flat building. The buildings were to be constructed in accordance with the plans and specifications prepared by Victor J. Klutho, architect for the owner. By article 4 of the contract, it is stipulated that the store and flat building should be completed and possession given to the owner on or before August 1, 1908, and the double flat building to be completed and given over to the owner on or before August 20, 1908. By article 9 of the contract, the price to be paid the contractor for the excavations and the buildings is agreed upon at \$14,943, to be paid upon the certificate of the architect on or about the first day of each month; that is, payments equal to 90 per cent. of the value of the work performed during the preceding month to be then due and payable. However, the same ninth article of the contract further provides as follows: "It is hereby understood and agreed between the parties that in case filled ground is encountered, prices for extra work to be as follows: Excavation, 75 cents per yard at single measurement. Concrete work, 22 cents per cubic foot. Rubble masonry, \$1.00 per perch." In excavating the cellars for the buildings, filled ground was encountered by the contractor, and it became necessary for him to proceed to a considerable depth by sinking a number of wells and erecting concrete pillars therein. The prosecution of this work was delayed some by frequent rains until in all several weeks of time were consumed before the foundations were completed. A considerable controversy in the case arises on this matter, for it is said by defendant contractor that such was extra work which operated to extend the time for the completion of the buildings, while it is asserted on the part of plaintiff that such was work contemplated in the contract, and that no extension of time may be had therefor at any rate, for the reason the contractor laid no claim thereto under the seventh article of the contract, which imposed this obligation upon him. Moreover, it is asserted on the part of defendant sureties that such additional work on foundations was extra work beyond the pale of the contract, the performance of which destroyed its identity, and therefore discharged them. On the other hand, it is asserted by plaintiff that, such extra work being expressly mentioned and provided for in the contract in case filled ground was encountered, it was within the contemplation of all the parties, and therefore it was, though its precise extent was unknown, a part of the very contract to which the sureties assented upon signing the bond. The petition is in four counts but the court found the issue for defendants, and gave judgment in their favor on the first count, and that matter will not be further noticed.

[1] In the second count of the petition, the breach assigned relates to the failure of the contractor to install plate glass mirrors for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the medicine cases in each of the bathrooms contained in the buildings. Such mirrors were required, according to the plans and specifications, and the breach touching this matter seems to be conceded. It appears the contractor installed inferior mirrors in the medicine cases in eight bathrooms, and it is said the value of each is \$2 less than the mirrors called for in the contract. The court found the issue for plaintiff touching this matter and awarded him damages to the amount of \$15. The evidence supports the finding, and it may be put aside without further consideration.

[2] Among other things, the ninth article of the contract provides substantially that, should there prove to be any claim which may be established by mechanic's lien against the buildings, or either of them, after all payments are made by the owner, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging it. After the owner had paid the contractor all moneys due him, save \$43.17, one Ehle, the plasterer, a subcontractor, served notice on plaintiff that there was a balance due him for plastering of \$139.94, and also took steps to establish a mechanic's lien on the buildings by serving notice to that effect. Plaintiff thereupon paid this entire claim under the provision of the contract last quoted, in order to prevent the accrual of costs, and there seems to be no controversy in the case with respect to the fact that the balance of \$139.94 was due the plasterer, and that it was paid by plaintiff as above stated. The breach declared upon in the third count of the petition relates to this matter, and it proceeds to recover \$139.94 so paid to Ehle, the plasterer. The court found the issue for plaintiff on this count, but deducted therefrom the balance due the contractor, and then in the hands of plaintiff, that is, \$43.17, and gave judgment for plaintiff for the remainder. This finding and judgment are amply supported by the evidence, and seem to be well enough in every respect, but defendant argues that plaintiff should not recover therefor because the contract says the amount is to be refunded if paid on "any such claim after all payments are made to the contractor." Because there remained \$43.17 in the hands of the owner due the contractor, it is said the payment of the plasterer's bill was premature, but obviously this argument is without merit. It is highly technical and without substance, for it is conceded that the plasterer's bill of \$139.94 was unpaid, and that plaintiff paid it in order to prevent a lien from being established against the buildings, and this too, after the lien notice was served upon him. The mere fact that there remained \$43.17 of money due the contractor in his hands at the time is immaterial, for it is clear that substantially all payments had then been made to the contractor by plaintiff before

this claim was discovered to be unpaid. It is true plaintiff sued for the entire amount paid out to the plasterer, that is, \$139.94, but he is permitted to recover only the balance so paid, with interest, after deducting the small amount then owing by him to the contractor. When it is remembered that, by the command of the statutes, judgments are not to be reversed on appeal save for error affecting the merits of the case against the appellant, it would seem that such a point should not be urged upon us.

[3] The real controversy in the case arises on the fourth count of the petition. The breach alleged in this count relates to the failure of the contractor to complete the buildings in the time specified; that is, the one by August 1, 1908, and the other by August 20, 1908. It is said the buildings were not completed until, one in the latter part of November and the other about the middle of December. Because of this plaintiff lost the rentals for considerable time, which, in all, amounted to \$165 per month. Defendant contractor insists that the contract time for the completion of the buildings was waived, and a reasonable time substituted therefor, because: First, that he was delayed 10 days in commencing the work, in that the lots were covered with macadam; and, second, delayed thereafter because of the owner's failure to pay promptly for the work on July 1st the installment of compensation then due under the contract; and, third, because of alleged extra work entailed through sinking wells and building concrete pillars in that filled ground was encountered. It appears the contract was entered into on the 20th day of April, and on the following day defendant contractor visited the lots with a view of arranging to commence excavating thereon. But upon arriving there he discovered about 30 loads of macadam, which had been placed upon the lots by a street contractor, and he was deterred from commencing work because of that fact. Touching this matter, it appears that neither the owner nor the contractor was advised at the time the contract was made; that is to say, the street contractor had appropriated the use of the lots as a storage place for his macadam without the knowledge or consent of the owner, and without the knowledge of defendant. Daman notified plaintiff's agent forthwith to cause the macadam to be removed, and he proceeded at once to that end. However, about 10 days' time was consumed before the macadam was removed from the lots, and the contractor thus enabled to commence work thereon.

Touching the matter of the owner's failure to pay Daman, the contractor, for 90 per cent. of the work done in June, which, according to the contract, should have been paid on July 1st, it appears this payment was not made for some reason until July 13th. Because this payment was not promptly made, the excavators quit work for 10 or 12 day

and it is insisted this default on the part of the owner operated to extend the time for completing the buildings.

Touching the matter of the alleged extra work in sinking wells and putting in concrete pillars beneath the regular foundation walls designed, it appears several weeks were consumed, inasmuch as the work was delayed by frequent rains as well.

The court denied the right of defendant contractor to an extension of the time because of these facts, for the reason he had made no claim thereto in accordance with the seventh article of the contract, and the judgment is obviously sound when that instrument is looked to. The seventh article of the contract is as follows: "Should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, of the architect, or of any other contractor employed by the owner, upon the work, or by any damage caused by fire or other casualty for which the contractor is not responsible, or by general strikes or lockouts caused by acts of employés, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architect; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of such delay." Such provisions are inserted in building contracts with a view of clearly defining the rights of the parties thereto, and obviating controversies which so frequently arise with respect to delays and alleged waivers of time, based upon claims concerning extra work and other variations from the contract terms, which, as a rule, almost always occur to some extent if the work is of any considerable proportion. A provision of a building contract precisely similar to the one above copied was considered by this court and upheld on a former occasion. In that case it was declared that, where the contract contains this article, it is incumbent upon the contractor, in order to avail of an extension of time provided for completion of the buildings in other portions of the contract, to lay claim therefor at the time and within the time and manner stipulated. Otherwise no such extension of time is available to him on the grounds of waiver, for it will not do to imply a reasonable time in the very face of a provision stipulating a precise time, coupled with another express provision to the effect that such time shall prevail unless extended in the manner agreed upon by the parties. See *Ward v. Haren*, 139 Mo. App. 8, 119 S. W. 446. Here, it is conceded that defendant Daman, the contractor, made no claim whatever for an extension of time, as required by the seventh article of the contract, because of any of the delays above referred to, and, indeed, he made no

such claim of any kind, or at any time, until after the institution of the suit. But it is said the case of *Eldridge v. Fuhr*, 59 Mo. App. 45, determines that where a lot is not given into possession of the contractor by the owner so that he might immediately commence work thereon, such fact operates an extension of time. The judgment there given by the court is sound, indeed, on the facts it portrays, but the case is entirely dissimilar from this one. In that case the owner expressly agreed in the contract to deliver possession of the lot to the contractor on or before the 9th day of April, and he breached this provision in that he failed to do so until April 20th. Here, no such agreement whatever appears between the parties, but this is of only slight importance, as it may be conceded, though not decided, that the law devolved upon the owner the duty in the instant case of furnishing the lots clear of macadam if nothing otherwise appeared. But the case of *Eldridge v. Fuhr*, supra, is, moreover, to be distinguished from this one in that there the contract contained no provision whatever requiring the contractor to lay a claim for an extension of time if one were desired, as in the case at bar. Had Daman, the contractor, proceeded in accordance with the seventh article of the contract and presented in writing to the architect, within 48 hours of the occurrence of the delay, his claim for an extension of time on account of it, a different situation entirely would appear. But this he did not do, and he is therefore concluded with respect to that matter by his failure to avail himself of the provisions of the contract.

[4] But it is said, though such be true, article 7 of the contract contemplates delays in the "prosecution or completion of the work," and that the 10 days' delay occasioned because of the failure to see that the lots were cleared of macadam when the contract was let is not within it because such delay occurred before the commencement of the work. Touching this matter, it is to be said that the subject-matter of article 7 of the contract is delays that might occur, and it is obvious the delay here involved occurred after the execution of the contract, for until that fact was accomplished no right to performance in execution of the contract obtained. It is therefore manifest that the delay referred to, though it was occasioned by the condition of the lot at the time the contract was let, falls within the very terms of the stipulation, for it deterred the "completion" of the buildings. Obviously the contractor should have made his claim for an extension of time in accordance with the provisions of article 7.

No claim was made on the part of the contractor for an extension of time on account of delay in the work occasioned by the failure of the owner to pay him 90 per cent. of the contract price for work done during the month of June, which became due on the

first day of July. It is true this payment was deferred until July 13th, and it is true, too, that the workmen quit because their pay was not forthcoming. But this delay so occasioned, though because of the neglect or default of the owner, is not available to the contractor as a waiver of the other terms of the contract for the reason that the contractor made no claim therefor under article 7 above referred to.

[5] Touching the matter of the delay occasioned through alleged additional work in sinking a number of wells and filling them with concrete beneath the regular foundation walls of the building, it is to be said that this work was clearly within the terms of the contract. The parties contemplated that filled ground might be encountered in this connection and stipulated in the contract concerning it. The contract recites: "It is hereby understood and agreed between the parties that in case filled ground is encountered, prices for extra work to be as follows: Excavation, 75 cents per yard at single measurements. Concrete work, 22 cents per cubic foot. Rubble masonry, \$4.00 per perch." Obviously this work cannot be regarded as extra work, for it was expressly agreed upon in the contract. Moreover, whether it be extra or not the contractor is not entitled to an extension of time because of it, for the reason that he made no claim whatever on that score, as he was required to do in order to obtain an extension of time under the provisions of article 7 of the contract.

[6] But it is argued article 7 of the contract is not available to plaintiff, for that he did not set it forth and rely upon it in his reply. The petition declared upon the contract, and assigns the several breaches thereof hereinabove discussed. Moreover, the contract is filed with the petition as an exhibit in the case. By their answer defendants admitted the execution of the contract, as pleaded in the petition, and all of its terms, but incorporated another plea besides, to the effect that the time limit prescribed in the contract for a completion of the building was waived because of the several matters above discussed. To this answer plaintiff filed merely a general denial by way of reply. It is argued that in this state of the pleadings plaintiff is not entitled to avail himself of article 7 of the contract, which imposed the duty upon defendant Daman to lay claims for an extension of time in order to avail himself thereof. Obviously this provision of the contract is available to plaintiff, even though he did not expressly plead it in the reply, for defendant expressly admitted the entire contract containing all its parts in his answer. Such an admission in the answer, not only runs through the whole defense of the case, as was said by the Supreme Court in *Cox v. Volkert*, 86 Mo. 505, 511, but is indisputable on the trial of other issues raised by the pleadings. *Call v. Moll*, 89 Mo.

App. 386. Indeed, it would seem, after thus expressly admitting the contract in the answer, containing as it did article 7, that defendant's plea of a waiver of the provisions of the contract for completing the buildings within the time therein stipulated was beside the case unless it set forth, too, compliance with such article 7.

[7] The defendant's sureties argue that they are discharged from their obligation because of changes made in the execution of the contract and additional work entailed. This argument proceeds from the fact that, upon encountering filled ground the several wells were made, and concrete pillars erected therein beneath the foundations. But obviously such is not an alteration of the contract in the sense required to discharge the sureties from their obligation to respond for its breach. The identity of the contract was in no wise impaired by this work, for the very contract, to the execution of the faithful performance of which the sureties stood responsible, contemplated such work in the event filled ground was encountered, and provided the prices that should be paid therefor. In such circumstances, it appearing that the parties contemplated and the contract clearly referred to such additional work as within their contemplation when it was executed, the sureties are regarded as having consented thereto at the time of assuming their obligation, and may not be heard to complain thereafter. The question has been pointedly decided heretofore. See *Burnes' Estate v. Fidelity & Deposit Co.*, 96 Mo. App. 467, 70 S. W. 518; *The Ashenbroedel Club v. Finlay*, 63 Mo. App. 256, 260.

[8] However, there was a slight change made by consent of the owner and the contractor, whereby certain reinforced concrete beams were installed in lieu of some other work, and an argument is predicated on this matter, to the effect that the sureties were discharged because of such change. No doubt this argument would inhere with considerable force were it not for the fact that the bond which the sureties executed expressly stipulates that the parties may make such changes and alterations as they deem proper, not exceeding the cost of \$1,000, and that the sureties accorded their consent thereto in advance. The changes so made did not entail an item of expense to equal that to which the sureties had thus consented, and it therefore avails nothing to them by way of acquitting their obligation to respond. It is true this particular matter is not referred to in the contract, but it is expressly provided for in the bond. The suit proceeds on both the bond and the contract, for they are to be read and considered together. The consent stipulated in the one is equally as valid on this matter as in the other.

The questions made on defendant Daman's counterclaim are all fully disposed of by what has been said in the opinion, and it is

unnecessary to consider them separately. It seems to be clear enough that there is no merit in the controversy.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

### GIBSON v. POLLOCK. (No. 10,842.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 4, 1914.)

#### 1. PLEADING (§ 418\*)—PETITION—DEFECTS—WAIVER.

A defendant who files an answer after the overruling of his demurrer to the petition as insufficient to state a cause of action does not thereby waive the objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.\*]

#### 2. INSANE PERSONS (§ 80\*)—TORTS—LIABILITY.

An insane person is liable for his torts.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 142; Dec. Dig. § 80.\*]

#### 3. INSANE PERSONS (§ 94\*)—ACTIONS—GUARDIAN.

An insane person, when sued for a tort, must be given the benefit of a defense made by a sane person as guardian.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.\*]

#### 4. JUDGMENT (§ 334\*)—WRIT CORAM NOBIS—REMEDY.

Where the face of the proceedings against an insane person for a tort does not show the fact of his insanity and his inability to defend, and the judgment against him is on its face valid, the remedy is to have the judgment set aside by writ of error coram nobis for the error of fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

#### 5. JUDGMENT (§ 334\*)—WRIT CORAM NOBIS—PETITION—SUFFICIENCY.

A petition for writ of error coram nobis to set aside a judgment against an insane defendant for a tort, which alleges that the allegations of the petition of plaintiff in the action were untrue, and that defendant had a good defense to the action, is sufficient after verdict, though subject to attack by demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

#### 6. JUDGMENT (§ 334\*)—WRIT CORAM NOBIS—DEFECTS—OBJECTIONS—MANNER OF RAISING.

The objection to a petition for a writ of error coram nobis to set aside a judgment against an insane defendant for a tort, based on the fact that the petition shows that the guardian of the insane defendant is plaintiff in the writ instead of the insane defendant, can only be raised by special demurrer or specifically set up in the answer; otherwise it will be waived.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

#### 7. JUDGMENT (§ 334\*)—WRIT OF ERROR CORAM NOBIS—REVIEW.

The court, on application for a writ of error coram nobis to set aside a judgment against an insane defendant, who was not represented by guardian in the action resulting in the judg-

ment, will not try the merits of the action in which the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

#### 8. INSANE PERSONS (§ 2\*)—EVIDENCE OF INSANITY.

On an application for a writ of error coram nobis to set aside a judgment against an alleged insane defendant, who was not represented by guardian in the action resulting in the judgment, evidence held to sustain a finding that defendant was insane at the time of the trial authorizing the granting of relief.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 4-10; Dec. Dig. § 2.\*]

#### 9. JUDGMENT (§ 334\*)—VACATING—LIMITATIONS.

The statute of limitations does not apply to writs coram nobis to set aside judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

#### 10. JUDGMENT (§ 334\*)—VACATING—LACHES.

A delay of 5 years before bringing a writ of error coram nobis to set aside a judgment rendered against an alleged insane defendant, who was not represented by guardian, does not amount to laches, where only about 18 months elapsed after the appointment of the guardian before the application for the writ.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

Appeal from Circuit Court, Buchanan County.

Application for writ of error coram nobis by James A. Gibson, guardian, against Alice Pollock, to set aside a judgment. From a judgment granting relief, defendant appeals. Affirmed.

Jas. W. Boyd, of St. Joseph, for appellant.  
C. F. Strop and Eugene Silverman, both of St. Joseph, for respondent.

ELLISON, P. J. On the 19th of May, 1903, a judgment was rendered in favor of defendant, Alice Pollock, against Frederick Reischel in the sum of \$1,000. The ground of her action against Reischel was assault and battery. On the 11th of August, 1908, this plaintiff, as guardian for Reischel, instituted this action in the nature of an application for a writ of error coram nobis, whereby he seeks to set aside such judgment on the ground of error of fact, viz., the insanity of Reischel, which fact did not appear on the record in the action for assault and battery. The trial court sustained the application and set aside the judgment with a view to allowing the guardian to file an answer and defend against the action. Alice, as defendant in this proceeding, appealed to this court.

[1] Defendant demurred to plaintiff's petition on the ground that it failed to state a cause of action. The demurrer was overruled, and she then filed an answer consisting of a general denial and that no cause of action was stated. While an answer ordinarily waives a demurrer, it does not do so when the objection is a failure to allege facts sufficient to constitute a cause of action, and we therefore will examine into the sufficiency of the petition.



It is claimed that, though the petition alleges that at the time of service of process in the action for assault and battery, and at the time of the trial of that action, Reischel was insane, and that no guardian was appointed for him, yet it is fatally defective in that it is not alleged that he was insane when he made the assault on Mrs. Pollock. In support of this proposition, defendant has cited us to an array of authority to the effect that a judgment against an insane person is not void, and that "process and judgment go against the lunatic as against other parties." 1 Black on Judgments, § 205; 1 Freeman on Judgments, § 152; Jamison v. Culligan, 151 Mo. 410, 416, 52 S. W. 224; Redmond v. Railroad, 225 Mo. 721, 729, 126 S. W. 159; 10 Encyclopedia Pleading & Practice 1224. And that a lunatic is civilly liable for his wrongful trespass such as for assault or for destruction of property. Lancaster County Bank v. Moore, 78 Pa. 407, 413, 21 Am. Rep. 24; Behrens v. McKenzie, 23 Iowa, 333, 342, 92 Am. Dec. 428; Morain v. Develin, 132 Mass. 87, 42 Am. Rep. 423; 11 Am. & Eng. Ency. of Law (1st Ed.) 127.

[2-4] In our opinion these propositions fail to support the objection to the petition. The allegations therein are not, directly or indirectly, inconsistent with the law thus stated. An insane person is liable for his torts, but he must have the right and benefit of a defense made by a sane person (either himself recovered, or a guardian) to ascertain if he committed the tort. The face of the proceedings against him not showing the fact of insanity, and consequently that he was disabled to defend at the time of the trial, the judgment appears to be valid, and the only way he may have defense is to set it aside by writ coram nobis, for error of fact not disclosed by the record. The office performed and the practical application of this writ has been stated and illustrated many times in this state. State v. Wallace, 209 Mo. 358, 365, 108 S. W. 542; State ex rel. v. Riley, 219 Mo. 667, 683, 118 S. W. 647; State v. Stanley, 225 Mo. 525, 532, 125 S. W. 475; Dugan v. Scott, 37 Mo. App. 663.

But while defendant seems to concede the writ would be allowable in cases where the judgment was against an infant, deceased person, etc., she insists that, since the judgment against an insane person is valid, the writ will not aid such person. This idea leaves out of view what we have just written, that, if properly applied for, there must be opportunity afforded for defense by a sane person. And insane persons are included with those mentioned as being entitled to the writ. Heard v. Sack, 81 Mo. 610, 616; State v. Wallace, supra, 209 Mo. loc. cit. 364, 108 S. W. 542; State ex rel. v. Riley, supra, 219 Mo. loc. cit. 682, 118 S. W. 647; Dugan v. Scott, supra, 37 Mo. App. loc. cit. 670; Hadley v. Bernero, 103 Mo. App. 549, 561, 78 S. W. 64; 23 Cyc. 884.

[5] It is further contended that the peti-

tion fails to state a cause of action, in that it does not allege facts showing that Reischel had a good defense which he could, and would, offer if given an opportunity. Many cases are cited in support of the proposition that such allegation should be made to set aside judgments by default and in some other instances when a party had failed to make a proper defense; or for some irregularity. These are not applicable. In proceeding for the writ of error coram nobis, it has been held that no inquiry can be had into the cause of action upon which the judgment is founded. Higbee v. Comstock, 1 Denio (N. Y.) 652; Breckenridge v. Coleman, 46 Ky. (7 B. Mon.) 331, 335; 23 Cyc. 884, 885.

But it is not necessary that we should decide the matter as a question of pleading, since, in our opinion, the petition is sufficient after judgment. It does not set out the facts of defense which existed in Reischel's favor in the action of assault and battery; but it does allege "that the allegations in said petition so filed by Alice Pollock as aforesaid were untrue, and that said Frederick Reischel had a good and complete defense to said action." The sufficiency of those allegations might be attacked by proper demurrer, but they are not so deficient as not to be curable by verdict or judgment. The allegations being of that character, defendant's answer waived objection to them.

[6] Another objection to the petition is that it should not have been entitled as "James A. Gibson, Guardian and Curator of Frederick Reischel, Insane"; that, as it stands, Gibson is the plaintiff instead of Reischel; and that he is not a proper party plaintiff. But this also should have been made a ground of special demurrer, or specially set up in the answer; otherwise, it is waived. Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856; Gibson v. Shull, 251 Mo. 480, 158 S. W. 322.

[7] But during the introduction of evidence the question was presented whether the merits of the action for assault and battery were an issue in the present proceedings. The trial court ruled they were not, and we believe the ruling was correct. Keeping in mind that the ground of plaintiff's present complaint is that a trial was had of an insane man and that a judgment was rendered against him, we cannot see the reason for, or propriety of, trying the merits of the action in which such judgment was had. Higbee v. Comstock, 1 Denio (N. Y.) 652; Breckenridge v. Coleman, 46 Ky. (7 B. Mon.) 331, 335; 23 Cyc. 884, 885. In the first of these cases, the court, per Beardsley, J., said: "We cannot, as I think, look at the cause of action upon which the judgment was recovered, and if we find that the party who now asks an allowance of the writ acted with palpable dishonesty and bad faith, refuse its allowance on that ground. I find no authority which would justify such a course, and none of this character was referred to by the counsel who

opposed this motion. I am persuaded no writ of error has ever been refused on such a principle." In the circumstances of a case like the present, the merits of the controversy will be tested when both sides may be represented by sane men.

[8] An examination of the evidence bearing on Reischel's sanity at the time Mrs. Pollock's action was brought against him and at the time of the trial and the judgment in her favor does not justify us in interfering with the conclusion reached by the trial judge. Her action was instituted on the 2d of March, 1903, and, as stated at the outset, judgment was rendered against him for \$1,000 in the following month of May, and the present proceeding was instituted in August, 1908. The evidence clearly shows that prior to the year 1903, and during that year, and continuously to the 22d of March, 1907, he was insane, and on the latter date he was so adjudged by the probate court of Buchanan county. He carried on conversations (as he thought) with the dead and the angels. He would preach sermons on his porch to imaginary congregations. One witness said that "sometimes he would sing, and then he would exhort, and was as near a maniac as any man could be." In some of his preaching he used "very vulgar language" and attracted the attention of the neighborhood, and he kept it up frequently until past midnight. At one time he tried to set fire to his neighbor's wood shed. His family left him, and he lived alone in his house for several years. We will not go into more detail. Suffice it to say he was finally formally adjudged insane as above stated. We have not overlooked evidence in his behalf of his caring for himself; that he purchased meat and groceries for himself, though sometimes when they were delivered he would "holler and yell and sing"; and that he drew a pension. Undoubtedly he did sane acts and may not have been continuously giving evidence of aberration. An insane person will frequently act sane and do sane things; but a sane man will not persistently, or frequently, do things insane.

[9, 10] It will be noticed that this proceeding was not begun until more than five years after the judgment was rendered. But it seems to be conceded that the statute of limitations does not apply to writs *coram nobis* (Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153), though it is suggested by defendant that plaintiff was guilty of such laches as to justify a refusal to grant him relief; and she cites Baker v. Cunningham, 162 Mo. 134, 144, 62 S. W. 445, 85 Am. St. Rep. 490. While more than 5 years had elapsed between the date of defendant's judgment and the bringing of this action, yet only about 18 months had elapsed after the appointment of a guardian. In such circumstances, we think there was not such delay as to bar the writ. Plaintiff stoutly maintains that defendant

has no proper bill of exceptions. In the foregoing we have assumed the bill to be regular and valid.

We have carefully considered other minor objections to the judgment, but think them not well founded, and hence affirm the judgment. All concur.

## RONCHETTO v. NORTHERN CENT. COAL CO. (No. 10,657.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 4, 1914.)

### 1. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries received by a coal miner from a fall from the hoisting cage, evidence held not to show that it was a physical impossibility that plaintiff's fall was due to a partial dumping of the floor of the cage, caused by a defect thereof, during the ascent, as plaintiff contended, and to support a verdict for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

### 2. TRIAL (§ 60\*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE—ORDER OF PROOF—SUBSEQUENT USE OF DEFECTIVE CAGE.

In an action for injuries alleged to have been caused by a defective hoisting cage, an objection to a question asked by defendant whether the cage had been in use since the accident, based on the ground that the cage might have been repaired or might not be the same cage, was properly sustained, where there was no evidence tending to show, and no offer by defendant to show, that the cage was in the same condition, and that its subsequent use was successful and reasonably safe.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141-145; Dec. Dig. § 60.\*]

### 3. MASTER AND SERVANT (§ 118\*)—INJURIES TO SERVANT—DEGREE OF CARE—MINES—STATUTE.

Rev. St. 1909, § 8456, requiring the operator of a coal mine to provide safe means for hoisting the miners, so as to keep safe, as far as possible, persons ascending out of the shaft, is only a statutory expression of the common-law rule requiring the master to exercise reasonable care to keep the cage in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.\*]

### 4. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—LIABILITY OF MASTER—KNOWLEDGE OF DEFECT—INFERENCE OF NEGLIGENCE.

A coal mine operator is not an insurer of the safety of the miners while they are being hoisted out of the shaft, and the mere existence of a defect in the hoisting cage is not sufficient to raise the inference of negligence on his part, without a showing of actual or constructive knowledge by the master of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

### 5. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—DEFECTIVE CAGE—INFERENCE OF NEGLIGENCE.

In an action for injuries to a coal miner alleged to have been caused by a defective cage, evidence held sufficient to warrant an inference that the defect had existed for some time, and

that the exercise of reasonable care by the master in inspecting the cage would have led to the discovery and repair of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by James Ronchetto against the Northern Central Coal Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Willard P. Cave, of Moberly, for appellant. Dan R. Hughes and John R. Hughes, both of Macon, and Hunter & Chamier, of Moberly, for respondent.

JOHNSON, J. Plaintiff, a coal miner employed by defendant, fell from a hoisting cage in which he was being lifted to the top of the mine, and sustained personal injuries he alleges were caused by negligence of defendant. The averment of negligence in the petition is that defendant "negligently and carelessly failed to inspect said cages, and negligently and carelessly failed to repair them, and negligently and carelessly permitted said cages to remain in a loose, unsafe, dangerous, and defective condition, and imperiling the lives and limbs of the employees employed in said mine while riding upon said cages; \* \* \* that by reason of the carelessness and negligence of defendant \* \* \* in its failure to inspect, to keep in repair and to maintain its cages in a reasonably safe condition, he was injured," etc. The answer is a general denial, followed by pleas of assumed risk and contributory negligence. The cause is here on the appeal of defendant from a judgment for \$2,500 recovered by plaintiff in the circuit court.

[1] The principal contention of counsel for defendant is that the demurrers requested by him at the close of plaintiff's evidence, and afterward at the close of all the evidence, should have been given.

The injury occurred at 3:30 p. m., November 8, 1911, in the main shaft of defendant's "Mine No. 2" at Huntsville. Two hundred miners were employed in this mine, and a double compartment hoist operated by a steam engine was used to carry them to and from the mine and to carry coal to the tipple at the top of the shaft. The two elevators or cages, as they are called by the witnesses, were covered with sheet iron, and each had its floor constructed in a manner to permit the automatic dumping of each load of coal into a hopper at the top of the shaft, but to be firmly fixed in a horizontal position while the cage traveled up and down the shaft. Plaintiff and five other miners, having finished their work for the day, entered the north cage for transportation to the top, and plaintiff stood on the southwest corner of the cage floor, which was

hinged to the cage on the east side, but detached on its other sides, to allow it to swing downward and open towards the west in the dumping process. After the cager, whose post was at the bottom of the shaft, had given the signals to the engineer, apprising him that men and not coal were to be carried, the cage began its ascent at a speed requiring from 12 to 15 seconds to reach the top of the shaft, which was 77 feet deep. During the ascent, plaintiff fell out of the cage into the sump at the bottom, which was covered with six or eight inches of water. From the top of the shaft down to a point about ten feet above the bottom, the shaft was boxed or curbed with heavy oak boards, and this boxing rested upon a ring of heavy timbers, called "the ring set." There was no boxing below the ring set. The theory of the cause of plaintiff's fall, urged by counsel for defendant, is that he stood too near the entrance to the cage, and in going upward his head, projecting beyond the inner side of the boxing, collided with the west timber of the ring set, and he was caused to fall in the space between the cage floor and the wall of the shaft below the ring set. The contention of plaintiff is that he rode in safety until after the cage had passed the ring set and was entirely in the boxing, and that his fall was caused by the sudden dumping of the floor, which returned almost immediately afterward to a horizontal plane. No other occupant of the car was thrown therefrom, but all testified that the floor did drop down at the west side a sufficient distance to admit the passage of plaintiff's body. They raised a great clamor by shouting and striking their lunch pails against the cage, and the engineer stopped the cage when it was about midway in its ascent; but, after it was known that plaintiff had fallen into the sump, the cage was hoisted to the top without further misadventure. The floor of the cage rested on the dumping mechanism which, in turn, was supported by heavy timbers, called the sills of the car. The sill on the east side sustained the principal shock and stress of the dumping process and was covered by an iron strap to protect the wood from wearing away under the blows of the "knuckle." This strap was bolted at each end to the sill, and the evidence of plaintiff tends to show that the bolt at the north end had worked out, and that the released end of the strap had worked around towards the east, to an extent to cause it to touch and drag along the boxing, while the other end remained firmly bolted to the sill. The men in the car testified that, from the moment it entered the boxing, they could hear the sound of metal scraping on wood, and that the strap seemed to catch in the wood at the instant the floor dumped. It is not seriously contended that plaintiff did not fall from a much greater height than the ring set, and that the cage had passed en-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

tirely within the boxing; but defendant, in support of its theory of the cause of his fall, points to the facts that no one saw him when he pitched headlong into the shaft, and that some of the occupants of the car did discover his plight at the moment when, as one of them states, "his foot was hanging on the cage between the cage and the curbing; his body was down, and he had his foot hanging there." It is argued from this evidence that in falling, in consequence of a blow from the ring set timber, his foot and ankle were caught as the floor of the car ascended past the ring set; and, as the east and west dimension of the shaft inside the boxing was only about 3 inches greater than the width of the car floor, he was dragged upward by the foot a distance of 15 or 20 feet until his foot became disengaged and he plunged to the bottom. Expert witnesses for defendant testified that the floor could not have dumped inside the boxing owing to the lack of room for such operation, which required a movement of the floor westward a distance of 12 or 15 inches beyond the line of the curbing, and further state that the loosened iron strap could not have had any effect upon the dumping apparatus.

We are asked by counsel for defendant to accept this evidence as conclusive, and to declare, as a matter of law, the physical impossibility of there being any causal relation between the loosened and displaced strap and the fall of plaintiff. The evidence of plaintiff tends to show that the walls of the curbing had been allowed to become uneven and irregular, so that at some places the well was six inches or more wider than the cage, and there is room for a reasonable inference that such space would permit the floor to be partially dumped. Further it is shown that the perpendicular guides for the car had become out of line in places, permitting the cage to sway from one side of the shaft to the other. In addition to the facts mentioned (i. e., that the strap bolt was gone, that the strap was heard and felt to scrape along the east wall of the boxing, and finally seemed to catch in the wood, and that all of the men on the car state that the floor did dump), we find evidence to the effect that large lumps of coal had fallen during prior ascents of that cage, and that such things could not have occurred without partial dumping of the floor. Further, the theory of defendants is met by the inharmonious fact that the many serious and painful injuries inflicted on plaintiff were upon his sides and back, and that his head and feet escaped all but trifling injuries, a result one would not expect from a terrific blow on the head, followed by the dragging and crushing of his foot and ankle between the heavy car and the timbers of the shaft.

[2] After the cage reached the top and the miners alighted, it was lowered to the bottom, and plaintiff was placed in it and carried to the top. There is evidence tending

to show that the cage was continued in use without repairs, and much stress is laid on this evidence in defendant's argument that the loosened strap did not and could not have caused the injury. Complaint is made by counsel for defendant of a ruling of the court which he claims prevented him from showing, on cross-examination of one of plaintiff's witnesses, that the cage had been continued in safe use after the injury; and the rule is invoked that: "Evidence that the machine which caused the accident was in good condition at the time of the trial and at other times shortly before and after the accident, and that it worked properly before and after the accident, is admissible as having a tendency to show its condition and how it worked at the time of the accident. Such evidence may even be conclusive in the master's favor." 4 La Batt on Master & Servant, 4829. This rule may be conceded, and the relevancy of the question the court refused to permit the witness to answer also may be acknowledged, but it does not follow from these concessions that the adverse ruling necessarily constituted reversible error. The question which was asked at an early stage of the trial was, "And that cage has been in use?" Counsel for plaintiff objected on the ground that the question "is improper. They may have fixed it (the cage) since that time, and it may not be the same cage." The objection was sustained, and counsel for defendant merely saved an exception without indicating in any manner the nature of the proof he purposed making and to which the question was addressed.

As was said by the Supreme Court in *State v. Arnold*, 206 Mo. loc. cit. 597, 105 S. W. 641, and by this court in *Bowman v. Mining Co.*, 168 Mo. App. loc. cit. 707, 154 S. W. 891: "A mere refusal to hear an answer is not alone sufficient to constitute error, but it is the duty of the party alleging error to indicate what the evidence is which he proposes to elicit." This rule is especially applicable in instances such as the present, where the particular fact to which the question relates may or may not be endowed with probative value. The fact alone that the cage had been continued in use would tend to prove nothing, unless coupled with additional proof that its condition had not been altered, and that such subsequent use had been successful and reasonably safe. At the time of the ruling in question, no such proof had been introduced, and, without any intimation that it would be forthcoming, the court was justified in assuming that the question was directed merely to an isolated fact of no evidentiary significance. This assignment of error must be ruled against defendant.

Passing to a consideration of the demurrer, we find the evidence of plaintiff, relating to the cause of the injury, is reasonable and substantial and should not be denounced in law as opposed to the conceded physical

facts of the situation. That plaintiff fell from the car after it had passed the ring set is a fact about which there is little room for controversy. He stood at the western or opening side of the floor, and there is only one possible way in which he could have been removed from the car after it passed the ring set; i. e., by the opening of the floor a sufficient space to admit the passage of his body between its edge and the curbing. Without such dropping of the floor, the space between it and the wall could not have been over six inches, a distance too narrow to allow the passage of the body of a man. The theory of defendant that plaintiff's head collided with the ring set, and that he was dragged upward by the foot, is too unreasonable to receive much consideration, in view of the absence of serious injury to his head and feet. Instead of being opposed to physical facts, the testimony of plaintiff and his witnesses that he did not fall until the cage had passed the ring set is the only view of the injury that may be reconciled with them, as is also their assertion that a partial dumping of the floor was the cause of his fall.

The testimony of defendant's experts that the floor could not have dumped is met by the stubborn fact that it did dump, and, when analyzed, is found to be predicated of a state of facts which the evidence of plaintiff shows was nonexistent. If it had been indisputably shown that the guides were in proper alignment, that the walls of the enclosure were regular and of even surface, and that not over an inch or an inch and a half of play was allowed the cage on each side, the opinion of these experts would appear to be well founded; but under the hypothesis that the guides were out of line, that the walls had become irregular and uneven, so that at times the cage would be in a place where it would have as much as six inches of play, we think the jury were entitled to infer that the floor could be partially dumped by the force engendered by the catching of the projecting strap on the boxing it was scraping. Nor may such conclusion be held to be disproved by the evidence that the cage was continued in use without a repetition of such an incident. In the first place, it is not conclusively shown that the defect was not repaired. We are not bound by the testimony of defendant's witnesses on that point, and their credibility and the reasonableness of their testimony are issues of fact for the jury to determine. And, if not repaired, the fact that the strap, which had mobility in some degree, did not continue to scrape along the wall might indicate nothing more than that the loose end had been shifted back to a different and less dangerous position. Certainly it cannot be said to refute conclusively the testimony of so many apparently credible witnesses.

[3] In the statutes pertaining to mines and safety of miners (section 8456, Rev. Stat. 1909), it is made the duty of the owner or operator to "provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." So far as the purposes of the present inquiry are concerned, this provision may be regarded as a statutory expression of an elementary common-law rule. Having provided a hoisting cage for the transportation of its miners, it was the duty of defendant to exercise reasonable care to maintain the cage in a reasonably safe condition for use.

[4] Defendant was not an insurer of the safety of plaintiff, and the mere fact that plaintiff was injured while in the discharge of the duties of his employment by a defect in the cage would not of itself raise an inference of negligence. The question is whether or not defendant exercised proper care to discover the presence of defects in the cage that would enhance the natural risks of the service. Knowledge, actual or constructive, of a defect in appliances must be brought home to the employer before a liability exists. 3 La Batt on Master & Servant, 1027; Wojtylak v. Coal Co., 188 Mo. 260, 87 S. W. 506; Glasscock v. Swafford, 106 Mo. App. 657, 80 S. W. 364; Kremer v. Manufacturing Co., 120 Mo. App. 247, 96 S. W. 726.

[5] We hold the evidence of plaintiff is sufficient to support an inference that the injury was caused by negligence of defendant in the inspection of the cage or in failing to repair the defect after its discovery. Reference to a single incident will suffice to show that the bolt must have been gone for a long time, and that the strap had been scraping the floor and causing it to dump. The testimony of the cager, who was in a position to know, that large lumps of coal had been falling from the ascending cage for quite a long period is compatible with no other conclusion than that the same cause that dumped the floor to the injury of plaintiff had been in operation and was manifested by results which could follow only from a partial dumping of the floor. The jury were entitled to the inference that the exercise of reasonable care by defendant would have resulted in the discovery and repair of the defect.

We conclude that the evidence of plaintiff discloses that his injury was the direct result of a negligent breach of such duty. The demurrer to the evidence was properly overruled.

We have sufficiently answered objections to the instructions in what we have said. The case was tried without prejudicial error.

Affirmed. All concur.

**ROGERS v. HAMMOND PACKING CO.**  
(No. 10,845.)

(Kansas City Court of Appeals. Missouri.  
Jan. 5, 1914. Rehearing Denied  
May 18, 1914.)

**1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action by a servant, held sufficient to support a finding of negligence of the master in furnishing him a highly tempered file for use as a chisel.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**2. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE—CAUSE OF INJURY.**

Evidence, in an action by a servant, held insufficient to show that the flying particle which struck his eye came from the head of the file he was using to chip concrete, in which case alone the master was liable, rather than from the concrete, the point of the file, or the hammer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**3. MASTER AND SERVANT (§ 213\*)—INJURIES TO SERVANT—RISKS ASSUMED BY SERVANT—DANGERS INCIDENT TO NATURE OF WORK.**

A servant engaged in chipping concrete with a file furnished by the master, which was highly tempered on the blunt end, but no more so than a chisel at the point, assumed the risk of flying particles from the concrete, the point of the file, or the hammer, as the tendency of such particles to fly off is well known, and was a risk incident to the employment.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.\*]

**4. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—TOOLS AND APPLIANCES—PROXIMATE CAUSE.**

Where the evidence showed that the flying particles which struck the eye of a servant engaged in chipping concrete with a file having a highly tempered head might reasonably have come from the concrete, or even the point of the file or the hammer, as well as the head of the file, in which case alone the master was liable, no recovery could be had.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**5. NEGLIGENCE (§ 121\*)—PROXIMATE CAUSE—IN GENERAL.**

Where an injury may have resulted from one of several causes, for one of which only the defendant is liable, the plaintiff must prove that it arose from the cause for which defendant is liable, and, failing to do so, the jury cannot speculate as to which of the possible causes was the real cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by Lawrence Rogers against the Hammond Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

William E. Stringfellow, of St. Joseph, for appellant. B. J. Casteel and John D. McNeely, both of St. Joseph, for respondent.

TRIMBLE, J. Plaintiff sues for the loss of an eye destroyed by an unknown flying particle striking it while he was engaged in chipping out and removing the concrete from under the frame and base of a very large and heavy ice manufacturing machine. This concrete formed the bed on which the machine, including a large flywheel 18 feet in diameter, rested, and in which its supports were embedded. Owing to years of use, the vibration of the machinery and possibly the dripping of oil thereon in some places, this concrete had shrunk or sunk down so as to render the machine less stable. It was desired to chip out a sufficient amount of the top of this concrete so that melted zinc could be run into the place of the concrete thus chipped out. Melted zinc could be forced more compactly into place under the machine than concrete, and when it cooled would not shrink, but would maintain a close contact with the base of the machine and thus render the ponderous machinery practically stable. Most of this concrete was exceedingly hard, but in the places where oil from the machinery had constantly dripped the concrete was soft and rotten. The concrete was chipped out by means of hammers and chisels. A portion of the concrete was between the flywheel and the frame of the machine, so that a workman engaged in chipping it out would have a more or less restricted place in which to work. Consequently, on account of the inaccessibility of some portions of the concrete, a shorter chisel could be used to better advantage, or would have to be used, than in others. The charge in the petition is that defendant furnished plaintiff a piece of an old file to be used as a short chisel in digging out the places which could not be reached by the longer chisel; that such file was unfit for use as a chisel because, owing to its extremely high temper, it was very brittle, and, when struck by the hammer, particles of steel would fly therefrom, greatly endangering the workman, that this unfitness of the file for use as a chisel was known to defendant and unknown to plaintiff, and could not be discovered by the exercise of ordinary care on plaintiff's part, and that while using said defective tool, under orders from defendant, a piece of said file broke off, striking plaintiff in the eye, injuring it so badly that it had to be removed. The answer was a general denial, together with pleas of assumed risk and contributory negligence. The case was before this court at the October term, 1912, on defendant's appeal from a judgment upon a jury's verdict in plaintiff's favor. *Rogers v. Hammond Packing Co.*, 187 Mo. App. 49, 150 S. W. 556. By reference to the opinion rendered at that time by Johnson, J., speaking for this court, it will be observed that this court held then that although plaintiff's evidence was strongly contradicted, yet there was substantial evidence that the foreman gave the plaintiff the file as

one of the necessary tools for use in the work, and instructed him in its use, that plaintiff was using it as instructed, and did not know of the danger of striking its brittle end with a steel hammer, and that the file, on account of its temper, was not a reasonably safe tool for the work in which it was directed to be used. See 167 Mo. App. 55, 56, 150 S. W. 556. The court, after holding that the mere fact that a chisel was included in the tools furnished would be insufficient to establish negligence, says that there was substantial evidence tending to show that the foreman not only included the file among the necessary tools furnished, but instructed him in the use of the file as a chisel, and in effect directed him to use it in places that could not be conveniently reached by the longer tools. The case was reversed and remanded, however, because the evidence did not support the further conclusion that such negligence in furnishing a tool known to be unfit was the cause of the injury, or sustained any causal relation to it. While no reason is given for remanding the cause for a new trial, evidently it was because the court thought from the state of the evidence that, if it had been more thoroughly developed, a case would have been made. At any rate the case has been retried, another jury has found in plaintiff's favor, and the case is again before us for consideration.

It is conceded that a file is an unfit and an unsafe tool for use as a chisel on account of its being so highly tempered that, when struck by a hammer, particles of steel will fly with great force from the end receiving the blow. It is also apparent that this property or character of files was well known to defendant. And there is sufficient evidence tending to show that plaintiff did not know of it. He testified that he did not. He is an Italian, calls himself a common laborer, and his previous employments, his use of language, at least the English language, and his ability to understand it and make himself understood, does not show him to be anything else, nor does the evidence. And there is nothing to show that knowledge of the brittle qualities of a file, or of its tendency to throw off particles when struck, had ever been acquired by him, either by experience or through information from others.

Defendant contends that under the evidence no case has been made. This contention is based upon several grounds. First, that no file was furnished at all for any purpose, but that, even if a file was among the tools supplied by defendant, there is no evidence that it was supplied for use *as a chisel and to be struck by a hammer*. Second, that even if a file was so furnished and used, still it is just as probable, if not more so, that the injury was caused by a flying piece of concrete as by a piece of metal, and that, even if it was a piece of metal, it is problematical whether said piece of metal came from the file or from the head of the

hammer. Consequently the jury could only guess or speculate as to what caused the injury.

[1] Taking up the first contention above noted that no file was furnished at all for any purpose nor used upon the job, but, if so, was not furnished as a chisel, we recognize the fact that plaintiff is alone in his testimony that a file was furnished, and is contradicted by the foreman and all the workmen in the place on this point. But a careful examination of plaintiff's evidence, and of all the other facts and circumstances shown to have existed, discloses that there was at least some substantial evidence that a file was furnished, and that it was furnished for use as a chisel and to be used by striking it with a hammer. The questions whether a file was furnished and whether it was furnished to be used as a chisel were very clearly and specifically submitted to the jury by instructions on both sides, and the jury was told that if they found that defendant did not furnish plaintiff with a file to be used as a chisel and struck with a hammer, then plaintiff had no case. So that the jury by its verdict found that a file was furnished to be used as a chisel, and we cannot say there was no evidence to support that finding.

[2,3] The second contention, namely, that the evidence does not show what caused the injury, and consequently, the jury were left to merely guess whether the particle that struck plaintiff in the eye came from the head of the file or elsewhere is of much force, and raises the great difficulty which plaintiff must overcome before he is entitled to a recovery. It must be borne in mind that the piece of broken file plaintiff claims to have been using as a chisel was not too highly tempered at the cutting end, but was only so at the top or hammered end; the way files are made, the point at the end is not tempered any harder than a properly tempered chisel, but the part back next to the handle where the filing is done is much more highly tempered, and is too brittle to be struck with a hammer. It must also be remembered that plaintiff's claim is that a piece of steel broken from the *top* end of the file struck and put out his eye. The defect claimed is that the file was unfit for use as a chisel, and that the unfitness was in the top or hammer end of the chisel on account of the brittleness of that end caused by its high temper. It was in evidence, and undisputed, and in fact it is common knowledge, that when concrete, stone, or any substance of flinty composition, is being chipped by a chisel, particles of the substance chipped fly with great force in every direction, and so also do particles from the edge of the chisel itself, however suitable and properly tempered, it may be. Consequently if the particle, whether of concrete or metal, which struck plaintiff's eye came from the cutting end of the chisel, plaintiff has no case. It was necessary, therefore, in order to support a recovery, for plaintiff to show it

some way that the flying particle came from the top or hammered end of the file. And if the evidence is in such state as to leave it a matter of guesswork as to which end the particle came from, then plaintiff's case must fail. *Rogers v. Hammond Packing Co.*, 167 Mo. App. 49, loc. cit. 57, 150 S. W. 556, and cases there cited.

Upon this question as to which end of the chisel the evidence shows that the particle came from, there is this to be said: Plaintiff testified that, at the time he was hurt, he was chipping out cement five inches under the base of the machine; that the crack in which he was working, that is, the space between the base of the machine down to the concrete left in place, was one-half inch; that he was using, as a chisel, a file 12 inches long, and the end he was striking with a hammer was four inches above the floor. Now, while we cannot consider the fact, if it be a fact, that plaintiff testified at the former trial that the concrete being chipped was three inches under the machine instead of five, as he now claims (because what he testified to on this point in the former trial is not in the record before us now), yet we can consider whether his statement that it was five inches under is correct *when compared with the other distances given by him*. He says the point of the chisel was *five* inches under the machine in a horizontal crack *one-half inch* wide, and that the top end of the chisel, 12 inches from the cutting end, was 4 inches above the floor. This could not possibly be. As a mathematical proposition, if he had his chisel 5 inches under the machine in a crack one-half inch wide, the top end of his 1-foot chisel would be about  $1\frac{2}{10}$  inches, instead of 4 inches, from the floor. Defendant's evidence is all to the effect that the chipping being done at the point where plaintiff got hurt was only about three inches under the machine, and that the crack was wider than plaintiff made it. It is true, by accepting defendant's evidence as to the width of the crack and disbelieving plaintiff's evidence on that point, a state of facts can be pieced out which will show that it is almost possible, though not quite, for plaintiff to have been chipping five inches under the machine with his chisel at the angle he says it was. But even if a state of facts can thus be pieced out by believing portions of the evidence on each side and disbelieving other portions in order to show that plaintiff was cutting concrete that far under the machine, still such piecing of the evidence greatly increases the probability, and renders certain the possibility that the injury might have come from that source. If it is reasonably possible or probable that particles, either of concrete or metal, from the cutting end of the chisel reached plaintiff's face, then the cause of the injury has not been removed from the field of conjecture. Plaintiff did not see, nor did any one find, the particle that penetrated his eye. No one

knows whether it was steel or concrete. His eye was injured by one of four possible causes: (1) By a piece of concrete; or (2) by a piece of metal from the point of the chisel; or (3) by a piece of metal from the head of the hammer; or (4) by a piece of steel from the head of the file. Now, in order for plaintiff to establish his case, there must be some evidence showing with reasonable certainty that the injury was caused by the piece last named. It must not be left to guesswork. As long as the evidence shows that it is ~~as~~ reasonably possible for the injury to have arisen from either of the first three things as from the last one, then the matter of selecting the last as the cause is not a determination thereof from evidentiary facts, but is the result of a guess or arbitrary choice. Plaintiff, in order to remove the first two things above mentioned from the field of possible causes, claims that the base of the machine rendered it impossible for the particle to have come from the cutting end of the chisel. He, therefore, puts the chisel five inches under the machine. But the facts show that it was not that far under, or, if it was, that the aperture was sufficiently wide to permit, the flying particles of concrete, driven with great force as they were, to go, either directly or by rebounding, into plaintiff's eye. So, whether the chisel was five inches or only three inches under the machine, it was still possible, and in fact reasonably certain, that particles would fly or rebound from thereunder and strike plaintiff in the face. Consequently the presence of the machine does not remove the first two things above mentioned from among the possible and reasonable causes of the injury. Plaintiff's hypothesis is that the particle doing the injury could not have come, and therefore did not come, from under the machine; consequently he says it came from the head of the file. Logically this is necessarily his hypothesis, for the reason that, where there are a number of causes that are likely to produce a certain effect, and an hypothesis is relied upon to prove that a certain one of those causes produced that effect, that hypothesis must be one which, if true, will necessarily, and not probably, produce the effect. Otherwise it will still remain a guess as to whether that particular cause produced the given result.

[4, 5] Since, therefore, the evidence still shows that there are at least two, and perhaps three or four, reasonable causes for the injury, and that if one caused it the other did not, and could not have had anything to do with it, plaintiff is in no better situation under the evidence at this trial than he was at the last. The remarks of Johnson, J., found on page 58 of 167 Mo. App., and on page 556 of 150 S. W., herein, apply at this point with great force and clearness, but they need not be repeated. Suffice it to say that, under all the evidence, it is only "by making an arbitrary and conjec-



tural choice between various reasonable, but antagonistic, probable causes" (for only one of which defendant is liable) that any one could say that the particle came from the highly tempered end of the file and not elsewhere. When this is the situation plaintiff's case must fail. This is unfortunate for plaintiff, but such is the law. In a case where the injury might have resulted from one of several causes, for one of which defendant is liable and for the others he is not liable, it is incumbent upon plaintiff to prove his case by showing that the injury arose from that cause for which defendant is liable. Of course ordinarily a plaintiff proves his case by proving a state of facts or a situation from which the cause of the injury can reasonably and legally be inferred, if that cause be one for which defendant is liable. But this can hardly apply with strictness when there are several different and reasonably probable causes and defendant is liable only for one of them. Or, if it does apply, the state of facts relied upon to produce the legal inference of the right cause must necessarily raise that inference and no other. If the state of facts so relied upon to show the right cause is such as to still leave it conjectural whether that or some other cause (for which no liability exists) produced the injury, then the case is not proved, and no recovery can be had. Many authorities could be cited in support of the proposition announced.

In the case of *Goransson v. Riter-Conley Mfg. Co.*, 186 Mo. 300, loc. cit. 307, 85 S. W. 338, 340, the Supreme Court say: "It is therefore a rule of universal law that in suits of this character it is necessary for the plaintiff to allege and prove a causal connection between the injury and the negligence of the master. The corollary of this rule is that if the accident might have resulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove, in the first instance, that the injury arose from the cause for which the master is liable, for it is not the province of a court or jury to speculate or guess from which cause the accident happened. *Railroad v. Nelms*, 83 Ga. 70 [9 S. E. 1049, 20 Am. St. Rep. 308]; *Searles v. Railroad*, 101 N. Y. 661 [5 N. E. 66]; *Dobbins v. Brown*, 119 N. Y. loc. cit. 193 [23 N. E. 537]; *Peirce v. Kile*, 80 Fed. loc. cit. 867 [26 C. C. A. 201]; *Mining Co. v. Kitts*, 42 Mich. loc. cit. 37 [3 N. W. 240]; *Priest v. Nichols*, 116 Mass. 401; *Epperson v. Telegraph Cable Co.*, 155 Mo. 346 [50 S. W. 795, 55 S. W. 1050]; *Wood on Law Master and Servant*, § 382."

The case of *Modlagl v. Iron & Foundry Co.*, 248 Mo. 567, 154 S. W. 752, was a suit for injury to an eye from a flying piece of metal caused by chipping rivet heads off with

a chisel alleged and shown to have been defective. The judgment in the trial court was for defendant, and this was affirmed by the Supreme Court, and on page 605 of 248 Mo., and on page 758 of 154 S. W., the court uses this language: "There is a third and final reason why the judgment of the circuit court should be affirmed, and that is, the evidence tends no more to show that the piece of metal which struck and destroyed plaintiff's eye came from the chisel than that it came from the rivets which were being chipped off by the use of the chisel."

If the injurious piece of metal came from a rivet head, then this was one of the risks incident to the employment. So, in the case at bar, if the injury was caused by a particle, either of concrete or metal, coming from the cutting end of the chisel, then this was one of the risks incident to plaintiff's employment, and, in that event, defendant would not be liable. And since the evidence is such that one can only guess at where it came from, the causal connection between plaintiff's injury and the negligence charged has not been proved. Defendant's demurrer to the evidence should therefore have been sustained.

Consequently the judgment of the circuit court is reversed. All concur.

# **BOTEN v. SHEFFIELD ICE CO.** (No. 10,971.)

(Kansas City Court of Appeals. Missouri.  
April 6, 1914. Rehearing Denied  
May 18, 1914.)

## **1. MASTER AND SERVANT (§ 235\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.**

Where a building which was being taken down, though old, was not so weak or dilapidated as to be obviously about to fall, and the outside walls looked safe, an employé was not chargeable with contributory negligence defeating a recovery for injuries caused by the breaking of the plate upon which the rafters rested on account of a local defect hidden from him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

## **2. MASTER AND SERVANT (§ 218\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

Where an employé 18 years old, reared on a farm, and with no prior experience in wrecking buildings, and who was never in a position to observe the condition of a plate on which the rafters rested, and did not know that it had rotted, was assured by his employer's president, who was an expert of experience in that kind of work, and who knew the condition of the plate, but failed to take any steps to remedy it, that the place was safe, and, in reliance upon such assurance, went upon the plate and was injured by the breaking thereof, he did not assume the risk, and the employer was liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 601-609; Dec. Dig. § 218.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. MASTER AND SERVANT (§ 107\*)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.**

Though employes were engaged in the more or less hazardous undertaking of tearing down a building, it was the employer's duty to furnish them with a place as reasonably safe as the nature of the work would permit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

**4. MASTER AND SERVANT (§ 288\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

Where an employer assured an employe that a place was safe, it was a question for the jury whether the employe assumed the risk of injury from the unsafe condition of such place.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**5. MASTER AND SERVANT (§ 278\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.**

In an employe's action for injuries due to the breaking of the plate upon which the rafters of a building which was being taken down rested, evidence *held* to show that the statements of the employer's president as to the safety of the roof were not the expression of a mere opinion, nor so general as not to apply to such plate.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**6. MASTER AND SERVANT (§ 125\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

That an interval of time elapsed between an employer's assurance that a place was safe and an injury due to its unsafe condition did not defeat the employer's liability, where the conditions had not changed in the meantime.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**7. MASTER AND SERVANT (§ 235\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

Where an employe who did not know of a dangerous condition was assured by the employer, who did know thereof, that the place was safe, he had a right to rely thereon without making an inspection, such as would have discovered the defective condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

**8. TRIAL (§ 108½\*)—MISCONDUCT OF COUNSEL—EXAMINATION OF JURORS.**

Where, in an employe's action for injuries, an indemnity company was interested in the outcome of the case, but the particular company was unknown to plaintiff's counsel, questions asked the jurors on their voir dire as to their relations with any liability insurance company were not ground for discharging the jury; it not appearing that they were asked in bad faith.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 108½.\*]

**9. MASTER AND SERVANT (§ 268\*)—ACTIONS FOR INJURIES—EVIDENCE—RELATION OF PARTIES.**

In an employe's action for injuries, where defendant denied that the work in which the employe was engaged was being done by it, claiming that it was being done by a third person through defendant's president, evidence that defendant took out insurance against liability for injuries to the employes was admissible to show that defendant was doing the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 910; Dec. Dig. § 268.\*]

**10. TRIAL (§ 108½\*)—MISCONDUCT OF COUNSEL—REFERENCE TO INSURANCE.**

Where, in an employe's action for injuries, evidence that defendant took out liability insurance was admissible to contradict its contention that a third party was doing the work, the asking of questions relative to the taking out of such insurance was not ground for discharging the jury, though prejudicial to defendant.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 108½.\*]

**11. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

Plaintiff, a stout healthy boy 18 years old, sustained injuries by which his hip was broken, and he was rendered unconscious most of the time for a week, and was in bed for 5 weeks. His kidneys were injured, and they and his bowels passed blood. His weight decreased from 142½ to 129 pounds. He was nervous and restless, and able to do only light work. *Held*, that a verdict for \$6,000, approved by the trial judge, was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Jackson County; James E. Goodrich, Judge.

Action by Frank Boten, by his next friend, A. Boten, against the Sheffield Ice Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pierre R. Porter, of Kansas City, for appellant. Atwood & Hill and W. E. Pepperell, all of Kansas City, for respondent.

TRIMBLE, J. Plaintiff was assisting in taking down an icehouse belonging to defendant. During the progress of the work the place whereon he stood broke on account of its rotten condition, and plaintiff fell to the ground, receiving a broken hip and other injuries. The suit is for damages received by the fall. He recovered in the trial court, and defendant has appealed.

The building was about 100 feet square, and divided into five rooms, each 20 feet in width running the full length of the structure. Over each room was a gable roof sloping both ways from the roof ridge down to the valleys, which extended lengthwise and above the partitions separating that room from the others. These valleys were about 32 feet from the ground. The roof of each room was supported by rafters placed parallel to and at regular intervals from each other, and extending from the comb or roof ridge down to the valley. Sheeting was nailed across the rafters, and on the sheeting were the shingles. The feet of these rafters rested on the plate which was a timber of some width lying along and on the top of the wall of each room, and was supported by posts in the walls set in the ground at intervals. The valley, therefore, lay along and upon the top of this plate. Over this plate was placed tar paper and gravel forming the trough of the valley, and preventing water from running through into the build-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing. The condition of the plate, therefore, could not be observed by one standing on top in the valley because of this tar paper and other roofing material; but the plate and its condition were easily observable from the inside of the room. This is important because plaintiff's fall was caused by the breaking of the plate, which was decayed, and plaintiff's complaint is that defendant knew of its rotten condition (which was unknown to plaintiff), and negligently assured plaintiff that the place where he was working was safe, and plaintiff relied upon that assurance, and was injured by reason of the carelessness and negligence of defendant in directing plaintiff to work in a dangerous and unsafe place with an assurance that it was safe, when plaintiff did not know, and had no reasonable means of knowing, that it was unsafe.

The answer was a general denial, a plea of contributory negligence, a further plea that the injury was caused by the negligence of plaintiff's fellow servants, and lastly a plea of assumption of risk.

Plaintiff had been employed about four days, but during that time had not been in the building, and had not been in it for more than a year. On the day of the accident plaintiff was helping to tear the sheeting from the rafters over the east half of room No. 4, which was next to the outside room of the building on the east. He was standing in the valley between the roofs of rooms Nos. 4 and 5, and on the plate above mentioned. The sheeting was removed by beginning next to the roof ridge and working down to the valley, or to what would have been the eaves of the room had it been standing alone. The sheeting had been removed down far enough to enable plaintiff to stand in the valley between rooms 4 and 5. While thus standing and engaged in taking the sheeting from the rafters as aforesaid, the plate broke and threw him to the ground.

[1] Defendant insists that its demurrer should have been sustained. So far as contributory negligence and the plea that the accident was caused by plaintiff's fellow servants are concerned, they are clearly not in the case, at least not at this stage. The house, though old, was not so weak or dilapidated as to be obviously about to fall. The outside walls looked safe, and the evidence was the building was being taken down piece by piece for further use as lumber. Unless the building was so obviously dangerous that a reasonable man would not have attempted to go upon it to take it down, plaintiff cannot be charged with contributory negligence. Plaintiff's fall was brought about, not by a collapse of the building, but by the breaking of the plate on account of a local defect hidden from him. He was not even aware of the danger to which he was subject by reason of the defect. And as to the fellow servant doctrine, it cannot, of course, apply

since no act of a fellow servant caused the injury.

[2-4] As to the plea of assumption of risk, certain important elements in the case operate to take it out of the rule that a servant assumes the ordinary risks inherent in the nature of the business in which he is engaged, and these elements must be carefully borne in mind: (1) Plaintiff was only 18 years of age, reared on a farm, with no prior experience in wrecking buildings. Defendant's president, in charge of the work, was a man of 20 years' experience in that kind of work. He was an expert. (2) Plaintiff was never in a position where he could observe the plate or its condition. He had never seen it, and did not know it had rotted. But defendant's president knew it, and had known it for a long time. (3) Knowing of its defective condition, he not only failed to take any steps to remedy it, but he assured plaintiff in the most positive manner that the place was safe. (4) Plaintiff, unaware of the defect, relied upon the assurance of safety, and was injured. Under such circumstances the courts have repeatedly held the master is liable. *Burkard v. Rope Co.*, 217 Mo. 466, 117 S. W. 35; *Swearingen v. Mining Co.*, 212 Mo. 524, 111 S. W. 545; *Carter v. Baldwin*, 107 Mo. App. 217, 81 S. W. 204; *Dodge v. Mfrs. Coal & Coke Co.*, 115 Mo. App. 501, 91 S. W. 1007. The fact that plaintiff was engaged in tearing down a building, and therefore was engaged in a more or less hazardous undertaking, can make no difference in this case. The danger to plaintiff arose, not from the general liability of the building to fall, but from a defective condition at one place known to defendant and unknown to plaintiff; and defendant, without remedying said defect, assured plaintiff it was safe. With that knowledge, it was defendant's duty to furnish plaintiff with a place as reasonably safe as the nature of the work would permit. *Dayharsh v. Railroad*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; *Carter v. Baldwin*, 107 Mo. App. 217, 81 S. W. 204. And by assuring plaintiff it was safe, the case was no longer in the domain of assumption of risk as a matter of law. *Adolf v. Columbia Baking Co.*, 100 Mo. App. 199, loc. cit. 208, 73 S. W. 321. The case was therefore properly one for the jury. *Hoover v. Western Coal & Mining Co.*, 160 Mo. App. 326, 142 S. W. 465.

[5] We cannot agree with defendant that the statements made and repeatedly given to plaintiff were mere expressions of opinion, and did not amount to an assurance of safety. When plaintiff first went to work on the building defendant's president, on the ground and in charge of the work, told the employees, including plaintiff, that the building was perfectly safe. Some of the boys were apprehensive about going upon the building, and the president said, in plaintiff's presence and hearing: "Boys, there ain't a bit of danger

in the world; go right on up; I will go up and work with you. Q. Tell the exact language he used and all he said. A. He said, "The building ain't a bit dangerous; you needn't be scared about going high." During the progress of the work the president again said: "There ain't no danger in the world; it is perfectly safe; if there was any danger in the world, boys, I would not have you up there. By the Court: Q. You heard that, did you? A. Yes, sir." On cross-examination plaintiff was asked as to what the president said to him, and this occurred: "Q. Did he say anything to you about the plate? A. No, sir. Q. Over which you were working? A. No, sir. Q. He never told you that was safe? A. He said the building was perfectly safe. Q. But he did not tell you anything about the plate? A. No, sir. Q. He did not tell you anything about that part of the roof where you were working when you fell? A. Yes, sir. Q. What did he say? A. He said—he told a boy to go out and saw off a board, and he said he was scared, and he said it was perfectly safe out there, not a bit of danger in the world. He said, 'If there was any danger in this building, I would not have you boys up there.' I heard him say that." Again at another place plaintiff testified: "Q. You say Mr. Garlock told you that it was safe there? A. Yes, sir. Q. What were you doing at the time he told you that? A. We were tearing off sheeting, and letting down rafters. Q. Which were you doing? A. First one and then another. Q. Were you doing them both at once? A. No, sir. Q. Which were you doing when he told you it was safe up there? A. Letting down rafters, and tearing off sheeting. Q. You were not tearing off sheeting at that time, were you? A. Yes, sir; we were doing both. Q. At the same time? A. No, sir. Q. Well, what were you doing? A. Tearing off sheeting. Q. Then you were not letting down rafters? A. No, sir. Q. Whereabouts were you tearing off sheeting? A. I was tearing off sheeting off of the rafters. Q. Whereabouts? A. On the icehouse. Q. On the place where you fell? A. Not exactly right there, but pretty close to it."

When the president gave him these assurances, they were working on the roof over room No. 5; but the valley in which plaintiff was standing when he fell was the same valley he was in when the president told him this, since it was formed by the west half of the roof over 5 and the east half of room 4. In other words, when the president told him it was safe, plaintiff was in the valley between 4 and 5 taking boards off of room 5, and, when plaintiff fell, he was standing in the same valley, but taking boards off of room 4. This is shown by the following testimony: "Q. Now, the place where he sent you that he said was safe was not the place where you fell, was it? A. He said the whole building was safe. Q. Never mind about that

now. You can answer my question, can't you? The place where he sent you that he said was safe was not the place where you fell, was it? A. Yes, sir; we worked right along there where we fell. Q. Do you mean to say that for several days you tore off sheeting in the identical place where you fell? A. No, sir. Q. Then the place where you fell was not the place where you were on the first day when he told you it was safe? A. No, sir. Q. Then the place where you fell was not the place where you were on the first day when he told you it was safe? A. We were working right along there. Q. What do you mean by right along there? A. Right along where we fell. Q. Do you mean for several days you were taking off sheeting from the place where you fell? A. I never said that. Q. Where were you working when you fell? A. On the valley. Q. On which house? A. Between No. 4 and No. 5. Q. When you first began to work on the building, where were you working? A. In the valley taking sheeting off of No. 5. Q. When you fell, you fell from the roof of No. 4, didn't you? A. No, sir; I fell from the valley between 4 and 5."

[8] It is thus seen that the statements of the president were not the expression of a mere opinion, nor were they so general as not to apply to the place where plaintiff was working when he fell. Nor does the fact that the assurances of safety were given on one day and the fall occurred on another, while the president was absent, change the situation. The assurance covered the very place which was unsafe, and where plaintiff fell. Nor was the effect of the assurance of safety destroyed by the interval of time that elapsed between the giving of the assurance and the breaking of the plate, because the progress of the work had not changed conditions. Because the roof had been removed from room No. 5 did not render the valley between rooms 4 and 5 less safe. Apparently there was less weight on this valley at the time of the accident than when the assurances were given. And the president admits that the breaking of the plate was occasioned by its decay, and not by the advanced stage of the work. On cross-examination he was asked this question: "Q. If the plate had been sound timber, it would not have broken, would it; the taking off of the sheeting would not have caused it to break? (Objected to, and objections overruled.) A. No, sir; not if it had been sound."

The evidence did not show that the progress of the work affected the dangerous condition of the plate; but, if it did, the president knew at the time the assurances were given that in the progress of the work, done according to his instructions, a stage would be reached when the plate would become unsafe. And yet, knowing of the condition of the plate, he not only took no steps to make it safe, but negligently assured the servants

that the place was safe. It is useless to pursue this branch of the case farther. The general doctrine as to the effect of an assurance of safety is thus stated in 4 Labatt on Master and Servant (2d Ed.) § 1373: "If the servant is shown to have entered upon the performance of certain work, or continued to perform that work, relying upon an assurance of his master or his master's representative that such work would not unduly imperil his safety, the mere fact that, before he received the assurance, his apprehensions as to the possibility of injury had been excited by circumstances which had come to his knowledge will not, as matter of law, render him chargeable, either with an assumption of the risk involved in the work, or with contributory negligence."

[7] Plaintiff's petition is not open to the charge of insufficiency, because it failed to allege that plaintiff could not have discovered the defective condition of the plate by the exercise of ordinary care. The petition charged that plaintiff did not know of the dangerous condition, that defendant did know of it and assured plaintiff it was safe, and plaintiff relied thereon. Under these circumstances plaintiff was not bound to search for danger, but had a right to rely on defendant's assurance. *Sullivan v. Railroad*, 107 Mo. 66, loc. cit. 78, 17 S. W. 748, 28 Am. St. Rep. 388; *Melly v. Railroad*, 215 Mo. 567, loc. cit. 588, 114 S. W. 1013; *Swearingen v. Mining Co.*, 212 Mo. 524, loc. cit. 538, 111 S. W. 545.

[8] In the examination of the panel of jurors on their voir dire, plaintiff asked a question as to their relations with any liability insurance company. Defendant objected and moved to discharge the jury. Thereupon, out of the presence and hearing of the jury, the court inquired of defendant's counsel if he denied that an indemnity company was defending the case. Counsel replied that an indemnity company was defending the case to a certain extent, and that it was proper to ask only with reference to a specific liability insurance company. The court then asked plaintiff's counsel if he knew the name of the company, and counsel replied that he did not; that defendant's counsel, in telling him of the insurance company, did not tell him the name. Upon receiving this information, the court overruled the objection. It thus seems that there was an insurance company interested in the outcome of the case, but the particular company was unknown to plaintiff. In *Meyer v. Gundlach, etc., Co.*, 67 Mo. App. 389, loc. cit. 391, 392, it was held that: "It was clearly proper for plaintiff's counsel to ascertain fully the situation of the juror as to parties interested in the suit to enable him to exercise his statutory right of peremptory challenge, as well as to lay ground for challenges for cause. At the time the question was put, counsel gave as his reason that he was informed that the party named was the real defendant in

this action, and appealed to defendant's counsel for the correctness of this assumption. The court then called attention to this appeal and stated to defendant's counsel, if the interest of said third party was not denied, the proposed question was proper. The counsel for defendant by his reply virtually admitted the interest of said third party in the litigation. Under this state of facts it cannot be held that defendant was prejudiced by the remarks of the court or plaintiff's counsel, and the first assignment of error is therefore overruled." In *Saller v. Shoe Co.*, 130 Mo. App. 712, loc. cit. 720, 109 S. W. 797, it is said: "Counsel have the right to probe a proposed juror to the bottom for the purpose of ascertaining whether or not his social or business relations, etc., are such as would probably prejudice him against a recovery in the character of case to be tried. The method of examination of jurors on their voir dire pursued by plaintiff's counsel was approved in the following cases: *Faber v. Reiss Coal Co.* [124 Wis. 554] 102 N. W. 1049; *Chybowski v. Bucyrus Co.* [127 Wis. 322] 106 N. W. 833 [7 L. R. A. (N. S.) 357]; *Foley v. Cudahy Packing Co.*, 119 Iowa, 246 [93 N. W. 284]; *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340 [61 N. E. 79]; *O'Hare v. Railroad Company*, 139 Ill. 151 [28 N. E. 923]." In *M. O'Connor Co. v. Gillaspay*, 170 Ind. 428, 83 N. E. 738, the plaintiff did not merely ask one general question, as was done in the case at bar, but asked each juror separately, and there was nothing in the record to show whether an insurance company was interested in the case or not. On this point the court, at page 431 of 170 Ind., at page 739 of 83 N. E., said: "Parties litigant in cases of this class are entitled to a trial by a thoroughly impartial jury, and have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to elucidate their impartiality and disinterestedness. In the exercise of this right counsel must be allowed some latitude to be regulated in the sound discretion of the trial court according to the nature and attendant circumstances of each particular case. The examination of jurors on their voir dire is not only for the purpose of exposing grounds of challenge for cause, if any exist, but also to elicit such facts as will enable counsel to exercise their right of peremptory challenge intelligently. Questions addressed to this end are not barred, though directed to matters not in issue, provided they are pertinent, and made in good faith." To the same effect are *Cripple Creek Mining Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079; *Swift v. Platte*, 68 Kan. 10, 72 Pac. 271, 74 Pac. 635; *Girard v. Grosvenor-dale Co.*, 82 Conn. 271, 73 Atl. 747; *Grant v. National Ry. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805. From these authorities, it appears that, if the inquiry is made in good faith, and is not conducted beyond

reasonable limits, the discretion of the trial court will not be interfered with. In the case of *Gore v. Brockman*, 138 Mo. App. 231, 119 S. W. 1082, the question could not be justified on the ground of voir dire examination, since it was not asked of a prospective juror, but of the defendant, a witness in the case, and clearly it was not in good faith, but was asked for the purpose of injecting a false issue in the case. So it was in the case of *Trent v. Printing Co.*, 141 Mo. App. 437, 126 S. W. 238, and also in the cases of *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957; *Herrin v. Daly*, 80 Miss. 340, 31 South. 790, 92 Am. St. Rep. 605; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Hollis v. United States Glass Co.*, 220 Pa. 49, 69 Atl. 55. In all of the cases holding such evidence to be reversible error, the objectionable matter was introduced by way of evidence or statements of counsel, and the sole purpose was to get before the jury the fact that an insurance company would eventually pay the judgment, and the testimony offered had no bearing upon any issue. In this case, however, as to the question asked the jurors on their voir dire, we cannot say it was asked in bad faith, especially as it was but a single question, carrying with it no intimation as to what effect it had upon defendant's fortunes, and did not tell them anything more than they would have known as intelligent men, i. e., that in all probability defendant carried indemnity insurance.

[9, 10] During the trial of the case, and somewhat near its close, defendant's president, while on the stand, was asked as to indemnity insurance. But by this time the question was a pertinent one bearing directly on the question whether the Sheffield Ice Company was the company having the building dismantled.

In defendant's answer, and in the opening statement, it was denied that plaintiff was sent on the building by defendant, or by any one representing the defendant. The defendant's president had testified that the Sheffield Ice Company did not own the icehouse being torn down, and that Ben Myers, the foreman in charge at the time of the accident, was not foreman of the Sheffield Ice Company. In addition to this, there was some question whether or not the work was not in fact being done by the Bean Lake Ice Company, acting through Mr. Garlock, who happened to be the president of the Sheffield Ice Company. In this state of affairs, Garlock was asked this question:

"Q. I will ask you if it is not a fact that the Sheffield Ice Company took out a policy of indemnity insurance covering the liability of these men working on the razing of this building?"

"Mr. Porter: I object to that question for the reason—

"Mr. Hill: I ask this question for the purpose of showing that the Sheffield Ice Com-

pany was engaged in employing these men to do this work.

"Mr. Porter: That question is objected to for the reason that, if the Sheffield Ice Company did take out any insurance indemnifying the men, the policy of insurance is the best evidence of whether that fact exists, and the further objection is made that it is immaterial in this case.

"The Court: Sustained on the first ground.

"Mr. Porter: And the defendant moves the court to discharge the jury for the reason that the plaintiff has, of his own accord, asked the question, and in that question has solicited information as to whether this defendant carries a policy of indemnity insurance covering the plaintiff in this case.

"The Court: It seems to me that the question is a pertinent question. Your attitude has been throughout that these men were not your servants; at least I took that from your opening statement and your attitude throughout the trial, and, if that be your attitude, this would be a pertinent question as tending to show for whom they were working.

"Mr. Hill: That is what I asked it for.

"The Court: The objection to the question is sustained, and the motion to discharge the jury is overruled."

To further reasons given why the motion to discharge the jury should be sustained, the trial court ruled that the motion to discharge was overruled because of the attitude of defendant apparently disclaiming the fact that plaintiff was in its employ, and that this was a matter that in the opening statement, and in the attitude of the defendant throughout the trial, had been controverted, and the question would have been competent if offered in proper form.

Upon the issue of whether or not the Sheffield Ice Company was tearing down the building, and not the Bean Lake Ice Company, evidence that the Sheffield Ice Company took out indemnity insurance covering the liability of the men engaged upon this particular building would be of strong probative value going to show that it was doing the work. Under such circumstances, the question, though ordinarily inadmissible, and its asking would constitute reversible error, yet, inasmuch as it was competent on one issue, it was not error to ask it. Evidence is admissible if it tends to prove one issue, even though it is not admissible to prove another issue, and is prejudicial upon such latter issue. It is admissible if competent upon any material controverted fact. *State v. Phillips*, 24 Mo. 475; *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182. In *Wabash Screen Door v. Black*, 126 Fed. 721, 61 C. C. A. 639, evidence that a witness went to the hospital at the instance of an indemnity insurance company was admissible because it bore on his credibility, although objected to as prejudicial. In the case of *M. O'Connor v. Gillaspay*, 170 Ind. 428, 83 N. E. 738, it was held that,

were the question objected to bore on a converted issue, this was sufficient to acquit counsel of the charge of bad faith in asking such question. In *Self v. White*, 155 S. W. 10, not yet reported in our official reports, was held by this court, in an opinion written by Ellison, P. J., that evidence conveying information that an indemnity insurance company was the real defendant could not be deemed reversible error, since at the time the evidence was offered it bore on an issue in the case. In *Brower v. Tilmreck*, 66 Kan. 70, loc. cit. 771, 71 Pac. 581, the defendant was required to testify on cross-examination, and over the objection of defendant's counsel, that he insured against accidents to his employes, and that the insurance company employed the lawyers and defended that case. The court held the evidence was admissible and proper, inasmuch as the defendant denied employing the plaintiff. In *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45, the court held that evidence that defendant carried an indemnity policy on its servants, including plaintiff, was proper, in view of the fact defendant had contended plaintiff was not defendant's servant. The court said that the evidence was highly prejudicial, and that it was certainly error to admit it, unless it was competent on the issue named, and, being so, its admission was not error. To the same effect, see *Finkbine Lumber Co. v. Cunningham*, 101 Miss. 292, 57 South. 916; *Robinson v. Hill*, 60 Wash. 615, 111 Pac. 871. In *Grant v. National Ry. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805, loc. cit. 807, it is said, speaking of a decision of the New York Court of Appeals in *Cossmelmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494: "The asking of a question clearly incompetent, and not for the purpose of eliciting any material evidence, but with the ulterior design of disclosing the fact that an insurance company is interested in the litigation, is condemned. It is only when the question is incompetent and immaterial, however, that the motive of counsel is to be considered."

In view of the foregoing authorities, and the circumstances under which the question objected to was asked, we cannot say it was asked in bad faith, or was not pertinent to the issue as to plaintiff's employment.

[11] Neither can we say that the verdict was excessive. At the time of his fall plaintiff was a stout healthy boy 18 years old. The fall broke his hip, rendered him unconscious, in which state he remained most of the time for a week. He was in bed for 5 weeks. His kidneys were injured and passed blood for 2 weeks, and so did his bowels. At the time of the trial his kidneys still were affected. His weight went down from 142½ to 129 pounds. Since the accident he has been nervous and restless, able to do light work only. The hip bone was fractured at the top part or crest, and at a place which

helps to support the weight of the body. Twelve men saw the plaintiff and learned the nature of his injuries, and fixed his damages at \$6,000. The trial judge approved the verdict. We cannot say it was excessive.

The judgment is affirmed. All concur.

## LOWENSTEIN v. OLD COLONY LIFE INS. CO. (No. 10,892.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

### 1. APPEAL AND ERROR (§ 934\*)—PRESUMPTIONS.

Where, in an action tried to the court, no declarations of law were asked or given, a judgment for plaintiff must be regarded on appeal as a final adjudication in his favor of every controverted issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

### 2. INSURANCE (§ 608\*)—LIFE POLICIES—CERTIFICATE.

In an action on a life policy issued in substitution of a certificate issued by a fraternal order, the policy will be treated as an ordinary life policy, in the absence of proof that the insurance contract was governed by the laws relating to fraternal beneficiary societies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1517, 1519; Dec. Dig. § 608.\*]

### 3. INSURANCE (§ 552\*)—LIFE POLICY—PROOFS OF LOSS.

A statement as to the age of the insured, made in the proofs of loss required by a life policy, is not binding on the beneficiary, where it showed that it was not based on family records, but on statements of the insured, who, by reason of his immigration to this country in early youth, was uncertain as to his own age.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1358; Dec. Dig. § 552.\*]

### 4. INSURANCE (§ 665\*)—LIFE INSURANCE—EVIDENCE—FINDINGS.

In an action on a life policy, the evidence held to warrant a finding that the age of insured was as determined by negotiations between himself and the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

### 5. INSURANCE (§ 392\*)—LIFE INSURANCE—LIFE POLICY.

Where an insurer, upon discovering that the insured had understated his age, offered him the privilege of continuing the policy upon payment of the proper assessment and the deficiency, and this was accepted by the insured, there was a new contract, and the insurer could not thereafter defeat recovery because of the insured's misstatement, even though after payment of the deficiency it failed to collect the correct rate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.\*]

### 6. INSURANCE (§ 523\*)—LIFE INSURANCE—LIABILITY—PREMIUM.

An insurance certificate issued by a fraternal order was assumed by a corporation which discovered that the age of the insured had been understated, and required him to pay the difference between the assessments he had paid and those he would have been required to pay had he stated his correct age. Thereafter defendant assumed the contracts of the corporation; but, instead of basing the premium upon

the insured's age as shown from the records of the corporation, it was based on the original application. *Held*, that defendant, an Illinois corporation, could not reduce its liability to the amount of insurance which the premium would have purchased at the insured's correct age, either under Hurd's Rev. St. Ill. 1911, c. 73, § 208u, declaring that, if the age of the insured has been misstated, the amount payable shall be such as the premium would have purchased at the correct age, or under the laws of the forum, for the statute applies only to misrepresentations of insured, and not to mistakes of insurer, and the original application was abrogated by the new contract between insured and the corporation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1307, 1308; Dec. Dig. § 523.\*]

**7. INSURANCE (§ 392\*) — LIFE INSURANCE — CONTRACTS—CONSTRUCTION.**

Where a corporation which assumed liability on a certificate issued by a fraternal order, upon discovering that insured had understated his age, required him to pay the deficiency in assessments, defendant, which assumed the obligations of the corporation, could not revive the original application as basis for assessments so as to take advantage of the misrepresentations therein, unless insured was notified; it having been abrogated by the new contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.\*]

**Appeal from Circuit Court, Saline County; Samuel Davis, Judge.**

Action by Henry Lowenstein, individually and as administrator of Julius Lowenstein, against the Old Colony Life Insurance Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Alf. F. Rector and A. B. Hoy, both of Marshall, for appellant. Duggins & Duggins, of Marshall, for respondent.

JOHNSON, J. [1] This is an action on a policy of life insurance. The principal defense is the alleged misrepresentation of the age of the insured in his application, and defendant confesses liability for the amount of insurance the agreed premium would have secured on the life of a person of the real age of the assured. Plaintiff denies the insurance was procured by misrepresentation, and demands the face of the policy with interest and the statutory penalty. A jury was waived, and, after hearing the evidence, the court rendered judgment for plaintiff in accordance with the prayer of his petition, except that no penalty was allowed. Defendant appealed.

No declarations of law were asked or given, and the judgment must be regarded as a final adjudication in favor of plaintiff of every controverted issue of fact.

[2] The material facts of the case, stated in chronological order, are as follows: In 1896 Julius Lowenstein, a resident of Marshall, applied in writing to the Royal Tribe of Joseph for a certificate of insurance and stated in his application that he was born in August, 1838, and was 58 years old. The application was accepted, and a policy or certificate for \$1,000 was issued and delivered

to him as a person of the represented age. The application was made a part of the contract, which is claimed by defendant to have been governed by the laws relating to fraternal beneficiary societies; but there is no proof in the record that it was a contract of that character (*Gruwell v. Knights*, 126 Mo. App. 496, 104 S. W. 584, and cases cited), and we shall regard it as an ordinary life insurance policy. Lowenstein paid premiums or dues which were assessed at a rate based on his represented age until 1903, when the Royal Tribe of Joseph reinsured its risks in the Cosmopolitan Life Insurance Association, a life insurance corporation of Illinois. Lowenstein was notified that the reinsurer "herewith assumes the benefit certificate No. 5407, issued by the Royal Tribe of Joseph of Sedalia, Missouri, on the life of Julius Lowenstein, and contracts to carry out the provisions thereof in accordance with the terms, provided the insurer complies with and fulfills the obligations assumed thereunder."

Pursuant to this notice Lowenstein exchanged his certificate for a policy issued and delivered to him by the reinsurer, which recited that it was issued upon his original application to the Royal Tribe of Joseph, and the premiums were based on his present age as computed from the date of his birth stated therein. Lowenstein accepted this new policy and paid premiums thereon at the stipulated rate until 1906, when the association discovered in some way, not disclosed, that his age had been misrepresented, and that he was born in August, 1831, instead of 1838. Under date of November 5, 1906, the association wrote him a letter submitting alternative propositions; the second being "that you pay the difference in the rate of assessment between what you are paying and what you should pay at your correct age since becoming a member of the Royal Tribe of Joseph up to the present time, and continue to pay the correct rate of assessment at your correct age in the future." Lowenstein replied, saying: "I positively did not misrepresent my age at the time of joining the Royal Tribe of Joseph. I told the organizer that, as near as I could tell at the time, my age—as I came to this country very young, had no way of telling of my years at that time. I wish, therefore, to accept your second proposition of your letter of the 5th inst." The association replied November 20th, giving the grand total of the deficiency in the past premiums as \$87.30, and requesting remittance of that amount by return mail. The letter closed with the statement: "Beginning with the November, this month's assessment, your correct rate is \$2.90 (per month), instead of \$2.30, as you have been paying. This matter must be attended to by return mail."

Lowenstein promptly remitted the amount demanded (\$87.30) and thereafter continued to pay monthly premiums or assessments un-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



til September, 1909, when the Cosmopolitan Association reinsured its risks in the defendant company, another insurance corporation chartered by the state of Illinois. By the terms of the reinsurance contract the association sold and delivered to defendant "all of its assets of every character and description and wheresoever located, including all its applications, inspection reports, books of accounts, records, files, and indexes which in any manner bear upon, evidence, or explain the risks taken or refused in the course of its business from the date of its organization," and defendant assumed all of the liabilities of the association and agreed "to deliver to each of the policy or certificate holders of the said association \* \* \* the company's 'Convertible Term Policy,' which said policy shall provide \* \* \* a two-year term policy with the right of conversion by the holder during said period of two years to any other form of policy the company issues \* \* \* at the rate of premium required therefor at the attained age," etc. Such "Convertible Term Policy" was to be delivered to each holder of an association policy who, on or before November 14, 1909, would deposit his policy with defendant and consent to take such "two-year term policy" in exchange. Defendant bound itself "that, upon the receipt of any such policy or certificate from any member of said association, which said policy or certificate being in good standing at the date of its delivery to the company, it will issue forthwith to the member so depositing said policy or certificate a receipt, acknowledging receipt of payment of premium to the date to which said premium has been paid." The substituted policies were to be issued without medical examination, and regardless of the condition of health of the assured, but with the right to a lien on the term policy "for 10% of each annual premium commuted on the annual premium basis to be paid by said member on said convertible term policy, to be treated by the said company as an impairment lien on account of no examination being required to issue said exchange policy."

The contract contained the further provision that: "All policies to be issued by the company under the provisions of this contract in substitution of policies or certificates issued by the association up to the date of ratification of this contract shall be based on the original application to the association, which application shall bear the same relation to the policy to be issued by the company in substitution, as herein provided, as if such application had originally been made to the company, instead of said association."

Following the signing of this contract the two companies advised Lowenstein by letters and notices of the agreement of defendant to reinsure the risks of the association, and urged him to send in his policy for exchange. They did not tell him that defendant proposed to issue a short term policy, nor that such

policy would be issued on the faith of his original application. Their representation was that defendant assumed the risk the policy he carried imposed on the association. Lowenstein responded by sending his policy to defendant, and under date of October 14, 1909, defendant issued to him the following receipt, denominated on its face a "Certificate of Assumption": "Received by the Old Colony Life Insurance Company certificate of policy No. 21155 of the Cosmopolitan Life Insurance Association of Freeport, Illinois. The Old Colony Life Insurance Company acknowledges itself bound to the holder of said certificate or policy under the provisions of the contract between said company and said Cosmopolitan Life Insurance Association, ratified September 9, 1909, by the members of said association in legal meeting assembled. Said company will promptly deliver to the holder of said certificate or policy its policy provided for in contract above referred to between said company and said association, which shall be paid up to October 25, 1909, being the end of the period for which payment has been made to the association."

On October 25th of the same year defendant delivered to Lowenstein a short term, non-participating policy, by the terms of which it agreed to pay plaintiff (his son) immediately upon receipt of proofs of death the sum of \$1,000. The caption contained the words and figures: "Premium \$111.09. Age 71." This policy does not refer to the original application nor contain any other reference to the age of the assured than the following: "If the age of the assured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age, or the premium may be adjusted and credit given to the insured or to the company according to the company's published rate at the date of issue."

Further, the policy provides that it "is not entitled to participate in the profits or divisible surplus of the company," and that "this policy may be converted upon written request of insured, and without medical examination, at any time within two years from its date by exchange for any form of policy issued by the company at the date of exchange except term policies, at the company's published premium rate for the age attained."

The assured died at Marshall December 11, 1909, less than two months after the receipt of this policy. Plaintiff made proofs of loss in which he stated that his father was born August 15, 1829, in Tuchel, Prussia, Poland. In answer to the question, "State authority for answer to last question [family record, certificate of birth, or otherwise]," he answered: "No family records—facts as told by deceased in his lifetime to claimant."

Plaintiff claims that the policy was issued and the annual premium of \$111.09 was charged on the erroneous supposition that Lowenstein was 71 years old at that time.

when, in truth, as shown by the proofs of loss, his age was 80 years; that this mistake was induced by the false representation of the original application to the Royal Tribe of Joseph that the applicant was born in 1838; that under the terms of the policy, which must be treated as an Illinois contract, the assured must be considered as having misstated his age to defendant, and plaintiff is entitled to recover only the amount of insurance the annual premiums of \$111.09 would have purchased at the correct age. It is shown that the annual premium on such policy for a person 80 years old was \$211.37, and that the premium of \$111.09 would have purchased insurance in the sum of \$528.80. Further, it is shown that Lowenstein owed \$90.99 on the first premium, and deducting this from \$528.80, and deducting also \$11.10, the amount of the impairment lien, left a remainder of \$428.71, which is the sum defendant would pay in full discharge of its liability under the policy.

Pursuant to the reinsurance contract the Cosmopolitan Association turned over to defendant all its applications, books, records, and correspondence, including such documents as it had formerly received from the Royal Tribe of Joseph. At the time it issued the policy in suit it had in its possession, not only the original application of Lowenstein, but also the records and correspondence of the association showing the discovery of the misstatement of age in the original application and the readjustment of the contract of insurance to conform to the conceded fact that the birth of Lowenstein was in August, 1831, instead of August, 1838. In explanation of the mistake in the policy the officers of defendant testified that they looked only to the original application and did not examine the correspondence and records relating to the correction of the misstatement until after the proofs of loss informed them of the discrepancy between the application and the policy issued by defendant. Further, it appears from the records of the association in the possession of defendant that for some strange reason the association had followed its sharp and successful correspondence with Lowenstein, which resulted in his tacit confession that he was born in 1831 and his payment of the amount of the claimed deficiency in past premiums, by continuing to levy and receive payment of monthly assessments on the old basis, instead of the new. The oversight of the association (for it cannot be regarded as anything else) did not mislead defendant, since its officers did not inspect the files and records which would have disclosed the readjustment of the insurance, but, as stated, contented themselves with an inspection of nothing but the original application.

[3, 4] Plaintiff and one of his brothers testified their father came to the United States from his birthplace in Europe when he was very young, that there was no record or family history of his age, and that even he did

not know the year of his birth. As we understand the evidence, the statements of plaintiff in the proofs of loss relating to the age of his father were a mere guess or conclusion founded on vague and unreliable information. Plaintiff is not conclusively bound by such statements. The fact of the real age of his father is an issue legally raised by the pleadings, and the trial court, sitting as a jury, well may have believed from the evidence that the readjustment of the contract of insurance forced by the peremptory demand of the association was based on an agreement or understanding between it and the assured relating to the date of his birth which came as near the true fact as the inaccurate and unreliable data would permit.

[5] Whether Lowenstein fraudulently or innocently had misstated his age in his application to the Royal Tribe of Joseph, the association, after acquiring full knowledge of the misstatement, offered to continue the relationship of insurer and insured upon condition that he would make adequate restitution, and would consent to treat the contract from the beginning and in the future as having imposed upon him the obligation he would have been required to assume had his age been stated accurately in the first place. This offer being accepted and performed, the effect of such acceptance and performance was to create a new contract of insurance which, so far as the subject of age was concerned, was wholly independent of, and unrelated to, the original application. Had Lowenstein died immediately after the readjustment agreement became effective, the association would have been in no position to interpose a defense based on the misstatement in the original application which the parties, in effect, had agreed should be *functus officio*—should be eliminated as an integral part of the insurance contract. The fact that for some undisclosed reason the association did not levy and collect subsequent assessments in accordance with the terms of the new agreement did not alter the relationship it established, which continued to the date of the acceptance by Lowenstein of the policy issued to him by defendant, pursuant to the last reinsurance contract.

[6, 7] The risk the association was under on the date it entered into the reinsurance contract was to pay the face of the policy on the death of the assured, without any deduction on account of the misstatement in the application as to the age of the applicant. Under the terms of the reinsurance contract defendant, in consideration of succeeding to the assets and business of the association, assumed its risks and so notified Lowenstein and offered to substitute a policy of its own issue for the one he had, without requiring a medical examination or a new application. In every possible way it assured him that it was merely stepping into the shoes of the Association. Neither its letters and notices to him nor the short term, nonparticipating pol-

icy it induced him to take contained any intimation that it proposed to revive his old application to the Royal Tribe of Joseph and make it a part of the new contract of insurance. The policy did indicate in its caption that an error had been committed by defendant in the statement of the age of the assured; but there is a material difference between an error induced by the false representation of the insured and one resulting from negligence or mistake of the insurer.

Neither the laws of Illinois, which defendant contends control the interpretation of the policy, nor of this state give the insurer the right to have his liability reduced on account of his own mistakes. Section 208u, c. 73, Hurd's Rev. Stat. Ill. 1911, provides that "if the age of the insured has been misstated the amount payable under the policy shall be such as the premium would have purchased at the correct age"; but this obviously refers to representations of the insured, and in a subsequent clause of the same section policies of temporary insurance and nonparticipating policies (such as the present) are expressly exempted from this provision. See subdivision 5c, § 208u.

The statutes of Illinois do not aid the position of defendant, nor is there any stipulation in the policy which will justify the contention that defendant may take advantage of its own mistake in the age of the assured. The provision in the policy that "if the age of the assured has been misstated the amount paid herein shall be the same as the premium would have purchased at the correct age" is quoted literally from the Illinois statute and refers, as does the statute, to misrepresentations of the assured in procuring a policy; but there were no such misrepresentations made to defendant.

Defendant chose, both in its contract of reinsurance and in its proposals to Lowenstein not to call for a new application, but to step into the position of the passing association and to shoulder its burdens. The old application was dead beyond recall. The records and files in the possession of defendant disclosed the cause, and manner of its taking on, and defendant had but to look at what was before it to know that the insurance was being carried on a substituted agreement which had wholly disregarded that application.

We do not wish to be understood as intimating that defendant would not be entitled to a correction of a mistake which would give it a lien on the policy for the amount of the difference between the premium it charged and the premium it should have charged. We express no opinion on that subject, since it is foreign to the issues raised by the pleadings. What we are holding is that the mistake made by defendant was not the result of any misrepresentation of Lowenstein, and therefore that neither the provisions of the laws of Illinois nor those of

the policy itself give support to the position that the recovery of plaintiff should be restricted to the amount of insurance the premium paid would have purchased at the correct age of the assured.

The judgment is affirmed. All concur.

STATE ex rel. SCHENK v. FLICK et al.  
(No. 10,614.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

EXCEPTIONS, BILL OF (§ 32\*)—SETTLEMENT—  
FINDING BY JUDGE—JUDGE ENTITLED TO  
SIGN.

Rev. St. 1909, § 2032, provides that, where the judge who heard the cause shall go out of office before signing the bill of exceptions, the bill, if agreed to be true by the parties or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard. *Held* that, where a case was tried on a change of venue in S. county when it was a part of the Second circuit, and after the trial, but during the time taken to prepare the bill, but before it was signed, S. county was taken from the Second circuit and became a part of the Thirty-Seventh circuit, to which the judge who tried the case was transferred, the bill of exceptions could not be properly signed by him, but should have been signed by his successor.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 37-41, 94; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

Action by the State, on the relation of Schenk, against Henry P. Flick and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. R. Bartlett, for appellants. J. E. Luther, H. V. Smoot, and B. R. McKee, all of Memphis, for respondent.

ELLISON, P. J. Sylvanus Flick died, and his widow, Sarah, was appointed administratrix of his estate by the probate court of Scotland county. The latter died before her administration ceased, and her son, H. P. Flick, was appointed administrator of her estate, and relator, as public administrator of the county, was appointed administrator de bonis non of the estate of Sylvanus, which was left not wholly administered by Sarah at her death. Relator claimed that H. P. Flick, when appointed administrator of the estate of his mother Sarah, took possession of assets as her individual property, and converted it to her estate, which she, in fact, only held as administratrix of her deceased husband, Sylvanus, and he brought this action in the circuit court of Scotland county on the bond of said Flick for the value of such assets so alleged to have been converted. A change of venue was taken to Schuyler county, which is not in the same circuit with Scotland. A trial was had in Schuyler before Judge Shelton, the regular judge of that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Ind'

circuit, which resulted in a judgment for plaintiff. Defendant thereupon appealed to this court.

Plaintiff, passing by all other questions, attacks the legality of defendant's bill of exceptions. Time was given to prepare the bill, and when it was prepared it was signed by Judge Shelton, who was then (and is yet) a circuit judge, but who, since the trial and before he signed, had ceased to be judge of the circuit court of Schuyler county, and Judge Pettengil had become his successor.

That situation came about in this way: At the time of the trial Schuyler county was a part of the Second circuit; Judge Shelton being the judge. After the trial, and during the time taken to prepare the bill and before it was signed, the Legislature created a new circuit (Laws 1913, p. 216) by taking Lewis and Clark counties from the First and Schuyler from the Second circuit and designating it as the Thirty-Seventh circuit. Thereupon the Governor appointed Judge Pettengil as the judge. Plaintiff contends that, notwithstanding Shelton tried the case, Pettengil, his successor, should have signed the bill.

The general statute (section 2032, R. S. 1909) provides that: "In any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard." It will be observed that if the parties cannot agree on the bill prepared it may be *shown* to the judge to be correct. The Supreme Court, in *State ex rel. v. Gibson*, 187 Mo. 536, 554, 86 S. W. 144, commented on the statute and the different practice it permits from that which prevailed before its enactment. Before the day of preserving the actual occurrences at a trial by shorthand methods, it seemed to be really necessary that the bill of exceptions should be taken at the time and signed by the judge who observed and heard the things he certified to in the bill; and, if it happened that he died or went out of office, his successor necessarily could not perform that act. But, says the court in that case, with the improved methods of the stenographer, a judge who had not heard the case, for all practical purposes, could become informed as to what transpired at the trial. In view of this, the Legislature, in the section above quoted, set

aside those decisions "requiring the trial judge and no other to settle and sign the bill of exceptions."

In *Ranney v. Hammond Packing Co.*, 132 Mo. App. 327, 110 S. W. 613, we decided that, where the regular judge had tried a case and given until the next term to prepare a bill of exceptions, became so ill that he could not hold the next term, and a lawyer, in pursuance of the statute, was elected by the bar to hold the term in his stead, the regular judge was disqualified, during that term, from signing and filing in court the bill of exceptions; that, under the statute, the judge elected by the bar was his successor for the term, with all the powers of the regular judge. That case was approvingly cited in *Farley v. Welch*, 237 Mo. 128, 140, 140 S. W. 875.

In *Fenn v. Reber*, 153 Mo. App. 219, 132 S. W. 627, it was held by the St. Louis Court of Appeals that if the judge who tried the case in a circuit composed of several divisions presided over by as many different judges, who, under the law, rotate or succeed one another in service, is succeeded by one of the other judges before the bill of exceptions is signed, the trial judge cannot act, and the bill must be signed by the presiding judge.

But in *Patterson v. Yancey*, 97 Mo. App. 681, 171 S. W. 845, the facts were quite similar to those in this case, and the ruling was that the judge who tried the case could properly sign the bill, though the court in which the case was tried had been taken from his circuit and put in another circuit presided over by a different judge. But that case was disapproved by the same court in *Fenn v. Reber*, and, we think, inferentially condemned by the Supreme Court in the *Gibson Case* supra. In the latter case the court called attention to the fact that "there is a line of cases [the cases relied upon in *Patterson v. Yancey*] holding otherwise, of which *State ex rel. v. Barnes*, 16 Neb. 37 [19 N. W. 701], is a sample, but it does not appear that such a statute as section 731, supra (now 2032), existed there or in the states whose appellate courts are cited by the Nebraska court."

The foregoing views show that the paper presented here as a bill of exceptions must be disregarded. And this leaves us with nothing but the record proper, and in that we do not find any error.

The judgment will therefore be affirmed. All concur.

**THOMPSON v. WHITE SEWING MACH. CO. (No. 10,846.)**

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**1. CHATTEL MORTGAGES (§ 161\*)—RIGHT TO POSSESSION—DEFAULT.**

Where plaintiff bought a sewing machine and gave a chattel mortgage to secure a balance of the price, providing that if the note was not paid when due possession could be taken by defendant, defendant, having secured possession peaceably to repair the machine when the last installment of the price had been due more than a year, was entitled to refuse to return the machine until the balance had been paid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 282-285; Dec. Dig. § 161.\*]

**2. CHATTEL MORTGAGES (§ 252\*)—PAYMENT OF DEBT—DEMAND.**

Where a chattel mortgagee obtained peaceable possession of the mortgaged property, its refusal to redeliver to the mortgagor unless the balance of the debt which was then overdue was paid was a sufficient demand.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 520; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Aretta Thompson against the White Sewing Machine Company. Judgment for plaintiff, and defendant appeals. Reversed.

A. Bowers, of St. Joseph, for appellant. Thompson, Griswold & Thompson, of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff's action is for trover and conversion of a sewing machine. She recovered judgment in the circuit court for \$62.

[1] It appears that plaintiff bought the machine from defendant for \$70, putting in her old machine for \$28, and executing her note due on demand for \$42 balance, payable in monthly installments of \$3, and a chattel mortgage securing payment of the note where-in possession was reserved to her; but providing that, if the note was not paid when due, possession could be taken by defendant. After she had paid all but a balance of \$8 on the note, the machine became out of order, and she requested defendant to take it for repair. They did so, and after repairing it, refused, on her demand, to redeliver until she paid the balance on the note. At this time the last installment had been due more than a year.

We cannot see any legal ground upon which plaintiff should be allowed to maintain her action. After default in the payment of the note according to its terms, defendant became the legal owner and entitled to the possession of the property. Robinson v. Campbell, 8 Mo. 365; Bowens v. Benson, 57 Mo. 26; McCandless v. Moore, 50 Mo. 511; Lacey v. Giboney, 36 Mo. 320, 88 Am. Dec. 145; Edmonston v. Jones, 96 Mo. App. 83, 69 S. W. 741; Turner v. Brown, 82 Mo. App. 30.

Defendant had a right to enforce that possession by an action at law, and we do not see why, if it finds itself in peaceable possession, it should surrender such possession to the mortgagor so as to force itself to bring an action for the property. This mortgage contained also a clause giving defendant a right of possession if it was misused by plaintiff, or if defendant felt it necessary for its better security. The fact that defendant obtained possession to repair did not estop it from asserting the rights secured by the mortgage. A default in payment might occur while the mortgagee is repairing, or the mortgagee might discover while repairing that other conditions of the mortgage were broken. It seems absurd to say he is to go through the form of delivery back to the mortgagor before asserting his right.

[2] It is suggested that the note was not due until demand, and therefore, as no demand had been made, the mortgage condition was not broken. This is not true in point of fact. Defendant refused to deliver the machine unless the balance on the note was paid. This was a demand.

The judgment is reversed. All concur.

**STATE ex rel. WISEMAN v. URTON et al. (No. 11,094.)**

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**1. HIGHWAYS (§ 72\*)—OPENING AND CHANGING PUBLIC ROAD—TOWNSHIP BOARD—APPEAL TO COUNTY COURT—NOTICE OF APPEAL.**

Rev. St. 1899, § 10347, providing that, on appeal from a township board, the appellant shall serve, at least ten days before the first day of the term of the county court at which the cause is to be determined, a notice in writing stating that an appeal has been taken, etc., is mandatory, so that, in the absence of such notice, the county court had no jurisdiction of an appeal from an order of a township board denying a petition to open and change a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. § 72.\*]

**2. HIGHWAYS (§ 72\*)—NOTICE OF APPEAL—FAILURE TO SERVE—REMEDY—MOTION TO DISMISS.**

A motion to dismiss an appeal to the county court from an order of a township board is the proper remedy, where no notice of the appeal, as required by Rev. St. 1899, § 10347, has been given.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. § 72.\*]

**3. HIGHWAYS (§ 72\*)—APPEAL TO COUNTY COURT—MOTION TO DISMISS—ORDER—CONSTRUCTION.**

Where a motion to dismiss an appeal from an order of a township board to the county court was made for want of proper notice of appeal, an order sustaining a motion and dismissing the "cause" would be construed as a clerical misprision for "appeal," and was therefore not objectionable on the ground that the court had no authority to dismiss the cause.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. § 72.\*]

#### 4. MANDAMUS (§ 7\*)—RIGHT TO WRIT—DISCRETION.

Mandamus, being a discretionary writ, will not be granted if the record shows relator is not entitled to it for any good reason.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 5; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Cass County; Nick M. Bradley, Judge.

Mandamus by the State, on relation of one Wiseman, against John W. Urton and others. Decree for defendants, and relator appeals. Affirmed.

W. D. Summers, of Harrisonville, and A. L. Graves, of Garden City, for appellant. J. S. Brierly and Allen Glenn, both of Harrisonville, for respondents.

ELLISON, P. J. This proceeding is mandamus to compel the county court of Cass county to docket and set for hearing a certain case for opening and changing a public road alleged to have been appealed to that court from the township board in such county. The circuit court refused a peremptory writ.

Relators are a part of a number of petitioners for a public road. Their petition was addressed to the township board (Cass county being under township organization), and it asked for changing and laying out of a new public road. It was heard by the township board and refused. The refusal was indorsed on the back of the petition, as required by section 10346, R. S. 1899. The petitioners then appealed to the county court. Thereafter the county court docketed the cause and set the 14th of November, 1909, as the day for its hearing. On that day the remonstrators against the road appeared specially for a motion to dismiss the appeal. Three grounds were alleged: First, that the county court had no appellate jurisdiction; second, that in this class of cases no right of appeal existed for a refusal to open or vacate a public road; third, that no notice of the appeal had been given as required by law. The county court heard this motion and sustained it in these words: "Which motion was thereupon taken up and submitted to the court; and, after hearing arguments, the court is of the opinion that they have no jurisdiction in the matter, and the motion is sustained, and said cause is dismissed."

[1] If the county court could properly sus-

tain this motion, relators, of course, have no right to a mandamus. Several grounds have been stated in support of the motion. One of these, that no right of appeal existed, and the other that, if it existed, no notice of the appeal was given. It is claimed that this case does not belong to that class in which an appeal is not allowed, as decided in *Alldridge v. Spears*, 101 Mo. 400, 14 S. W. 118; Id., 40 Mo. App. 527. We need not pass upon this, since there is ample ground to justify the county court, in that no notice of the appeal was given. The statute (section 10347, R. S. 1899) requires that, on appeal from the township board, "the appellant shall serve the appellee, at least ten days before the first day of the term of the county court at which the cause is to be determined, with a notice, in writing, stating that an appeal has been taken," etc. No such notice was given, and the appeal could not remain effective without it, in the face of objections from the appellee. Relator has said that whether or not there was a notice would appear at the trial, and that it was not proper to sustain the motion for such cause, as he might have produced a notice at the trial.

[2] The suggestion is without merit. A motion is the proper practice. If, in such case, a notice exists, it should be shown on a hearing of the motion.

[3] But it is said that, granting a reason existed for dismissing the appeal, the county court did not do so, but dismissed the cause. We think the proper interpretation of the judgment of the county court is that it dismissed the appeal. The motion was for that action, and the motion was sustained; the mere use of the expression "the motion is sustained, and said cause is dismissed," instead of "appeal dismissed," was a clerical error. Without the notice, there was no jurisdiction of the person in the county court.

[4] But, if it be granted the county court dismissed the cause instead of the appeal, relators would still be without standing in this court. Issuing a writ of mandamus is discretionary with the court; and if the record shows that relator, for any good reason, is not entitled to it, it will not be issued. It would be singular action to mandamus a county court at the instance of an appellant; to hear a cause the appellee has a right to demand shall not be heard.

The judgment is affirmed. All concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**TEXAS TRACTION CO. v. SHERRON.**  
(No. 7146.)

(Court of Civil Appeals of Texas. Dallas.  
May 2, 1914. Rehearing Denied  
May 28, 1914.)

**1. CARRIERS (§ 318\*)—INJURY TO PASSENGER—UNSAFE FLAG STATION—NEGLIGENCE—EVIDENCE.**

Evidence in an action for injury to one about to take passage on defendant's car at a flag station, at a highway crossing, through falling, because of the rough condition of the crossing, in front of the car, *held* sufficient to authorize a finding of negligence in not using proper care to keep the station premises in proper condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**2. CARRIERS (§ 318\*)—INJURY TO PASSENGER—PROXIMATE CAUSE—EVIDENCE.**

As respects the question whether such an accident should have been reasonably anticipated, evidence as to condition of the highway crossing, where a railroad had a flag station, *held* to authorize a finding that its negligence, in not having it in proper condition, was the proximate cause of injury to one waiting to take passage, who fell before an approaching car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**3. CARRIERS (§ 346\*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

Evidence in an action for injury to one about to take passage at a railroad's flag station, at a highway crossing, by being hit by the car, having, when crossing in front of it, fallen, owing to the rough surface, *held* to authorize a finding of freedom from contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. § 346.\*]

**4. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

The evidence not being such that reasonable minds would necessarily reach but one conclusion, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

Appeal from District Court, Grayson County; W. J. Mathis, Judge.

Action by Nellie Sherron against the Texas Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Templeton, Beall & Williams, of Dallas, and Head, Smith, Maxey & Head, of Sherman, for appellant. Randell & Randell, of Sherman, for appellee.

**RAINEY, O. J.** Appellee was struck and injured by one of appellant's passenger cars at a station called Holt. Appellee sued appellant. The cause was submitted to the jury upon special issues, and, upon the return of the verdict, judgment was rendered for appellee for \$4,000, from which this appeal is taken.

Appellee alleged in effect: That she went to the station to take passage on appellant's car. That she crossed the track before the arrival of a car, and, thinking it necessary to

return, she started back, and, while using due care, she stumbled and fell on the track in front of said car, and, before she could get out of the way, the car struck her hip, side, and thigh and threw her some 25 feet. She charges negligence in that the premises at said station were out of repair, improperly constructed, rough, and dangerous, etc., which condition caused her to stumble and fall. That in approaching said station said car was negligently operated. That the signal to stop had been given, and it was the duty to slow down said car and have it under full control. That the operatives saw appellee fall on the track and realized her danger and failed to use the means necessary to prevent hurting her.

[1] The jury by its verdict found that the appellant was negligent in failing to use ordinary care to keep and maintain the premises known as Holt Stop in a reasonably safe condition for the use of passengers, etc. Appellant complains that said finding is not based on any evidence, and insists that "negligence cannot be predicated on the isolated fact that an interurban railway permitted the rails of its track to extend two inches above the surface of the road crossing on a country road where it sometimes received and discharged passengers."

The evidence shows that Holt Stop was a place where the railway crossed a public highway. The dirt was thrown up to the track, two guard rails inside of the two track rails, and the track rails extended up about two inches above the dirt. There was no plank up next to the rails to assist in the crossing. There were no approaches to the crossing, except the end of the ties and loose dirt—the common dirt thrown up there. The guard rails extended across the crossing on each side of the track. There were no planks or anything of the kind or any ballast approaching the guard rails. There was no ballast except ordinary dirt, and the approach to the rails was of white rock dug up there, and the slack just like dirt. It is a general mixture, some gravel and some dirt that has been brought there by wagon wheels, all kinds of dirt.

The foregoing evidence shows the condition of said stop, and we think it warranted the jury in finding that the appellant was guilty of negligence in not keeping the premises in proper repair. The place was a public highway crossing, which the law requires to be kept in reasonable repair. While railroads are not required to furnish depots or platforms at flag stations, yet they must use some care to keep them safe for passengers desiring to board and disembark from the train. The care imposed on appellant to keep its station at this place in proper condition was such at least as the law imposes for keeping a public road crossing in repair. Under the evidence, we cannot say the jury were

not justified in finding the appellant negligent on this issue. *Railway Co. v. Byas*, 12 Tex. Civ. App. 657, 35 S. W. 22; *Railway Co. v. Neill*, 30 S. W. 369; *Eichorn v. Railway Co.*, 130 Mo. 575, 32 S. W. 993.

[2] Complaint is made of the jury's answer to question No. 15, which was in effect that the negligence of appellant in not having its station in proper condition was the proximate cause of plaintiff's injuries.

The proposition submitted is that "the railway could not reasonably anticipate that, on account of its rails extending two inches above the surface of the ground at a country crossing where it received passengers, a person intending to board its train would attempt to cross its tracks in front of a rapidly moving car and stumble over said rail and be injured, in consequence thereof, by such car."

The general rough, uneven condition, the loose dirt and crushed rock on the ground at the station being such as shown by the evidence, we are not prepared to say the falling of a passenger, as was done by appellee, should not have been reasonably anticipated by appellant.

[3, 4] The jury in effect found that appellee was not guilty of contributory negligence at the time she was struck by the car in attempting to cross the track. This finding is criticised by appellant as not being supported by the evidence.

The evidence shows that appellee and her companion were traveling in a buggy toward the station from the west, intending to take passage on a north-bound car. When they were within 150 feet of the station, the headlight of the car coming from the south was seen. When they were within 50 feet they alighted from the buggy; her companion went hurriedly to the center of the track, struck a match, and signaled the car, and the motorman answered it. Appellee followed her companion on the track, and, after signaling, her companion went back to the west side, and she went to the east side. Seeing that her companion had returned to the west side, she immediately started back to cross the track, but stumbled over the east rail and fell across the track. When she started across the car was about 150 feet away.

We would not be justified in overturning the jury's finding, unless the evidence shows conclusively that the appellee failed to exercise proper care for her safety. The evidence, we think, does not show such a condition. When we consider the circumstances surrounding the occasion (that is, the rough and uneven condition of the ground, the distance of the car at the time, and it being in the nighttime), had she not fallen she would not have been struck by the car and injured. At least the evidence is not such as reasonable minds would necessarily reach but one conclusion. This being the nature of the evi-

dence, it was an issue for the jury's determination, and their verdict will not be disturbed. On the issue of discovered peril the findings were favorable to appellant, and the judgment against it was evidently not based thereon.

There are other assignments of error, all based on the want of sufficient evidence to support the jury's findings. We have carefully considered each one, but find no reversible error, and conclude the evidence is sufficient to support the findings.

The judgment is affirmed.

### HESSE ENVELOPE CO. OF TEXAS v. ADDISON. (No. 1306.)

(Court of Civil Appeals of Texas. Texarkana. April 27, 1914. Rehearing Denied May 21, 1914.)

CORPORATIONS (§ 82\*)—STOCK—PURCHASE OF OWN STOCK.

Under an agency contract whereby plaintiff was to purchase 20 shares of the stock of defendant company at a valuation of \$100 per share and to pay \$1,500 cash, the agreement that, on termination of the agency, the company would repurchase the stock at the price paid for it, in the absence of any evidence that the stock was part of the original unsubscribed stock or shares once purchased and subsequently acquired by the company, or that the company had any creditors beside himself, was valid, so that, on termination, the agent could recover the purchase money.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

Appeal from District Court, Dallas County; J. O. Roberts, Judge.

Action by G. C. Addison against the Hesse Envelope Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Burgess, Burgess & Chrestman, of Dallas, for appellant. Ross & Muse, of Dallas, for appellee.

HODGES, J. In August, 1906, the appellant was chartered as a private corporation under the laws of Texas, with an authorized capital stock of \$30,000. The purpose for which it was incorporated was that of manufacturing and selling envelopes. On the 15th day of September, 1911, appellant entered into a contract in writing with the appellee, by the terms of which it employed the latter as an agent to conduct a branch of its business at Houston and Galveston. The compensation which appellee was to receive was fixed at \$35 per week and \$10 per month for office expenses. The written contract also provided for the purchase by the appellee of 20 shares of stock in the appellant company. That portion of the contract is as follows: "The party of the second part (G. C. Addison) further agrees as a part consideration of this contract to purchase twenty shares of the stock of the aforesaid Hesse Envelope Company of Texas, Incorporated, at the valuation of one hundred dollars per share, for



which he shall pay fifteen hundred dollars cash; and the balance of said contract price shall be paid for at the rate of one hundred dollars per month. With reference to the purchase of the stock provided for in section 7, it is hereby mutually agreed by the parties hereto that the party of the second part shall, to the exclusion of any other purchaser, sell to the said party of the first part the stock provided for, at the price paid therefor by the party of the second part; and the said party of the first part hereby agrees and binds itself to purchase from said party of the second part, at the price paid therefor by said party of the second part, said stock, upon notice by either party to the other of such intention within a period of six days prior to said sale or purchase."

Appellee continued in the service of the appellant till the 25th day of December, 1911, when he withdrew and demanded payment of the sum of \$180.54 as the balance due for wages and expenses, and the further sum of \$1,500 as the par value of the stock he had purchased and paid for, and which appellant had obligated itself to repurchase, on giving of the notice provided for in the written contract. Upon the refusal of the appellant to pay the sums demanded, the appellee instituted this suit.

The evidence shows without dispute that the claim presented for \$180.54, as the balance due on salary and expenses, is correct. It is also conceded that appellee had bought and paid for 17 shares of stock at \$100 per share. At the conclusion of the evidence, the court instructed a verdict for the appellee for the amount claimed.

The only defense presented on this appeal is the contention that the portion of the contract which stipulated for the repurchase of the stock by the appellant was void. The following proposition specifies the grounds upon which this contention is based: "The corporation had no legal authority or capacity to release Addison, as a subscriber to its capital stock, from payment of it in whole or in any part; and any contract made by said company with him by which the company, its creditors or stockholders, shall lose any part of the subscription is ultra vires and a fraud upon the creditors and the cosubscribers to the stock of said company." There is nothing in the evidence to show whether the shares which the appellee purchased from the appellant was a part of the original stock which had never been subscribed for, or shares which had once been purchased and subsequently acquired by the appellant. There was evidence to show that, at the time the charter was filed with the Secretary of State, only 240 of the 300 shares of stock authorized had been taken. But it does not necessarily follow from this that in the course of five years this unsubscribed balance remained unsold. Neither is there any evidence tending to show that appellant had any

creditors besides the appellee. For aught that appears to the contrary, the appellant owed no other monetary obligation, and its affairs were in a flourishing condition. At the time this suit was filed, its shares of stock may have been worth a premium in the market. That a corporation may purchase its own shares of stock, except when prohibited by statute, is well settled by numerous authorities. *San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104, and cases there cited. We do not think the provision of the contract referred to in the assignment is subject to the objection urged.

We are not called upon, however, to determine whether or not the appellee can escape liability for the three remaining shares which he did not pay for. That question is not before us.

The judgment is affirmed.

PICKERING MFG. CO. v. GORDON et al  
(No. 6516.)

(Court of Civil Appeals of Texas. Galveston.  
April 21, 1914.)

GARNISHMENT (§ 196\*)—PARTIES—DISCHARGE.

Where the original suit in which a writ of garnishment was sued out was brought against an alleged corporation, and after the issuance and service of the writ of garnishment the petition was so amended as to make the action one against an individual, instead of a corporation, the garnishment proceedings were thereby discharged, and judgment cannot be rendered against the corporation in the garnishment proceeding.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 386-389; Dec. Dig. § 196.\*]

Appeal from Jefferson County Court; R. W. Willson, Judge.

Action by W. D. Gordon against the Pickering Manufacturing Company, in which a writ of garnishment was sued out against the Gulf National Bank of Beaumont, Tex. From a judgment for plaintiff in the garnishment proceedings, defendant appealed. Reversed and rendered.

Crook, Lord, Lawhon & Ney, of Beaumont, for appellant. Thos. J. Baten and W. D. Gordon, both of Beaumont, for appellee.

McMEANS, J. W. D. Gordon, on September 10, 1908, brought suit against the Pickering Manufacturing Company, alleging that the defendant was a private corporation doing business in the state of Pennsylvania, and sought the recovery of the sum of \$292 as damages for the breach of a contract. He alleged that this amount of money was then deposited in the Gulf National Bank of Beaumont, Tex., to the credit of the defendant, and at the time he filed the suit he sued out a writ of garnishment against said bank to subject said sum to the payment of his demand. On October 6, 1908, the Gulf National Bank answered, setting forth that it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was indebted to the Pickering Manufacturing Company in said sum of \$292. It appears that no further proceedings were had in the case until January 16, 1913, more than five years after the filing of the suit, when plaintiff filed an amended petition, in which he stated that he filed his original petition upon the theory that the Pickering Manufacturing Company was a corporation, but that it had since developed that the Pickering Manufacturing Company was only a name under which Emeline A. Pickering, an individual, was doing business, and sought, in the amended petition, to recover against Emeline A. Pickering, an individual, instead of the Pickering Manufacturing Company, a corporation. On the date of the filing of the amended petition the defendant filed a motion to quash the garnishment; one of the grounds of the motion being that the suit as originally filed, and in which the garnishment was sued out and served, was against the Pickering Manufacturing Company, a private corporation incorporated under the laws of the state of Pennsylvania, and by the amended petition plaintiff sought judgment against Mrs. Emeline A. Pickering, an individual, and not against the corporation, and that the garnishee could not be held liable upon a judgment rendered against Emeline A. Pickering. The motion to quash was overruled, and upon a trial before a jury, on January 17, 1913, judgment was rendered against the "defendant Pickering Manufacturing Company and Emeline Pickering, established in this case to be one and the same person," and judgment was thereupon entered by the court in favor of the plaintiff, against the garnishee, upon its answer, for the sum of \$292, and from this last-mentioned judgment the defendant Mrs. Emeline A. Pickering has appealed, and has assigned as error the action of the court in overruling her motion to quash.

Under this assignment appellant contends by her propositions, first, that the plaintiff having sued the Pickering Manufacturing Company, a private corporation, and having sought to subject its funds in the hands of the garnishee, it was necessary, before a valid judgment could be rendered against the garnishee, to secure a judgment in the main case against the corporation; and, second, that the plaintiff, by his amended petition, wherein he sought judgment against Emeline Pickering, an individual doing business as the Pickering Manufacturing Company, and not against the corporation, as alleged in his original petition, set up an entirely new cause of action, and this had the effect of discharging the garnishment proceedings. We think the assignment must be sustained. A writ of garnishment sued out to subject funds belonging to an alleged corporation to pay a debt alleged to be owing by it will not support a judgment against a

garnishee rendered in an ancillary proceeding, where the original suit after the issuance and service of the writ of garnishment has been changed to one against an individual, and the judgment rendered in such proceeding is against an individual. We think it is clear that under the original petition, which sought judgment against an alleged corporation, no judgment could have been legally rendered against Mrs. Pickering, an individual, and a realization of this fact caused plaintiff to amend in order to show that he was suing the individual. If, then, under the allegations of the original petition, no judgment could have been rendered against Mrs. Pickering, it necessarily follows that in the ancillary proceedings instituted under the original petition no judgment could have been legally rendered against the garnishee. The judgment in the garnishment proceedings in the court below is therefore reversed, and judgment here rendered for appellant.

Reversed and rendered.

#### LANGE v. INTERSTATE SALES CO.

(No. 5272.)

(Court of Civil Appeals of Texas. San Antonio.  
April 29, 1914. Rehearing Denied  
May 20, 1914.)

#### 1. SALES (§ 168\*)—DELIVERY—EXECUTORY SALE.

One who ordered an automobile of a certain make and color, with certain equipment, and with the buyer's initials thereon, has the right to inspect the car before accepting it, and delivery thereof could not be made until after the buyer or her authorized agent had had reasonable opportunity to make such inspection, and a charge that an unconditional tender of delivery at defendant's residence would be sufficient, whether she or anyone authorized by her were present to receive the car or not, was erroneous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.\*]

#### 2. EVIDENCE (§ 237\*)—DECLARATIONS OF AGENT—PROOF.

Declarations by the children of the buyer of an automobile showing a delivery of the car to them as their mother's agents are inadmissible in an action against the buyer for the purchase price, in the absence of proof of the agency aside from the relationship and the declarations of the children.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 885-886; Dec. Dig. § 237.\*]

#### 3. TRIAL (§ 244\*)—INSTRUCTIONS—COMMENT ON EVIDENCE—UNDUE PROMINENCE OF PARTICULAR MATTERS.

In an action for the purchase price of an automobile, which defendant denied had been delivered, it was improper for the court to single out and weaken or destroy testimony as to the furnishing of a demonstrator to run the car and as to the housing of the car, by explaining to the jury the effect of such testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

#### 4. SALES (§ 358\*)—ACTIONS BY SELLER—ADMISSIBILITY OF EVIDENCE—MATERIALITY.

In an action for the purchase price of an automobile, where the plaintiff claimed delivery to the children of defendant as her agents, tes-

timony as to the anxiety of the children to obtain possession of the car had no probative value and was improperly admitted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.\*]

Appeal from District Court, Galveston County; Robert G. Street, Judge.

Action by the Interstate Sales Company against Augusta L. Lange. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellant. D. D. McDonald, of Galveston, for appellee.

**FLY, C. J.** This is a suit instituted by appellee to recover the value of an automobile sold by it to appellant, a feme sole. The defense to the suit was that the automobile was never delivered to appellant. The cause was tried by jury and resulted in a verdict and judgment for appellee in the sum of \$3,420.

The facts showed that appellant had, in the autumn of 1912, placed an order with appellee for a National, seven-passenger, touring automobile. Appellee did not have the automobile in stock, but it was to be ordered from the factory and was to be fully equipped as stated in the catalogue, besides additional equipment, to be a certain color, and to be guaranteed for a year, at the price of \$3,520 in Galveston. Appellant went to New York, and while she was gone the automobile arrived in Galveston, and, according to the testimony of Toebelman, the general manager of appellee, Willie Lange, a minor son of appellant, assisted in unloading the car and went in it to the garage of appellee. The car was driven by an employé of appellee, and Willie requested that it be sent out to his mother's house on the next day. On the next day, which was Friday, the daughters of appellant telephoned that they wanted the automobile and it was sent out by appellee. Toebelman testified that he telephoned to Alvin Lange, an adult son of appellant, about delivering the car, and that he told the witness to deliver the car to the other children of appellant, as he had been informed that his mother had written to his sisters that they could use the car during her absence. Alvin Lange also promised to give a check for the car as soon as his mother arrived from New York. Toebelman stated that after this conversation he ordered Billie Mather, a chauffeur, to take the car out and deliver it to the children of appellant. The children rode in the car, the chauffeur driving, or sitting by instructing a member of the family to drive. At night the car was carried back to the garage of appellee. On Saturday the automobile was again taken out by Billie Mather. There were three Lange young ladies and two minor boys

living with their mother. The youngest boy was 14 years old. Mather, under instructions from appellee, on Saturday afternoon took the car out, and Oscar, the youngest boy, was permitted to drive the car, and while on the boulevard he lost control and the machine went over the seawall and was wrecked. Appellant and the young ladies denied that appellant had written a letter to them such as Toebelman swore that Alvin told him about, and the latter swore that he never told Toebelman that such a letter had been written, or that he had authorized a delivery of the car to his sisters and brothers. The young ladies and Willie Lange denied the delivery of the car to them.

[1] The facts raised a sharp and direct issue as to the agency of appellant's children, as well as the delivery of the car to them. If they were the real or apparent agents of appellant and a delivery of the car was made to them, appellant is liable for the purchase price of the car. These were the crucial points in the case, and yet the question of agency was not submitted by the court to the jury; but, on the other hand, the question of agency of the children was eliminated by an instruction "that tender of delivery at the residence of Mrs. Lange, if made unconditionally, would be sufficient, whether she or any one authorized by her was there to receive it or not." Under that instruction, if appellee had sent the automobile to the residence of appellant in her absence, no one else being authorized to receive it, and left it standing at the curbing of her sidewalk, there was a delivery of the car. This is not the law as applied to the facts of this case at least.

Appellant had ordered a certain kind of automobile, of a certain color, with certain equipment, and initials inscribed on it, and she had the undoubted right, the contract being executory, to inspect the car and see if it met the contract specifications. She could not be compelled to accept the car without the right of inspection being given her, or her duly constituted agent. The right of inspection carried with it a reasonable time in which to make such inspection, but under the charge of the court, the car could have been left at the residence of appellant, without notice to her, within an hour after its arrival in Galveston, and she would become absolutely responsible for its purchase price. The facts of this case create an executory sale, and it was so treated by appellee. It did not consider the car the property of appellant, as soon as it reached Galveston, but treated it as its property until, as it claims, it had been satisfied by Alvin Lange as to the purchase price and the agency of the members of the family. "Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but, where the transfer of the property in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

goods is to take effect at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." *Mechem, Sales*, § 6. The title of the car did not pass to appellant until she had inspected it. *Railway v. Ogburn*, 26 Tex. Civ. App. 217, 63 S. W. 1072. "When the contract is executory, as it always is when a particular article is ordered, without being seen, from one who undertakes it shall be of a given quality or description, and the thing sent as such is never completely accepted, the buyer is not bound to keep it, or pay for the article on any terms, though no fraud was intended by the vendor." *Fogel v. Brubaker*, 122 Pa. 7, 15 Atl. 692.

Appellee did not consider that the title to the car had passed to appellant, because he refused to allow the sons and daughters of appellant to have possession of the car until another brother had agreed to pay for it. This refusal was made although appellee attempts to show that the children were the agents of appellant.

Appellant swore that under the terms of the contract she was to have the machine demonstrated to her and exhibited for approval before she was under any obligation to accept or pay for it, and yet in the face of that testimony the jury was informed that appellee could have delivered the car at her house, without her knowledge and she would be liable. The charge was clearly erroneous.

[2] The declarations of Alvin Lange, or of any of the other children of appellant, could not bind appellant unless it had been shown that they were the agents of appellant. Agency could not be established by their declarations or admissions, nor could it be inferred from their relationship to appellant. To render such admissions or declarations admissible, the agency must be established, the admission must have been made in regard to something within the scope of the agency, and must constitute a part of the res gestæ. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 18.

[3] We fail to see the appropriateness of the charge explaining to the jury the effect of the testimony as to a demonstrator being furnished to run the car and as to the housing of the car. These were facts to be passed upon, as any other, by the jury, and the trial court had no right to single them out and weaken or destroy their effect.

[4] The anxiety of the children to obtain possession of the car before the return of their mother had no legal bearing on the case and it was error to admit such testimony. Such testimony had no probative force on the subject of agency. The acts and declarations of the young ladies and boys in

connection with the automobile could not be used to prove agency.

The judgment is reversed and the causes remanded.

## HOUSTON OIL CO. OF TEXAS v. GRIF-FIN. (No. 6542.)

(Court of Civil Appeals of Texas. Galveston. April 9, 1914. Rehearing Denied April 23, 1914.)

### 1. ADVERSE POSSESSION (§ 115\*)—QUESTION FOR JURY—NOTICE TO FORMER OWNER.

The inclosure and cultivation of a small field of 1 acre on a tract of 160 acres made the question whether such possession and use of the land was sufficient to put the owner upon notice that the person in possession was claiming the 160-acre tract upon which it was actually situated, or any larger portion than that actually inclosed, one for the jury.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.\*]

### 2. INFANTS (§ 24\*)—EMANCIPATED MINOR—ADVERSE POSSESSION.

A minor, who, with the consent of his father, claimed and occupied, as his own, land adjoining that of his father, the father at no time asserting any claim thereto, could not be regarded as holding under his father, and hence his minority did not prevent him from acquiring title by limitation, the consent of the father having the effect of emancipating him in so far as the right to acquire the land was concerned.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 25; Dec. Dig. § 24.\*]

### 3. ADVERSE POSSESSION (§ 46\*)—CONTINUITY OF POSSESSION—DISABILITY OF OWNER.

Under Rev. St. 1911, art. 5711, providing that, when the law of limitation shall begin to run, it shall continue to run notwithstanding any supervening disability of the party entitled to sue, the appointment of a receiver of the owner of land did not stop the running of limitations in favor of an adverse claimant.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 232-254; Dec. Dig. § 46.\*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by the Houston Oil Company of Texas against T. J. Griffin. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 149 S. W. 567.

Hightower, Orgain & Butler and J. D. Campbell, all of Beaumont, and H. O. Head, of Sherman, for appellant. Singleton & Nall, of Kountze, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title, brought by the appellant against the appellee to recover title and possession of a tract of 226 acres of land, a part of a survey of 1,280 acres of school land patented to Hardin county by the state of Texas by patent No. 541, vol. 41. The defendant disclaimed title to all of said land except a tract of 160 acres described in his answer, as to which he claimed title under the 10-year statute of limitation. By supple-

mental petition plaintiff alleged that from February 1, 1904, to May 5, 1909, the plaintiff corporation was in the hands of receivers appointed by the United States Circuit Court for the Southern District of Texas, and during said time all of the property of plaintiff, including the land in controversy, was in custodia legis and defendant's possession during said time could not avail to perfect title in him by limitation. The trial in the court below with a jury resulted in a verdict and judgment in favor of defendant for the 160 acres claimed by him. This is the second appeal of the case. The opinion of this court on the former appeal is reported in 149 S. W. pages 567-569.

The evidence shows that plaintiff has a regular chain of title to the 220 acres of land from the sovereignty of the soil. In 1894 and 1895, respectively, Ivy M. Griffin, appellee's father, and J. M. Griffin, appellee's uncle, made settlements in the northwest corner of the 1,280-acre tract. The land at that time belonged to the Village Mills Company, and when said company found the Griffins in possession of its land they procured from them the following acknowledgment of tenancy:

"The State of Texas, County of ———:

"Know all men by these presents, that I, Ivy M. Griffin, of the county of Hardin, do hereby acknowledge that I now live on a certain tract of land, situated in said county of Hardin, namely, a survey No. 266 of land originally granted to Hardin county, and which land is situated on the south side of Village creek, and which said tract of land now belongs to the Village Mill Company, and I do hereby acknowledge the ownership of said land to be in said company, and that I hold possession of said land by and with the consent of said Village Mills Company and its tenant at will.

"Witness my hand this 9th day of June, A. D. 1894.

his  
"Ivy M. X Griffin.  
mark

"State of Texas, County of ———:

"Know all men by these presents, that I, J. M. Griffin, of the county of Hardin, do hereby acknowledge that I now live on a certain tract of land, situated in Hardin county, namely, survey No. 266, originally granted to Hardin county, and which land is situated on the south side of Village creek, and which tract of land now belongs to the Village Mills Company, and I do hereby acknowledge the ownership of said land to be in the Village Mills Company, and that I hold possession of said land by and with the permission of the said Village Mills Company, as their tenant at will.

"Witness my hand this 19th day of June, A. D. 1895. J. M. Griffin.

"Witness: Ivy M. Griffin."

In 1896 Ivy M. Griffin inclosed and put in cultivation about 1 acre of land on the 100-

acre tract now claimed by appellee. In December, 1896, the Village Mills Company sold the 1,280-acre survey to Olive Sternberg & Co. Ivy and J. M. Griffin continued to reside on the tract, and in 1899 Olive Sternberg & Co., conveyed to Ivy Griffin 100 acres out of the northwest corner of the 1,280-acre survey. This 100 acres included the improvements and all of the land on the tract theretofore occupied by Ivy and J. M. Griffin, except the 1-acre field, before mentioned, which was situated about 150 yards east of the east line of the 100-acre tract. Appellee was then about 19 years old, was living with his father, and continued to live with him until after this suit was brought. After Ivy Griffin bought the 100-acre tract, he ceased to cultivate the 1-acre field; but appellee, with the consent of his father, took possession of said field, continued to cultivate it, and began to claim 160 acres of land lying east and south of his father's 100-acre tract. His claim to said 160 acres was continuous and notorious for more than 10 years before this suit was filed. He cultivated the 1-acre field every year for five years, and then opened another field of 2½ acres on said 160-acre tract, which he continued to cultivate up to the time of the trial. When he opened the 2½-acre field he abandoned the 1-acre field and used the fence thereon in inclosing the new field. His occupancy and use of the land by the cultivation of the two small fields, above mentioned, continued for more than 10 years before the institution of this suit. The 2½-acre field was some distance south and west of the 1-acre field, and its northwest corner was within 20 or 30 feet of his father's fence on the south line of the 100-acre tract; but it was inclosed separate and apart from the inclosure on his father's land. After Ivy Griffin purchased the 100-acre tract, his brother, J. M. Griffin, who was unmarried, moved into the same house with him, and has lived with him ever since.

It is not shown that either Ivy or J. M. Griffin have ever used, occupied, or made any claim to any part of the land, except the 100-acre tract, since the purchase of said tract by Ivy. Appellee testified that he knew the location of the north and east lines of the 1,280-acre survey, and the east and south lines of his father's 100-acre tract, and that the 160 acres claimed by him was in an L shape and lay south and east of his father's tract. The land described in appellee's answer, and designated on the plat contained in the statement of facts as the 160 acres claimed by appellee, begins at the northeast corner of the Ivy Griffin 100-acre tract on the north line of the 1,280-acre survey; thence with said north line to the northeast corner of said survey; thence with the east line of said survey to a point thereon, from which a line runs west to the west line of the survey; and thence north with said west line to the southwest corner of the 100-acre tract, east with the south line of said tract to its

southeast corner, and north with the east line of said tract to the place of beginning, containing 160 acres.

On March 17, 1904, receivers were appointed for the appellant Houston Oil Company by the United States Circuit Court for the Southern District of Texas, and all of the property of said company was, by the order of said court appointing the receivers, divested out of appellant company and vested in the receivers appointed by the court. This receivership continued and the property of the company remained vested in the receivers until April 15, 1909, when the court in which said proceedings were pending directed the receivers to deliver to the appellant company the property of the company theretofore placed in their hands by the order of court before mentioned. This suit was filed August 20, 1910. Most of the questions presented by this appeal were raised on the former appeal and decided adversely to appellant's contention.

[1] Appellant, under appropriate assignments of error, contends, as it did upon the former appeal, that the trial court should have instructed the jury to return a verdict in its favor on the ground that the evidence is insufficient to raise the issue of the adverse possession of appellee of the 160 acres of land claimed by him for 10 years prior to the institution of this suit. This contention is based upon the proposition that the cultivation and use by appellee of the small field of one acre on the land in controversy during his minority and while he was living with his father was not a sufficient actual and visible appropriation of the land to put the owner upon notice of appellee's claim to said 160 acres. As said in our former opinion, it cannot be held as a matter of law that the inclosure and cultivation of a field of one acre on a large tract of land is not sufficient possession and use to put the owner of the land upon notice that the person so using and occupying his land is claiming some right or title thereto. The case is not one of encroachment. From the distance the 1-acre field was located from the land owned by appellee's father where appellee lived with his father, the owner of the land on which the field was situated could not reasonably have supposed that said field was placed on his land by mistake on the part of his neighbor as to the location of his lines, and the rule announced in *Bracken v. Jones*, 63 Tex. 184, *Titel v. Garland*, 99 Tex. 201, 87 S. W. 1152, and *Bender v. Brookes*, 103 Tex. 329, 127 S. W. 168, *Ann. Cas.* 1913a, 559, does not apply.

[2] On the question of the effect of the minority of appellee upon his right to acquire the land for himself by his adverse claim, occupancy, use, and cultivation thereof for the

time prescribed by the statute, we adhere to our holding on the former appeal. The evidence shows that appellee's claim and occupancy of the land as his own was with the consent of his father, who at no time asserted any claim to the land. In these circumstances appellee cannot be regarded as holding possession for or under his father, and we cannot believe that his minority affects the adverse character of his claim and possession. The consent of the father to the acquisition by appellee of the land for himself by occupying and cultivating it had the effect of emancipating appellee in so far as his right to acquire the land was concerned. The fact that the father, Ivy Griffin, prior to the sale of the land by the Village Mills Company, held possession as tenant at will of said company would not, after the abandonment of the field by him, he having in the meantime purchased a portion of the survey from the vendees of the Village Mills Company, affect the subsequent adverse possession of appellee. There is nothing in the evidence tending to show that Ivy Griffin ever agreed to hold the land for the vendees of the Village Mills Company, or that they ever supposed that he was occupying any portion of the land as their tenant.

[3] The appointment of receivers for appellant company did not have the effect of stopping the running of the statute of limitation in appellee's favor. Appellee's adverse possession and claim began prior to the appointment of the receivers, and the inability or disability of appellant to bring suit for the recovery of the land pending the receivership would not stop the running of the statute. Revised Statutes, art. 5711. The receivers were expressly authorized by the order of the court by which they were appointed to sue and recover "all of the moneys, property, and assets of the company, and to that end are authorized to institute and prosecute all suits that may be necessary for the protection and preservation of, or in reducing to possession, the property rights and assets of said company." We know of no rule which would protect the appellant from the result of the failure of the receivers of the company to exercise the power conferred upon them to bring suit to recover possession of this property.

We have not deemed it necessary to discuss each of appellant's assignments of error in detail. What has been said disposes of all the material questions presented by the appeal. We have considered all of the assignments presented, and none of them, in our opinion, should be sustained. It follows that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

## SAVAGE v. MOWERY. (No. 5264.)

(Court of Civil Appeals of Texas. San Antonio. April 22, 1914. Rehearing Denied May 20, 1914.)

## 1. APPEAL AND ERROR (§ 500\*)—RULINGS ON PLEADINGS—RECORD.

Where the appeal record fails to show any ruling on any of the pleadings, assignments of error with reference to alleged rulings on the pleadings will not be considered, except that an objection that the petition is fatally defective may be urged for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.\*]

## 2. FRAUDS, STATUTE OF (§ 144\*)—WAIVER—PLEADING.

Where an answer is subject to general demurrer because showing on its face that the defense pleaded is within the statute of frauds, such defect may be waived so that, if the general demurrer is waived, the answer will be as effective as though no demurrer had ever been filed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 351; Dec. Dig. § 144.\*]

## 3. APPEAL AND ERROR (§ 173\*)—DEFENSES—QUESTIONS NOT RAISED AT TRIAL—STATUTE OF FRAUDS.

Where the statute of frauds was not urged below until in the motion for new trial, it could not be relied on, on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

## 4. TRIAL (§ 420\*)—MOTION FOR INSTRUCTED VERDICT—DENIAL—WAIVER OF ERROR.

Where a motion for an instructed verdict is overruled and the moving party thereafter introduced evidence in his own behalf, he waives his right to assign error on denial of the motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.\*]

## 5. TRIAL (§§ 251, 252\*)—INSTRUCTIONS—REQUEST TO CHARGE—ISSUES.

Where, in a suit on certain notes given for the rent of land, a pumping plant and canal, defendant pleaded that an agreement had been made in consideration of his foregoing his right to rescind on discovery of the falsity of plaintiff's representations concerning the saline character of the water, by which plaintiff bound himself to forego his rent and cancel the notes if salt water appeared in the river at the pumping plant in sufficient quantity to injure defendant's crops, and defendant testified that salt water appeared in the river in 1909, but not in sufficient quantity to injure the crops for that year, and in 1910 the water again became salty and badly damaged the crop, while plaintiff denied making such agreement, a request to charge that if plaintiff promised to forego his rents if salt water appeared in the river, and the jury found that salt water did appear, and defendant continued to use and cultivate the premises without electing to rescind, then he ratified the contract, was properly refused as not within the issues or testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 587-612; Dec. Dig. §§ 251, 252.\*]

## 6. LANDLORD AND TENANT (§ 233\*)—ACTION FOR RENT—MODIFICATION OF CONTRACT—INSTRUCTIONS.

Where, in an action on notes given for the rent of land, a pumping plant, and canal, defendant pleaded and proved an agreement subsequent to the lease that, in consideration of defendant's foregoing his right to rescind on

discovery of the falsity of plaintiff's representations concerning the saline character of the water, he agreed to forego his rent and cancel the notes if salt water appeared in the river at the plant in sufficient quantity to injure defendant's crops, and it appeared that during the third year of the lease the water became so salty as to cause defendant a heavy loss for that year, defendant was entitled to cancel the notes on that ground, and hence an instruction to award plaintiff a verdict at the rate of \$500 a year for three years, during which it was claimed that defendant used the property without complaint, was erroneous and properly refused.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 49, 940-944; Dec. Dig. § 233.\*]

## 7. LANDLORD AND TENANT (§ 34\*)—LEASE—MODIFICATION—RESCISSION.

Where, after a contract for the renting of land, a pumping plant, and canal for a term of years had been modified by parol, so that plaintiff agreed to forego his right to rent and cancel his rent notes if salt water appeared at the pumping plant in sufficient quantity to injure defendant's crops, defendant expended considerable money, and had contracted to deliver water to persons who had rented land on the strength of such contracts, defendant was under no obligation to accept plaintiff's subsequent offer to rescind, and hence defendant's declining to accept such offer did not constitute a ratification of the contract so as to preclude his demanding a cancellation of the notes on salt water subsequently appearing in quantity sufficient to endanger the crops.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 97; Dec. Dig. § 34.\*]

## 8. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—INSTRUCTIONS—PROPOSITIONS.

A proposition, under an assignment of error to the giving of a charge, that it was on the weight of the evidence, failing however to point out in what respect, would not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 9. LANDLORD AND TENANT (§ 193\*)—LEASE—RESCISSION—EFFECT.

Where, after a lease of land, a pumping plant and a canal for five years, and the execution of notes for the rent, defendant objected because of the saline condition of the water, whereupon plaintiff bound himself to forego his rent and cancel the notes if salt water appeared in the river at the pumping plant in sufficient quantity to injure defendant's crops, and such condition occurred in June, 1910, the court properly held that defendant's election to terminate the contract for that reason released him from payment of the rent remaining unpaid for 1909 as well as the notes not due at the time the salt water appeared in 1910.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 787; Dec. Dig. § 193.\*]

Appeal from District Court, Matagorda County; Saml. J. Styles, Judge.

Action by E. J. Savage against C. W. Mowery. Judgment for defendant, and plaintiff appeals. Affirmed.

Gaines & Corbett, of Bay City, for appellant. L. M. Williamson, of Houston, for appellee.

MOURSUND, J. On October 2, 1907, E. J. Savage and C. W. Mowery entered into a

written contract whereby Savage leased Mowery certain land, and pumping plant, and canal for five years beginning November 1, 1907, with the privilege of extending the lease for two years, and Mowery agreed to pay an annual rental of \$500, payable as follows: \$250 on November 1, 1907; \$500 on the 1st day of November of each of the years 1908, 1909, and 1910; and \$250 on November 1, 1912—for which sums promissory notes were executed bearing 8 per cent. interest from maturity and providing for attorney's fees. The first two notes were paid. On December 15, 1911, Savage sued Mowery for principal, interest, and attorney's fees upon the remaining notes and for the establishment and foreclosure of a lien upon certain property situated upon the leased premises. Defendant pleaded payment of note 3, alleging that \$463.50 was paid to the Bank of Matagorda which held the note for collection, and was accepted by said bank, and the remaining \$36.50 was paid by reason of plaintiff charging defendant with and collecting 10 cents per sack for 365 sacks which under the lease contract were to be furnished by plaintiff for the purpose of containing rice agreed to be delivered by plaintiff to defendant for watering certain lands of plaintiff. Defendant further pleaded that the consideration for the notes sued upon had failed because the lease contract had terminated; that he had been induced to enter into said contract by reason of false and fraudulent representations by Savage to the effect that there never had been any salt water in the Colorado river at the point where the pumping plant leased by defendant was located; that defendant knew nothing concerning such matter and believed and relied upon such representations; that in fact salt water had therefore been in the river at said place, thereby rendering the water totally unfit for irrigating purposes, and about October 15, 1907, defendant learned such fact and thereupon accosted plaintiff and demanded the cancellation and surrender of his notes, whereupon plaintiff agreed that defendant should proceed under the lease contract, and, if at any time there should be such quantity of salt water at said place as to injure the rice crop, the contract should be canceled and defendant relieved from the obligation to pay rent; that pursuant to such agreement defendant proceeded with the contract during 1908 and 1909 and up to June, 1910; that about June 15, 1910, the water in the river at the point where the pumping plant was located became salty and unfit for irrigating purposes, and defendant was required to desist from further pumping, thus causing the rice crop on 400 acres to dry up and fail to mature, so that instead of producing 6,000 bushels it only produced about one-third of such amount; that by reason of such fact and of said agreement defendant abandoned the contract and became absolved from the payment of said notes, wherefore he prayed that

the notes be canceled and that he recover his costs. The trial resulted in a verdict and judgment for defendant.

[1-4] The first assignment complains of the overruling of a general demurrer, the second and third of the overruling of special exceptions, and the fourth the overruling of a motion for an instructed verdict. The record fails to show any ruling by the court upon any of said pleadings, and it is well settled that under such circumstances they will be considered as waived. *City of San Antonio v. Bodeman*, 163 S. W. 1044, and cases therein cited. But an exception is recognized where a petition is fatally defective, in which case it may be attacked upon appeal, though such error was not urged below. In this case the only matter called to our attention under any of these assignments which presents a serious question is a contention made in the motion for an instructed verdict that the verbal agreement modifying the written contract was within the statute of frauds and therefore not enforceable. The third amended original answer does not expressly state that the agreement modifying the written contract was verbally made, yet it is apparent from the answer that such is the case. But the statute of frauds can be waived, and in the absence of an attack upon the answer the agreement pleaded constitutes a good defense. If an answer is subject to a general demurrer because showing on its face that the defense is within the statute of frauds, such defect in the answer is one which can be waived, and it is evident that, when the general demurrer is waived, the answer is as effective as if no demurrer had ever been filed. It does not appear that objection was made to the evidence of the verbal agreement on the ground that the same was within the statute of frauds, and in fact such defense to the answer is nowhere suggested except in the motion for an instructed verdict. As the record does not show that said motion was ever called to the trial court's attention, no ruling thereon appearing in the record, we cannot hold that the statute of frauds was ever urged until in the motion for new trial. It therefore appears that appellant is not entitled to rely upon the statute of frauds upon this appeal. *International Harvester Company v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93. It has also been held that if a motion for an instructed verdict is presented and overruled, and thereafter the party making such motion introduces evidence, he waives his right to assign error upon such ruling of the court. *Goggan v. Goggan*, 146 S. W. 972; *Knights & Daughters of Tabor v. Johnson*, 156 S. W. 533; *Railway v. Hall*, 156 S. W. 356.

The four assignments are overruled.

[5] The fifth and sixth assignments complain of the refusal to give special charges Nos. 1 and 2. Special charge No. 1 was to the effect that if the jury found that plaintiff promised to forego his rents if salt water



appeared in the river, and find that salt water did appear in the river, and defendant continued to use and cultivate the premises without electing to rescind, then that he ratified the contract, and do find for plaintiff. The issue sought to be submitted was not raised by the pleadings or testimony. Defendant pleaded that an agreement had been made in consideration of his foregoing his right to rescind upon discovery of the falsity of plaintiff's representations, by which agreement plaintiff bound himself to forego his rent and cancel the notes if salt water appeared in the river at the pumping plant in sufficient quantity to injure his crops. His testimony was to the effect that salt water appeared in 1909, but did not injure the crop, and in June, 1910, the water again became salty and stayed that way for a long time, so that the crop was very badly damaged. Plaintiff denied making any such agreement. Special charge No. 2 is somewhat similar to special charge No. 1. It entitled plaintiff to recover if salt water appeared and rendered the use of the canal hazardous, and defendant continued to use same. This issue was also not made by the pleadings or evidence. We conclude that the court did not err in refusing to give these charges, and therefore overrule the assignments.

[8] The seventh assignment complains of the failure of the court to give a special charge instructing the jury to allow plaintiff at any rate the sum of \$500 per year for three years; the contention being that defendant used the property of plaintiff for three years without complaint and therefore should pay for such time. The evidence shows that before the third year expired the water became so salty as to cause a very heavy loss of crop for that year, and under the verbal contract as pleaded and testified to by defendant he had the right to cancel the notes. The charge therefore was erroneous, and the assignment is overruled.

By the eighth assignment complaint is made of the charge of the court; various objections being urged in the assignment, which is sought to be submitted as a proposition in itself. It cannot be treated as a proposition because multifarious. The first proposition thereunder is as follows: "It having been shown that the defendant did not rely upon the statements alleged to have been made by the plaintiff, the court should have instructed the jury to disregard the same." There is sufficient evidence to sustain a finding that defendant relied upon plaintiff's statement that no salt water had ever come up to his pumping plant, and therefore such proposition cannot be sustained.

[7] The second proposition reads: "An offer to rescind having been made by the plaintiff and declined by the defendant, there was ratification of the contract, and the charge of the court was faulty." Defendant testified that plaintiff's offer to rescind came several months after the verbal contract was

made, and at a time when he had expended considerable money, and had contracted to deliver water to persons who had rented land upon the strength of such contracts. Certainly, if the contract as modified suited defendant, he could adhere to same. No obligation rested upon him to accept an offer to rescind after the contract was modified to suit him.

[8] The third proposition submitted is that the charge is upon the weight of the evidence, but it is not pointed out in what respect, and therefore the objection will not be entertained. The assignment is overruled.

[9] The ninth and tenth assignments relate to the sufficiency of the evidence to sustain the judgment. It is contended that defendant used plaintiff's property for three years without complaint, and paid only \$963.50, and should at least pay the difference between said sum and \$1,500. The evidence shows that about four or five months before the third year expired salt water became so abundant in the river and remained so long that the rice crop was damaged to the extent of about two-thirds. It appears that \$250 of the rent for the third year became due November 1, 1909, and \$213.50 thereof was paid. This statement does not agree with appellant's contention (which is acquiesced in by appellee), but we are at a loss to understand how appellant arrived at the figures upon which he bases his contentions. He contends that only \$963.50 was paid by appellee. True, appellant testified that \$463.50 had been paid on note No. 2, and only \$963.50 in all. To arrive at such amount we would have to decide that the first \$500 note was paid and \$463.50 on the second note for \$500. In fact, the first note to become due was one for \$250 due November 1, 1907, and it is admitted in the petition that said note was paid, and also that the note for \$500 due November 1, 1908, was paid. Plaintiff alleged that nothing had been paid on the note for \$500 due November 1, 1909, but the note when offered in evidence bore a credit of \$463.50. This note is described in plaintiff's petition and defendant's answer as note No. 3, but in the statement of facts is referred to by plaintiff as note No. 2. We think it is clear that \$1,213.50 was paid in all, which amount covers the rent for the first two years and leaves \$213.50 as a part payment of rent for the third year. The only question then left to be decided is whether appellee should pay the \$36.50 because of the fact that such amount became due November 1, 1909, and was not paid, and the contract had not at that time been canceled. Appellee pleaded payment of \$36.50 by delivery of rice sacks of that value, but offered no proof. The court, however, took the view that the agreement pleaded, whereby plaintiff was to release defendant from the payment of rent and cancel all notes if salt water in sufficient quantity to injure the crops appeared, was sufficient, if established, to

release defendant from payment of the \$36.50 as well as the notes not due at the time the salt water appeared in 1910. Therefore the charge was so drawn as to permit an absolute finding for defendant if the jury found that the allegation of the answer as to the creation and breach of the verbal contract was established by the evidence. We conclude that the court did not err in so construing the verbal contract pleaded. After alleging payment of \$36.50 in rice sacks furnished, defendant pleaded that the consideration for all notes sued upon had failed, and alleged that the verbal agreement was that no rent would be charged if salt water appeared in sufficient quantity to injure the crops. Defendant's testimony justifies a finding that such was the agreement. As the crop for 1910 was badly damaged because of the existence of salt water in the river for such a long time, the rent for that year cannot be collected under the contract, and plaintiff is not entitled to judgment for the \$36.50. The assignments are overruled. The judgment is affirmed.

#### ROBSON v. MOORE et al. (No. 5270.)

(Court of Civil Appeals of Texas. San Antonio. April 22, 1914. On Motion for Rehearing, May 20, 1914.)

#### 1. APPEAL AND ERROR (§ 622\*)—FILING TRANSCRIPT—TIME.

The 90 days from the time of giving notice of appeal, within which the transcript must be filed, should be computed from the giving of the notice of appeal recited in the order overruling a motion for new trial, instead of from the notice recited in the judgment theretofore entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2732-2735; Dec. Dig. § 622.\*]

#### 2. APPEAL AND ERROR (§ 564\*)—STATEMENT OF FACTS—TIME OF FILING.

A statement of facts, which was filed in the trial court September 10, 1913, and in the Court of Civil Appeals on September 17, 1913, was filed too late, and will not be considered, where judgment was rendered May 24, 1913, and the order overruling the motion for new trial was made on May 30, 1913.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

#### 3. TRESPASS TO TRY TITLE (§ 19\*)—DEFENSES—EQUITABLE TITLE.

An equitable title can be sued upon or set up as a defense in an action of trespass to try title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 22; Dec. Dig. § 19.\*]

#### 4. TRUSTS (§ 44\*)—EVIDENCE.

Evidence held not to sufficiently show that land conveyed was taken under a parol trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

#### 5. TRUSTS (§ 44\*)—CONSTRUCTIVE TRUST.

Where the trustee is dead, a parol trust should not be ingrafted on a deed to land without clear and satisfactory evidence thereof, and such evidence is not satisfactory where the

party suing to establish a trust withholds the best on the question.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

#### On Motion for Rehearing.

#### 6. APPEAL AND ERROR (§ 345\*)—NOTICE OF APPEAL.

A notice of appeal given in the term in connection with the order overruling a motion for new trial, after notice of appeal had been given when judgment was rendered, was valid; the trial court having control of the judgment during the term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.\*]

#### 7. APPEAL AND ERROR (§ 937\*)—PRESUMPTION.

Where a transcript was filed during vacation, it cannot be presumed that the clerk filed it by order of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3788-3794; Dec. Dig. § 937.\*]

#### 8. APPEAL AND ERROR (§ 628\*)—FILING OF TRANSCRIPT—DELAY—WAIVER.

Where appellee received notice of the filing of the transcript pursuant to Court of Civil Appeals rule 7b (142 S. W. xi), and did not move to dismiss the appeal because the transcript was filed too late until more than seven months thereafter, he waived the delay in filing the transcript, and cannot excuse his own delay on the ground that he called attention to the time of filing the transcript as soon as he could after appellant's brief had been filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.\*]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Action by Lucy Robson, executrix, against T. W. Moore and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

C. E. Lane, of Austin, and C. D. Krause and L. D. Brown, both of La Grange, for appellant. Dyer Moore and John T. Duncan, both of La Grange, for appellees.

MOORSUND, J. Mrs. Lucy Robson, as executrix of the last will of W. S. Robson, sued Dr. T. Warren Moore and H. B. Kaulbach, alleging that the estate of W. S. Robson is the owner of one-eighth of three certain tracts of land in Fayette county, and that defendant Moore owns the other seven-eighths thereof, but that defendant Kaulbach has a mortgage upon Moore's interest therein; that plaintiff and Moore both claim title from a common source, to wit, T. C. Moore and his wife, Martha Moore, both deceased, who were the parents of defendant Moore; that W. S. Robson acquired title to his said interest at sheriff's sale under an execution issued upon a judgment in favor of H. B. Kaulbach against T. Warren Moore, at which sale W. S. Robson, J. T. Duncan, and H. B. Kaulbach purchased; and that Duncan and Kaulbach conveyed their interests to T. Warren Moore. Plaintiff prayed that the interest

claimed by her in said lands be established, and that partition be had.

Defendants answered by a general denial, a special denial that W. S. Robson ever owned any interest in the lands described in plaintiff's petition, and alleged at considerable length the transactions leading up to the execution sale under which plaintiff claims—the substance of said allegations being that the judgment under which said sale was made was owned by Kaulbach, John T. Duncan, and L. W. Moore, Duncan and Moore having, as partners, acquired by assignment from Kaulbach a one-half interest in the claim upon which the judgment was rendered; that neither of said parties ever transferred or promised to transfer to Robson any interest in said judgment; that Robson superintended the sale under the execution and bid in the land, crediting the bid upon said judgment and paying no money; that the deed should have been to Kaulbach, Duncan, and Moore, because Robson owned no interest in the judgment, and used Moore's interest therein to pay for the interest in the land conveyed to Robson, without authority from Moore; that by reason of the facts mentioned Robson took the title as trustee for L. W. Moore; that thereafter Kaulbach, Duncan, and Moore sold the land to defendant Moore, who gave Kaulbach a deed of trust thereon. Defendants prayed that they go hence without day and recover their costs.

Plaintiffs filed a trial amendment, containing a general demurrer to the answer and a general denial thereof. Judgment was rendered that plaintiff take nothing by her suit. Upon request of plaintiff, the court filed findings of fact and conclusions of law.

[1, 2] Appellee suggests that we may not have jurisdiction to entertain the appeal. The judgment was dated May 24, 1913. The order overruling the motion for new trial is dated May 30, 1913. Both the judgment and order recite notice of appeal. The transcript was filed August 26, 1913. If the 90 days is to be computed from the giving of the first notice of appeal, the transcript was not filed within such time; if from the notice given upon the overruling of the motion for new trial, the filing was within the 90 days. We are of the opinion that the time should be computed from the giving of the second notice of appeal. But it further appears that this transcript was filed in the Court of Civil Appeals for the First District on August 26, 1913, and as that court had discretion to permit it to be filed after 90 days, it will be presumed that the clerk of said court acted in accordance with his duty in filing the same, and did so under authority from the court. It also appears that the suggestion by appellees comes too late; that appellees by their long delay have waived their right to ask for a dismissal. *City of Eagle Lake v. Lakeside Sugar Refining Co.*, 144 S. W. 709. However, the statement of facts, being filed September 10, 1913, in the trial court, and in

this court on September 17, 1913, will not be considered by us.

[3] The first question raised by appellant is whether defendants could prevent plaintiff from recovering a judgment upon the deed to W. S. Robson, in the absence of a decree granting a correction of such deed, so as to make it read that one-fourth was conveyed to L. W. Moore, instead of to Robson. The theory of appellant is that a suit would have to be brought to correct the deed, but this contention cannot be sustained. No mistake was made in the deed. It was drawn just as Robson and the sheriff intended it; but if the facts alleged are true, then L. W. Moore had the superior equitable title to the land, and Robson held the legal title in trust for said Moore. It is well established in this state that an equitable title can be sued upon or urged as a defense in an action of trespass to try title. *Neill v. Keese*, 5 Tex. 29, 51 Am. Dec. 746; *Stafford v. Stafford*, 96 Tex. 112, 70 S. W. 75; *Burdett v. Haley*, 51 Tex. 540; *Wright v. Thompson*, 14 Tex. 561; *Hix v. Armstrong*, 101 Tex. 275, 106 S. W. 317; *McKamey v. Thorp*, 61 Tex. 648; *Burns v. Ross*, 71 Tex. 516, 9 S. W. 468; *Pearce v. Dyess*, 45 Tex. Civ. App. 406, 101 S. W. 550; *Hill v. Moore*, 62 Tex. 612. In the case of *Stafford v. Stafford*, supra, it was held that a suit could be brought to recover land by the beneficiary of a trust upon his equitable title without a previous suit to declare the existence of the trust. The cases of *Railway v. Titterton*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 89, and *Gilmore v. Onell*, 139 S. W. 1162, cited by appellant, are not in point. Those cases, in determining questions of limitation, merely distinguish actions to correct or cancel a deed from actions to recover land.

It is further contended by various assignments of error that the judgment is not supported by the evidence. The court found that the execution deed described in plaintiff's petition was in fact made, and thereby Robson acquired the legal title to one-fourth of the half interest in the land thereby conveyed, but that plaintiff could not recover upon such title, because the judgment under which the sale was made was owned, one-half by Kaulbach and one-half by Moore & Duncan, a firm composed of L. W. Moore and John T. Duncan, and that the bid made by Robson evidenced by said deed was paid by crediting the amount thereof upon the judgment, and that neither Kaulbach, Moore, nor Duncan ever conveyed to Robson any interest in the judgment, and that Robson paid no costs; that W. S. Robson and John T. Duncan formed a partnership for the practice of law at the time the firm of Moore & Duncan was dissolved, but that the evidence fails to show that Robson & Duncan succeeded to the assets or business of Moore & Duncan. From these findings the court concluded as a matter of law that L. W. Moore's interest in the judgment entirely paid for the interest conveyed to Robson, wherefore a resulting trust

was created, and, as defendant held under L. W. Moore, plaintiff could not recover.

The court infers that Robson's interest must have been purchased with Moore's part of the judgment, doubtless because of the fact that Duncan had one-fourth conveyed to him; but as Duncan was looking after this matter for Moore & Duncan, and wrote the sheriff's return on the execution, as well as the sheriff's deed, and at the time he and Robson had dissolved partnership, it occurs to us that a more reasonable theory to deduce from the facts is that Duncan, as the partner who looked after the business of the dissolved firm of Moore & Duncan, agreed to give Robson one-fourth of the judgment for certain services in the matter of collecting the same, and that Duncan, in taking the title to the other one-fourth in his name, took same in trust for Moore & Duncan. All the facts indicate an agreement on the part of Duncan to convey Robson one-fourth, and, as Duncan had a one-fourth interest in the judgment, it seems that Robson should hold one-fourth, which should be charged to Duncan, or to the firm of Moore & Duncan, if the facts warrant it. The deed could have just as easily been made to L. W. Moore as it could to Robson, if the part of the judgment used in paying for the interest conveyed to Robson in fact belonged to L. W. Moore, and when that sale was superintended by Duncan, who knew all the facts and who wrote the instrument and had it executed, it will be presumed to speak the truth, in the absence of a full and satisfactory showing to the contrary. While the court concludes that Duncan made no transfer to Robson, that conclusion is in direct conflict with the facts found by the court upon which it is based, and, being unable to reconcile the two, we deem it proper to discard the conclusion and adhere to the facts.

[4, 5] The evidence is far from being clear and certain to the effect that L. W. Moore's interest in the judgment entirely paid for the interest conveyed to Robson, and we think that it is not sufficient to ingraft a trust by parol upon a deed. There is probably but one witness who could, by his testimony, throw light upon the transaction between Duncan and Robson, and he failed to testify. Robson and Moore are dead. Kaulbach knew nothing of the partnership arrangements of Moore, Duncan, and Robson. The only survivor of the two law firms did not disclose those arrangements. A trust should not be ingrafted on a deed to land, where the trustee is dead, without clear and satisfactory evidence, and evidence should not be satisfactory to any court when the best and most direct evidence of the existence or nonexistence is withheld by the party seeking to establish the trust. The case should be thoroughly investigated, and all known testimony tending to throw light upon the subject produced, scrutinized, and given such weight as

it may deserve. It was not incumbent on appellant to place the witness in question on the stand, for she might well have considered him adverse to her. Appellees should be compelled to fully disclose all testimony bearing on the trust. Justice to the memory of the dead, to the interests of the living, demands a full, fair, and exhaustive investigation.

The judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

[6] There is no merit in appellees' contention that the second notice of appeal is void. The trial court had control of its judgment during the term, and having entertained a motion for new trial after the first notice of appeal was given, and entered an order overruling same, the notice of appeal then given was valid. *Sass & Cohen v. Hirschfeld*, 23 Tex. Civ. App. 1, 58 S. W. 602.

[7, 8] As the transcript was filed during vacation, the presumption cannot be indulged that the clerk filed it by order of the court; but appellee cannot excuse his laches by saying that he called attention to the time of filing transcript as soon as he could after appellant's briefs were filed. He does not deny that he received notice as provided by rule 7b (142 S. W. xi) of the filing of the transcript, yet for more than seven months he failed to file any motion to dismiss. We therefore conclude that, if we should be in error in computing the time from the second notice of appeal, then appellee waived the late filing of the transcript.

We adhere to our decision upon the merits of the case, and overrule the motion for rehearing.

#### BARNARD & MORAN v. WILLIAMS. (No. 606.)

(Court of Civil Appeals of Texas, Amarillo.  
April 25, 1914. Rehearing Denied  
May 16, 1914.)

#### 1. VENUE (§ 17\*)—PRIVILEGE TO BE SUED IN COUNTY OF RESIDENCE—WAIVER.

A defendant who invokes the jurisdiction of the trial court by a cross-action thereby waives his plea of privilege to be sued in the county and precinct of his residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 28-31; Dec. Dig. § 17.\*]

#### 2. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—AMENDMENTS TO PLEADINGS.

A plaintiff suing in justice's court may on appeal to the county court amend his petition so as to conform to the evidence at the trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

#### 3. JUSTICES OF THE PEACE (§ 174\*)—ACTIONS—PLEADINGS.

A petition, in an action in justice's court, which states a cause of action on a written contract and in addition thereto a cause of action based on a subsequent oral contract, is not

subject to exceptions in the county court on appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

#### 4. EVIDENCE (§ 445\*)—PAROL EVIDENCE—ADMISSIBILITY.

Where an action was founded on a written contract and on a subsequent oral contract, proof of the oral contract not contradicting the written contract was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

#### 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for pasturing cattle, defendant reconvened for the conversion of cattle, and it was shown without objection that two of the cattle had died and that others had escaped through the fault of third persons, the error, if any, in admitting evidence of the custom of the country that parties taking cattle for pasturage were not responsible for the loss thereof, was not prejudicial, since plaintiff was only required to exercise ordinary care.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Gray County Court; Siler Faulkner, Judge.

Action by J. E. Williams against Barnard & Moran. From a judgment for plaintiff, defendants appeal. Affirmed.

E. C. Gray, of Higgins, for appellants.  
Charles C. Cook, of Pampa, for appellee.

HALL, J. This is an appeal from the county court of Gray county. The suit was filed by appellee in the justice court, upon a written contract, whereby the defendants agreed to pay plaintiff \$2.80 per head for keeping and pasturing certain cattle for them from November 1, 1912, to April 20, 1913. The contract also provided that if the cattle were delivered to plaintiff before November 1, 1912, defendants were to pay him \$3 per head; that 680 head of cattle were received by plaintiff on October 10, 1912. Plaintiff alleges that at the time of entering into the contract it was mutually understood that the cattle were not to be placed in plaintiff's pasture until October 25th, and that on October 10, 1912, when said cattle were placed in there, the defendants agreed to pay plaintiff the reasonable value of the pasturage from October 10th to October 25th. From a judgment for plaintiff in the sum of \$100, with interest from date, this appeal is prosecuted.

[1] The first assignment of error is that the court erred in overruling defendants' plea of privilege to be sued in the county and precinct of their residence. The record shows that this plea was filed in the justice court after motion to quash the citation had been sustained. In *C. & M. Ry. Co. v. Morris & Crawford*, 68 Tex. 49, 3 S. W. 457, the Supreme Court held that under R. S. of Texas 1879, art. 1243, providing that if the

citation or service is quashed upon motion of the defendant he shall be deemed to have entered his appearance to the succeeding term of the court, that the defendant had the option in such case to move to set aside the service or to appeal from any judgment rendered, and that it is not an unconstitutional act on the part of the Legislature to declare his appearance to quash the service shall be deemed a good appearance on the merits for the next term. *M., K. & T. Ry. v. Scoggin*, 57 Tex. Civ. App. 349, 123 S. W. 229. In any event, the appellants waived their plea of privilege and invoked the jurisdiction of the trial court by their cross-action for conversion. *Ramsey v. Cook*, 151 S. W. 346.

[2-4] Defendants filed a motion to strike out of plaintiff's first amended original answer the allegation as to the ambiguity of the written contract, because such allegation did not appear in the justice court. This is certainly not a new cause of action set up in the county court. The grounds of plaintiff's action in both courts are identical. It is said in *Wooley v. Corley*, 57 Tex. Civ. App. 229, 121 S. W. 1139, that a plaintiff in an action in the justice court could amend his petition on appeal to the county court so as to conform it to the details of the evidence developed at the trial without violating the rule against pleading a new cause of action by amendment. The amended pleading in the county court did nothing more than this and did not constitute a new cause of action. *Fowler v. Michael*, 81 S. W. 321. Plaintiff's action was upon a written contract and in addition thereto upon a subsequent oral contract. Proof of the oral contract in no way tended to vary or contradict the terms of the written contract, and the petition was not subject to exception, nor did the court err in admitting parol evidence to sustain the allegation.

Appellant's third, fourth, sixth, seventh, and eighth assignments, raising this question, are overruled. *Strauss v. Gross*, 2 Tex. Civ. App. 432, 21 S. W. 305; *Southern Kansas Ry. Co. v. Burgess*, 90 S. W. 189; *Heathery v. Record*, 12 Tex. 49.

[5] The fifth assignment is that the court erred in overruling the defendant's objection to the introduction of evidence showing the custom of the country, because the same was insufficiently alleged by plaintiff. The proposition announced by appellant is sound, but upon the whole record we think the error of the court was harmless. The defendants reconvened for the conversion of four head of cattle, and the evidence utterly failed to sustain the plea of conversion. It was shown, without objection, that two of the cattle had died; that the other two escaped through the fault of third parties. This testimony, not being objected to and being in explanation of the apparent default on the part of ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

pellant, in our opinion renders harmless the testimony admitted and objected to, to the effect that, according to the custom of the country, parties taking cattle for pasturage were not responsible for the loss thereof.

The ninth assignment raises practically the same question and is also overruled.

The tenth assignment of error has been disposed of by what we have said in disposing of the third assignment.

The twelfth assignment complains of the finding of the court to the effect that the plaintiff was required to use only ordinary care and, having used such care, was not liable for the loss of the cattle, because there were no allegations in plaintiff's pleadings to the effect that plaintiff had used such care. The evidence upon this point was admitted without objection and is not even challenged in this court.

Finding no reversible error in the record, the judgment is affirmed.

Appellant's motions to strike out appellee's brief and transcript are overruled.

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**W. D. CLEVELAND & SONS v. HOUSTON SPORTING GOODS STORE.**  
(No. 5266.)

(Court of Civil Appeals of Texas. San Antonio.  
April 22, 1914. Rehearing Denied  
May 20, 1914.)

**PRINCIPAL AND AGENT (§ 137\*)—POWERS OF AGENT—ESTOPPEL TO DENY AUTHORITY.**

Plaintiff was not estopped to deny that its agent, a traveling salesman, had authority to allow defendants a discount on goods sold to them when defendant knew nothing of the agent's authority and did not attempt to ascertain anything about it and was in no way misled by any act of plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492-494; Dec. Dig. § 137.\*]

Appeal from Washington County Court; W. R. Ewing, Judge.

Action by W. D. Cleveland & Sons against the Houston Sporting Goods Store. From a judgment for plaintiff less an amount of \$178.66 claimed by defendant, plaintiff appeals. Reversed and rendered.

Mathis, Teague & Embrey, of Brenham, and Hunt, Myer & Teagle, of Houston, for appellant. L. M. Williamson, of Houston, for appellee.

FLY, C. J. Appellant sued F. W. Martin, doing business as the Houston Sporting Goods Store, to recover the sum of \$411.61, alleged to be due on an account for certain ammunition sold to appellee by appellants. Appellee sought to avoid payment of a portion of the account by a plea that the agent who sold the goods to appellee agreed to allow a discount of 2½ per cent. on all purchases made of appellants, that he had bought \$7,146.45 worth of goods, and that on that sum appellee was entitled to a discount

of \$178.66. The cause was tried by the court, and judgment was rendered in favor of appellants for the amount sued for, less the sum of \$178.66 claimed by appellee.

The evidence showed that appellee bought the goods from appellants, and that the sales were made through Ed Moch, an agent of appellants. Gardiner, his wife, and another witness swore that Moch agreed to allow appellee a discount on all ammunition sold by appellants to appellee. Moch denied that he did so and testified that he had no authority to allow such a discount on ammunition. That he had no such authority was testified to also by A. S. Cleveland, who stated that Moch had authority to arrange for discounts on all goods except ammunition and a few other articles, the price for those being fixed by the manufacturers and could not be sold at a discount by appellants. Appellee, nor Gardiner, had no knowledge of any authority being given Moch to grant discounts on any goods.

The uncontroverted evidence showed that Moch had no authority to promise a discount on the amount for which the ammunition was sold, and appellee had no knowledge of facts connected with the authority of Moch that would lead him to believe that Moch had such authority. The act being unauthorized, appellants would not be bound by his promise, because there was no act of appellants proved that induced appellee to believe that Moch had any such authority, and it is not pretended that appellants ratified the contract made by Moch. Appellee never at any time claimed the discount, although he made numerous payments on ammunition bought at different times during a year's time, until payment of the balance was sought to be enforced. The doctrine of apparent authority to act as an agent is founded on the law of estoppel, but in every case in order to create estoppel the authority to act must be based upon facts. No man can profit by estoppel unless he has been led to act by reason of the conduct or words of another. The circumstances, known to the third person, must be such as to clothe the agent with apparent authority. The doctrine in relation to agency by estoppel does not apply unless the person dealing with the pretended agent and invoking the doctrine relied upon and was misled by his apparent authority, or, in other words, unless he was misled by the representation or conduct of the alleged principal. He must have been actually misled and induced to act to his prejudice by reason of the principal's conduct; he having on his part exercised due diligence to ascertain the truth. Clark & Skyles, Agency, p. 149.

The evidence fails to show that appellee or his agents knew of the course of conduct of appellants towards their agent, or that any inquiry whatever was made as to the agent's authority. Appellee could not have been misled as to the authority of the agent

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

because he knew nothing about it, and did not attempt to ascertain anything about his authority. If Moch had authority to allow discounts on goods sold by him for his principals, appellee did not know it. Appellants had never acted in any manner so as to lead appellee to believe that Moch was authorized to contract for discounts on ammunition. He had never had any dealings before with appellants or their agent and had no reason to infer that the agent had the authority claimed by him. Appellee relied altogether upon the representations of Moch, and he made no effort to ascertain the scope of his authority. Appellants were not estopped to deny the authority of Moch. *McGoldrick v. Willets*, 52 N. Y. 612. Appellee neither pleaded nor proved facts raising an estoppel.

The judgment is reversed, and judgment here rendered that appellants recover of appellee the sum of \$411.61 with 6 per cent. interest thereon from January 1, 1913, and all costs in this behalf expended.

ROSS et al. v. BLUNT et al. (No. 6601.)  
(Court of Civil Appeals of Texas. Galveston.  
April 6, 1914. Rehearing Denied  
May 7, 1914.)

1. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error that the verdict of the jury is unsupported by the evidence, that it is contrary to law, and that the court erred in instructing a verdict in favor of defendants, are too general for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

2. SPECIFIC PERFORMANCE (§ 35\*)—RIGHT TO CONTRACTS

Where the husband of the owner of the legal title of land contracted for its sale, the purchaser is not entitled to specific performance unless he shows that the owner's husband was acting as her agent, or that she knew he was so acting and ratified the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 102-106; Dec. Dig. § 35.\*]

3. SPECIFIC PERFORMANCE (§ 121\*)—ACTIONS—EVIDENCE.

In a suit for specific performance of a contract for the sale of land, made between plaintiff's guardian and the husband of the owner of the legal title, evidence held insufficient to show that the wife was a party to the contract, or that she assented to or ratified her husband's act.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

4. SPECIFIC PERFORMANCE (§ 97\*)—RIGHT TO TENDER.

Purchasers are not entitled to specific performance of a contract for the sale of land, unless they have tendered performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.\*]

Appeal from District Court, San Jacinto County. L. B. Hightower, Judge.

Action by Turner Ross and others against

R. E. Blunt and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

William McMurrey, of Cold Springs, and A. T. McKinney, of Huntsville, for appellants. G. I. Turnley, of Houston, and Campbell & Campbell, of Livingston, for appellees.

McMEANS, J. This is an action of trespass to try title, brought by Turner Ross and Lucy McMurrey, joined by her husband, R. J. McMurrey, against R. E. Blunt and his wife, S. A. Blunt, to recover a tract of 126 acres of land described in their petition. Mrs. Blunt having died pending the trial, her heirs, John Harrell, Sr., Peyton Harrell, Charles Harrell, Wash Harris, and Will Harris, were made parties defendant. The plaintiffs, in addition to the ordinary allegations in actions of trespass to try title, further alleged in their petition that in July, 1892, one A. W. Harrell was appointed guardian of the estates of the said Ross and Lucy McMurrey, the said plaintiffs then being minors, by the probate court of San Jacinto county, Tex., and that he qualified as such; that said plaintiffs were the owners of an estate consisting of real and personal property in the state of Virginia; that it was decided that it would be to the advantage of said plaintiffs to sell said property in Virginia and invest the proceeds of such sale in real estate in Texas; that in pursuance of this plan one G. D. Gray was appointed guardian of said plaintiffs by the chancery court of Culpepper county, Va., in 1897, and the said property of said plaintiffs was, by the order of said court, sold and the proceeds remitted to the said A. W. Harrell, the Texas guardian of said plaintiffs. Plaintiffs further averred that in February, 1898, the said R. E. Blunt, acting for himself and as the agent of the said Mrs. S. A. Blunt, entered into a contract in writing with the said A. W. Harrell, as guardian of said plaintiffs, for the sale of the tract of land described in their petition to the said Harrell, for the use and benefit of said plaintiffs, in consideration of the sum of \$820. Five hundred dollars was to be paid in cash upon the execution and delivery to the said Harrell by the said Blunt and wife of a deed of conveyance of said land for the use and benefit of said plaintiffs, the balance to be paid in one and two years, in payments of \$160 each, for which the said Harrell was to execute his promissory notes, to bear interest from date at the rate of 8 per cent. per annum, in which a lien for the unpaid purchase money was to be retained; that the said Harrell was to take possession of said land, but that the rents for the year 1898 were to go to the said Blunt and wife, which said contract has been lost. Plaintiffs further averred that in pursuance of said contract the said Blunt and wife delivered possession of said tract to the said Harrell, for the use and benefit of

said plaintiffs, who remained in its possession until his death in 1903, during which period the said Harrell erected permanent and valuable improvements thereon of the value of \$1,500, for which purpose he expended that amount of the funds of said plaintiffs. Plaintiffs further averred that in compliance with the terms of said contract Harrell paid to the said Blunt and wife, of the funds of said plaintiffs, the following sums: February 19, 1898, \$150; April 28, 1898, \$200; January 2, 1899, \$150; January 2, 1900, \$30; April 28, 1903, \$50—in which payments the said Mrs. S. A. Blunt acquiesced, and received the same for her own use; and in April, 1903, the said Turner Ross and Lucy McMurrey, having attained their legal majority, ratified the acts and doings in that behalf by their guardian, A. W. Harrell, and the said Harrell and the plaintiffs entered into an agreement in writing between themselves and the said Blunt and wife whereby they agreed to complete said sale, and whereby they became liable to pay to the said Blunt and wife the balance then due on said contract, the consideration thereof being that the said Blunt and wife should make to the said Harrell, for the use and benefit of the said Ross and Lucy McMurrey, a deed to said premises; that in April, 1903, the said Blunt and wife executed a deed conveying said premises to the said Harrell for the use and benefit of the said Ross and Lucy McMurrey, duly acknowledged by said grantors, and deposited the same with one C. E. Turnley, to be delivered to the said Harrell upon his compliance with the terms of said contract and agreement. Plaintiffs further averred that in September, 1903, the said Harrell departed this life; that plaintiffs sought a completion of said contract, and tendered to the said Blunt and wife the balance of the purchase money due on said contract; that the said Blunt and wife, with intent to deceive these plaintiffs, represented to them that, inasmuch as the said Harrell was dead, it was proper for them to make a deed directly to the said Ross and Lucy McMurrey, and persuaded these plaintiffs to permit the said Blunt to withdraw the said deed from the possession of the said Turnley, with the promise that the grantors therein would execute a deed conveying said premises directly to the said Ross and Lucy McMurrey, to which proposition the said plaintiffs agreed; that when the said Blunt and wife obtained possession of said deed from the said Turnley they forcibly took possession of said tract of land, and ejected plaintiffs, and refused to execute said deed according to their promise, and still refuse so to do, and have converted to their own use the rents on said land since January 1, 1904, of the value of \$400 per annum. They prayed that if it should be held by the court that plaintiffs are not entitled to recover by reason of their action of trespass to try title, then for judgment for the specific performance of said contract, for the

rents and profits so converted as aforesaid, for costs of suit, and general relief, and tendered into court whatever balance should be found to be due on said contract with interest thereon. Defendants answered by general denial and a plea of not guilty, and by special pleas of the statutes of limitations of two, three, four, five, and ten years.

[1] The case was tried before a jury, and after the introduction of evidence had been concluded the court, upon motion of defendants, instructed the jury to return a verdict in their favor, which was done, and thereupon judgment was accordingly entered in favor of the defendants and against the plaintiffs for the land in controversy, from which judgment the plaintiffs have appealed, and seek to have the judgment reversed upon the following three assignments of error: (1) "The verdict of the jury is unsupported by the evidence adduced on the trial and is contrary thereto." (2) "The verdict of the jury is contrary to law." (3) "The court erred in instructing a jury in favor of defendants." Under decisions too numerous to cite, these assignments are too general to require our consideration; but, even if they were considered they are without merit, for the reasons hereinafter stated.

[2] It was admitted on the trial that there was a perfect chain of title to the land in controversy from the sovereignty of the soil to Mrs. S. A. Blunt. It was also admitted that Mrs. Mollie L. Harrell (then Ross) was the guardian of the persons and estates of plaintiffs, Turner Ross and Mrs. Lucy McMurrey. Afterwards Mrs. Ross married A. W. Harrell, and the latter was then appointed guardian pro forma with his wife. The plaintiffs Turner Ross and Mrs. Lucy McMurrey were the owners of an estate in Culpeper county, Va., consisting principally of two tracts of land in said county, and their guardian, Mrs. M. L. Ross, in 1885, made application to the circuit court of said county for the sale of the lands belonging to her wards and minor children, for the purpose of investing the proceeds of such sales in Texas lands. An order was made by the court as prayed for, and one G. D. Gray was appointed commissioner to make such sales and as guardian of said plaintiffs in the state of Virginia, and the smaller of said tracts was sold for \$150, which sale was confirmed by the court. Mrs. M. L. Ross having intermarried with A. W. Harrell, he became a party to said proceeding, and as guardian for said minors, on December 28, 1896, made a contract with one J. P. Mahoney for the sale of the larger tract for \$3,000, payable in six annual payments of \$500 each, beginning November 1, 1897, with interest from date of said contract, which sale was confirmed by the court. Harrell having made application to the circuit court for an order directing that the proceeds of said sales be paid over to him as guardian of said plaintiffs, as well



as all money in the hands of said Gray, an order was made by the court as prayed for, and the said Gray filed his report, showing remittances to Harrell of sums of money aggregating \$1,325, which report was approved by the court. On February 15, 1898, the defendant R. E. Blunt, without being joined by his wife, Mrs. S. A. Blunt, in whom was the legal title, made a contract with A. W. Harrell, the guardian, in behalf of his wards, for the sale of the land in controversy for the sum of \$820; \$500 to be paid in cash, and the balance to be evidenced by notes and secured by a vendor's lien on the land, with interest from the date of sale. The record does not disclose whether this contract was oral or in writing; but this is immaterial, in the view we take of the case. Afterwards Harrell at various dates from February 19, 1898, to January 3, 1903, paid R. E. Blunt various sums of money, aggregating \$530. Harrell at the time of the contract went into possession of the land, and remained in possession until his death in 1903. There was much additional testimony adduced tending to prove the execution of the contract of sale by R. E. Blunt to the plaintiffs.

We think plaintiffs failed to make out their case, because they wholly failed to show that the contract made by R. E. Blunt was joined in by his wife, Mrs. S. A. Blunt, the owner of the legal title, or that in making said contract R. E. Blunt was acting for her or at her instance, or that she knew he was so acting. We will not discuss here the question of whether Mrs. Blunt, a married woman, could have been bound by her executory contract of sale, had it been shown she had made such; for in the absence of any proof that she had made or authorized the making of such a contract, such question does not arise. But the sole contention of appellant arises upon the making of the contract by the husband, who had no title, and his subsequent acts in relation thereto; it not being shown that he was acting in behalf of his wife as her agent, or at her instance, in any manner to bind her. The contract, if it was in writing, was not introduced in evidence or its absence accounted for, or its contents proved. While appellants' contention is that Harrell in contracting to purchase the land was buying it for his wards, the appellants, the evidence fails to show that he used the money belonging to them in making the payments to R. E. Blunt, and failed to show that he had used their funds in making improvements on the land, if any were made.

[3] It appears from a letter written by R. E. Blunt to plaintiff R. J. McMurrey, December 7, 1903, that the contract of sale made by him with Harrell was for the benefit of the latter's wards, the plaintiffs. It also appears, from a letter written by said Blunt, on October 9, 1903, to plaintiff Lucy McMurrey, that a deed to the tract sold to said Harrell

was in the possession of Judge Geo. I. Turnley, Blunt's attorney, which he had held since the previous April with instructions to deliver the same to said Harrell upon the compliance by the latter with the contract of sale. This letter continues as follows: "Since the death of our brother [meaning A. W. Harrell] I think it necessary to make a new deed to you and your brother, and have written Mr. Turnley to comply with your request. You can confer with Mr. Turnley, and get him to make out all necessary papers and forward to me for our signatures, and the same will have my prompt attention." On November 21, 1903, said Blunt wrote to Mrs. Mollie E. Harrell as follows: "Inasmuch as we still hold the land I sold him [A. W. Harrell], we will not, for the present, at least, sign deed sent us by Lucy and Turner [the plaintiffs], and will claim the amount of money he paid on the place as rent for the five years he held it. \* \* \* I have instructed Mr. Turnley to take possession of our place on January 1, 1904 (or earlier, if necessary), and act as my agent in disposing of it."

[4] There is nothing in the letters to prove, and the testimony does not otherwise raise the issue, that Mrs. S. A. Blunt was a party to the contract of sale, or that she had signed the deed left by her husband with Mr. Turnley, or even that she authorized, assented to, or acquiesced in the acts of her husband in relation thereto. And even if the testimony had so shown, there was no evidence that the guardian, Harrell, or the plaintiffs, at any time tendered performance of the contract of sale, or in any other manner placed themselves in a position to demand specific performance. Appellants, having failed to prove the execution of a contract of sale to them through their guardian by Mrs. Blunt, the owner of the title, or any fact that would bind her to make the conveyance, were not entitled to a judgment, and the court, in the circumstances, correctly instructed a verdict against them. The judgment of the court below is affirmed.

Affirmed.

#### PERKINS v. PERKINS. (No. 6550.)

(Court of Civil Appeals of Texas. Galveston.  
April 7, 1914. Rehearing Denied  
April 30, 1914.)

#### 1. ADVERSE POSSESSION (§ 62\*)—HOSTILE POSSESSION—HOMESTEAD RIGHT.

Where the widow had a right of homestead, her possession was not adverse to the brother and only heir of decedent, who had no right of possession and could not have recovered possession, and her claim of ownership of the whole of the property did not affect her right to its use and occupancy as a homestead; and hence the brother was not required to sue within ten years after knowledge of defendant's claim to prevent it from ripening into a title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 324-327, 329-332; Dec. Dig. § 62.\*]

## 2. BASTARDS (§ 104\*)—PROPERTY—INHERITANCE.

Under the express provisions of Rev. St. 1911, art. 2473, children of the same mother inherit from each other without regard to whether their parents were legally married.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 251, 257-262; Dec. Dig. § 104.\*]

## 3. PARTITION (§ 46\*)—PARTIES—INTEREST.

In partition by the brother and only heir of deceased against his widow claiming a right of homestead, parties having no interest in the property should not have been made parties to the suit.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. § 46.\*]

## 4. PARTITION (§ 85\*)—ISSUES—IMPROVEMENTS.

Where plaintiff in partition had no right to recover possession of his one-half interest and hence no right to partition, the issue of defendant's improvements in good faith could not be determined in a suit.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

## 5. JUDGMENT (§ 712\*)—PARTIES CONCLUDED—PERSONS NOT PARTIES.

Even if the probate court had jurisdiction of the question of title to land and such title had been put in issue by pleadings thereunder, its judgment that the fee-simple title therein vested in deceased's widow would not be binding on a surviving brother and heir who was not a party to that suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. § 712.\*]

## 6. PARTITION (§ 74\*)—FORM OF JUDGMENT—EXCEPTION OF HOMESTEAD RIGHT.

Though plaintiff in partition failed to establish the defendant's abandonment of her homestead right, and hence was not entitled to partition, it was proper for the court to determine the issue of defendant's asserted title to all the property, so that a judgment decreeing title to each of the parties, but denying plaintiff's right to partition so long as defendant might occupy it as a homestead, was proper.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 209; Dec. Dig. § 74.\*]

## 7. HOMESTEAD (§ 145\*)—ABANDONMENT—OFFER TO SELL.

A widow's offer to sell the property was not an abandonment of her homestead rights therein.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 268, 277, 280, 285; Dec. Dig. § 145.\*]

## 8. HOMESTEAD (§ 145\*)—ABANDONMENT—REMOVAL.

The fact that a widow was not living on the property was not an abandonment of her homestead rights, where she had not acquired another home.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 268, 277, 280, 285; Dec. Dig. § 145.\*]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Partition by Alexander Perkins against Laura R. Perkins. Judgment for plaintiff, subject to defendant's homestead, and defendant appeals. Affirmed.

James B. & Charles J. Stubbs, of Galveston, for appellant. Stewarts, J. E. Quaid, and Edward F. Harris, all of Galveston, and Harris & Harris, of Houston, for appellee.

PLEASANTS, C. J. This is a suit for partition of lot No. 10 in the southwest block of outlot No. 118 in the city of Galveston, brought by the appellee against the appellant. The petition alleges that plaintiff is the owner of an undivided one-half of said lot and that the defendant owns the remaining one-half. The prayer of the petition is for judgment establishing plaintiff's title and for partition of the lot, or its sale and partition of the proceeds of such sale, equally between plaintiff and defendant. In addition to a general denial and plea of not guilty, defendant pleaded limitation of three, five, and ten years, and improvements in good faith made. She also pleaded that the lot had been set aside to her in fee simple by a decree of the district court of Galveston county on December 13, 1902, in a suit in said court which had been appealed thereto from the county court of said county, and she claimed title by virtue of said decree and by limitation. Plaintiff filed a supplemental petition, the substance of which we copy from appellee's brief, as follows: "That the property was the separate estate of Albert Perkins, who died intestate and without issue September 8, 1900, leaving surviving his wife, defendant herein, and his brother, plaintiff herein, and no other heirs. That same was occupied by defendant and her said husband as homestead at the date of death of said Albert, who was drowned in the storm of September 8, 1900, at which time all improvements were destroyed. What was known as a relief committee donated a house which was erected on said lot just after the storm and became a part of the real estate. Defendant continued to occupy the property as homestead for several years and was entitled to such occupancy as the surviving widow. On or about January 1, 1912, defendant removed from and abandoned said premises as homestead and left Texas, whereupon plaintiff became entitled to have partition. That defendant has since her removal collected \$350 rents which plaintiff pleads as an offset to defendant's claim for improvements. That limitation did not run on account of defendant's right of occupancy of homestead. That about January 1, 1912, defendant attempted to sell and did enter into a contract whereby she attempted to sell the entire property, though she only owned a one-half interest therein. That it is necessary that plaintiff secure a judgment establishing his right of record to a one-half interest in the property. That defendant is charged with the duty of paying taxes during her use and occupancy, but has permitted taxes to accumulate to the extent of \$200. That the lot is 43 feet 10 inches wide, by 120 feet long, and incapable of partition, as to divide same into two parts would destroy the value of each part. Plaintiff prays judgment for his one-half interest, for accounting, for pay-

ment of taxes, and for partition, and in the alternative, should partition be refused, plaintiff asks that he have judgment establishing his title to an undivided one-half interest." In answer to this petition defendant filed supplemental answer reiterating her pleas of limitation and of title under the decree of the district court of Galveston county and her plea of improvements in good faith. She further expressly denies that she has ever abandoned the property as her homestead. After hearing the evidence, the trial court instructed the jury to return a verdict in favor of plaintiff for an undivided one-half interest in the property, in favor of defendant for the other one-half, and in favor of defendant on her claim of homestead. Upon the return of this verdict, judgment was rendered in accordance therewith decreeing title to an undivided one-half of the property to each of the parties, but denying plaintiff's right to partition so long as defendant may continue to use the property as her homestead.

The record discloses the following facts: The property in controversy was acquired by Albert Perkins on February 20, 1893. Subsequent to his acquisition of the property, he married the defendant Laura Perkins, and it became their homestead and was occupied by them as such until the storm of 1900, when all of the improvements were destroyed and Albert lost his life. Soon after the storm, the defendant, with the assistance given her by the relief committee, placed other improvements thereon, and the property, though rented for much of the time since the second improvements were placed thereon, has not been abandoned as homestead by the defendant. She has been out of the state for her health five or six times and had remained away for a year or two at a time. She had offered to sell the property, but did not intend to abandon it as a homestead unless she could sell it upon satisfactory terms. She has acquired no other home. When she was not living on the place herself, it has been rented and occupied by her tenants. It was vacant sometimes for a month or so between the going out of one tenant and the coming in of another, but with this exception it has been continuously occupied by the defendant or a tenant under her for more than ten years before this suit was brought. Defendant has claimed title to all of the property at all times.

There is evidence tending to show that plaintiff, who assisted in improving the place in 1901 after the storm, knew that defendant claimed title to all of the property. Defendant has paid all taxes due on the property from 1900 to 1912 inclusive, but the taxes were not paid each year as they accrued. She has spent \$400 or \$500 in improving the property, and the improvements placed thereon by her are worth said amount. After the death of Albert Perkins a former wife of his, from whom he had been divorced, qualified as administratrix of his estate. A probate pro-

ceeding in the county court involving the claim of said divorced wife to an interest in an insurance policy left by Albert, and claims of defendant for homestead and allowance in lieu of exempt property and for a year's support, was appealed to the district court of Galveston county. Upon this appeal the district court entered a decree adjudging the divorced wife \$400 out of the proceeds of said insurance policy and adjudging the remainder of said proceeds to defendant as allowance in lieu of exempt property and for a year's support, and further decreeing "that lot number ten (10) in southwest quarter of outlot number one hundred and thirteen (113) and improvements in the city and county of Galveston, Texas, which was the homestead of decedent and his wife, Laura Perkins, be and the same hereby is set apart to, and fee-simple title therein vested in said Laura Perkins as and for her homestead." Plaintiff is a full-brother of Albert Perkins; they having been born of the same father and mother, both of whom are dead. The father of plaintiff and Albert had another son, George Perkins, who was not a son of the mother of plaintiff and Albert. George is now dead and has left several children who are now living. George, Albert, and plaintiff were all born in slavery and their parents were slaves. It is not shown that their father lived with either of the women, by whom he begot the sons named, as his wife until his or her death, or that he was so living with either of them on August 15, 1870. Plaintiff and Albert Perkins were the only children of their mother. Albert left no children.

[1] The first assignment of error presented in appellant's brief assails the action of the trial court in instructing a verdict for the plaintiff on the ground that the evidence raised the issue of title in defendant by limitation to all of the property in controversy and that issue should have been submitted to the jury.

The assignment is without merit. If it be conceded that the evidence was sufficient to sustain a finding that defendant's claim of ownership of all of the property was known to plaintiff for more than ten years before the suit was brought, that such claim was continuous during all of said time, and that defendant's possession was continuous during said ten years, no title by limitation could be acquired by her because her possession of the property as a homestead being lawful was not adverse to plaintiff. The defendant's claim of ownership of the whole of the property did not affect her right to its use and occupancy as a homestead, and plaintiff could not because of such claim recover possession of any part thereof. This being true, his title would not be lost by his failure to sue within ten years after he received notice of defendant's claim.

The case is not like that of a tenant in

common who repudiates the title of his cotenant. In such case the tenant in possession has no right to the possession of the whole of the premises as against his cotenant, and, when he repudiates the rights of his cotenant and takes possession of the whole, the cotenant can sue and recover possession of that portion of the property owned by him.

Plaintiff having no right of possession in this case, he was not required to bring suit in order to prevent defendant's claim ripening into a title. There can be no difference in principle, so far as limitation is concerned, between the possession of one holding under a homestead right and the possession of a life tenant, and it is well settled that limitation will not run against a remainderman in favor of the life tenant, or one claiming under him during the life of such tenant. *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 885; *Millican v. McNeill*, 102 Tex. 189, 114 S. W. 106, 21 L. R. A. (N. S.) 60, 132 Am. St. Rep. 863, 20 Ann. Cas. 74; *Covan v. Bynum*, 17 Tex. Civ. App. 180, 43 S. W. 319; *Beaty v. Clymer*, 32 Tex. Civ. App. 322, 75 S. W. 540; *Meurin v. Koplplin*, 100 S. W. 984; *Keaterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97.

[2] The fact that the evidence fails to show that the father and mother of plaintiff and Albert Perkins were legally married does not affect plaintiff's right to recover. Plaintiff and Albert, being children of the same mother, would inherit from each other without regard to whether their father and mother were legally married. Article 2473, Revised Statutes; *Berry v. Powell*, 47 Tex. Civ. App. 599, 105 S. W. 345.

[3] The half-brother, George, not being a child of the mother of Albert, did not inherit from him, and his children, having no interest in the property, should not have been made parties to this suit.

[4] The plaintiff having no right to recover possession of his one-half of the property, and no right of partition, the issue of improvements in good faith could not be determined in this suit, and the trial court properly so held.

It is hardly necessary to notice appellant's claim of title under the decree of the district court of Galveston county before set out, and we do not understand that counsel for appellant contend that this decree vested any title in appellant.

[5] The probate court had no jurisdiction of the question of title, and the appeal from that court to the district court could not confer upon the latter court jurisdiction to hear and determine such question. In addition to this, it does not appear that any question of title was raised by the pleading in that proceeding. But if the court had had jurisdiction of the question and the title to the property had been put in issue by the pleading, plaintiff, not having been a party

to the suit, would not be bound by the judgment.

[6] Plaintiff, having failed to establish the abandonment by the defendant of her homestead right in the property, was not entitled to partition, and, if defendant had only asserted her homestead right and had not by affirmative pleading claimed title to all of the property, the proper judgment would have been that plaintiff take nothing by his suit. In such case the judgment in favor of defendant would not have been an adjudication of the question of title. But when defendant, in addition to her homestead claim, asserted title to all of the property, it was proper for the court to determine that issue. A judgment against defendant on her claim of title to all of the property would have been sufficient, but we can see no objection to the form of the judgment rendered.

[7, 8] Appellee has presented a cross-assignment complaining of the judgment of the court refusing him partition of the property. The assignment is too general in its terms to require our consideration; but, if it could be considered, it could not be sustained. There is no evidence of an abandonment by defendant of her homestead right in the property. Her offer to sell the property was not an abandonment of her homestead rights therein, and it is well settled that the fact that she was not living on the property was not an abandonment of her homestead rights; she not having acquired another home. *Foreman v. Meroney*, 62 Tex. 723.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

ANGELINA & N. R. R. CO. et al. v. DUE.<sup>†</sup>  
(No. 6538.)

(Court of Civil Appeals of Texas. Galveston.  
April 17, 1914. Rehearing Denied  
May 14, 1914.)

1. MASTER AND SERVANT (§ 88\*)—INJURIES TO SERVANT—RELATION OF PARTIES.

Where a lumber company had constructed portions of a railroad track which it had turned over to a railroad company upon payment of the cost of construction, and was engaged in constructing an additional portion of the track which had not yet been turned over to or paid for, or operated by the railroad company, the railroad company was not liable for injuries to an employé of the lumber company, caused by the negligence of other employés of that company, even though the stockholders and general officers of the two companies were largely the same.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-151; Dec. Dig. § 88.\*]

2. MASTER AND SERVANT (§§ 278, 281\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—MASTER'S NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

In an action for injuries received by a railroad construction employé, evidence held

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

sufficient to warrant findings that the engineer and fireman of the work train were negligent in starting the train without warning, that the injured servant was not negligent, and that those operating the train saw him in time to avoid the injury and failed to use proper care to prevent it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977, 987-996; Dec. Dig. §§ 278, 281.\*]

**3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.**

A railroad construction employé was not negligent, as a matter of law, in stepping upon the track in front of a work train which was standing still at the time, and in proceeding down the track toward the water barrel without looking back, since he had the right to rely upon the performance by those in charge of the engine of their duty to give a warning before they started the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**4. MASTER AND SERVANT (§ 228\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATUTE.**

Acts of 31st Leg. (1st Ex. Sess.) c. 10, § 2, which provides that, in actions brought under that act by employes of a common carrier by railroad for personal injuries, the contributory negligence of the employé shall not bar recovery, when construed with the other sections of the act which apply to all railroads, and in the light of the manifest purpose of the act, applies to a railroad operated by a lumber company in conducting its own business, as well as to a common carrier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

**5. MASTER AND SERVANT (§ 97\*)—INJURIES TO SERVANT—NEGLIGENCE—ANTICIPATION OF INJURY.**

Where the engineer and fireman of a work train started it without giving any warning, although they knew that there were a number of workmen around the train, they must have anticipated that such negligence might result in injury to a workman, especially where the engineer testified that it was an absolute rule to give a signal before starting such a train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

**6. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PETITION—LAST CLEAR CHANCE.**

Where a petition for injury to a railroad construction employé charged that the defendant's servants were negligent, in that they saw plaintiff pass the engine, and knew that he was a short distance in front thereof, and was ignorant of their intention to start, and knowing and seeing his position in time to have avoided the injury, they carelessly started the train, the allegation is sufficient to raise the issue of last clear chance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

**7. MASTER AND SERVANT (§ 284\*)—INJURIES TO SERVANT—INSTRUCTIONS—LAST CLEAR CHANCE.**

Where plaintiff, an injured servant, had testified at a former trial that, when he passed the engine of a work train which later struck and injured him, the fireman was in the gangway, from which place he could not have seen the plaintiff when he stepped upon the track in

front of the engine, and at the second trial testified that the fireman was at his window, from which the plaintiff could have been seen, and his later testimony was corroborated by other witnesses, it was for the jury to say which testimony was true, and an instruction upon the doctrine of the last clear chance which was predicated upon the later testimony was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.\*]

**8. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.**

In an action for injuries received by a railroad construction employé who was struck by a work train, testimony by the engineer that he could have seen the plaintiff if he had been where the testimony of the plaintiff and other witnesses showed that he was, and that the engineer looked before he started the train but did not see any one on the track, is sufficient to take to the jury the issue that the engineer did see the plaintiff; the presumption arising from the facts not being conclusively rebutted by the denial by the engineer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**9. TRIAL (§ 191\*)—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMING FACTS.**

In an action for injuries to a railroad construction employé, an instruction upon the doctrine of last clear chance which stated that, if the jury believed from the preponderance of the evidence that the engineer and fireman knew that the plaintiff was in front of the engine in time to have avoided the injury, the defendant was liable was not erroneous, as assuming that the engineer and fireman discovered plaintiff's peril in time to have avoided the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**10. MASTER AND SERVANT (§ 137\*)—INJURIES TO SERVANT—INSTRUCTIONS—MASTER'S DUTY TO WARN.**

An instruction that, where persons have a right to be on the track near a train that is standing still, it is the duty of the employes to give a warning before starting the train, and that the failure to do so would be such negligence as would entitle another employé injured as a result thereof to recover, is not erroneous, since reasonable minds could not differ in the conclusion that ordinary care in such case required the warning to be given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

**11. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—INSTRUCTION—MASTER'S DUTY TO WARN.**

A statement in such a charge that it was the duty to give some warning, such as by ringing the bell or blowing the whistle, is not erroneous, as requiring a warning to be given in one of those two ways, and not otherwise.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**12. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

If the charge was open to that construction, the error was harmless, there being no evidence that a warning was given in any manner other than by ringing the bell or blowing the whistle.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

# 18. DAMAGES (§ 182\*)—EXCESSIVE DAMAGES—Loss of Foot.

A verdict for \$15,000 for damages sustained by a minor whose foot was so severely injured by a railway locomotive that its amputation was necessary is not so excessive as to justify the belief that the jury were moved by passion or prejudice, or by some improper influence.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 182.\*]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

Action by James W. Due, by his next friend, S. T. Due, against the Angelina & Neches River Railroad Company and the Angelina County Lumber Company. Judgment for plaintiff against both defendants, and both defendants appeal. Judgment against the Railroad Company reversed and rendered in its favor, and judgment against the Lumber Company affirmed.

Arthur A. Seale and Wm. A. Wade, both of Nacogdoches, Mantooth & Collins, of Lufkin, Young & Stinchcomb, of Longview, and T. D. Wynne, of Fordyce, Ark., for appellants. C. M. McKinnon, of Groveton, King & King, of Nacogdoches, and Platt & Nelms, of Groveton, for appellee.

PLEASANTS, C. J. Appellee, by his next friend, S. T. Due, brought this suit against appellants, Angelina & Neches River Railroad Company and Angelina County Lumber Company, to recover the sum of \$25,000, as damages for personal injuries sustained by him, and alleged to have been caused by the negligence of appellants. The petition alleges, in substance, that appellee at the time of his injury was in the employment of both of the defendants as a surfacer engaged with others in the construction of a railroad for defendants; that, while in the proper performance of the duties of his employment, the employes of defendants operating a work train on said railroad negligently put said train in motion without ringing the bell or sounding the whistle on the engine attached thereto, or giving any warning to appellee, and ran said engine against appellee, knocking him down and so injuring his foot as to require its amputation. The petition further alleges that the operatives of said engine and train were negligent in that, after they saw and realized appellee's peril, they failed to use the means at their command to prevent his injury.

The pleadings of the appellants, including their general denial, put in issue the allegations of the appellee, and permitted them to make the following defenses:

(1) That the appellee and the engineer and fireman were not employes or representatives of the appellant railroad company, but were, at the time of the injury, employes of the appellant lumber company.

(2) That the appellee placed himself on the track ahead of the engine when he knew, or by the exercise of ordinary care could have

known, it was going to move in his direction, and was therefore guilty of contributory negligence.

(3) That the Angelina County Lumber Company was not a common carrier, and that the contributory negligence of the appellee prevented a recovery against it.

(4) That the evidence was not sufficient to submit the issue of discovered peril to the jury.

(5) That the plaintiff received his injury as the result of his own negligence, and not by reason of any negligence of either of the appellants.

(6) That plaintiff's injury resulted from a risk assumed by him, and defendants were not liable therefor.

The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$15,000.

[1] The evidence shows that the railroad, in the construction of which appellee was employed, was being constructed by the lumber company. Appellee and the others engaged in the construction of said road, including the operatives of the work train by which appellee was injured, were employed and their wages paid by the lumber company. After the road was completed, which was shortly after appellee's injury, it was sold or turned over by the lumber company to the railroad company in consideration of the payment to the lumber company by the railroad company of the costs of its construction. The stockholders of the two companies were with a few exceptions the same, and they had the same general officers. But they were separate and distinct corporations, and the accounts of each were kept separate from the other. The lumber company was organized 10 years prior to the organization of the railroad company, which was chartered about 12 years ago. The railroad operated by the railroad company was all built by the lumber company and taken over and operated by the railroad company after its completion. It had been extended from time to time, and, after each extension was made by the lumber company, it was taken over by the railroad company upon the payment of the cost of construction. The undisputed evidence shows that at the time of plaintiff's injury the railroad company had not taken over that portion of the road upon which appellee was at work, and was not operating same as a part of its railroad. The lumber company had been using the road for a short time in hauling logs to its mill; but it was not completed so that it could be used as a commercial railroad, and it was not taken over by the railroad company until it was so completed and ready for general use as a railroad.

The appellants have filed a joint brief; but the assignments in the brief are not all joint assignments.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The first assignment presented by appellant railroad company complains of the refusal of the court to instruct the jury to return a verdict in favor of said company.

This assignment must be sustained. The facts before set out conclusively show that the operatives of the engine, by whose negligence appellee alleges he was injured, were not in the employment of the appellant railroad company, but were employed, by the lumber company, who was also the employer of appellee, and that the appellant railroad company was not even the owner of the railroad upon which appellee was working at the time of his injury. Upon these facts it goes without saying that the railroad company cannot be held liable for appellee's injury.

Our conclusion that this assignment should be sustained renders it unnecessary for us to pass upon the other assignments presented by the appellant railroad company.

The circumstances under which appellee was injured, as disclosed by the record, are as follows: Just before his injury appellee and other employes of appellant lumber company had been engaged in unloading dirt, to be used for surfacing the road, from a train of cars standing on the track upon which the dirt was to be placed. When the work of unloading was finished, appellee walked along the side of the train, passed the engine, which was facing west, and proceeded on down the track towards the water barrel, which was near the side of the track some distance in front of the engine. The foreman in charge of the work was ahead of appellee, walking down the track. It was in the evening about the time that work was usually suspended and the employes taken in to the work camp a few miles distant. The water barrel was taken in on the train each evening for the purpose of bringing out water for the use of the hands the next day. Appellee testified that he was going to the water barrel for the purpose of assisting in placing it on the train when the time came to start in to camp. He did not know that they would go in at once, and he had his tools with him and was prepared to go to work on the track if so directed by the foreman. As he passed the engine he saw the fireman, who was sitting on his seat in the cab of the engine and looking out of the side window of the cab. The fireman saw appellee and spoke to him. After appellee had passed the engine a short distance, he stepped on the ends of the ties and had proceeded but a short distance further when he was struck by the engine which had been put in motion without the whistle having been blown or the bell rung, or a warning of any kind given appellee of its approach. Appellee was thrown down, and his foot caught under the wheels of the engine and so mashed that its amputation became necessary. When the train was put in motion, the engineer and fireman were in their proper places on the engine. There were windows in front of the

cab, and there was no obstruction which would prevent their seeing appellee walking on the ends of the ties in front of the engine. Each of them testified that he did not see appellee until just before he was struck by the engine, and when it was too late for them to stop the train and prevent the injury. The engineer testified as follows: "There was nobody ahead of that train on that track when I started out. I looked down the track to see if I could locate the water barrel. I was looking on both sides of the track for the water barrel, and I could have naturally seen a person on either side of the track. I do not think a person could have been further than six or eight feet from the engine that I could not have seen. If he had been on the ends of the ties on the fireman's side, eight or ten feet in front of the engine, I could have seen him. If he had been in three or four feet of the front of the engine, and on the fireman's side, I do not suppose I could have seen him. I could not see him if he was right close to the engine. I could not see immediately in front of it, but within a few feet. \* \* \* I do not think I could have seen him if he was only three or four feet from the engine, but think I could have seen him if he was eight or ten feet from it. I never did start that engine, when pulling a gang of men like that, without looking to see whether or not anybody was in front of it. Whenever I moved that engine, and was going ahead, I would always look around for signals, and look to see if anybody was on the track. I did that on this occasion. \* \* \* If he [Due] had walked by the side of the engine on the fireman's side, and had gotten on the track in front of the engine on that side, the fireman could have seen him. The fireman said he saw him; but he never said anything about it until after he was hurt. The fireman was about 20 years old. There are three windows on the fireman's side of the cab, one to the side, one in front, and one to the rear. \* \* \* That fireman was slow to think. I told you on one occasion that he was inclined to be careless and slow to think. I don't know about telling you that I could turn that engine around before he could change his mind. I hardly know whether he was reliable or not. I had complained about his unreliableness. I had made this complaint to the company. I had complained to the officials of the company about his being unreliable. \* \* \* Nixon rang the bell; that was one of his weaknesses; he always would ring the bell; he worried me by ringing the bell; he rang it nearly all the time. He was very slow, and he was unsatisfactory about telling me anything; he would hardly ever say anything to me about anything, and that is the objection I had to him. I never had any case where anybody was in danger and find objection to him about that. It was just with reference to the management of his part of the engine. That was the only

time we ever hurt anybody while he was with me."

In not looking back after he passed the engine, appellee relied upon the known rule which required that, before the train should be put in motion, the whistle should be blown.

These facts are sufficient to sustain the findings that the operatives of the train were negligent in putting the train in motion without blowing the whistle or ringing the bell of the engine, that appellee was not guilty of contributory negligence, and that the operatives of the train saw appellee and realized his peril in time to have avoided injuring him, and failed to use proper care to prevent his injury.

The first assignment of error presented by the lumber company complains of the refusal of the court to instruct the jury to return a verdict in favor of said company. Under appropriate propositions submitted under this assignment it is contended, first, that the undisputed evidence shows that appellee was guilty of contributory negligence, and, the evidence being insufficient to raise the issue of discovered peril, and the defendant not being a common carrier, it cannot be held liable for plaintiff's injury; second, that the act of the operatives of the train in putting same in motion, and failing to give proper warning before starting the train, was not negligence, because said operatives could not have reasonably anticipated that such act and omission on their part might result in injury to any one.

[3] These contentions are disposed of by our fact conclusions before stated. It seems clear to us that, under the circumstances shown by the evidence, appellee cannot be held guilty of negligence, as a matter of law, in going upon the track in front of the engine. The engine was not in motion when he went upon the track, and he had a right to rely upon the performance by the operatives of the engine of their duty to give proper warning before putting it in motion, and in the absence of such warning it cannot be held, as a matter of law, that a person of ordinary prudence would not have proceeded down the track as appellee did without looking back to see if the train was coming. While the evidence is conflicting upon the question, there is evidence to sustain the findings that no warning of any kind was given of the moving train, and the noise made by its movement was not sufficient to attract appellee's attention, and it is beyond dispute that he did not hear it coming until it struck him. Under these facts the issue of contributory negligence was a question for the jury.

[4] We do not think the act of the Thirty-First Legislature, which provides in substance that, in suits by an employé against a railway company to recover damages for personal injuries, the fact that the employé may have been guilty of negligence should not bar a recovery, but may be considered by the

jury in determining the amount of damages to which such employé is entitled, should be held to apply only to railroads operated as common carriers. Acts 31st Leg. (1st Ex. Sess.) c. 10, p. 279. The language of the second section of the act is susceptible of the construction contended for by appellant; but, when the entire act is considered, and due regard given to the evident purpose and intent of the Legislature, we do not think it should be so construed. The employés of a railroad operated by a lumber company in conducting its business are engaged in the same dangerous employment as the employés of a railroad operated as a common carrier, and entitled to the same consideration, and, unless the act as a whole is susceptible of no other construction, it should not be interpreted as discriminating between such employés.

As we have before found, the evidence was sufficient to raise the issue of discovered peril; but, if that issue was not in the case, the appellee was entitled to have the jury pass upon his right to recover upon the other grounds of negligence alleged.

[5] The contention that the evidence fails to show negligence because the operatives of the train could not have reasonably anticipated that putting the train in motion without giving any warning would likely result in injury to some one is wholly without merit. The operatives of the engine knew that there were a number of employés around and about the train, and, so far from there being no reason for the engineer and fireman to anticipate that putting the train in motion without warning might injure some of said employés, it seems to us that every dictate of reason and prudence would suggest the danger of such movement of the train. As showing his full appreciation of such danger, the engineer testified: "It is the absolute rule among railroad people to always give signals when going to start a train, and that is blowing two blasts of the whistle; that is done on anything like a work or freight train."

The third and fourth assignments presented by the lumber company are each predicated upon the assumption that the undisputed evidence shows that appellee was guilty of contributory negligence, and for the reasons before stated each of said assignments is overruled.

The fifth assignment complains of the following portion of the court's charge: "If the defendants, by their servants in charge of the engine (that is, the engineer and fireman, or either of them, if you should find that such engineer and fireman were the servants of the defendants), knew when they started the engine, or after it was in motion, that plaintiff, James W. Due, was in front of the engine on the track, or so near to it that, unless he moved aside, he would be struck and injured, and they had such knowledge in time to have avoided injury, such knowledge imposed upon them the duty of using every



means then within their power, consistent with the safety of the engine and cars and the persons thereon, to avoid running him down or striking him, and failure to use such means would render the defendants liable, notwithstanding plaintiff may have been wrongfully on or so near the track. Therefore, if you believe from a preponderance of the evidence that, after plaintiff, Due, was discovered in front of the engine, if you find he was discovered by the engineer or fireman on the track, or so near it that he would be struck on its approach, defendants' servants in charge of the train negligently failed to use such care, attention, and skill, and effort to get him off the track before starting (if they knew of his presence in front of the engine before starting), or if they first discovered his presence in front of the engine after starting, and negligently failed to use such care, skill, and effort then to stop or check up the train and avoid the collision with plaintiff, as they reasonably should and could have done after it reasonably became apparent to them that plaintiff would not get off of or a safe distance from the track, and that he was in peril of injury, and if plaintiff received some or all of the injuries complained of in his petition through such fault of defendants' said servants, then you will find for plaintiff."

[8] The first objection to this charge is that plaintiff's petition does not present the issue of discovered peril, in that it failed to allege that the operatives of the engine saw plaintiff "in a place of peril in time to have, by the use of the means at hand, avoided his injury."

This objection is untenable. The petition contains the following allegations: "Plaintiff charges that the defendant was guilty of negligence and want of care in this: (a) Defendant's said agents, servants, and employes in charge of said engine and train saw this plaintiff when he passed said engine, and knew that he was at a point only a few feet in front of same, and was in total ignorance of their intention to start the same, and, knowing and seeing plaintiff's perilous position in time to have avoided his said injury, negligently and carelessly started said train and ran the same down upon this plaintiff, injuring him as aforesaid."

The allegation that the operatives of the train saw appellee when he passed the engine, and knew that he was at a point only a few feet in front of same, and ignorant of their intention to start the engine, is, we think, a sufficient allegation that the operatives of the engine knew of the peril and danger appellee would be placed in if the engine was started without warning. But the petition goes further and alleges that the operatives, "knowing and seeing plaintiff's perilous position in time to have avoided said injury, negligently and carelessly started said train and ran the same down upon this plaintiff." We hardly think there could be a

more positive allegation of knowledge on the part of the operatives of the engine of appellee's perilous position.

The next objection to this charge is that the evidence is insufficient to sustain a finding that the operatives of the train discovered appellee's peril in time to have avoided injuring him.

The appellee testified that at the time he passed the engine going to the water barrel the fireman, Nixon, was sitting in his seat on the left side of the engine, which was the side by which appellee passed. There were three windows on that side of the cab, one in front, one on the side, and one in the rear. From his position in the cab, the fireman could see up the track far beyond the place at which appellee was walking when he was struck by the train. He further testified: "I spoke to the fireman as I passed, and he saw me and spoke to me. I believe I could have reached up through the window and touched him when he spoke to me. I looked up and saw him; he was sitting upon his seat, with his head kinder hanging out of the window, and was looking right at me, and saw me. I was acquainted with the fireman, and he was acquainted with me. When I spoke to him, and he spoke to me, I would say he was about two feet from me. I did not stop walking at the time, but just walked by. The last time I saw him he was sitting in the window on his seat, and was looking at me. I went down track toward the river. After I passed from the side window on down to the side of the engine, the fireman would have seen me by looking out through the front window. He could have seen me a long ways down the track. The track was straight for 200 or 300 yards, I suppose, and was about level. The engine was standing still when I passed in front of it."

The fireman, Nixon, testified that he saw appellee as he passed by the engine; that at this time he (the fireman) was standing in the gangway between the engine and the tender, and appellee was walking by the side of the engine going towards the front; that the engine was moving slowly at the time the appellee was walking beside it; and that he did not see appellee again until he fell. Appellee is corroborated in his statement that the train was standing still when he passed by it, and when he went on the track, by other witnesses.

George Matthews, a witness for plaintiff, testified that appellee was from six to ten feet in front of the engine before it was started. Appellee testified that he got on the track one or two feet in front of the engine, and that he had walked fifteen or twenty feet from where the engine was standing when he got on when he was struck. It is shown by the testimony of the engineer before quoted that, before the engine was started, he looked down the track to locate the water barrel, and that he could have seen any per-

son on either side of the track who was as much as six or eight feet in front of the engine, but he does not suppose that he could have seen one who was on the left side of the track, and only three or four feet in front of the engine. He further testifies he did not see appellee, but that, if appellee walked by the side of the engine and got on the track in front of the engine, the fireman could have seen him and told witness that he did see him, but did not tell him this until after appellee was hurt; that the fireman was careless and slow to think and act; and that he had complained of the fireman's unreliableness.

We think it clear that the evidence raises an issue as to whether the fireman knew and saw appellee on the track in front of the engine at the time the engine was started. If he saw him, he was bound to have realized appellee's peril from the approach of the engine put in motion without warning. If the fireman saw appellee in his position of peril, and failed to ring his bell or give other warning which he might have done in time to avoid the injury, or failed to inform the engineer, who, the evidence shows, could have stopped the engine in six or eight feet, such failure on the part of the fireman to use the means at his command to avoid the injury was negligence, and appellant was liable therefor, without regard to the question of appellee's negligence.

[7] Appellant contends that upon a former trial of the case appellee testified that, when he passed the engine, the fireman was in the gangway between the engine and the tender, and that appellee is bound by his former testimony, and will not be permitted to contradict it and place the fireman in a different position, and that under the former testimony of appellee the position of the fireman was such that he could not have seen appellee on the track in front of the engine; and therefore the issue of discovered peril is not raised.

Appellee did not admit that he made the statement on the other trial claimed by appellant, but testified that he did not think he made any such statement, and that the fireman was not in the gangway but in his seat when he passed the engine. The stenographer who made a record of the testimony on the former trial testified that he felt sure the record was correct, and this record shows that the appellee testified as claimed by appellant. This testimony raises an issue as to what appellee's former testimony was; but, if it be conceded that he did state on the former trial that the fireman was in the gangway, it was a question for the jury to determine from all the evidence whether his statement upon this or the former trial was correct, and there is no rule of estoppel which would prevent the jury from accepting as true the statement made on the last trial, especially as that statement is corroborated by other evidence.

[8] We think the evidence is also sufficient to raise the issue as to whether the engineer saw appellee upon the track in time to have avoided his injury. His statement that he did not see him is not directly contradicted as is the fireman's statement. But the jury could have found from the evidence that, at the time the engine started, the appellee could have been seen by the engineer, who testified that he looked down both sides of the track before starting the engine. The presumption that arises from these facts is not conclusively rebutted by the statement of the engineer that he did not see the appellee.

[9] The objection to this charge that it is upon the weight of the evidence, in that it assumes that the operatives of the engine discovered appellee's peril in time to have avoided his injury, is without merit.

The court did not err in refusing to give any of the special charges mentioned in appellant's assignments of error 6 to 13, inclusive. Those of said charges which are correct were either unnecessary because the issue submitted was sufficiently covered by the charge given by the court, or the issue was not of sufficient importance to justify the belief that the refusal to give such charge probably resulted in an erroneous verdict. Each of said assignments is overruled without discussion.

[10] The fourteenth assignment of error complains of the following charge: "It is the duty of the operators of a train to use ordinary care to discover persons who may be upon the track before starting a train, when such trains be standing, if such persons have a right to be upon the track, and to give some warning, such as ringing the bell or blowing the whistle on the engine, to such persons that said train is attempting to start up, and a failure to use such care would be such negligence as to entitle a person who was not himself also guilty of negligence to recover for injuries received in consequence thereof."

The objection made to this charge is that it in effect makes the failure to ring the bell or blow the whistle before starting a train, under circumstances stated in the charge, negligence as a matter of law, when there is no statute requiring that the bell be rung or whistle blown under such circumstances, and the failure to give such warning does not show such a lack of ordinary care that reasonable minds cannot differ in the conclusion that such failure constitutes negligence.

[11, 12] The charge is not subject to this criticism. We do not think reasonable minds can differ in the conclusion that, before a train is put in motion on a track on which people have a right to be, and, as in this case, may be expected to be, it is the duty of the operatives of such train to use reasonable care to discover persons on the track, and to give them warning of the approach of the train. The mention in the charge of ringing the bell or blowing the whistle does

not require that one of these warnings should have been given; but such or any similar warning sufficient to attract the attention of the people on the track is all that the charge requires. But, if the charge should be constructed as contended by appellant, it was harmless error, because there was no evidence that the operatives of the train gave any warning other than ringing the bell and blowing the whistle, and, if these warnings were not given, the engine was moved without any warning.

The fifteenth and sixteenth assignments of error are without merit, and each of them is overruled without discussion.

The seventeenth assignment complains of the refusal of the court to instruct the jury that plaintiff was not entitled to recover if the jury found his injury was the result of a want of ordinary care on his part in walking upon the track in front of the engine.

It follows from our conclusions that the act of the Legislature before cited, providing that, in suits by employes of railroads to recover damages for personal injuries, the fact that the employe is guilty of negligence shall not bar his right of recovery, applies to this suit, the requested charge was erroneous, and it was therefore properly refused.

[13] The verdict of the jury for \$15,000, in view of the character of appellee's injury and the suffering which he must have undergone, is not so large as to justify the belief that, in fixing that amount as compensation for appellee's injury, the jury were moved by passion or prejudice, or some improper influence, and we are therefore not authorized to disturb their finding upon this issue.

The remaining assignments in appellant's brief do not require discussion, none of them in our opinion present any error which requires a reversal of the judgment against the appellant lumber company, and each of them is overruled.

The judgment of the court below against the appellant railroad company is reversed, and judgment here rendered in favor of that company, and the judgment in favor of appellee against the appellant lumber company is affirmed.

Reversed and rendered in part. Affirmed in part.

TEXAS CENT. R. CO. v. McCALL et al.  
(No. 600.)

(Court of Civil Appeals of Texas. Amarillo.  
April 11, 1914. On Motion for Rehearing, May 16, 1914.)

1. APPEAL AND ERROR (§§ 215, 263\*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS—WAIVER.

Where no objection was made and no exception taken to a charge, as required by Acts 33d Leg. c. 59, the giving of the charge must, as required by Rev. St. 1911, art. 2061, as

amended by such act, be regarded as approved, and appellant cannot complain thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1809-1814, 1516-1523, 1525-1532; Dec. Dig. §§ 215, 263.\*]

2. APPEAL AND ERROR (§ 562\*)—RECORD—STATEMENT OF FACTS.

Under Rev. St. 1911, arts. 2068, 2070, and district court rules 72-74 (87 S. W. xxv), prescribing the manner of preparing statements of facts, instruments or parts of them bearing on a question presented should be copied into the statement of facts, and the original instruments should not be attached to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. § 562.\*]

3. ESTOPPEL (§ 58\*)—PREJUDICE TO CARRIER—CONDITION REPORT OF SHIPPER.

A carrier not misled nor induced to refrain from doing any act, the performance of which would have placed it in a better condition, cannot rely on estoppel to bind a shipper of live stock to condition reports signed by him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.\*]

4. EVIDENCE (§ 265\*)—TRANSPORTATION OF LIVE STOCK—CONDITION REPORTS—CONCLUSIVENESS.

Statements in stock condition reports signed by a shipper as an accommodation to the conductor, and without having been read, and only to indicate that the shipment had reached the terminus of the carrier's line, are not binding on the shipper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

On Motion for Rehearing.

5. CARRIERS (§ 177\*)—CARRIAGE OF LIVE STOCK—DAMAGES—LIABILITY.

The object of Rev. St. 1911, art. 1830, subd. 25, providing that, where freight has been damaged in transit over two or more railroads, the damage shall be apportioned among the railroads, is to relieve the shipper of the burden of proving the damage accruing on each line, and the initial carrier is liable for all damage, and an apportionment is necessary only as between the carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.\*]

6. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—VALIDITY.

A statement in a contract for the shipment of live stock that the condition of the cars and bedding was satisfactory, did not relieve the carrier from liability for failure to properly bed the cars; otherwise the stipulation would limit the common-law liability of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-686, 927, 928, 933-949; Dec. Dig. § 218.\*]

Appeal from Fisher County Court; L. C. Miller, Judge.

Action by J. S. McCall against the Texas Central Railroad Company and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Spell & Sanford and W. W. Naman, all of Waco, and Chas. C. Huff, of Dallas, for appellant. Jno. W. Woods, of Rotan, L. H. McCrea and L. B. Allen, both of Roby, and Douthit & Smith, of Sweetwater, for appellee.

HALL, J. Appellee, McCall, instituted this suit against appellant and the Texas Pacific Railway Company to recover damages growing out of a cattle shipment from Rotan, Tex., to Ft. Worth, Tex. It was alleged that on account of negligent handling and the manner in which the cars were bedded by the Texas Central Railroad Company at point of origin, and on account of the negligent delay and the jerking and jarring of the cars in transit over the lines of both companies, plaintiff was damaged in the sum of \$840.

The Central Company answered generally, and specially that the plaintiff entered into a written contract with it, by the terms of which he agreed he would be estopped from denying the condition of the bedding, as shown by the condition report signed by himself.

By supplemental petition, plaintiff denied the execution of the condition report, and pleaded further that, if he signed the report, it was done only as an accommodation to the conductor, and without plaintiff's having read the same, and for the purpose only of indicating that such shipment had reached the terminus of said company's line, and for no other purpose, intent, or reason.

The Texas & Pacific Company, by special answer, alleged that the cattle were shipped under a written contract for through carriage; that they received the same from the Texas Central Company at Cisco for transportation to Belt Junction, where the shipment was delivered to the Ft. Worth Railroad Company.

Upon a trial before a jury there was a verdict and judgment in the sum of \$250, with interest and costs of suit.

[1] The first assignment of error is predicated upon the third special charge requested by the Texas & Pacific Company and given by the court, referring to the duty resting upon the Texas & Pacific Company in the movement of said shipment on the first regular train passing through Cisco in the direction of Ft. Worth. No objection was made and no exception taken to this action on the part of the court, as required by Acts 33d Leg. c. 59, p. 113, and, under article 2061 of that act, the giving of such charge must be regarded as approved by appellant. *Q., A. & P. Ry. Co. v. Galloway*, 165 S. W. 546.

[2] The eighth and twelfth assignments, as contained in the motion for new trial, are submitted by appellant together as his second assignment of error, and refer to the condition report, which is signed by appellee, McCall, and which states that the bedding in the cars was good. The statement of facts in this case has attached to it, as exhibits, two condition reports, three bills of lading issued by the Texas & Pacific Railway Company, and three issued by the Texas Central Railway Company, which show to be the original bills upon which the cattle were transported. This method of preparing a

statement of facts is not in accordance with rules 72, 73, and 74 of the district court (67 S. W. xxv) and articles 2068 and 2070, R. S. 1911. These papers, or such parts of them as bore upon the questions presented, should have been copied into the statement. The contracts were not attached as exhibits to the pleadings, and the proper practice in such cases is clearly stated in *Byers et al. v. Thacker et al.*, 42 Tex. Civ. App. 492, 94 S. W. 138.

[3] We have, however, considered the statement of facts in connection with the assignments, and we find that appellant offered no testimony to prove that by reason of the statement contained in the condition report with reference to the bedding, that it was misled and induced to refrain from doing any act, the performance of which would have placed it in a better condition, and there is therefore no estoppel.

[4] We think, further, the conditions under which appellee, McCall, signed this report would not have the effect of making the statement binding upon him. *M., K. & T. Ry. Co. v. Gober*, 125 S. W. 383; *Mo. Pac. Ry. Co. v. Ivey*, 79 Tex. 444, 15 S. W. 692; *Mo. Pac. Ry. Co. v. Fennell*, 79 Tex. 448, 15 S. W. 693; *St. L. etc., Ry. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008.

The judgment is affirmed.

#### On Motion for Rehearing.

[5] The appellant insists that we erred in refusing consideration of its first assignment of error, and in disposing of the same upon the ground that no exception was taken by appellant to the motion of the court in giving the special charge requested by the Texas & Pacific Railway Company, and insists further that, if the rule prescribed by the statute quoted is to be enforced against it, then, because the statute provides that the special charges, shall be "submitted to opposing counsel for examination and objection," as provided by amended article 1973, *Vernon's Sayles' Ann. Civ. St. 1914*, and because the record shows this special charge was not submitted to appellant's counsel, we should consider the assignment. We have inspected the pleadings, and find no issue or contest of any character between appellant and its connecting carrier. Neither of the carriers in this case asked that the damages, if any, be apportioned. *Fly, J., in G., H. & S. A. Ry. Co. et al. v. Young & Webb*, 148 S. W. 1113, held under the laws of 1899, p. 214 (Statutes of 1911, art. 1830, subd. 25), providing, where freight has been damaged in transit over two or more railroads that the damages shall be apportioned among the railroads, that the object of the act is to relieve the shipper of the burden of proving the damages accruing on each line, the initial carrier being liable to him for all damages, and the apportionment being necessary only as between the two carriers, and uses this

language: "It is a matter to be adjusted between them, and, if it has not been satisfactorily done, they should not complain of appellees, but assail each other." While they filed separate answers, their position is the same as if a joint fight had been made by the railway companies against plaintiff's right to recover. There is nothing in the pleadings of the carriers to indicate that either was opposing the other, and the statute does not therefore apply. Our conclusion from an examination of the record is that the matter of apportionment of damages between the defendants was not an issue and if we should admit that the court erred in giving the charge in question, appellant cannot be heard to complain.

[8] Appellant further insists that we erred in overruling the eighth and twelfth assignments. We were misled by appellant's brief in calling the paper referred to in this assignment a condition report, and by considering it as such. This paper, which appellant sought to plead as an estoppel, is its blank form No. 112. The upper half of it is an order for cars; the lower half, as filled out, is termed "agent's record," and is a brief statement of the date when the cars were ordered by wire and when they were received. It further gives the hour when the shipper was notified to load, when his cattle were penned, when the loading commenced, when it was finished, states that the condition of the cars and bedding was good, that they were bedded with sand, and, opposite this question, "Were cars bedded to satisfaction of shipper?" is written "Yes." Following this is: "I certify the above statement is correct." This is signed: "J. S. McCall, Shipper in Charge. L. M. Smith, Agent T. C. R. R. Co."—in the order named. At the bottom of this form is a note of instructions to agent with reference to the making of this record, directing that it be filled up in duplicate, mailing duplicate to trainmaster, and further instructing that, when shipments have been loaded and forwarded, all messages shall be attached to the original and sent, along with the duplicate of the contract covering the shipment, to the general freight agent of appellant. Section 11 of the bill of lading, and which was pleaded by appellant, provides that the shipper shall furnish reports to the conductor of the train at the end of each division as to the condition of the cattle, and shall be estopped from denying the truth of such reports. We find attached to the statement of facts the statement referred to in this section of the contract, but the instrument first above described is clearly not this condition report, and appellant has not faithfully briefed the case in this particular. Court of Appeals rule 31. The paper under discussion is not a part of the contract of shipment. No consideration is expressed in it, and none can be implied. The state-

ment therein that the condition of the cars and bed was good and satisfactory, even if it was a part of the contract, would not relieve appellant from liability. *G., C. & S. F. Ry. Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767; *S. A. & A. P. Ry. Co. v. Dolan*, 85 S. W. 302. It is admitted in the motion that the duty to properly bed the cars was primarily upon appellant. The record shows that McCall had no knowledge of the contents of the paper when he signed it, and that he had not seen the bedding in the cars. If we admit that McCall had inspected the bedding and had expressed himself as being satisfied with it, nevertheless, if thereafter the bedding proved to be insufficient, he would not be estopped from setting up that fact. We further think, too, that if this statement, which seems to be nothing more than an "agent's record" for the information of his principal, had been by proper reference made a part of the shipping contract, its effect would tend to limit the common-law liability of appellant, and it would for that reason be void. *G., H. & S. A. Ry. Co. v. Sillegman*, 23 S. W. 298. We are at a loss to know why this paper should have been offered or admitted in evidence. It has no more binding effect upon appellee, McCall, than any other private communication between appellant's agents and officers, and the fact that his signature appears thereon does not alter the rule.

The motion for rehearing is therefore overruled.

# JOHNSON et al. v. MANSFIELD.

(No. 6531.)

(Court of Civil Appeals of Texas. Galveston.

April 5, 1914. Rehearing Denied

May 7, 1914.)

## 1. SPECIFIC PERFORMANCE (§ 105\*)—DILIGENCE—EXCUSE.

Plaintiff in 1904 entered into a written agreement, whereby in consideration that plaintiff and W., who were brokers, would obtain land at a low price, defendants agreed to purchase it and to give plaintiff and W. an undivided one-half interest therein for \$1,500 or, when the proceeds of the timber cut or land sold to others amounted to \$1,500, a deed of their interest would be executed to plaintiff and W. Defendants settled with W. and sold a part of the land to him for a price in excess of \$1,500, and plaintiff on discovering the fact, in 1910, sued for specific performance, and tendered \$750 in payment for his one-fourth interest. Held that, as it necessarily required time to establish sawmills and to cut and sell the timber, plaintiff was excused from not sooner seeking a performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.\*]

## 2. SPECIFIC PERFORMANCE (§ 97\*)—ACTION—TENDER.

In such case, plaintiff, on a showing that defendant had settled with W. and sold land to him for a price in excess of \$1,500, had the right to maintain a suit for specific performance as to his undivided interest without any tender; and, even if a tender was necessary, his

tender of \$750 at the trial was sufficient both as to time and amount to entitle him to maintain a suit.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.\*]

### 3. SPECIFIC PERFORMANCE (§ 12\*)—RIGHT OF ACTION—JOINT INTEREST.

In such case, plaintiff did not lose his right to the specific enforcement of a conveyance to the extent of his interest under the contract, merely because W. by accepting a settlement from defendant could not be properly joined as a party plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 26-28, 37; Dec. Dig. § 12.\*]

### 4. EVIDENCE (§ 444\*)—PAROL EVIDENCE—CONSIDERATION OF CONVEYANCE.

An obligation to convey lands, independent on its face, may be shown by parol evidence to be dependent upon a consideration not expressed in the obligation or instrument declared on.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

### 5. CONTRACTS (§ 212\*)—TIME FOR PERFORMANCE—REASONABLE TIME.

Under an agreement, whereby, in consideration that plaintiff would obtain land at a low price, defendants were to purchase it and to convey an interest to plaintiff and another for \$1,500, or when sales of timber and land equaled that amount, but not providing any time in which it should be performed, a reasonable time was implied, to be determined under all the facts and circumstances.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 944-955; Dec. Dig. § 212.\*]

### 6. SPECIFIC PERFORMANCE (§ 6\*)—RIGHT OF ACTION—MUTUALITY OF OBLIGATION.

In such case, it was not essential to the validity of the contract or to plaintiff's right to enforce specific performance thereof that there should be a reciprocal obligation or mutuality of remedy; plaintiff having performed his part by procuring the land at the price set.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9-11; Dec. Dig. § 6.\*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by H. P. Mansfield against J. S. Johnson and others with cross-plea by defendants. Judgment for plaintiff, and defendants appeal. Affirmed.

E. B. Pickett, Jr., of Liberty, and Jones & Jones, of Houston, for appellants. Stevens & Stevens, of Liberty, for appellee.

McMEANS, J. H. P. Mansfield brought this suit against J. S. Johnson, Z. S. Johnson, and E. J. Waldron to enforce specific performance of an alleged contract for the conveyance of certain land. He alleged that on January 15, 1904, he conveyed two tracts of land in Liberty county to appellants Johnson, and that the Johnsons at the time executed the agreement on which he sued, by the terms of which they agreed to convey to plaintiff and defendant E. J. Waldron an undivided one-half interest in the land upon the payment by plaintiff and Waldron to the Johnsons of the sum of \$1,500; that the contract provided that the land could be sold by the

Johnsons and that the timber thereon should be cut by them, and that when the Johnsons had cut a sufficient quantity of timber at the rate of \$1.25 per thousand feet stumpage, or should have sold off any portion of the land, and the value of said timber cut at said price, or any part of said land sold as aforesaid, should at any time become equal to \$1,500, then the defendants were to convey to plaintiff and Waldron an undivided one-half interest in said land, or a specific portion thereof that might be agreed upon in satisfaction of the undivided one-half interest of plaintiff; it being further agreed that the \$1,500 could include the price of timber cut from said land or the proceeds of the sales of any portion of said land, and that all of said sum could be made alone by timber cut, at the price stated, or it might be made alone by the sale of any portion of the land. He further alleged that defendants erected a sawmill and cut timber from said land of the value of \$1,500, at the rate specified, but that they refused to convey the land to plaintiff; that in 1906 the defendants made some kind of a settlement with the defendant Waldron by adjusting and compromising his claim, the exact terms of which were unknown to plaintiff, for which reason the said Waldron was made a party defendant, and it was prayed that he be required to answer and disclose what settlement was made by him with defendants Johnson. He further alleged that in 1906 he tendered to the Johnsons \$750, and demanded that they convey to him an undivided one-fourth interest in said land in satisfaction of the contract. He further alleged that the moving consideration on the part of the said Johnsons in the execution of the instrument declared upon was that the plaintiff should procure the title of the lands described in his petition from T. P. Ayers, and that the plaintiff had performed his part of the said consideration and did procure the title from said Ayers. It was further alleged that the instrument declared upon had been executed in duplicate; one copy being retained by the defendants and one copy was kept by Ira P. Jones, Esq., to be held by him for all parties concerned, and it being understood and agreed that said instrument would not be recorded in order that the records might not show the claim of plaintiff and Waldron, thus facilitating the defendants Johnson in making sales of the land. It was further alleged: That the defendants fraudulently concealed from the plaintiff the fact as to moneys realized out of the sale of said land and timber, and that the plaintiff did not ascertain until about the 1st day of January, 1910, that the defendants had realized \$2,000 out of the proceeds of timber cut and sales of land. That the amounts acquired by said Johnsons were wholly within the knowledge of the said Johnsons, and plaintiff was unable to ascertain all of the facts in regard

thereto until the first day of January, 1910. Plaintiff further pleaded that if it be found that the defendants Johnson had not cut timber of sufficient value, at the rate named, to cover the interest of plaintiff in the land in accordance with the contract, that he stood willing and ready to pay into court such amount as would be sufficient to cover his pro rata share of the land under the terms of the contract.

The appellants answered by general denial, and pleaded that there was no consideration to support the contract sued on and total failure of consideration. They further pleaded: That the agreement set up was a gratuitous offer of a gift, and not binding. That about January 15, 1904, Ayers was the owner of lands described in the plaintiff's petition, and the appellee Mansfield and Waldron came to the defendants to get them to purchase the same for a consideration of \$3,000 to be paid to Ayers. That Mansfield claimed to have authority from the owners of lands adjoining and nearly surrounding the Ayers lands, and heavily timbered, and that he would sell the timber thereon to the said Johnsons. That the appellants were induced to buy the Ayers land for \$3,000 and were willing to purchase the timber from Mansfield on the lands represented by him, and that Mansfield made a contract or conveyance of said timber to the appellants for himself and those he represented, and as a consideration for the contract from Mansfield and his constituents for the sale of such timber to the Johnsons the latter made an agreement by which, on being paid \$1,500 by Mansfield and Waldron, they would convey to them an undivided one-half interest in the lands purchased from Ayers, and that two years was fixed as the limit of the time for such payment, and if said sum was not paid within two years the contract was to be of no further force or effect. That the only agreement made by the appellants is the one attached to their answer. That appellants never received anything of value for making said agreement. That it turned out that Mansfield was without authority from the owners to sell the timber to appellants, and that said contract was repudiated by many of his constituents, and that the same was wholly invalid and inoperative, and that by reason thereof the agreement made by the appellants to Mansfield and Waldron became inoperative and void by total failure of consideration. That the \$3,000 paid for the Ayers land was the full value thereof and an adequate consideration for the conveyance. That the agreement from appellants to appellee and Waldron was a gratuitous donation based on no consideration and was a nudum pactum. That the appellants set up a sawmill on the land which they had purchased from Ayers through Mansfield and commenced to cut the timber which had been sold to them by Mansfield on the adjoining lands, and that immediately the owners forbade

them to cut the timber and threatened them with lawsuits and injunctions and repudiated the contract and declared it not binding on them, and that appellee was estopped by reason of his acts and representations as to his authority and right to convey the timber. That a large number of the owners had never given appellee any authority to bind them. That the appellee and Waldron, within two years from the making of said contract, abandoned all claim or right thereunder and renounced any right to the said agreement and made a rescission thereof and declared that they would neither rely upon nor insist upon it any further. That the appellee should not sustain said suit because of his laches, delay, and renunciation of said agreement, and because the lands sought to be recovered had become of great value with the timber thereon, and that said land was not of the value of \$20 per acre, and because of such great increase in value of said land and the large sums of money paid out by appellants in perfecting the title and defending litigation thereon, to which the appellee contributed nothing, it was now inequitable and unjust to the appellants for appellee to recover, and denied that the deed from Ayers to Mansfield, or the deed from Mansfield to appellants, created a trust, and said deed was absolute, and that there was no reservation of title or interest in the land conveyed by Mansfield to appellants, and that by reason of the lapse of more than four years since the execution of said agreement and said deeds, any trust was barred, and by cross-plea the appellants sought to have said agreement sued on declared of no further force or effect, and any cloud it cast upon their title to be removed, and for general, legal, and equitable relief.

Plaintiff dismissed as to defendant Waldron, and a trial before a jury resulted in a verdict and judgment for plaintiff, from which the defendants Johnson have appealed.

The evidence in the record justifies the following findings of fact:

On January 15, 1904, a written agreement in duplicate originals was signed by appellants, but not by Mansfield and Waldron, one copy of which was delivered to Mansfield and the other retained by the Johnsons. One of the copies was caused to be recorded by the Johnsons in the deed records of Liberty county, after which both copies were lost. The material portion of the contract declared upon, omitting field notes, is as follows: "Know all men by these presents, that whereas, H. P. Mansfield has this day conveyed to us, J. S. Johnson and Z. S. Johnson, of Liberty County, Texas, those two certain tracts of land fully set forth in said deed of conveyance described as follows: First tract—A tract of (640) six hundred and forty acres of land out of the Jose Dolores Martinez leagues Nos. (6) six and (9) nine. Second tract—All that certain tract of land contain-

ing (345) three hundred and forty-five acres and being part of league No. (9) nine of the J. D. Martinez Eleven league grant. And whereas, we have paid him, the said H. P. Mansfield, the sum of (\$3,000.00) three thousand dollars each. And whereas, it is contemplated that we are to erect a sawmill upon the above mentioned and described land and to operate the same in cutting and sawing lumber from the timber thereon. Said mill which we contemplate to be erected on or by the 1st day of July, 1904, or sooner if possible. Said mill to be owned by the undersigned with all attachments and improvements that we may make on said land, pertaining to said sawmill to be owned by us and placed at our expense. And whereas, the said H. P. Mansfield and E. J. Waldron contemplate the reconveyance from us of an undivided one-half of said land to them, exclusive of said improvements, mill and attachment on payment to us of the sum of (\$1,500.00) fifteen hundred dollars. And whereas, it is contemplated that portions of said land may be sold at any time hereafter by us as well as timber off of it that may be cut into lumber: It is agreed that when the sales of any portions of said land or any amount of timber cut from said land at the rate of \$1.25 per thousand feet stumpage shall amount to the sum of \$1,500.00, then in such event we are to deed to the said H. P. Mansfield and E. J. Waldron a one-half undivided interest in said land or a specific portion thereof that may be agreed upon in satisfaction of the undivided one-half interest of the said Mansfield. It is hereby agreed that the said amount of (\$1,500.00) fifteen hundred dollars shall include the prices of said timber first cut off of said land or the proceeds of the sales of any portion of said land or the said (\$1,500.00) fifteen hundred dollars may be made alone from the timber at the price of \$1.25 per thousand feet stumpage or it may be made up from the sale of any portion of said tracts of land. It is understood and agreed by us that in case of any sales of any portion of said above-mentioned tracts of land we are not to sell the same for less than \$40.00 per acre without the consent of all parties hereto in writing, but there is not restriction or limitation upon the maximum amount or price that we may receive for said land. When the said \$1,500.00 above specified has been received by us, then we are to convey to the said H. P. Mansfield and E. J. Waldron or their heirs and assigns an undivided half of all of what remains unsold in said two tracts, and it is hereby specially agreed and understood that in making a partition or division of said tract of land we are to reserve to ourselves that portion of said tracts on which our said improvements may be placed, that is the improvements shall belong to us and the portion which we are to receive in said division shall be so laid off as to include our improvements. After the

division of said tract of land as hereinbefore set out the timber on that portion which shall be set aside to the said H. P. Mansfield and E. J. Waldron shall be paid for by us at the price of \$1.25 per thousand feet stumpage to include all classes of timber that we may cut, but upon that portion of the land that is set aside and included in our portion we are to own the timber as well as the land and we do not have to pay said price for said timber."

The contract introduced in evidence and relied upon by appellants Johnson is identically the same as the above, with the exception that to the clause providing for the payment of the \$1,500 is added, "Within two (2) years from date, a failure to pay said sum of money shall forfeit and annul the contract." Mansfield, in the court below, attacked this additional provision as a forgery. The evidence was sufficient to authorize the jury to find that the contract declared upon by the plaintiff was the true contract, and we so find. The jury was also warranted in finding that the appellants had made a settlement with Waldron for such interest in the land as he was entitled to by conveying to him an interest therein. The consideration entering into the execution of the contract between plaintiff and defendants seems to have been this: Ayers was the owner of the land, and Mansfield, a real estate dealer, was in a position to buy it from him cheaper than any one else, and, in order to purchase the land at the price at which Mansfield could buy it, the Johnsons agreed to give him and Waldron, who it appears was also trying to sell the land to the Johnsons, an undivided half interest therein upon the payment to them of \$1,500. It was contemplated that the Johnsons should cut and sell the timber, and that, when they sold \$1,500 worth at the price of \$1.25 per thousand feet stumpage, a deed conveying an undivided half interest should be made by the Johnsons to Mansfield and Waldron; and it was also contemplated that the Johnsons might sell a portion of the land, and, if a sufficient quantity should be sold to make the stipulated amount, then a deed should be executed to Mansfield and Waldron for an undivided half of the remainder. The evidence further warrants the conclusion that the Johnsons sold a portion of the land to Waldron for a sum in excess of \$1,500. At the time of the trial Mansfield tendered to the Johnsons \$750 in payment of a one fourth interest in the land, but no tender of any amount was made by him prior thereto. This suit was not filed until April 19 1910, more than six years after the execution of the contract declared on.

[1-3] Appellant under his first assignment of error, which sufficiently raises the point contends, in effect, that plaintiff Mansfield, seeking specific enforcement of the contract must show that he has performed or offered to perform the acts which formed the consid-



eration of the undertaking on the part of defendants; and that the contract providing for the conveyance of a half interest to Mansfield and Waldron jointly, upon the payment by them of \$1,500, is not complied with by Mansfield when he tendered only \$750 and demanded a conveyance to himself of a one-fourth interest in the land, and that therefore he was without equity entitling him to a decree for any part of the land. This contention cannot be sustained. As before shown, tender of the \$1,500 by Mansfield and Waldron was contingent upon the failure of the Johnsons to sell sufficient timber or land to make the sum of money stated. It was only in the event that this sum was not realized in this way that Mansfield and Waldron were required to make any tender. Necessarily it required time to establish sawmills, and to cut and sell the timber or to negotiate the sale of land, and this was a sufficient excuse for Mansfield not sooner seeking the performance of the contract. The testimony sufficiently shows that the Johnsons sold land sufficient in value to realize the amount agreed upon, and this of itself rendered a tender upon the part of Mansfield and Waldron unnecessary. The testimony is sufficient to show, further, that the Johnsons settled with Waldron for his interest in the land, and, this being true, a suit for specific performance brought by him would have been wholly unauthorized and could have been defeated, had it been brought, by showing this fact. In these circumstances Mansfield had the right to bring and maintain this suit in his own behalf to compel the Johnsons to specifically perform the contract in so far as his undivided interest in the land is concerned. Certainly it was not requisite that Mansfield tender the entire \$1,500, after Waldron had been settled with for his interest in the land. It is equally certain that Mansfield did not lose his right to specific enforcement of a conveyance to the extent of his interest under the contract merely because Waldron by accepting a settlement from the Johnsons could not be properly joined as a party plaintiff. To so hold would be in effect to declare that the Johnsons by specifically performing their contract as to Waldron's interest, and thus putting it out of his power to maintain a suit for specific performance, had deprived Mansfield of the right to maintain an action to compel specific performance to the extent of his interest under the contract. *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824; *Townsend v. Blanchard*, 117 Iowa, 36, 90 N. W. 519; *Ward v. Walker*, 159 S. W. 320. And even if a tender by Mansfield had been necessary, we think in the circumstances of the case the tender at the time of trial was sufficient both as to time and amount to entitle him to maintain the suit.

[4-6] Appellants contend by their second assignment that the court erred in admit-

ting in evidence, over their objection, the contract sued upon by plaintiff. The objections offered were: (1) That the contract failed to show any consideration to support it, (2) because it stated no time within which it was to be performed by defendants, and (3) because of the absence of reciprocal obligations or mutuality of remedy. The objections are not well taken. An obligation to convey lands, independent on its face, may be shown by parol evidence to be dependent upon a consideration not expressed in the obligation or instrument declared on. *Younger v. Welch*, 22 Tex. 419. Such consideration was shown by parol proof upon the trial. While the contract did not provide any time within which it should be performed, a reasonable time was implied, and since it was shown that the plaintiff had in part performed the consideration by procuring the land for defendants, and, further, that the defendants were cutting the timber and selling the land as they had a right under the contract to do, for the purpose of consummating the agreement, such reasonable time is to be determined under all the facts and circumstances. Under the facts of this case, it was not essential to the validity of the contract that there be reciprocal obligations or mutuality of remedies. Mansfield having in part performed the consideration by purchasing the land from Ayers for the Johnsons, and the contingencies upon which he had the right to have a conveyance to his interest having happened, by the sale of more than \$1,500 worth of the land and by tendering into court the money, it was immaterial that there was no provision in the contract entitling the Johnsons to maintain specific performance against Mansfield in case they desired he should take the land and he refused to do so. *Pomeroy on Cont.* §§ 166, 168, 169, 170; 2 *Pomeroy's Equitable Remedies*, §§ 770, 773.

It is contended by the sixth assignment that the judgment is against the great preponderance of the evidence, in that the evidence shows that the consideration for the execution of the written agreement has failed, because such consideration was that Mansfield should procure and sell to the Johnsons the timber upon lands surrounding that purchased from Ayers, and that he had failed to do so. This was pleaded by defendants and denied by plaintiff, and the issue thus formed was submitted to the jury, who upon sufficient evidence found against defendants in this regard. The assignment is overruled.

We will not prolong this opinion by a discussion of each of appellants' assignments of error. We think it is sufficient to say that we have carefully examined all of them and find that no reversible error has been pointed out in either of them.

The judgment of the court below is affirmed.

Affirmed.

**ELLIOTT et al. v. CITY OF BROWNWOOD.**  
(No. 4,730.)

(Court of Civil Appeals of Texas. Austin. June 7, 1911. Certified Questions Answered by Supreme Court May 6, 1914.)

**DEATH (§ 33\*)—ACTION FOR DEATH—LIABILITY.**

Under the statute authorizing an action for death by negligent act, a municipal corporation is not liable for the death of a person caused by its negligence in maintaining its streets.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 49; Dec. Dig. § 33.\*]

Furman, J., dissenting.

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Action by Mary B. Elliott and others against the City of Brownwood. From a judgment sustaining a general demurrer to the petition, plaintiffs appeal. Affirmed.

Certified question answered by Supreme Court in 166 S. W. 1129.

A. S. Fisher and W. M. Allison, both of Georgetown, and Arch Grinnan, of Brownwood, for appellants. O. L. McCartney, of Brownwood, for appellee.

**KEY, C. J.** This suit was brought by Mary B. Elliott, the surviving wife, and other relatives of Otho S. Elliott, seeking to recover damages from the city of Brownwood on account of the death of Otho S. Elliott. The plaintiffs alleged in their petition that the defendant was a municipal corporation of more than 1,000 inhabitants, duly incorporated under title 18, c. 1, of the Revised Statutes of Texas. They predicated their cause of action upon alleged negligence of the defendant in reference to a certain street and bridge or culvert across the same, which street the defendant had opened up and was maintaining for the use of the public, and which bridge or culvert it had constructed across the street. It was alleged that on May 23, 1908, a heavy rain fell in the city of Brownwood and vicinity, which rain caused the timbers and boards of the bridge referred to to be severed from their fastenings and washed away, which resulted in a pit or trench about 6 feet deep and 20 feet wide in the street. It was further alleged that on May 26, 1908, during the nighttime, and while it was very dark, Otho S. Elliott was passing along said street on horseback, without any knowledge of the absence of the timbers and boards of the bridge, and without any knowledge of the pit or trench referred to, and, without fault on his part, his horse fell or plunged headlong into said pit or trench, and as a result thereof Otho S. Elliott was killed. The petition contained all other averments necessary to show that the plaintiffs had a cause of action against the defendant, if the statute creating a cause of action in behalf of relatives when the death of one person is caused by the wrongful act of another per-

son includes in the latter class a municipal corporation when the wrongful conduct charged against such corporation relates to acts done or omitted in opening or maintaining public streets within the limits of such corporation. The trial court sustained a general demurrer to the plaintiffs' petition, and the latter have appealed and assign error upon that ruling.

The statute referred to was construed by this court in *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029, in which it was held that the word "person," as used in that statute, did not include a corporation. Although a writ of error was refused in that case, our Supreme Court, in *Flemming v. Texas Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250, held that the statute was intended to include and render liable private corporations. In that case the Supreme Court said: "The reasoning in the case of *Ritz v. City of Austin*, 1 Tex. Civ. App. 455 [20 S. W. 1029], in which an application for a writ of error was refused by this court, is not in accordance with the view expressed in this opinion. That was a case of a municipal corporation, and is distinguishable from this case. In rejecting an application for a writ of error, we approve the result of the case as determined by the Court of Civil Appeals, but do not necessarily adopt the opinion."

As a matter of fact the *Ritz* Case had another question in it; but the foregoing excerpt from the opinion in the *Flemming* Case indicates that the writ of error was refused upon the ground that the city of Austin was a municipal corporation, and therefore not within the purview of the statute creating a cause of action in favor of a surviving relative, when the death of one person is caused by the wrongful act, negligence, unskillfulness, or default of another. *Ritz's* death was caused by a defective street.

After the *Flemming* Case was decided, the case of *Searight v. City of Austin*, 42 S. W. 857, which involved a similar question of municipal liability, came before this court. In that case the deceased lost his life while working for the city upon one of its electric light towers, and this court affirmed the action of the trial court in holding that the municipality was not liable, and the Supreme Court refused to grant a writ of error. In that case this court said: "It was decided by this court in the case of *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029, that such a suit would not lie against a municipal city corporation. The Supreme Court refused a writ of error in that case. In a later case the Supreme Court held that such a suit was maintainable against a private corporation (*Flemming v. Loan Agency*, 87 Tex. 238, 27 S. W. 126 [26 L. R. A. 250]); but, as we understand the court, it approved the

result of the case decided by this court. The court distinguishes between a private and a municipal corporation. We believe the case last cited settles the law of the case at bar adversely to the appellants, and the judgment of the lower court is affirmed."

In the case at bar counsel for appellants have presented a strong argument, and have cited cases in other jurisdictions construing statutes somewhat similar to ours, and holding that, when the facts alleged would have constituted a cause of action in favor of the deceased, if death had not resulted, such statutes create a cause of action against a municipality in favor of the beneficiaries mentioned in the statute; and, if that was an open question in this state, we might feel disposed to follow such authorities and hold that the petition under consideration states a cause of action. However, we regard the action of the Supreme Court in refusing a writ of error in the Ritz Case for the reason stated by that court in the Flemming Case, and the subsequent action of that tribunal in refusing a writ of error in the Searight Case, as having settled the question in this state.

Counsel for appellant have cited some other cases decided by our Supreme Court, none of which sought to recover damages for injuries resulting in death, except *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519. But in that case it is apparent from the opinion of the court that whether or not the statute created a cause of action against a municipality for damages caused by injuries resulting in death was not presented or considered. Prior to 1892 many suits were maintained and judgments affirmed by the Supreme Court against receivers of railroads; but, when the question was raised as to whether or not the statute creating such cause of action included receivers, that court held that it did not, and stated that the affirmance of former judgments against such receivers, where the question was neither suggested nor considered, did not constitute adjudications of the question. *Turner v. Croos & Eddy, Receivers*, 88 Tex. 231, 18 S. W. 578, 15 L. R. A. 262. In the *Barbour* Case above cited and relied on by appellant's counsel, the judgment of the trial court was not affirmed, but was reversed and remanded, and, as to the question of liability, the court merely said: "The question of the liability of a municipal corporation for damages for an injury resulting from neglect to keep its sidewalks and streets in repair has been considered in the case of the *City of Galveston v. Posnainsky* [62 Tex. 118, 50 Am. Rep. 517], decided at the present term, \* \* \* and for the reasons given, and upon the authorities cited in that case, we hold in this case that such a corporation is liable for such injury, in the absence of an express statute declaring the liability." That quotation, taken in connection with the case therein cited, which was decided the day previous, shows that the court did not have in mind, consider

or decide any question of liability based upon a statute creating a cause of action. In fact the last clause of the quotation, as well as the *Posnainsky* Case therein referred to, shows that the court had in mind the question of common-law liability, and not of liability created by statute law.

Counsel for appellant lay great stress upon the case of *City of Galveston v. Posnainsky*, 62 Tex. 119, 50 Am. Rep. 517, wherein several general principles are announced and supported by authorities therein referred to, and in which Chief Justice Willie was disqualified, and the other members of the court held that a person who was injured, but not killed, by reason of the negligent failure of the city of Galveston to properly maintain a street could recover damages, resting such liability, not upon any statute, but upon the common law. That decision has been repeatedly followed, and, unless overruled by the Supreme Court, will continue as the rule of law in this state, although it is contrary to many decisions in other jurisdictions. And in *White v. City of San Antonio*, 94 Tex. 316, 60 S. W. 428, while seemingly conceding that the question was finally settled by the *Posnainsky* Case, Chief Justice Gaines said: "Since the public have a right to use the streets of a city, and they are for the benefit of the public at large, and not peculiarly for the interest of the corporation, it seems difficult to justify the holding under the general rule. However, the law is so settled in this state and very generally so settled elsewhere, either by statute or by judicial decision."

Without questioning the authority of the *Posnainsky* Case, it is not considered amiss for the writer of this opinion to say that investigation made in this case has led him to doubt if the weight of authority supports that case. Many of the cases on the subject were reviewed by Chief Justice Gray in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, is an elaborate and forcible opinion, dealing with the question of municipal liability for damages sounding in tort; and it is shown in that opinion that many of the cases relied on in support of the proposition that such liability exists at common law were based upon charters or statutes held to create such liability. In *Hill v. Boston*, supra, it is pointed out that *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, which is quoted from in the opinion in the *Posnainsky* Case, was a case in which a city, not in the discharge of any public duty, was holding and dealing with property as its own, for its own benefit, and in the same was as a private owner might. As *Hill v. Boston* does not appear to have been cited by either the court or counsel in the *Posnainsky* Case, it is reasonable to suppose that it was overlooked. The *Posnainsky* Case is in conflict with *City of Navasota v. Pearce*, 46 Tex. 525, 26 Am. Rep. 279, in which it was held that the municipality was not liable to one who was injured

by its negligent failure to keep its streets in repair.

It is contended on behalf of appellant that a municipal corporation, as is shown in the *Posnainsky Case*, acts in a dual capacity, one governmental or public, and the other in a sense proprietary or private, and that, when it acts in the former capacity, it cannot be held liable for the negligence or misfeasance of its officers or representatives, but, when it acts in the latter capacity, it can and should be so held. That proposition is followed with the further contention that, as it was settled in the *Posnainsky Case* that a municipal corporation in opening and maintaining streets does not act in a governmental or public capacity, but acts for its own benefit, the statute creating liability when the death of one person is caused by the misconduct or negligence of another person should be so construed as to include a municipal corporation when the death results from its negligent failure to properly maintain a street. Our answer to that is that the Supreme Court has, in effect, held otherwise in the *Ritz Case* and the *Searight Case*, heretofore referred to.

In reaching the conclusion that the statute did not include a municipal corporation, we do not know, any more than may be inferred, what was in the minds of the members of the Supreme Court. It may be that they failed to be impressed with the suggestions so forcibly urged by appellants' counsel in this case, and it may be that they had doubts and regrets concerning the *Posnainsky Case*, and were not willing to make it a predicate upon which to extend the liability of municipal corporations.

It is also worthy of note, and a circumstance of some importance in determining whether or not it was the legislative intent that the word "person" should include a municipal corporation, that, when the statute in question was first enacted, it had not been held by our Supreme Court that such corporations were liable at common law for damages resulting from failure to properly maintain streets; and outside decisions were in conflict upon that subject, and the court referred to has since that time rendered conflicting decisions upon it. *Navasota v. Pearce*, *supra*; *Galveston v. Posnainsky*, *supra*.

It has been held in this state that neither the state nor a county can be held liable at common law for the failure of either or both to properly maintain public roads, and it is impossible for the writer of this opinion to perceive any sound distinction between a county and a city in that respect. A street in a city is as much a public highway as a turnpike or dirt road not within the limits of a municipal corporation, and the maintenance of a street by a municipal corporation is as much the exercise of a public function as is the maintenance of a public road by a county.

For the reasons given, a majority of this

court has reached the conclusion that the trial court ruled correctly when it sustained the demurrer to appellants' petition, and its judgment is therefore affirmed.

**Affirmed.**

JENKINS, J., being disqualified, did not sit in this case.

FURMAN, J. (dissenting). Adopting the statement of the case as set forth in the opinion of a majority of this court, the writer hereof is constrained to dissent from the conclusions reached by the court for the following reasons:

It was clearly decided in the case of *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029, that, under clause 2, art. 3017, of the Revised Statutes of Texas an action for damages would not lie against a corporation, and that the word "another," as used in said clause 2, was intended to mean and did mean another natural "person," and did not include an "artificial" person or corporation. Which principle was later followed and reaffirmed in the case of *Searight v. City of Austin*, 42 S. W. 857, by this court; in which two cases writs of error were denied by our Supreme Court. It does not seem clear, however, that the precise question raised herein was raised in the *Searight Case*. It appears, then, from the face of the decision that our Supreme Court approved the principle laid down in the *Ritz Case*, and held that the word "person" and "another," as used in said clause 2, art. 3017, are used and employed in their popular sense, and mean an individual and not an artificial person. In a later case, however, than the *Ritz Case*, viz., *Flemming v. Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250, our Supreme Court modified the effect of the decision in the *Ritz Case*, and decided, in effect, that the word "another," as employed in said clause 2, art. 3017, was not limited to natural persons only but did include private corporations, which construction has since been followed and reaffirmed in a number of cases, so that it may be justly assumed that the law is definitely settled in this state that, under said clause 2, art. 3017, of the Revised Statutes of 1895, an action will now lie against a private corporation when the death of any person is caused by its wrongful act, negligence, unskillfulness, or default. It further appears, too well settled to admit of controversy, that a municipal corporation—a city, for example—acts in a twofold capacity. "Certain functions are conferred upon it in the interest of the public at large, and certain others for the peculiar advantage of its own inhabitants. For the unlawful acts of its officers in performing functions of the former class, the corporation is held, as a rule, not to be responsible; but, for their torts in discharging duties of a purely corporate character, the corporation is liable. *White v. City of San Antonio*, 94 Tex. 313, 60 S. W. 426;

*City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, and numerous cases therein cited."

It is not deemed necessary in deciding this case to follow the reasoning of the various courts by which they have arrived at the conclusion that a municipal corporation—a city for example—is held liable for a failure to keep its streets, sidewalks, and bridges in repair. Suffice it to say, in the language of Mr. Justice Gaines in the case of *White v. City of San Antonio*, 94 Tex. 316, 60 S. W. 427, "as to the liability of cities for the negligence of its officers in opening and maintaining its streets there is some contrariety of opinion though it is held, as we think, by the great weight of authority, that they are so liable." It would seem, then, that if a municipal corporation—a city for example—incorporated under the general laws of Texas, is to be held liable for damages for neglect of corporate duty in failing to keep its streets, sidewalks, and bridges in repair, it must follow that such duty appertains to it in its character as a private corporation, and the exercise of such duty is not a governmental function.

Hence it is clear that it is the character, purpose, and object of the act done or duty neglected that determines whether a municipal corporation—a city—is or is not exempt from liability for wrongful acts or negligence causing injury, and not the mere fact of incorporation as a municipality *vel non*.

In the discharge of certain involuntary duties under the terms of its charter, an incorporated city may perform functions that are governmental and essentially public in character, and would enjoy immunity from liability for negligence in the performance thereof. While the same city may voluntarily assume optional duties under its charter that are essentially private in object, scope, and character, in which latter event such city would act in the capacity of a

private corporation, and would be held responsible for damages resulting from its negligence, wrongfulness, or default as such, and could not and should not be permitted by the law to invoke, as a shield from liability for acts or defaults committed in furthering its private interest, the mere fact that at the time of the act or default complained of it was also invested with other powers, functions, and duties essentially public. We understand that the reason for the rule exempting municipal city corporations from liability for acts or negligence of their officers is based on the theory that such corporation, while in the discharge of governmental functions, is a part of the state government, and as such may not be sued without the consent of the state; but when, in a particular case, the pleadings disclose that the act or failure of duty complained of does not come within the purview of a governmental function, then the maxim that, when the reason for the rule fails, the rule also will fail applies.

If the act or omission of duty causing the alleged injury is shown by the pleadings to be of the class denominated as a governmental function, a different question would be before us; but where, as in this case, the petition specifically complains of an act and a failure of duty which our Supreme Court holds in repeated decisions to be of a character pertaining to private corporations, it would seem that the defendant, for the purposes of this case, has elected to act and did act as a *de facto* private corporation in erecting the bridge complained of, and in failing to keep same in repair, as alleged. And it is the opinion of the writer that the petition states a good cause of action, and that the demurrers addressed thereto in the district court of Brown county should have been overruled, and that the judgment of the district court of Brown county should be reversed, and this cause remanded for trial in said court.

**ROBERTSON v. DERRICK et al. (No. 299.)**  
(Supreme Court of Arkansas. May 4, 1914.)

**1. DEPOSITARIES (§ 6\*)—FUNDS—DEPOSIT—NOTICE—"COURT."**

Act April 12, 1911 (Sp. Acts 1911, p. 473) § 1, provides that it shall be the duty of the county "court" of certain counties at the July, 1911, term thereof, and at the same term every two years thereafter, to receive propositions from any bank that may desire to become a depository of the public fund of the county, including school funds, notice of intention to receive such propositions or bids to be published by the clerk of the court for a period of not less than 15 days before the commencement of the term, in some newspaper in the county. *Held* that, since the notice is required to be published 15 days before the commencement of the term, the word "court," as used in the first clause of the section, should be construed to mean "judge," so that it was the duty of the judge to enter an order directing the clerk to publish the notice, and the duty of the clerk to comply therewith.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1672-1682; vol. 8, p. 7622.]

**2. MANDAMUS (§ 73\*)—PUBLIC DUTIES—ENFORCEMENT—NATURE OF REMEDY.**

The duty imposed on a county judge of certain counties by Act April 12, 1911 (Sp. Acts 1911, p. 473) § 1, to order a publication of notice for the receipt of proposals from banks to act as depositories for public funds, and the duty of the clerk to publish such notice, may be enforced by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144-149; Dec. Dig. § 73.\*]

**3. DEPOSITARIES (§ 6\*)—COUNTY OFFICERS—NOTICE OF BIDS—DEPOSITORY OF PUBLIC FUNDS.**

Act April 12, 1911 (Sp. Acts 1911, p. 473), makes it the duty of a county court of certain counties at the July term, and every two years thereafter, to receive propositions from bankers for the deposit of county funds, and requires notice of such intention to be published by the clerk not less than 15 days before the commencement of the term. *Held*, that the duties prescribed are mandatory, and the publication of such notice in accordance with the order of the judge is ministerial, which duties the officers are bound to perform of their own motion.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20; Dec. Dig. § 6.\*]

**4. MANDAMUS (§ 72\*)—RIGHT TO WRIT—JUDICIAL DISCRETION—REFUSAL OF JUDGE TO ACT.**

While judicial discretion in matters committed to the county court will not be controlled by mandamus, yet, if the court fails or refuses to act at all, mandamus will issue to compel action.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 184; Dec. Dig. § 72.\*]

**5. MANDAMUS (§ 14\*)—ACTION BY COUNTY COURT—FAILURE TO ACT.**

Where the county judge and clerk of certain counties, within Act April 12, 1911 (Sp. Acts 1911, p. 473), requiring the court at its July term, and every two years thereafter, to advertise for bids from banks to act as depositories for public funds, failed to act, such failure was equivalent to a refusal to perform the mandatory duty imposed, and justified the issuance of mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 44-46; Dec. Dig. § 14.\*]

**6. MANDAMUS (§ 14\*)—ISSUANCE—PUBLIC OFFICERS—MANDATORY DUTY.**

Where a mandatory duty of a public nature affecting the people at large is imposed on a public officer, no demand of performance and refusal to perform is essential to the maintenance of mandamus to compel him to act; he having failed to act within the time prescribed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 44-46; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Lee County; J. M. Jackson, Judge.

Application by J. T. Robertson for writ of mandamus against W. T. Derrick and others. From an order denying the writ, petitioner appeals. Reversed, and writ granted from Supreme Court.

Roleson & McCulloch, of Marianna, for appellant. Burke & Mann and Daggett & Daggett, all of Marianna, and S. H. Mann and J. W. Morrow, both of Forrest City, for appellees.

WOOD, J. The question presented by this appeal is whether or not mandamus will lie at the instance of a citizen and taxpayer of Lee county to compel the county judge and the county clerk of that county to give the notice provided by and otherwise comply with Act 181, Sp. Acts 1911, approved April 12, 1911, which provides, in part, as follows:

"Section 1. It shall be the duty of the county court of Craighead, \* \* \* and Lee counties, at the July, 1911, term thereof, and at the same term of court every two years thereafter, to receive propositions from any bank, banker, or trust company in said counties, that may desire to be the depository of the public funds of said counties, including school funds. Notice of the intention to receive such propositions or bids shall be published by the clerk of said county for a period of not less than fifteen days before the commencement of said term, in some newspaper in his said county.

"Sec. 2. Any such bank, banker or trust company, desiring to become such depository, shall on or before the first day of said term of court, file with the clerk of said court a sealed bid stating the rate of interest offered to be paid by such bidder for the two years next ensuing, upon the county funds, \* \* \* that may be deposited in pursuance to such bids. And said bid shall be accompanied by a certified check for not less than \$250.00, and in such greater amount as the court shall order, to be stated in the advertisement heretofore required."

[1, 2] The provisions of the sections quoted are all of the act which it is necessary to set forth, as the other sections relate exclusively to things that are to be done after the notice is given. The sections must be construed together, so as to make them harmonious and to effectuate the manifest purpose of the Legislature in passing the act. The latter clause of the second section reads: "And

said bid shall be accompanied by a certified check for not less than \$250.00, and in such greater amount as the court shall order, to be stated in the advertisement heretofore required." The first section requires a notice to be published 15 days before the commencement of said term, etc. Taking these two sections together, it is apparent that the word "court" in the last clause of the second section has reference to the judge, for it would be impossible for the court, as a court, to order the publication of the notice 15 days before the commencement of the term of court. Necessarily only the judge of the court could make the order for the publication required by the act. The court, as a court, could not make an order, except when duly organized and in session, and as the act contemplates that the order for the publication shall be made before the court convenes, necessarily the word "court," as used in the latter clause, to wit, "the court shall order," etc., means the judge. The statute contemplates that the initial act shall be performed by the county judge in fixing the amount of the bidders' deposit and ordering the publication of the notice; but the statute itself fixes the minimum amount of the deposit at \$250, and if the county judge fails to act in the premises, the duty is imposed on the clerk to publish the notice anyway. These duties are imposed on each of those officers, and they may be compelled by mandamus to perform them.

[3, 4] The provisions of the statute requiring the publication of the notice, in the manner and form prescribed therein, are mandatory. The publication of this notice, as provided, is merely a ministerial function, and it is the duty of the officers intrusted with its performance to act on their own motion in pursuance of the statute. All the duties of a discretionary and judicial character imposed upon the county court come after the publication of the notice. The object of this notice is to give those desiring to become the depository an opportunity to make their bids, and to procure the best bids obtainable for the county, and to notify bidders of the time propositions or bids will be received. The county judge and the county clerk have no discretion, therefore, as to whether or not they shall publish the notice required by the statute. As to what the court, as a court, may or may not do, or what it should or should not be required to do, after the publication is given as the statute prescribes, are not now before us for consideration. Judicial discretion, in those matters committed to the county court, will not be controlled by writ of mandamus; but even in those matters, where the court fails or refuses to act at all, it can be set in motion by mandamus.

[5] The judge and the clerk, under the statute, must act by giving the notice, and their failure to act is tantamount to a refusal to perform a duty which is mandatory

upon them, and their failure to act also shows conclusively their intention not to perform their duty.

[6] The rule is correctly stated in *People v. Board of Supervisors*, 223 Ill. 187, 79 N. E. 123, as follows: "The general rule is that, before applying for a mandamus, an express demand should be made, and there should be a refusal to perform, either express or implied. In cases, however, where the duty sought to be enforced is of a public nature, affecting the people at large, and there is no one especially empowered to demand its performance, there is no necessity for a demand and a refusal. The law requiring the duty stands as a continuing demand." See, also, *People v. Board of Education*, 127 Ill. 613, 21 N. E. 187, and other cases cited in appellant's reply brief. The rule and the exception is recognized in *Lee County v. Phillips County*, 36 Ark. 276, where we said: "The general rule is admitted to be that a demand is necessary. The exceptions sustained by some authorities are in cases where the law imposes a positive and well-defined duty of a public nature upon public officers, affecting public interests. Then the law stands for a continuous demand, and it suffices to show a refusal."

It follows that the court erred in not ordering a writ of mandamus, and its judgment will therefore be reversed, and mandamus will issue here, directed against the appellees, commanding the judge to order and the clerk to publish the notice, and to further proceed as specified in the statute.

JONES et al. v. SHIBLEY et al. (No. 298.) (Supreme Court of Arkansas. May 4, 1914.)

LANDLORD AND TENANT (§ 95\*)—LEASE—TERMINATION—CONDITIONS—EVIDENCE.

Evidence held to support a finding that a lease of certain land in controversy to defendant was subject to the condition that it should terminate in case of a sale of the land by the landlord during the year.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 300-304; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by W. H. H. Shibley and others against Charlie Jones and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is a suit in unlawful detainer for the possession of 40 acres of land in Crawford county. Appellees alleged that appellee Shibley had rented the land in controversy for the year 1912, and that appellants were in possession under that lease, that this lease expired the 31st day of December, 1912, and that appellants were in possession, claiming to have rented the land for the year 1913. Appellees alleged that appellants were in the unlawful possession, and that they had re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fused, upon demand, to surrender possession to appellees, and appellees prayed that they have possession of the land, etc. Appellant Jones set up in his answer that during the year 1912, with the knowledge and consent of appellee Shibley, and at Shibley's instance, he purchased from Pape the unexpired lease and the crop on said premises, and at the time verbally leased and rented from appellee Shibley the premises for the year 1913, and that appellant Jones was in possession of the land through his tenant, Williams, under and by virtue of this lease, and that appellees had instituted a suit in unlawful detainer against the appellants, and had caused them to be ejected from the premises, to the damage of appellant Jones in the sum of \$1,000, for which he prayed judgment, and also for \$500 exemplary or punitive damages.

The testimony on behalf of appellees tended to show that appellee Shibley was the owner of the land, and that he rented the same for the year 1912 to one John W. Pape. Pape, during the year 1912, sold his crop to one Jones, with the consent of Shibley. Jones then rented the land for the year 1913, conditionally. Shibley told Jones that the place was for sale. Jones was to rent the place and have possession of it for the year 1913, if Shibley did not sell it by the 1st of January. Shibley, through his agent, Boatwright, sold the place to appellee Gillespie, and placed his deed in escrow about the 19th of December, 1912. The sale to Gillespie was consummated about that time. Jones had contracted to rent the place to appellant Williams. After the place was sold, Williams moved on the place. Shibley never at any time agreed to rent Jones the land, except upon condition that the place was not sold. Shibley testified that he had full possession of the place at the time the trade was made, and that he told appellee Gillespie that he would give him possession. He gave the appellee Gillespie to understand that if he bought the place it would be entirely optional with him as to whether or not he would keep Mr. Jones as tenant or take possession of the place himself. Appellant Williams was not on the place at the time Gillespie came to take possession. There was testimony tending to corroborate the testimony of Shibley to the effect that before he sold the place to appellee Gillespie he had informed appellant Jones that he had the place for sale, and advised the one to whom Jones was attempting to lease the same for the year 1913 not to move on the place because it would cause him trouble, and not to take it.

On behalf of the appellants the testimony tended to show that appellant Jones bought the crop from Pape, Shibley's tenant, for the year 1912; that he went to Shibley with Pape, before he purchased the latter's crop, and made a contract with Shibley to rent the place for the year 1913. Shibley asked Jones whether he wanted a written contract, and

Jones told him he did not think there was any use in it, and Shibley said he did not think so either. It was agreeable with Shibley that Jones should buy Pape's crop and rent the land for the year 1913. Appellant Jones took possession in October, 1912. In December, 1912, Shibley wanted to know of Jones if the latter would give possession, and Jones told him he did not see how he could, because the land was all rented, and that he could not get any more land. Jones had subrented the land to Williams, and Williams moved on the place in December.

The testimony of Jones and also the testimony of Shibley was corroborated. The cause was submitted to the jury upon instructions, to which there is no objection urged here. The verdict was in favor of the appellees, and from a judgment rendered in their favor this appeal has been duly prosecuted.

Edwin Hiner, of Ft. Smith, for appellants.

WOOD, J. (after stating the facts as above). It was a jury question, and there was evidence to sustain the verdict.

Affirmed.

#### ST. LOUIS, I. M. & S. RY. CO. v. DRUM-RIGHT. (No. 267.)

(Supreme Court of Arkansas. April 20, 1914.)

#### 1. RAILROADS (§ 400\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a convict hired to railroad contractors, who was struck by a train while walking on the ends of the ties in going from one of the camp cars, placed close to the track, to another, evidence held to make questions for the jury as to his negligence and the negligence of the railroad company's employees in charge of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

#### 2. RAILROADS (§ 355\*)—INJURIES TO PERSONS ON TRACK—DUTY TO KEEP LOOKOUT.

Where the camp cars of railroad contractors with the railroad company's consent were placed close to the railroad tracks and so that it was necessary in leaving them to go upon the track, a convict hired to such contractors was not a trespasser in walking upon the track in going from one car to another in the performance of his duties, even though the choice of location of the cars was made by the contractors or by the state warden, and it was the duty of the railroad company's employees operating the trains to keep an efficient lookout.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. § 355.\*]

#### 3. RAILROADS (§ 397\*)—ACTIONS FOR INJURIES—EVIDENCE.

Where the camp cars of a railroad contractor were placed close to the railroad tracks, and it was customary for the convicts hired to the contractor to cross the track when necessary and walk up and down the track in going from one car to another, and they frequently passed over the tracks to a place across both tracks where their clothes were washed, evidence as to the existence of the place for washing clothes was competent, in an action for injuries to a convict struck by a train, to show the situation and the custom with respect to



the use of the tracks, though he was not crossing the tracks to go to such place when struck.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1344-1355; Dec. Dig. § 397.\*]

**4. TRIAL (§ 125\*)—MISCONDUCT OF COUNSEL—IMPROPER REMARKS.**

In an action for injuries to a convict hired to railroad contractors, who was struck by a train, remarks of plaintiff's attorney, relative to plaintiff's testimony, that they worked the convicts as much as they could and got all that was coming to them, that that was not all they got, but that they got human flesh, blood, and sweat, that they brought them there alongside the track where there were mosquitoes and the noise of engines, and where everything prevented them from getting sleep or rest, with references to a man with a high fever being worked in a gravel pit until he died and investigations being made by the board, were improper, and, in the absence of disapproval by the court and the withdrawal thereof from the jury, would have required a reversal, as the railroad company was not responsible for the manner in which the contractors treated the convicts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 303-307; Dec. Dig. § 125.\*]

**5. TRIAL (§ 255\*)—MISCONDUCT OF COUNSEL—REQUEST FOR INSTRUCTIONS TO DISREGARD—NECESSITY.**

Where, in an action against a railroad company for injuries to a convict hired to railroad contractors, upon objection to the remarks of plaintiff's counsel concerning the manner in which the contractors treated the convicts, the court told the jury to consider nothing but the evidence, and plaintiff's counsel stated that, if he had said anything that was not proper under the court's instructions, he did not want the jury to consider it, defendant should have asked a more specific withdrawal of the remarks, if he thought the court had not sufficiently disapproved them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

**6. TRIAL (§ 133\*)—MISCONDUCT OF COUNSEL—CURE BY INSTRUCTIONS TO DISREGARD.**

Where the trial court expresses disapproval of counsel's improper remarks and directs the jury not to consider them, it is to some extent in his discretion whether it is necessary to rebuke counsel for making the remarks, and it is not proper to reverse merely because it appears to the Supreme Court that counsel's conduct deserved harsher treatment.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. § 133.\*]

**7. TRIAL (§ 124\*)—MISCONDUCT OF COUNSEL—IMPROPER REMARKS.**

In an action against a railroad company for injuries to a convict hired to railroad contractors, who was struck by a train while walking on the track, where there was evidence that the camp cars were placed close to the track with the railroad company's consent, the remark of plaintiff's counsel that they started this thing in the wrong, placed plaintiff and others where death was liable to come at any minute, and after he was injured continued, and would continue to do so until a jury called a halt on such actions, was not improper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 302; Dec. Dig. § 124.\*]

Smith, J., dissenting.

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by W. J. Drumright against the St. Louis, Iron Mountain & Southern Railway

Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, for appellant. W. H. Pemberton, of Little Rock, for appellee.

**McCULLOCH, O. J.** This appeal is from a judgment of the circuit court of Hot Spring county in favor of appellee, for damages on account of personal injuries inflicted by one of appellant's trains while being operated in or near the yards in Argenta.

Appellee was a state convict at the time he received his injuries, having been convicted of criminal homicide and sentenced to a term in the state penitentiary, but has been pardoned since the date of his injury. He was 66 years of age at the time, and was a carpenter by trade.

[1] The convicts, or at least a considerable portion of them, were hired to one Reaves by the State Board of Penitentiary Commissioners, and Reaves in turn sublet them to Ball & Peters, who were contractors doing railroad work. Ball & Peters had a contract with appellant to do certain construction work along the track north of Little Rock, and at the time appellee's injury occurred he, with a squad of about 100 of the men, were stationed in camp cars on a side track near Argenta. Ball & Peters were independent contractors, but under the Reaves contract the state retained the right to control the labor of the convicts, and they were guarded and worked in charge of wardens selected by the state. This bunch or squad of convicts was in charge of a deputy warden, who lived in one of the camp cars and had his family with him. Appellee was a trusty at the time; his work being to do the ordinary chores around the camp cars, make up the beds, and clean the cars where the guards and other free people stayed, and, among other things, to wait on the family of the deputy warden who was in charge. The road was double-tracked along there, the east track being used by north-bound trains and the west track by south-bound trains; the general direction of the road being north and south. The camp cars, about 15 in number, were placed on a side track on the west side and running parallel with the main track. The convicts had been located at that place for some time, and the situation of the cars was necessarily well known to the trainmen who operated trains. There is a conflict in the testimony as to the width of the space between the side track on which the camp cars were situated and the south-bound main track; the distance being, according to the varying testimony of witnesses, from a clear space of from 18 inches to 5 feet between cars occupying the two tracks. The main track curves a short distance north of the spot where plaintiff was injured, but there is a conflict as to the distance where the

curve is situated. The testimony adduced by appellee tended to show that, looking from the point where appellee was injured, the approach of a train from the north could not, on account of the curve, be observed for a distance of more than 300 feet. Appellant's testimony tended to show that a train could be seen a much greater distance.

Appellee was injured by a train which came from the north while he was walking down the track. The entrances to the camp cars were on the east side of the cars, making it necessary for the convicts, when they came out of the cars, to step down on the south-bound main track. There was no way to get out of the camp cars except to step out from the doors on the east side, and the evidence establishes the fact that it was customary for the convicts to cross the track when necessary to do so and to walk up and down the track in getting from one car to another. According to the testimony of the warden, when the convicts were brought out of the cars in the morning they were lined up on the south-bound track and marched along the track to the dining cars, and thence taken down the track to the work train which was to carry them out to the place of work.

There was a place across both main tracks from the camp cars where the clothes of the convicts were washed, and it was referred to in the testimony as the "wash place." The testimony shows that there was frequent passing over the tracks getting to and from the wash place, as well as passing up and down the tracks in getting to and from the cars.

Appellee was struck by a train and injured about 5:20 o'clock in the evening while he was walking southward on the south-bound track. He had stepped out on the edge of the track from one of the camp cars, and it was necessary for him to walk down to the second car below, which was occupied by the family of the warden; the distance he was required to travel being about 60 feet. He walked along the end of the ties a distance of about 50 feet when he was struck by the work train, which was backing down the track with the tender in front. The evidence was sufficient to warrant the conclusion that none of the trainmen was keeping a lookout, and that no signals were being given as the engine backed down the track.

The engineer and fireman both testified that the bell was ringing at the time, but they are contradicted by other witnesses who were in position to have heard such signal if it had been given; they also testified that they were keeping a lookout, but their testimony on that point is in conflict with that of other witnesses who detailed facts which were sufficient to lead to the conclusion that they could have seen appellee if they had been looking.

The verdict of the jury settles the issue that the men in charge of the train were

guilty of negligence in failing to keep a lookout, and also in failing to give signals.

Appellee testified that, when he stepped out of the camp car and down upon the end of the ties, he looked up the track as far as he could to see whether or not there was an approaching train. He stated that he did not see or hear any train, and then proceeded to walk down the track along the end of the ties, and as he walked down the track he turned his head and looked back over his shoulder. There was a long freight train passing at the time, going north on the north-bound track. The engine and 12 or 13 cars had passed the place where appellee was walking along, and smoke in great quantities (a "big smoke," as expressed by appellee in his testimony) was being emitted from the smokestack of the engine and drifted or was drawn down toward the ground between the line of camp cars and the moving train as through a funnel. Appellee continued to walk along the end of the ties until he was struck by the tender of the backing engine and knocked down. He stated that he did not discover the approach of the engine until it struck him.

There was sufficient evidence to warrant the jury in finding that appellee looked and listened for the approach of the train from the north; that his hearing was deadened to a considerable extent by the noise of the passing freight train; and that his vision was to some extent obscured by the smoke from the freight train. This state of facts, drawing from it the inferences most favorable to appellee, warrants the finding that appellee was not guilty of contributory negligence. He was, viewing the testimony in the light most favorable to his side, rightfully on the track, for the railway company, by permitting the camp cars to be placed in that situation, where it was necessary for the men to walk the tracks, thereby gave implied permission for them to do so, and, under the circumstances of this case, it was a question for the jury to say from all the testimony whether appellee, in the exercise of this right, was guilty of contributory negligence. If he had failed to exercise any precaution at all by looking and listening, it would become our duty to say, as a matter of law, that he was guilty of contributory negligence; but the evidence is that he did look and listen to a certain extent, and it was a question for the jury to determine whether he was negligent in failing to discover the approach of the train.

Appellee was not, according to the evidence, a trespasser, but, as before stated, was on the track by permission of the company.

It is true there is evidence which would warrant the jury in finding that there was sufficient clear space for him to use between the tracks, and that he unnecessarily exposed himself to danger by walking along the end

of the ties; but there was a sharp conflict in the testimony on that point. Appellee stated that there was only a space of 18 to 20 inches between the ends of the ties, and, as other testimony showed that the edge of the box cars overreached the end of the ties, there was not enough space to occupy, and in order to put himself in the clear, out of danger from a passing train, he would have had to get down under the edge of the camp cars. Other witnesses testified to a space of about 3½ feet between the ties, and appellant's witnesses show that there was a clear space of about 5 feet between trains passing on those tracks. Another witness testified that there was enough room for a man to stand between two trains by standing up very straight. So it will be seen that there was a sharp conflict in the testimony, and the jury were warranted in finding that appellee was not guilty of negligence in walking on the end of the ties rather than in the space between, for the danger was, according to testimony which the jury might credit, substantially as great in walking in one place as the other.

Appellant's witnesses produce maps showing the location of the tracks, which, if accepted as correct, establish a clear space of 5 feet between trains. But the correctness of those maps is challenged, and there was evidence to the effect that the maps were made according to the location of the tracks now, which some testimony shows had been changed since the happening of the injury.

Learned counsel for appellant strenuously insist that the testimony fails to make out a case, and that the issue should not have been submitted to the jury. A careful consideration of the testimony, however, convinces us that the testimony presented a disputed issue of fact upon every material question in the case, and that the court properly submitted the case to the jury.

[2] It was left to the jury to find whether or not appellee was a trespasser, or whether he was rightfully upon the track with the knowledge and permission of the company. The camp cars were placed there in that situation by consent of the company. Even if it be conceded that the choice was made by the contractors, or by the warden, the company is responsible for accepting the choice and cannot evade the consequences of a dangerous situation to which it gave its consent. It is not contended that the servants of the company were negligent in placing the camp cars there, but it is contended, and correctly, we think, that, when they consented to the creation of that dangerous situation it was an implied assent for the convicts to use the track for necessary purposes in going to and from the cars, and it was the duty of men operating the trains to take notice of that situation and exercise ordinary care for the protection of convicts who were using the tracks. If appellee was using the track for

necessary purposes in passing from one car to another, as his evidence tends to show, then he was not a trespasser, and the company's servants, who were operating the train, owed him the statutory duty of keeping an efficient lookout; and the court properly charged the jury that if he was not a trespasser, and was in the exercise of ordinary care for his own safety, that if the duty of keeping a lookout was not performed by the trainmen, and that his injury resulted from that omission or from failing to give proper warnings to those who might be on the track, the company was responsible for the injury.

A great many instructions were given by the court, some at the instance of appellee and some at the instance of appellant. Many of appellant's requested instructions were, however, modified by the court, and some refused. The assignments of error with respect to the giving and refusing of instructions are too numerous to justify a discussion of them all in this opinion, but, on an examination of all of the assignments, we are of the opinion that the court's charge was correct, that every phase of the case was properly submitted to the jury, and that none of the rulings of the court violated the principles of law governing the issues as herein stated. There are, however, some other assignments of error which need to be mentioned.

[3] One is that the court erred in permitting the witnesses to testify concerning the existence of the wash place across the tracks from the camp cars. We think this testimony was competent for the purpose of showing the situation there and the custom with respect to the use of the tracks and the necessity for using the tracks by the convicts. It is true, if there was a privilege to cross the tracks to go to the wash place, that privilege was not being exercised by appellee at the time he was injured; but this proof was proper to place before the jury the correct situation and to demonstrate the extent of the circumstances which made it necessary for the convicts to use the tracks and the notice of such use to the company's servants who operated trains.

[4-6] The next and last assignment of error relates to remarks of appellee's attorney in his closing argument. The objectionable remarks and the colloquy which took place between court and counsel appear in the record as follows: Counsel for plaintiff in his closing argument stated as follows: "Now, you take up another proposition. They say this train was coming in on time; that the train was expected by 5:20, about 5:20. Gentlemen, this old man told a sad story when he said they worked them just as much as they could. He put it, 'They got all that was coming to them.' And my God, gentlemen, that ain't all they got; they got human flesh and human blood and human sweat; and they brought them there, alongside of that track, where there were mos-

quitoes and the noise of engines, where everything utterly and absolutely prevented them from getting sleep or rest, but what is sleep or rest of those people? What is it to one of those men who hire these poor unfortunates? What is it to them that a man with fever at 104 is working in a gravel pit until he dies? What is it that these investigations are made by the board? They come up and whitewash them.' Mr. Kinsworthy: I object to that; it has nothing to do with this case. Mr. Pemberton: It is a matter of public history. Mr. Kinsworthy: He is talking about investigations made by the board. That has nothing to do with this. He is doing it to try to inflame the jury. Court: On either side the jury will not consider anything but the testimony. Mr. Kinsworthy: Note my exceptions. I ask the court to rebuke counsel for making that kind of talk. Court: I will instruct the jury not to consider anything but the evidence adduced before them and the instructions of the court. Mr. Kinsworthy: I ask the court to instruct him that it is wrong to make statements of that kind. Court: I don't know what statements— Mr. Pemberton: He stated that these contractors get all they could out of them. Mr. Kinsworthy: We are not contractors. Mr. Pemberton: Now, if I have said anything that is not proper under the instructions of the court, I don't want you to consider it. The record states: 'To which the defendant objected, and asked the court to rebuke counsel for making such improper argument. The court refused to rebuke counsel. To which action of the court, in permitting such improper argument and refusing to rebuke counsel, defendant at the time excepted, and asked that its exceptions be noted of record, which was accordingly done.'"

The argument was improper and, in the absence of some action of the court in disapproving it and taking it from the jury, would be treated as prejudicial error which would call for reversal of the case. The attack of counsel was one which could only have been justly made upon the contractors, or the state authorities, who alone were responsible for the manner in which the convicts were worked. According to the undisputed evidence the railway company merely received the benefit of the work through the independent contractors, and the company was not responsible for the manner in which the convicts were worked. The argument was calculated to inflame the minds of the jury against those who were responsible for the condition described with reference to the men being overworked and given no opportunity to sleep and rest, and the danger from this argument was that the jury might get the idea from it that appellant was in some way responsible for it. Therefore, if the court had refused to do anything to prevent that misleading effect, it would have constituted prejudicial error. But the colloquy

between the court and counsel shows that the court did all that it was asked to do with respect to the removal of this erroneous impression. The language used by the attorney for appellant in stating his objection shows that the basis of his objection was that the jury would understand that his client was brought under the accusation of having created the conditions under which the convicts were mistreated, and his language further shows that, when the court admonished the jury to "not consider anything but the testimony," he understood that this amounted to a disapproval of the remarks by the court and a withdrawal of the same from the consideration of the jury. The attorney who made the improper remarks evidently understood it the same way, for he turned to the jury and in effect withdrew the remarks. Appellant's counsel did not ask the court to do anything more specific in the way of disapproving the remarks or in withdrawing them from the jury except to ask that counsel be rebuked. In other words, he accepted the statement of the court as a disapproval of the remarks, but wanted a more severe rebuke administered to the counsel who had been guilty of the infraction. If he entertained any doubt whether the court was expressing disapproval of the remarks, he ought to have asked the court to make his withdrawal more specific; but he contented himself with merely asking that the counsel be rebuked.

Now, it is a matter to some extent in the discretion of the trial court as to how far it is necessary to go and the manner in which improper matter is to be withdrawn from the jury. If nothing is done at all, then the court's refusal would be construed into an approval, and a reversal must necessarily follow, where it can be seen that a prejudicial effect might result from the argument; but where, as in this case, the court does in a manner express its disapproval, we must leave it to some extent to the discretion of the court to determine how far it is necessary to go in expressing that disapproval. Doubtless in some cases it may be deemed necessary to rebuke counsel who is guilty of making improper remarks, but we cannot say that the court has erred merely because it refuses to administer a rebuke. The trial judge is in a better situation than we are to determine how far it is necessary to go in removing the improper effects of prejudicial remarks; and, where it can be seen from the record that he has expressed disapproval and directed the jury not to consider the improper remarks, it is not proper for us to reverse the judgment merely because it appears to us that the conduct of the offending attorney deserved harsher treatment.

[7] After the incident just related, the counsel for appellee, in proceeding with his argument, made the following remarks, which were objected to: "But, gentlemen of

the jury, I say to you they started this thing in the wrong. They placed the old man and the others where death was liable to come at any minute, and not only that, gentlemen, the testimony shows that after he was injured they still continued, and, gentlemen, they will always continue to do that until a jury says to them, 'We call a halt on such actions as that.' We understand these remarks to be directed to the conduct of the railway company in allowing camp cars to be placed where the men would be exposed to danger. Now, as we have already shown, there was no charge of negligence in the complaint in this respect, but proof of this situation was competent for the purpose of showing that there was an exposure to danger which placed upon the servants of the company the duty to guard against in operation of trains. It was therefore not an illegitimate argument to refer to this situation and the responsibility of the railway company on account of it. Of course that part of the statement which admonished the jury that, unless they "call a halt on such actions," the practice would continue was mere expression of the opinion of counsel which we do not think can be treated as prejudicial.

Appellee was very severely injured, and the amount of damages fixed by the jury is very moderate. It is not claimed, either in the motion for new trial or in the argument, that the verdict is excessive.

The evidence was sufficient to support the verdict in every phase of the case, and we fail to find in the record any erroneous ruling of the court which could have had any prejudicial effect and call for reversal of the case.

Judgment affirmed.

SMITH, J., dissents.

#### PINSON v. COBB et al. (No. 294.)

(Supreme Court of Arkansas. May 4, 1914.)

**BILLS AND NOTES (§ 525\*)—ACTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

In an action on a note in which defendants pleaded fraud, coercion, and lack of consideration, evidence held to show, by the preponderance thereof, that plaintiff was a bona fide holder for value, without notice of any infirmity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by W. J. Pinson against J. D. Cobb and others. From a judgment for defendants, plaintiff appeals. Reversed, and judgment entered for plaintiff.

Gaughan & Sifford, of Camden, and E. O. Mahony, of El Dorado, for appellant. Terry, Downie & Strepey, of Little Rock, for appellees.

McCULLOCH, C. J. Appellant, W. J. Pinson, instituted this action in the circuit court of Pulaski county against appellees, J. D. Cobb, Ben Cox, W. N. Morris, and G. W. Fair, to recover the amount of a promissory note in the sum of \$5,000 executed by appellees to one S. R. Morgan, and assigned to appellant by Morgan for a valuable consideration. Appellees answered, admitting that they executed the note in suit, but alleged that Morgan obtained it from them by fraud and coercion, and that appellant was not an innocent purchaser, without notice of the facts upon which the defense against payment is based. It is alleged in the answer that appellees and Morgan were stockholders in the People's Life Insurance Company of Little Rock, Morgan having subscribed for a certain amount of stock and paid for the same in part by delivering 11 first mortgage bonds of the El Dorado Light & Power Company, of the par value of \$1,000 each; that subsequently Morgan conspired with one Craig, who was secretary of the company, and procured the redelivery to himself of said bonds; that the possession of said bonds in the hands of the officers of the company was necessary in order to make a proper showing to the insurance commissioner to obtain his certificate, and, in order to secure from Morgan the return of said bonds to the proper officers of the insurance company, they (appellees) were compelled by Morgan to execute two notes, the one in suit for \$5,000, and the other for \$5,540; and that there was no valid consideration for the execution of the notes. Appellees moved to transfer the cause to the chancery court, and the cause was transferred by consent of all parties.

We will not enter into a discussion of the question whether the allegations of the answer and the proof adduced in support thereof constituted a defense to the note while the same remained in the hands of the original holder, for we are of the opinion that the evidence establishes the fact that appellant, Pinson, was a bona fide holder for value, without notice of any infirmity, and the defense cannot be sustained as against his right to recover. Pinson and Morgan both resided in El Dorado, Ark., and appellees resided in and about Little Rock. Pinson and Morgan both testified that before the maturity of the note Morgan sold it to Pinson and received, in consideration of the sale, shares of stock in the American Bank & Trust Company of El Dorado, of the par value of \$1,000, and stock in the El Dorado Light & Water Company, of the par value of \$1,000, and the surrender of Morgan's note for \$2,000 held by Pinson, leaving a balance of \$1,000 which Pinson held as a credit in favor of Morgan and subsequently paid it down to a balance of \$450 due at the time of the trial of this case. Pinson also testified that he had no notice of any defense to the note or any circumstances

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sufficient to put him upon inquiry. In other words, he testified that he purchased the note in good faith, and paid for it as above stated, and had no knowledge or intimation that the validity of the note would be contested. He stated that he was not acquainted with any of the makers of the note except Mr. Cox, but, from what he had heard of Cox, and from the statements of Morgan, he became satisfied that the note was good, and he purchased it.

There is no testimony whatever tending to show that Pinson's statements as to his purchase of the note, and as to the good faith of the transaction, are not true. The only thing relied on to impeach the good faith of the transaction is that Pinson and Morgan lived in the same town, and that they were distantly related by marriage, and had formerly been connected with a bank at the same time.

It is an undisputed fact in the case that Pinson paid a valuable consideration for the note, and that the consideration was substantially adequate. There is nothing whatever to dispute that fact, and it is supported by the uncontradicted testimony of Pinson and Morgan. The burden of proof was on appellant to establish that fact; but when once established the burden shifted to appellees to show that Pinson had notice of the facts which constituted the defense. Appellees have, as before stated, adduced no proof except a mere suspicion, from the relations between the parties, that Pinson might have known that there was something wrong with the note. The relations between Pinson and Morgan were not such as would warrant an inference of such intimacy as would throw a cloud upon transactions between them.

We need not go so far as to say that the testimony was not sufficient to have warranted a jury in a trial at law in finding in favor of appellees on that issue; but, this being a chancery case, and is heard here de novo, we are of the opinion that the chancellor's finding is not supported by the preponderance of the testimony. The decree is therefore reversed, and judgment will be entered here in appellant's favor for the amount of the note, interest, and protest fees as set forth in the complaint.

#### WEIGEL v. McCLOSKEY. (No. 289.)

(Supreme Court of Arkansas. April 27, 1914.)

#### 1. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—ELECTION BETWEEN CAUSES OF ACTION.

The refusal to compel an election between causes of action for false imprisonment and for damages for unlawfully shackling a convict laborer is not prejudicial, in view of Acts 1905, p. 798, providing that the court may consolidate causes of like nature when it appears reasonable to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

#### 2. DAMAGES (§ 210\*)—INSTRUCTIONS.

An instruction on the measure of damages, which does not tell the jury that their finding must be based on the evidence, is erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.\*]

#### 3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS AS TO DAMAGES.

An instruction on the measure of damages, erroneous because not telling the jury that their finding must be based on evidence, is not prejudicial error, as the oath of the juror is sufficient to compel him to conform his finding to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4218, 4221-4224; Dec. Dig. § 1064.\*]

#### 4. PARDON (§ 9\*)—TIME OF TAKING EFFECT.

A pardon is effective upon delivery and acceptance.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 16-22; Dec. Dig. § 9.\*]

#### 5. FALSE IMPRISONMENT (§ 15\*)—DETENTION OF CONVICT LABORER AFTER PARDON—LIABILITY OF WARDEN.

Where a warden, appointed by a contractor for convict labor and confirmed by the court under the statute, refuses, on the ground of lack of authority, to release a convict laborer of whom he had charge, on delivery of a pardon to him, he is liable for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.\*]

#### 6. FALSE IMPRISONMENT (§ 8\*)—DETENTION OF CONVICT LABORER AFTER PARDON—AUTHORITY OF WARDEN.

Where a contractor of convict labor delegates his custody of the convicts to a warden appointed by him and confirmed by the court under the statute, it is the duty of the warden, on delivery of a pardon to him, to himself examine the books to see if the pardon covers all the offenses for which the convict was committed if he would escape liability for false imprisonment in holding the convict.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68-73; Dec. Dig. § 8.\*]

#### 7. FALSE IMPRISONMENT (§ 36\*)—DETENTION OF CONVICT AFTER PARDON—EXCESSIVE DAMAGES.

Where a warden, having charge of convict labor hired out to a contractor, refuses to release a convict on the delivery of a pardon to him on the mistaken assumption that only the contractor had such authority, and the convict was detained 4 or 5 hours and was compelled to work 2½ hours after receipt of the pardon, but no indignities were offered him, a verdict of \$1,000 for the false imprisonment was excessive, and a verdict for \$25 would be affirmed.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 118-115; Dec. Dig. § 36.\*]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by C. E. McCloskey against E. N. Weigel. From a judgment for plaintiff, defendant appeals. Reversed as to one cause of action, and affirmed as to the other.

C. E. McCloskey instituted this action against E. N. Weigel to recover damages for false imprisonment. His complaint also alleges that during the time of his imprisonment he was unlawfully and wrongfully fore-

ed to wear upon his leg an iron shackle, commonly known as a "spur," which was very painful and caused a sore on his leg. The facts are as follows: The plaintiff, McCloskey, was convicted before a justice of the peace in Pulaski county of two offenses; his fine being fixed in one case at the sum of \$1, and in the other in the sum of \$50. The defendant, Weigel, at the time had leased the county convicts from the county court, and was working them under his lease. Under the rules adopted by the county court for working county prisoners, the contractor had the right to put fetters, or shackles, upon any prisoner who improperly refused to work or attempted to escape. One of the rules provided that the contractor should use all reasonable means to prevent a convict from escaping. Another one provided that a contractor should appoint a warden and deputy warden, but that before said appointment became effective such appointment must be approved by the county court. After his conviction on the 10th day of June, 1908, the plaintiff was turned over to the defendant to work out his fine and costs. W. H. Rankin applied to the Governor for a pardon for the plaintiff, and the pardon was issued on the 24th day of June, 1908, and delivered to Rankin. Rankin carried the pardon out to the place where the plaintiff, with the other county prisoners, was worked by the defendant. The defendant was not present, and Rankin delivered the pardon to John Harden, who was the warden in charge of the convicts. Harden had been appointed by the defendant, and his appointment had been approved by the county court. The warden refused to turn the plaintiff loose, saying that he had no authority to do so and that the pardon would have to be delivered to the defendant. Rankin testifies that he left the pardon with the warden and attempted to get in communication with the defendant over the telephone, but was unable to do so. On the other hand, the warden denied that Rankin left the pardon with him. The defendant lived about three miles from the camp where the convicts were worked and kept his books at his residence. He states that when he returned home that evening his wife delivered the pardon to him; that he immediately examined his books to see if there were any commitments against the plaintiff other than those named in the pardon; and that when he found there was not he immediately sent a messenger with the pardon to the camp with instructions to the warden to liberate the plaintiff. The pardon, according to the testimony of Rankin, was delivered to the warden at about 2 o'clock in the afternoon. The warden continued to work the plaintiff until about 4:30 o'clock, at which time the shackles were ordered to be cut off his leg, and this was done. The plaintiff, however, was detained in custody until 7 or 8 o'clock in the

evening; this being the time that the warden received instructions from the defendant to liberate the plaintiff. The plaintiff testified that he made no effort whatever to escape while he was a prisoner in charge of the defendant, and that the iron spur was placed upon him the first day he was delivered into the custody of the defendant, and remained there, both day and night, until he was liberated. He says that he suffered pain on account of the spur being on his leg, and that it caused a sore place to form there. The defendant testified that he was informed by the officers, before the plaintiff was delivered to him, that the plaintiff had a bad reputation and was likely to escape unless precautions were taken to prevent him; that in order to prevent his escape he placed the iron spur on his leg. Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff for \$1,000 for false imprisonment and a separate verdict for \$100 for placing and keeping the iron spur on the plaintiff's leg. Judgment was rendered upon the verdict in each cause of action, and the defendant has appealed.

Jas. A. Comer, of Little Rock, for appellant. Jno. F. Clifford, of Little Rock, for appellee.

HART, J. (after stating the facts as above). [1] Counsel for defendant made a motion to compel plaintiff to elect upon which cause of action he would proceed to trial, and assigns as error the action of the court in refusing to require plaintiff to make such election. An act of the General Assembly of 1905 provides, in effect, that when causes of a like nature, or relative to the same question, are pending in any circuit court in this state, the court may consolidate said causes when it appears reasonable to do so. Acts of 1905, p. 798. If separate actions had been brought, we think the court could have consolidated them under this statute. Therefore no prejudice could have resulted to the defendant by the court refusing to require plaintiff to elect upon which cause of action he would proceed. See *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Ashford v. Richardson*, 88 Ark. 124, 113 S. W. 808; *Western Union Tel. Co. v. Shofner*, 87 Ark. 303, 112 S. W. 751.

[2, 3] It is next contended by counsel for defendant that the court erred in giving instructions on the measure of damages. He claims that the error consists in the court's not telling the jury, in specific terms, that their finding as to the amount of damages must be based on the evidence, and insists that the instructions left it to the jury to find for the plaintiff in any amount that, in their judgment, should be proper. We have condemned instructions similar to the one now under consideration in several cases. See *St. Louis, I. M. & S. R. Co. v. Steed*, 105 Ark. 205, 151 S. W. 257; *St. Louis, I. M. &*

*S. R. Co. v. Dallas*, 98 Ark. 209, 124 S. W. 247. However, we have never held that such an instruction is reversible error. In the case of *St. Louis, I. M. & S. R. Co. v. Hydrick* (Ark.) 160 S. W. 196, the court said: "While it is always better form, and the better practice, for the court to tell the jury that its findings on every issue of fact in the case must be based upon the evidence, yet where it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. The jury were sworn, in the first instance, to try the case and a true verdict render according to the law and the evidence. Kirby's Digest, § 4530. That being true, it is not likely that any man of sufficient intelligence to be a competent juror would feel authorized to wander beyond the evidence to find matters upon which to predicate his findings in the case. The conscientious juror would necessarily feel restrained by his oath to base his findings upon the evidence."

[4-7] It is also insisted by counsel for defendant that the verdict of the jury on the cause of action for false imprisonment is excessive; and in this contention we think he is correct. A pardon is effective upon delivery and acceptance. See *Redd v. State*, 65 Ark. 485, 47 S. W. 119; *Ex parte Hunt*, 10 Ark. 284. The plaintiff was lawfully in the custody of the defendant as lessee of the county prisoners under a contract made by him with the county court. While this is true, when the time for which a convict has been sentenced has expired, or when he has been pardoned by the Governor, he is in law no longer a convict, and cannot be held as such. The defendant himself did not remain with the convicts and have direct charge of them. He delegated that authority to a warden who was appointed by him with the approval of the county court. It was the duty of Rankin, who procured the pardon for the plaintiff, to deliver the pardon first to the warden in order that he might examine it and see that it was issued by the Governor and ascertain that it was what it purported to be. It was then the duty of the warden to cease working the plaintiff. It is insisted by counsel for defendant that he should have had a reasonable time to have examined his records in order to ascertain whether or not the plaintiff had been pardoned for all offenses for which commitments had been delivered to him. This is true; but the warden refused to release the plaintiff solely on the ground that he did not have authority to do so. He told the person who had the pardon that the defendant alone reserved the right to discharge the plaintiff.

The defendant having delegated to the warden the authority to have charge of the persons worked by him, it was within the scope of the authority of the warden to have examined the records himself and have determined whether there were other commitments under which the plaintiff might be held. It was his duty to have made such an examination, or caused it to have been made at once, or to have discharged the prisoner. A prisoner who has been pardoned by the Governor is entitled to his freedom, and to deprive him of it is unlawful. Therefore the plaintiff was entitled to a judgment for some amount. As above stated, he was in legal custody of the defendant, and he had suffered all the humiliation it was possible for him to suffer solely on account of being a prisoner. The undisputed evidence shows that the illegal detention of the plaintiff by the defendant was not willful. No indignities were offered to the plaintiff by the defendant, or his servants, after the pardon had been presented to the warden. It is true he was required to work for about two hours and a half thereafter; but this was done under a misapprehension of the law on the part of the warden who had the legal custody of the plaintiff. Under these circumstances, we think that a judgment for \$25 would have been sufficient compensation for the jury to have awarded, and a judgment for that amount will be affirmed.

We find no error in the record on the cause of action for compelling the plaintiff to wear a spur, and the judgment on that count will be affirmed.

USSERY et al. v. USSERY. (No. 296.)  
(Supreme Court of Arkansas. May 4, 1914.)

1. TRUSTS (§§ 17, 18\*)—EXPRESS TRUSTS—PAROL AGREEMENT.

Where one purchased land and caused the deed to be executed to a third person, a parol agreement that the third person should hold the land in trust for the sole use of his wife was unenforceable, under statute of frauds.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.\*]

2. TRUSTS (§ 95\*)—TRUSTS EX MALEFICIO—EVIDENCE.

A purchaser, desiring to contribute to the support of his stepdaughter and her children, procured the conveyance to be made to her husband, who was not present when the deed was made, but to whom the deed was subsequently delivered. It was understood that he and his wife should move on the land, and they did so, but within less than a year the husband began to neglect his wife, and finally deserted her, leaving her in a helpless condition. Held, that the husband did not hold the land in trust ex maleficio, because of the absence of fraud on his part in procuring the legal title.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 145-147; Dec. Dig. § 95.\*]

Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.



Suit by Stella Ussery against J. M. Ussery and another. From a decree for plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss complaint for want of equity.

A. Curl, of Hot Springs, for appellants.  
M. S. Cobb, of Hot Springs, for appellee.

McCULLOCH, C. J. This is an action instituted on March 7, 1913, in the chancery court of Garland county, by Stella Ussery against her husband, J. M. Ussery, to enforce an alleged trust in her favor under a deed executed by one Robbins to said J. M. Ussery, dated November 27, 1908, conveying a tract of 80 acres of land situated in Garland county. Defendant J. M. Ussery executed to his codefendant Curl a deed, conveying the land in controversy, about the time of the institution of this action, and the latter was also made a party defendant. The answer contains a denial of all the allegations of the complaint with respect to the consideration for the deed from Robbins to J. M. Ussery, and alleges that Ussery paid a valuable consideration for said conveyance.

[1] The allegations of the complaint are that, on the date mentioned, plaintiff's stepfather, Charles Foster, purchased the land in controversy from Robbins and caused the deed of conveyance to be executed by Robbins to plaintiff's husband, J. M. Ussery; that Foster paid the consideration for the conveyance; and that "he had the deed made to James Ussery, the defendant herein, to hold in trust for the sole use and benefit of plaintiff." The allegations of the complaint are not sufficient to take the case out of the operation of the statute of frauds, for, at most, the alleged agreement constitutes an express trust, which cannot be ingrafted by parol testimony upon a written deed of conveyance. *Spradling v. Spradling*, 101 Ark. 451, 142 S. W. 848. There was an attempt, however, to bring the case within the principles upon which a trust *ex maleficio* may be declared.

[2] Plaintiff and defendant had been married many years before this transaction occurred, and had children the issue of their marriage. They had up to that time lived together happily, so far as this record reflects the facts. Plaintiff was in ill health, being subject to epileptic fits, and they lived in the neighborhood of their mother, who was the wife of Charles Foster, the purchaser of the land from Robbins.

Defendant J. M. Ussery testified that, at the request of Foster, he negotiated the purchase of a quarter section of land from Robbins, of which the 80 acres in controversy was a part, and that, in consideration of his services in negotiating the purchase at a very low price, Foster agreed to have the 80 acres in controversy conveyed to him. The chancellor found against defendant Ussery on that point, however, and we accept those findings as correct.

Foster testified that he purchased the quarter section of land from Robbins, and, desiring to contribute something to the support of his stepdaughter and her children, he caused the conveyance of the 80 acres in controversy to be made to J. M. Ussery. He testified that there was no agreement with Ussery at all with reference to the land; that he voluntarily had the conveyance made to the latter "to help Stella and him raise their children. I always wanted to help Stella and her children all I could." He stated that J. M. Ussery was not even present when the deed was executed, but that he subsequently delivered it to Ussery.

Mrs. Foster testified that there was an understanding or agreement that defendant and his wife should move on the land and build a house, and that she (witness) and Foster would move to an adjoining tract so that they could all be near each other.

The Usserys never moved on the land, and, within less than a year after the execution of the deed, defendant Ussery began to neglect his wife and finally deserted her, leaving her in a helpless condition. However reprehensible the conduct of Ussery was, we find nothing in the state of facts with reference to the execution of this conveyance which would warrant the court in declaring the existence of a trust *ex maleficio*.

The elements constituting that character of trust are stated by Mr. Pomeroy in language approved by this court as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." 3 Pomeroy's *Equity Jurisprudence*, p. 2033; *Ammonette v. Black*, 73 Ark. 310, 83 S. W. 910; *Bragg v. Hartney*, 92 Ark. 55, 121 S. W. 1059; *Spradling v. Spradling*, *supra*; *La Cotts v. La Cotts*, 159 S. W. 1111.

Foster, the purchaser of the land, testified that no agreement at all was made with Us-

sery, and that the conveyance was entirely voluntary. Mrs. Foster testified that there was an agreement or understanding that Usery would move on the place and build a house; but, at most, that testimony, even if it be accepted as the facts of this case, only constituted a promise and violation thereof without any element of positive fraud. With respect to that state of facts we have said: "There must, of course, in such cases be an element of positive fraud, by means of which the legal title is wrongfully acquired, for, if there was only a mere parol promise, the statute of frauds would apply." *Ammonette v. Black*, supra. We are therefore of the opinion that, when the testimony is viewed in the light most favorable to the plaintiff, it falls entirely to make a case which would warrant the declaration of a trust in her favor.

The chancellor reached an erroneous conclusion in applying the law to the facts as found by him, and the decree is therefore reversed, and the cause remanded, with directions to dismiss the complaint for want of equity.

**ST. LOUIS, I. M. & S. RY. CO. v. WAGONER et al. (No. 286.)**

(Supreme Court of Arkansas. April 27, 1914.)

**1. NEGLIGENCE (§ 56\*)—DANGEROUS INSTRUMENTALITIES — EXPLOSION — PROXIMATE CAUSE.**

Where defendant railroad company left an empty alcohol barrel unguarded on a station platform, and plaintiff's 10 year old son, while playing around it with others, placed a lighted match at a hole in the head of the barrel from which a cork had just been removed, resulting in an explosion by which he was injured, the court properly refused to charge that his act in placing the match at the hole was the proximate cause of the injury, since, if defendant was negligent in placing the barrel on the platform, then such negligence would be the proximate cause of the injury, notwithstanding the act of the child in producing the explosion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

**2. NEGLIGENCE (§ 23\*)—DANGEROUS PREMISES—INJURIES TO CHILDREN—OWNER'S LIABILITY.**

The rule that an owner of premises, who permits dangerous appliances to remain thereon which are attractive to children, will be liable for an injury resulting to a child which may reasonably have been anticipated has no application to a case where there is no negligence on the part of the owner in permitting the appliance to remain unguarded where it is located.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

**3. NEGLIGENCE (§ 24\*)—DANGEROUS PREMISES—APPLIANCES—EMPTY ALCOHOL BARREL—EXPLOSION.**

Where defendant carrier received for transportation an empty alcohol barrel without notice that it was dangerous or that the action of the sun thereon might generate an explosive gas therein, it was not negligent in permitting the barrel to remain on the station platform at destination, so as to render it liable for in-

juries to a child resulting from an explosion thereof caused by his holding a lighted match over a hole in the head of a barrel after the cork had been withdrawn; the rules of the company not requiring caution tags to be placed on empty barrels which had previously contained explosive substances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 24; Dec. Dig. § 24.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by Neal Waggoner and others against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and dismissed.

On the 27th day of September, 1912, C. J. Lincoln Company shipped over appellant's line of railway an empty alcohol barrel to Walter Priest, who lived at Ward, a station on appellant's line. There was nothing on the waybill to show that the barrel had had inflammables in it. The barrel was sent by the shipping clerk of C. J. Lincoln Company to the depot of appellant company at Little Rock, and it was received there by the appellant and shipped over its line to Ward. It arrived at Ward on the 28th. Appellant's local crew unloaded it and set it out on the end of the platform and gave the station agent at Ward the billing for it. The barrel would have been put on the platform and would have remained there the same as it did if it had been a full barrel of alcohol.

The bill of lading had stamped on it "No Label Required." This, according to the regulation of the appellant, was to be stamped on bills of lading whenever the shipment did not require a label. A red caution label is required on inflammables. The shipper is required to put the red label on a shipment that contains inflammables, and the bills of lading for shipments that require a red caution label to be put on them would have to be stamped as follows: "Red Label Required." The purpose of putting that stamp on the bills of lading was to instruct the railroad officials as to what class of goods were being shipped. The red label was not required by the regulation of appellant on an empty barrel. If the article had required it, the bill of lading would have been stamped "Red Label Required." The appellant's shipping clerk stated on the bill of lading that no label was required because that was a fact as to the shipment of an empty barrel. A red label had been put on this barrel when it was shipped to Lincoln Company as a full barrel. The fact that the red label was put on the barrel was an evidence that the barrel had contained inflammables at some time. The shipping clerk who made out the bill of lading did not see the barrel. He billed it out as it was reported to him by the shipping clerk of the Lincoln Company, as an empty barrel. The waybill was made by the billing clerk of the appellant from the bill of lading

containing the description of the article as given by the shipping clerk of the party who was billing the article for shipment. The waybill is delivered by the agent who ships the goods to the conductor and follows the article through to destination. The receiving agent at Ward never examined the barrel. They did not examine empty barrels like the one that was shipped in this instance. If the waybill had been marked "Inflammable Liquid" or "Red Label" stuff, it would have given the agent at Ward notice of the dangerous character of the shipment. In this instance there was nothing calling the receiving agent's attention to the barrel as having explosives in it or as being dangerous. The agent never noticed it.

On the bottom of the barrel, or the end on which it was standing, was a red tag which was as follows: "Caution: Inflammable Liquid. Keep away from fire, stoves, radiators, lighted matches, lanterns and direct sunlight. Any leaking package must be removed to a safe place."

On the 28th of September A. C. Waggoner went to the station at Ward to take a train for Judsonia. His wife and two boys, Neal and Paul, accompanied him to the station. While he was in the waiting room, the boys were playing on the station platform around the empty barrel. The barrel was sitting on its end. It had a half-inch cork stopper in a hole in the end of the barrel that protruded about half an inch out of the hole. When the stopper was pulled out, it made a hissing sound, like a goose makes. It was sitting in the sun, and it was warm in the sun. The boys would blow their breath in the barrel, and it would blow back on them. One of the boys said, "Stick a match to it," whereupon a match was given to Neal Waggoner. He asked some of the boys if it would hurt him, and they said no. He then struck the match and started to stick it in the barrel when the explosion occurred, causing the injuries to Neal and Paul Waggoner, for which the appellee, A. C. Waggoner, in his own behalf as parent and as their next friend, brought this suit, alleging substantially negligence on the part of appellant in placing the barrel on the station platform and permitting it to remain there when the platform was thronged with children playing around the barrel; that children were accustomed to play around on the platform at appellant's passenger station, especially on Sundays, and that such fact was known to appellant; that the appellant knowingly left this barrel on the platform where the children were in the habit of frequenting and on and around which they were accustomed to play; and that appellant knew, or by the exercise of ordinary care should have known, that the barrel was a dangerous article and was attractive to children.

Appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and al-

so answered, denying the allegations of negligence set up in the complaint.

The court, over the objections of appellant, instructed the jury in substance that if the defendant left on its station platform a dangerous barrel, attractive to children, which it knew to be dangerous, or by the exercise of ordinary care should have known to be dangerous, and if the defendant left the barrel at a place and time where and when children would congregate, and if the defendant, by the exercise of reasonable care, should have known that children would there congregate and play and would likely be attracted to and injured by said barrel, and if they further found that those children were attracted by said barrel, and, while in the exercise of such care as children of their age and experience would exercise, did, in playing with the barrel, strike a match and cause the barrel to explode, thereby injuring them, then this would be such negligence on the part of defendant (appellant) as would render it liable to the plaintiffs in damages for the injuries which they had sustained.

The court gave, at the instance of appellant, instructions which told the jury in effect that, if they believed from the evidence that the injuries to the plaintiffs by the explosion of the barrel could not have been reasonably anticipated or foreseen by the defendant as the natural and probable result of leaving the barrel on its station platform, then the defendant was not liable; and that if they believed from the evidence that the barrel was shipped as an empty barrel, and was accepted as such by the defendant, and that the agent at Ward had no knowledge of the fact that the barrel had contained anything of an explosive character, and that he exercised the same degree of care with reference to the barrel as any other prudent person engaged in the same business and under the same circumstances would exercise with reference to an empty barrel, then the plaintiffs cannot recover; and that if the defendant's employes had no knowledge or reasonable cause to believe that the empty barrel, which had been used for inflammable liquids, would contain explosive gas after it was empty of liquids, defendant would not be liable for the explosion; and that the burden was upon the plaintiff to show that the defendant's employes did have such knowledge, or reasonable cause of belief.

The appellant asked the court to instruct the jury that if the defendant railway company accepted the barrel for shipment as an empty barrel, and had no knowledge that it contained gas or other explosives, and that the barrel was exploded on account of a match being dropped in it by the plaintiff, they should find for the defendant. The court refused this prayer, but gave one to the same effect, over the objection of appellant, adding that, if the defendant had no knowledge, or by the exercise of ordinary care could not have had such knowledge, that

the barrel contained gas or other explosives, then their verdict should be for the defendant.

The court further told the jury, at the request of appellant, that the mere fact that there was posted on the end of the barrel a caution notice would not of itself be sufficient to establish negligence against the defendant.

The court refused prayers for instructions presented by the appellant, telling the jury in effect that the appellees were bare licensees, and that the appellant owed them no affirmative duty or care, but only owed them the duty not to willfully or wantonly injure them, and also prayers to the effect that the lighting of the match was the proximate cause of the injury, and also refused to direct the jury to return a verdict in favor of appellant.

The above are substantially the facts upon which judgments in favor of appellees were rendered, and from which this appeal has been duly prosecuted.

E. B. Kinsworthy, T. D. Crawford, and R. E. Wiley, all of Little Rock, for appellant. Jas. B. Reed and Trimble & Trimble, all of Lonoke, for appellees.

WOOD, J. (after stating the facts as above).

[1] The court was correct in refusing to tell the jury that the act of the appellee Neal Waggoner, in lighting the match and placing the same over the barrel, was the proximate cause of the injury. Neal Waggoner was only ten years of age, and it would not be correct to say, as a matter of law, that one of such tender age was guilty of contributory negligence, or that his act, which was the immediate cause of the explosion, was a new and independent force producing the injury and the proximate cause thereof so as to relieve the appellant of liability, provided it was negligent in placing and leaving the empty alcohol barrel upon the platform of its station at Ward. In other words, if appellant was negligent in placing the barrel on its platform at Ward, then such negligence would be the proximate cause of the injury, and appellant would be liable for such negligence, notwithstanding the act of the appellee Waggoner in striking the match which produced the explosion. See *Pittsburgh Reduction Co. v. Horton*, 87 Ark. 578, 113 S. W. 647, 18 L. R. A. (N. S.) 905; *St. Louis & S. F. Ry. Co. v. Williams*, 98 Ark. 72, 135 S. W. 804, 33 L. R. A. (N. S.) 94. In these cases the principle is recognized "that negligence in unnecessarily leaving an explosive exposed so that children could have access to it would be the proximate cause of an injury resulting therefrom, under circumstances" which showed that the act of the child in setting off the explosive was the "natural sequence of antecedent events and ought to have been anticipated by any person of ordinary care and prudence."

[2] To sustain their judgments appellees rely upon what is known as the doctrine of the turntable cases, which has often been approved by this court. The trial court correctly announced the law applicable to such cases, and, if the facts bring the present case within that doctrine, the judgments should be affirmed.

In the case of *St. Louis & S. F. Ry. Co. v. Williams*, supra, the Chief Justice, speaking for the court, succinctly stated the rule of the turntable cases as follows: "Where the owner permits to remain unguarded on his premises something dangerous which is attractive to children, and from which an injury may reasonably be anticipated," he may be liable. See, also, the recent case of *Nashville Lumber Co. v. Busbee*, 100 Ark. 76-91, 139 S. W. 301, 38 L. R. A. (N. S.) 754, where the doctrine is reiterated.

[3] As we view the record, the above doctrine has no application for the reason that, in our opinion, the undisputed evidence shows that appellant was not negligent in placing the empty alcohol barrel upon the platform of its station at Ward. The court told the jury that the mere fact that there was posted on the end of the barrel a caution notice would not of itself be sufficient to establish negligence against the defendant. This declaration of law was correct, because the undisputed evidence shows that the tag containing the caution was placed upon barrels that were filled with explosives for shipment, and not upon empty barrels. The shipments of empty alcohol barrels, under the rules of the company, were not required to have caution tags placed upon them, and a tag placed upon such a barrel was no notice that such barrel was dangerous.

The undisputed evidence shows that the agent in charge of the station at Ward, where this barrel was set upon the platform, did not know that it was explosive in character, and he had not even seen the tag that had been placed upon the barrel when it was an original shipment, full of alcohol. He could not have been expected to take notice of the cautionary tag, because such a tag was not required to be placed upon empty barrels.

There is no testimony to show that the agents and employees of appellant, who were charged with the duty of storing this barrel at its place of destination, had any knowledge that, by exposure to the sun, through chemical processes explosives would be produced, and that such barrel would therefore be dangerous when exposed to children who might be in the habit of frequenting the station platform. Such knowledge the employees of the appellant would not be expected to have. It could not be reasonably anticipated that such dangerous agencies would be created under such circumstances, nor could it be reasonably anticipated that children, who are in the habit of frequenting the station platform, would extract the stopper from a barrel and play with the same or place a lighted

match upon or within the same. These conditions and causes, we think, under the undisputed evidence, are entirely too remote and conjectural to be the basis for actionable negligence. It would not be reasonably anticipated by the servants of appellant, having in charge the handling of the empty barrel, that children would be attracted to it and would make a plaything out of it. In our opinion, there is nothing in the appearance or structure of an empty barrel, which is closed up at both ends, that is calculated to attract the attention of children in play, and the appellant, in the exercise of ordinary care, could not reasonably anticipate that an injury would result to appellees in the peculiar manner disclosed by the facts of this record.

As was aptly said in *Oatlett v. Railway*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254: "The youth of the person injured will sometimes excuse him from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence."

There is no evidence to sustain the verdict and the judgments are therefore reversed, and the causes dismissed.

### PIONEER LIFE INS. CO. v. GOX (No. 284.)

(Supreme Court of Arkansas. April 27, 1914.)

#### 1. INSURANCE (§ 236\*)—LIFE POLICY—FORFEITURE—DEFENSES.

Where a life insurance company had a right to declare and enforce a forfeiture of the policy, and did declare it, there could be no recovery thereon, even though the company obtained possession of the policy through fraudulent misrepresentation.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 508; Dec. Dig. § 236.\*]

#### 2. INSURANCE (§ 668\*)—ACTIONS ON POLICY—SUFFICIENCY OF EVIDENCE—FORFEITURE.

In an action upon a life insurance policy, where it was undisputed that the insured had not paid the note given for the first premium, which fact gave the company the right to declare a forfeiture under the terms of the policy, evidence held to require the submission to the jury of the issue whether the company had declared a forfeiture of the policy, or had waived its right.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

#### 3. INSURANCE (§ 388\*)—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUM.

Notwithstanding a custom of a life insurance company to charge its part of the first premium to the soliciting agent and to allow him to make his own arrangement for its collection, if the insured did not pay the premium at all, and it was paid to the company by the agent, the company could forfeit the policy under the clause giving such right of forfeiture, where the premiums or premium notes were not paid when due.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.\*]

#### 4. INSURANCE (§ 141\*)—FORFEITURE FOR NONPAYMENT OF PREMIUM—WAIVER.

Where the soliciting agent of a life insurance company surrendered the notes given for the payment of the first premium by the insured, and took in exchange another note, which he forwarded to the general agents of the company, their acceptance of such note constituted a waiver of the right to forfeit the policy for nonpayment of the premium in money.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.\*]

#### 5. INSURANCE (§ 245\*)—ABANDONMENT BY CONSENT—VOLUNTARY SURRENDER OF POLICY.

Where the right to forfeit a life insurance policy for nonpayment of the premium had been waived by the acceptance of a note for the amount of the premium, the voluntary surrender of the policy by the insured, before maturity of the note, at the instance of the company, constituted in the absence of fraud an abandonment of the policy by mutual consent.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 523; Dec. Dig. § 245.\*]

#### 6. INSURANCE (§ 665\*)—ABANDONMENT BY CONSENT—EVIDENCE.

Where a life insurance policy was surrendered by the insured before maturity of a note given for the first premium, the jury might infer from the fact that no request for a return of the policy was ever made, and that there was no offer to pay the note, that the surrender of the policy was voluntary, notwithstanding the testimony of the wife of the insured that the surrender was induced by fraudulent misrepresentations.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

#### 7. INSURANCE (§ 559\*)—LIFE INSURANCE—PROOF OF LOSS—WAIVER.

The action of an agent of a life insurance company in wrongfully obtaining possession of a policy, by means of fraudulent misrepresentation, amounts to a denial of liability, which constitutes a waiver of the requirement of proof of loss.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.\*]

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by Amanda Cox against the Pioneer Life Insurance Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

Sain & Sain, of Nashville, and Sam'l Frauenthal, of Little Rock, for appellant. R. P. Taylor, of Paragould, and O. A. Graves, of Hope, for appellee.

MCCULLOCH, C. J. The plaintiff, Amanda Cox, widow of John M. Cox, deceased, instituted this action to recover the amount of a policy of life insurance in the sum of \$3,000, alleged to have been issued by the St. Louis National Life Insurance Company upon the life of said John M. Cox; plaintiff being the beneficiary named in the policy. Defendant, Pioneer Life Insurance Company, succeeded the St. Louis National Life Insurance Company, and is liable upon its policies. It is alleged in the complaint that the policy was dated May 6, 1909, and was forwarded from the home office of the company at St. Louis

to the general agents in Little Rock, and by them forwarded to one Jarrett, a soliciting agent, who delivered it to Cox; that Cox left the policy at his home with his wife, the plaintiff herein, and that one Hammonds, an agent of the company, called at the house during the month of October, 1909, and, by falsely representing to plaintiff that her husband had directed that the policy be turned over to the agent, procured from her a surrender of the possession of the policy. Cox died in April, 1910, shortly before the second premium on the policy was to become due.

The defendant answered, denying the charge of fraudulent misrepresentation in procuring the surrender of possession of the policy, and alleging as a defense that the first premium had not been paid, and on that account the policy was, according to its terms, forfeited, and that it was taken up and surrendered with the consent of Cox and his wife. The case was tried before a jury upon testimony adduced from both sides of the controversy, and the court submitted the case upon an instruction given at plaintiff's request, to the effect that if the company obtained possession of the policy "through a material misstatement of facts on the part of its agent," and "that the plaintiff would not have surrendered said policy except for said misstatement of facts," then the verdict should be for the plaintiff. The court refused to give instructions requested by defendant submitting the question of the company's right to declare a forfeiture and take up the policy, or submitting the question of the surrender and abandonment of the policy by mutual consent. The jury returned a verdict in favor of the plaintiff, and an appeal has been prosecuted to this court.

[1] If, according to the terms of the policy, there was a forfeiture thereof, which the company had the right to declare and enforce, then there could be no recovery, notwithstanding the alleged false representations in the procurement of possession of the policy.

[2] It is insisted, however, that under the uncontradicted evidence the company had no right to declare a forfeiture. We are, however, of the opinion that the state of the proof called for a submission of the issues to the jury. The first, or advance premium, \$90.99, was never paid by Cox, except a small portion of it, the proof showing that \$16 was actually paid. The policy was forwarded from the home office to the general agents at Little Rock, who in turn sent it to Jarrett, the local agent at Hope, who delivered it to Cox and took two promissory notes from Cox for the advance premium. The proof adduced by defendant tended to show that Jarrett was only soliciting agent, without authority to waive the payment of the premium. It is shown, however, by proof which is not contradicted, that it was customary to give the soliciting agent 60 days, and a longer time

if necessary, within which to deliver policies, and that the portion of the first premium which was to come to the company was charged to the soliciting agent. The proof further shows that it was customary for soliciting agents to take notes for the first premium, the greater portion of which was retained by him as commissions, and account to the company for the portion of the premium going to the latter. The jury might have found, under this proof, that the company waived the payment of the first premium in cash, and authorized the soliciting agent to accept notes for the amount; but it cannot be said to be an undisputed fact in the case that the company waived its right to declare a forfeiture in case the assured failed to pay the premium. The policy contains the following provision: "This insurance is granted upon condition that all premiums be promptly paid when due, and failure to pay any premium or any part thereof when due, or failure to pay at maturity any note given for any premium, or any part of a premium, shall forfeit and cancel this contract and terminate all obligations of the company under this policy."

There is some testimony to the effect that only \$5 was sent to the company, and that that was received as payment of the fee of the medical examiner; the custom being for the company to pay the fee when the policy was accepted, but the assured to pay the fee when the policy was not accepted. The books of the general agents show that only the amount of the fee was paid; but there is evidence on the part of the plaintiff that enough more was forwarded to the company to make a total sum of \$16.

[3] Notwithstanding proof of the custom that the company's part of the first premium was charged to the soliciting agent at the end of the delivery period, which was sufficient to constitute authority to the soliciting agent to deliver policies and make his own arrangements about the collection of the first premium, still if the assured did not pay the premium at all, and the same was not actually paid to the company by the agent, the company had the right to declare a forfeiture under the provisions of the policy quoted above. There is no contention that the premium was paid by the assured in money, but it is conceded that he gave notes for the premium, only a small portion of which he paid. There is some conflict in the testimony whether the company received its portion of the first premium. So it was a question for the jury to determine whether the company had the right to declare a forfeiture on account of the nonpayment of the first premium. That question should have been submitted to the jury.

[4, 5] The two notes given for the premium were not paid, and the soliciting agent at Hope surrendered those notes and took another note for the whole amount, which he testified he forwarded to the general agents

at Little Rock. That note was not mature at the time the policy was taken up and canceled, according to the testimony of Jarrett, the soliciting agent. The evidence is silent on the question as to what became of that note, though there is no evidence that it was ever paid. If it is true, as stated by the soliciting agent, that that note was forwarded to the general agents, who confessedly had authority to accept notes, that constituted a waiver of the payment of the premium in money; but upon the maturity of that note and nonpayment thereof, according to the strict letter of the contract as above quoted, the company had the right to declare a forfeiture. Even though the note was immature at the time of the surrender and cancellation of the policy, still, if the assured surrendered the policy without insisting on waiting for the maturity of the note, the surrender of the policy was effective for the purpose of canceling the contracts. That constituted an abandonment by mutual consent.

This court, in the recent case of *Missouri State Life Insurance Co. v. Hill*, 159 S. W. 81, quoted with approval the following from Cooley's *Briefs on the Law of Insurance*, § 2883: "The rule as to the inability of the insurer to cancel the policy on its own initiative does not prevent an abandonment of the contract by agreement of the parties. And in the absence of fraud or coercion, such abandonment, if definite, will be effective, though at the time the company is erroneously claiming the right to forfeit or avoid the policy on account of some alleged violation of its conditions."

So, in the present case, though the note was immature, the company was insisting on the right to cancel, and if without any fraud the policy was surrendered, it amounted to an abandonment.

[8] The jury might have found under the testimony, notwithstanding the statement of Mrs. Cox, that she surrendered the policy solely because the agent told her that her husband had requested it, and that the policy was voluntarily surrendered, and that there was a complete abandonment. This might have been inferred from the fact that neither the plaintiff nor her husband ever requested the return of the policy or offered to pay the note, though her husband lived about six months after the policy was taken up. Those questions, relating to the voluntary surrender of the policy, and the abandonment thereof by failing to pay the note and ask for return of the policy, ought to have been submitted to the jury.

[7] It is insisted that there can be no liability in this case for the reason that the plaintiff failed to furnish proof of loss. In view of another trial of the case, we deem it proper to say that, if the company through its agent wrongfully obtained possession of the policy through fraudulent misrepresenta-

tion, and declared a forfeiture without any right to do so, this was tantamount to a denial of liability, which would constitute a waiver of proof of loss.

For the errors indicated in giving the first instruction at the instance of plaintiff, and in refusing to submit the question of the company's right to declare a forfeiture, the judgment is reversed and the cause remanded for a new trial.

## KEATHLEY v. HOLLAND BANKING CO. (No. 236.)

(Supreme Court of Arkansas. March 30, 1914.)

### 1. EVIDENCE (§ 429\*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Evidence that, after the execution of a written contract for the sale of a horse, a provision was added that agents of the seller were not permitted to change, modify, or sign any contracts, was not objectionable as tending to vary or contradict the contract, but was admissible to show an unauthorized alteration after execution thereof.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. § 429.\*]

### 2. BILLS AND NOTES (§ 369\*)—BONA FIDE PURCHASER—DEFENSES—EVIDENCE.

In an action by a bona fide purchaser on certain notes given for the price of a horse, evidence that the seller, to induce defendants to purchase the horse, had agreed not to sell another of the same kind in the county and had broken such agreement, was inadmissible.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 951; Dec. Dig. § 369.\*]

### 3. BILLS AND NOTES (§ 497\*)—BONA FIDE PURCHASER—BURDEN OF PROOF.

In an action on a note by an indorsee, evidence that plaintiff paid value for the notes, and bought them before maturity and in the usual course of business, established a prima facie case that it was a bona fide purchaser for value, and shifted the burden to defendants to show that plaintiffs had notice of some infirmity in the notes at the time of purchase.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

### 4. BILLS AND NOTES (§ 525\*)—BONA FIDE PURCHASER—EVIDENCE.

Where the payee of certain notes sued on indorsed them to plaintiff bank before maturity for value, the fact that the payee was a brother-in-law of the cashier of the bank and was himself vice president, though he took no part in the bank's management, and that members of his family owned the bank, was insufficient to show that the bank was not a bona fide purchaser for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by the Holland Banking Company against J. A. Keathley. Judgment for plaintiff, and defendant appeals. Affirmed.

This was a suit upon three notes aggregating \$2,800, which were executed by appellants to Holland Stock Farm, a private business owned by Charles Holland, and by him

assigned to appellee. Appellants answered and admitted the execution of the notes, but alleged they were executed for the benefit of the Yell County Stock Breeders' Association, which association they asked to have made party defendant. The answer denied that appellee was an innocent holder of the notes for value, but stated the facts to be that said notes were given in payment of a Percheron stallion named "Jenner," which was represented to be a show horse of country-wide reputation and to have no superior, and that but for such false and fraudulent representation they would not have purchased said horse; and it was further alleged that when they purchased said horse it was represented and agreed that the Holland Stock Farm would not sell another horse in Yell county, whereas the said Holland Stock Farm sold two other stallions of the same breed in Yell county within a month after the sale to appellants. Appellants set up a claim for damages for the false representations concerning the said horse. Appellee filed a demurrer to the answer, which was overruled. A written warranty was given to appellants at the time of the execution of the notes, which reads as follows: "We have this day sold the imported Percheron stallion Jenner No. (51417) 59958 to the Percheron Horse Association of Danville, Ark., and we guarantee the said stallion to be a satisfactory sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory sure breeder with the above treatment, we agree to take the said stallion back, and the said horse company agrees to accept another imported Percheron stallion of equal value in his place, the said stallion Jenner No. (51417) 59958 to be returned to us at Springfield, Missouri, in as sound and healthy condition as he now is by April 1st, 1911. [Signed] Holland Stock Farm. Accepted: Yell Co. Breeders' Association, by I. M. Graydon, Pres. Dated at Springfield, Missouri, this 29th day of June, 1909."

At the trial appellants undertook to show an agreement on the part of Holland not to sell another horse of that breed in Yell county, and that this was the inducing cause of the contract, but for which appellants would not have signed the note, and also offered to show that the horse was represented to be a show horse of country-wide reputation, when in fact he was a very ordinary horse of the Percheron breed and was only worth about \$600, and that two other horses of the same kind had been sold in Yell county, and appellants had lost business to the amount of \$1,500. The court excluded all this evidence upon the ground that it varied and contradicted the terms of the written warranty. The court also held that the burden of proof was on the appellants to show that the Holland Banking Company was not an innocent purchaser in due course of trade for value.

Appellee's cashier testified that the bank paid the face value of the notes, less the accumulated interest, and that the said sum was placed to the credit of Mr. Holland, and that the notes were purchased in the regular course of trade, shortly after their execution and before their maturity. Mr. Holland testified that he received the money from the bank and spent it for other horses and jacks. By the cross-examination of the bank cashier and of Holland it was shown that they were brothers-in-law and that Holland was the vice president of the bank, and the members of his family owned the bank; but, except for these circumstances, there was nothing to cast a suspicion upon the transaction or to raise a question as to the bank's being an innocent purchaser before maturity and for value, and there was no showing that Holland had any part in the management of the bank.

Appellants offered to show that the written contract of warranty had been changed by writing on it the following words, "Agents are not permitted to change, modify or sign any contracts;" but this evidence was excluded. The original of this contract of warranty was in the possession of appellees, but it was not offered in evidence.

Priddy & Chambers, of Danville, for appellant. J. A. Keathley, pro se.

SMITH, J. (after stating the facts as above). [1] This excluded evidence was competent, as it did not tend to vary or contradict the written contract, but tended to show that the written contract had been added to after its execution; and evidence is always competent and admissible which tends to show that unauthorized changes in, or additions to, a written contract have been made since its execution. *Brooks Medicine Co. v. Jeffries*, 94 Ark. 575, 127 S. W. 960; *Main v. Oliver*, 88 Ark. 383, 114 S. W. 917, 129 Am. St. Rep. 110; *Barton-Parker Mfg. Co. v. Taylor*, 78 Ark. 586, 94 S. W. 713.

[2-4] Appellants insist that the court below erred in excluding the evidence showing that the agreement not to sell another stallion of the kind sold them was a controlling consideration in the contract of sale, and that the breach of this agreement had very greatly damaged them. This evidence would have been competent had this suit been between the makers and the payee of the notes sued on; but the payee of the notes is not a party to this litigation, and recovery of judgment is asked in the name of its assignee, the Holland Banking Company. It is undisputed that the banking company paid value for the notes, and bought them before maturity and in the usual course of business. This proof having been made, the burden is shifted to the appellants to show some infirmity in the notes, of which appellee had notice, and we think the evidence on that question insufficient to require the submission of that issue to a jury. It appears that before purchasing



the notes appellee wrote to a local bank in Yell county and asked for and received information regarding the solvency of the makers of the notes. The depositions of Mr. Charles Holland and of the cashier of Holland Banking Company, the appellee, constitute the only evidence on the question of notice to the bank, and there is nothing in these depositions to raise a question for a jury's decision as to the bank's good faith. A finding by a jury that the bank had notice would have been arbitrary and unsupported by any evidence. There being no question for the jury as to appellee's good faith in the purchase of the notes, and this having been done before their maturity in the usual course of business and for value, it is immaterial to consider to what extent, if at all, the consideration for the notes has failed.

It follows therefore that the court did not err in directing the jury to return a verdict in appellee's favor, and the judgment of the court below is therefore affirmed.

#### EVANS et al. v. PETTUS. (No. 283.)

(Supreme Court of Arkansas. April 27, 1914.)

##### 1. EQUITY (§ 241\*)—PLEADING—EXHIBITS.

A court of equity, in testing the sufficiency of a complaint on demurrer, may look to the exhibits filed with the complaint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.\*]

##### 2. CANCELLATION OF INSTRUMENTS (§ 37\*)—CONTRACTS—FRAUD—PLEADINGS.

A complaint, in a suit to rescind a party wall contract, which alleges that defendant induced plaintiff to execute the contract by misrepresentation as to the value of the wall and the nature of the contract, but which does not allege that she relied on the representations, or that she had no opportunity to investigate, or that she was induced to sign the contract without reading it, states no cause of action for rescission.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.\*]

##### 3. LIMITATION OF ACTIONS (§ 55\*)—CONTRACTS—DAMAGES—LIMITATIONS.

An action for damages, caused by the negligent construction of a building attached to a party wall, accrues at the time of the infliction of the damages, and is barred by the three-year statute of limitations. Kirby's Dig. § 5064, subd. 2.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.\*]

##### 4. LIMITATION OF ACTIONS (§ 180\*)—PLEADING—DEMURRER.

The bar of limitations may be pleaded by demurrer in a suit in equity, where the complaint shows affirmatively that limitations have run since the accrual of the cause of action relied on.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.\*]

##### 5. TENANCY IN COMMON (§ 3\*)—CONSTRUCTION OF WILL—ESTATES DEVISED.

A devise to a wife of a half interest in real estate and a fourth interest to each of two

children, subject to the right of the wife to use and control the children's interest during infancy, and then pay the interest to each on his attaining full age, makes the wife and children cotenants, and she has no authority to convey the interest of the children.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 5-17; Dec. Dig. § 3.\*]

##### 6. PARTY WALLS (§ 1\*)—CONTRACTS—EASEMENTS.

A grant of the use of a wall to an adjacent owner for the erection of a building thereon creates an easement.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. § 1; Dec. Dig. § 1.\*]

##### 7. TENANCY IN COMMON (§ 41\*)—CONVEYANCES—VALIDITY.

A tenant in common cannot, without authority, create an easement so as to confer any rights which may be asserted against cotenants, and the cotenants may resort to any remedy to protect their interests against the alleged easement.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 121; Dec. Dig. § 41.\*]

##### 8. PARTY WALLS (§ 8\*)—CONTRACTS—ENCROACHMENT.

The use of a wall by an adjacent owner on which to erect a building is a permanent encroachment, whether it results in actual damages or not, and the owner, not authorizing the erection, is entitled to equitable relief to prevent the encroachment, without showing actual damages.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 24-41; Dec. Dig. § 8.\*]

##### 9. PARTY WALLS (§ 8\*)—INADEQUACY OF REMEDY AT LAW.

The wrongful use of a wall by the adjacent owner erecting a building thereon is such a wrong as to justify relief in equity on the ground of inadequacy of any remedy at law for damages.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 24-41; Dec. Dig. § 8.\*]

##### 10. EQUITY (§ 39\*)—JURISDICTION—DAMAGES.

Where equity obtains jurisdiction to prevent encroachment on a wall by an adjacent owner, erecting a building thereon, it will retain jurisdiction and award the damages sustained, as well as grant the equitable relief by compelling the withdrawal of the encroachment.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

##### 11. REMAINDERS (§ 17\*)—ACTIONS BY REMAINDERMEN—EQUITABLE RELIEF.

A court of equity will grant relief to protect the interests of remaindermen, whether vested or contingent, against a wrongful, permanent encroachment.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.\*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Suit by Mary E. Evans and others against Mrs. Jennie Lou Pettus. From a decree dismissing the complaint for want of equity, plaintiffs appeal. Affirmed in part and reversed and remanded in part.

J. W. Story, of Forrest City, for appellants. R. J. Williams, of Forrest City, for appellee.

McCULLOCH, C. J. Appellants, Mary E. Evans and her two children, John Cecil Blan-

ton and Annie Mabel Blanton, the latter being infants, suing by their next friend, the said Mary E. Evans, instituted this action in the chancery court of St. Francis county against appellee, Jennie Lou Pettus, to restrain the latter from using a certain brick wall constituting a part of a building situated on a lot owned by appellants in Forrest City, and requiring appellee to cut loose from said wall, and to recover damages alleged to have been sustained by use of the wall by appellee. It is alleged in the complaint that appellants are the owners of the building and lot on which it is situated, under the will of James P. Blanton, a half interest therein being devised to Mary E. Evans, the widow of James P. Blanton, and an undivided fourth interest therein to each of said children, John Cecil Blanton and Annie Mabel Blanton; that on March 2, 1909, said Mary E. Evans entered into a written contract with appellee, whereby she agreed to execute a deed to appellee conveying a half interest in the east wall of the building on said lot, the same to be used by appellee as part of a brick building she was then about to construct on an adjoining lot owned by her, and also undertook to obtain the interests of said infant owners and procure an order of the probate court authorizing the conveyance of the interests of said infants. It is further alleged that the signature of Mrs. Evans to said contract was procured by appellee and her agents "by misrepresentation as to the value of said wall and as to the nature of the contract," and that the consideration named therein was grossly inadequate. It is also alleged that plaintiff had no power or authority to convey the interests of said infants, or to contract with reference thereto, and that the contract was void as to their interests. The complaint also contains an allegation that, immediately after the execution of said contract on March 2, 1909, appellee "took possession of the east half of said brick wall of plaintiffs along the east line of their said lot 9, in block 16 aforesaid, and attached a building thereto, making plaintiffs' said wall a part thereof; that the said defendant cut into plaintiffs' wall and put her joists and sleepers therein so as to support the upper and lower floors of her said building, and also attached her roof thereto, and has been so using plaintiffs' said wall from the date of said pretended contract hitherto; that said defendant has attached her said building to and used plaintiffs' said wall in such a manner and so unskillfully as to greatly damage plaintiffs' said wall and their said building, and so as to cause said wall to spring and to be out of plumb, and so as to cause the roof on their said building to leak, and so as to break the windows and otherwise damage their said brick building, and they aver that, if said defendant is permitted to continue to so use said wall, plaintiffs' said wall and building will be still further and more greatly damaged thereby."

Damages are laid in the sum of \$1,000, and recovery of that amount is sought in addition to the other relief.

A copy of the will of James P. Blanton is exhibited with the complaint, and, after making certain minor bequests in money, the bulk of the estate is devised and bequeathed as follows:

"Fourth. I give, devise and bequeath to my wife, Mary Elizabeth Blanton, one-half ( $\frac{1}{2}$ ) of all the residue of my estate, real, personal, or mixed and wherever situated; to my son John Cecil Blanton one-fourth ( $\frac{1}{4}$ ) of the said residue of my estate, and to my daughter, Annie Mabel Blanton, one-fourth ( $\frac{1}{4}$ ) of said residue of my estate.

"Fifth. It is expressly understood that my wife, Mary Elizabeth Blanton, shall have the use and control of such portion of said estate that I have hereinbefore bequeathed to my said son John Cecil and my said daughter, Annie Mabel, until said son and daughter become of age respectively, at which time my said wife shall pay to my said son his portion of said estate and to my said daughter her portion of said estate.

"Sixth. I hereby direct that the homestead (residence property) located in Forrest City, county of St. Francis and state of Arkansas, shall be included as a part of said one-half of my estate bequeathed to my said wife."

A copy of the aforesaid contract entered into between Mrs. Evans and appellee is also exhibited. The contract provided, in substance, that Mrs. Evans sold to appellee a half interest in the aforescribed brick wall, for the sum of \$353, payable when she should deliver a warranty deed for her individual interest in said wall, and also her deed as guardian for her two children, Annie Mabel Blanton and John Cecil Blanton, which said deed was to be approved by the probate court of St. Francis county. The contract also provided that appellee could, at the time of the execution of the contract, take possession of said half interest in said wall and proceed with the work of joining her building thereto.

The court sustained a demurrer to the complaint, holding that it failed to state a cause of action of equitable cognizance, but that a cause of action at law for recovery of damages was stated. Appellants declined to plead further, and the court dismissed the complaint for want of equity.

[1] This being a suit in equity the exhibits may be looked to on demurrer for the purpose of testing the sufficiency of the allegations of the complaint.

It appears that James P. Blanton owned a lot in Forrest City, on which there was a brick store building, and appellee, Mrs. Jennie Lou Pettus, owned an adjoining lot, which was vacant. Blanton died, leaving a last will and testament, a copy of which is exhibited with the complaint, whereby he devised all of his property, one half to his wife, Mary E. Blanton (now Evans), and the other half equally between his two children, who

are still minors. The will provides that the widow "shall have the use and control" of the portion of the estate devised to the children until each should become of age, and then his or her portion should be set aside and paid over. After the death of Blanton appellee decided to construct a brick building on her lot, and obtained from Mrs. Evans the contract set out above, in which she agreed to sell her a half interest in the brick wall and undertook to procure an order from the probate court directing her, as guardian, to convey the interest of the children in the brick wall. It is not alleged that Mrs. Evans had ever been appointed as guardian. In fact the complaint alleges affirmatively that the children have no regular guardian, and they sue by their next friend.

Mrs. Evans seeks relief on the ground of fraudulent misrepresentation on the part of appellee, or her agents, in procuring the contract, and gross inadequacy of consideration, and she also seeks to recover damages for negligence in construction of appellee's building and cutting into the wall, whereby the building of appellants was damaged.

The other two appellants seek relief on the ground that said contract did not affect their interests in the building or wall, their mother having no authority to convey their interests, and that the use of the wall constituted an encroachment upon their rights which equity should restrain.

[2] We are of the opinion that the court was correct in sustaining a demurrer as to the cause of action of Mrs. Evans. Her allegations as to fraudulent misrepresentations are so vague that they amount only to conclusions of law, and are entirely insufficient to state a cause of action. The only allegation is that appellee induced her to execute the contract "by misrepresentation as to the value of said wall and as to the nature of the contract." There is no allegation that she relied upon these representations, or that she had no opportunity to investigate for herself, or that she was induced to sign the contract without reading it.

The statement in the complaint that the contract was induced by misrepresentation is not sufficient to state a cause of action for cancellation or rescission of the contract, and the chancellor was correct in holding the complaint to be insufficient.

[3] The cause of action of Mrs. Evans for damages on account of negligent method of using the wall is, according to the statement of the complaint, barred by the statute of limitations; the action not being commenced within three years after the accrual of the cause of action. Kirby's Digest, § 5064, subd. 2.

The damages were, according to the allegations of the complaint, original, and the statute began to run when the new building was negligently constructed and attached to wall.

[4] The bar of the statute may be pleaded by demurrer in an action in the chancery court where the complaint shows affirmatively that the period of limitation has elapsed since the accrual of the cause of action. *Mueller v. Light*, 92 Ark. 522, 123 S. W. 646, 31 L. R. A. (N. S.) 861, 135 Am. St. Rep. 164.

[5] The question relating to the rights of the two infant plaintiffs has given us more concern. They are cotenants of their mother, Mrs. Evans, until the property is divided according to the terms of the will. Mrs. Evans is, by the terms of the will, given the "use and control" of her children's interests, but she is to account to them, and has no beneficial interest in the property except the half interest devised to her under the will. *Wyman v. Johnson*, 68 Ark. 369, 59 S. W. 250. The effect of the will was only to give her the management for the benefit of her children; it being in the nature of a trust, and the words used are not sufficient to confer authority upon her to convey the property or any interest therein.

[6] The grant of the use of the wall to an adjoining owner constituted an easement. 30 Cyc. p. 772.

This is an interest in the land which requires express authority from the owner to convey.

[7] The cotenants cannot create an easement so as to confer any rights capable of assertion against the other owners. *Washburn on Easements and Servitudes* (4th Ed.) p. 46; *Freeman on Cotenancy* (2d Ed.) § 185.

It follows that the contract executed by Mrs. Evans could not, and did not, affect the interests of her two children, and they may resort to any remedy afforded under the law to protect their interests, and to prevent encroachment upon their property.

[8] The use of the wall amounts to a permanent encroachment, whether it results in actual damage or not, and they are entitled to equitable relief to prevent it. *Trulock v. Parse*, 83 Ark. 149, 103 S. W. 166, 11 L. R. A. (N. S.) 924.

[9] The owner of a building does not have to show actual damages in order to prevent a permanent encroachment upon his premises. He has the right to resist such encroachment, and, there being no remedy at law save to recover damages, which is inadequate, a court of equity should afford relief by preventing the encroachment.

[10] In this case, however, the complaint alleges a state of facts which establishes a wrongful encroachment upon the premises, and also shows damage to the premises resulting therefrom, and it was within the jurisdiction of the court of equity to grant relief by compelling the wrongdoer to withdraw the encroachment, and the court, having taken jurisdiction for one purpose, will give complete relief by awarding damages.

[11] The infant plaintiffs are not remaindermen, and their interests are not contin-

gent in this case; but, even if they were, a court of equity will grant relief to protect the interests of remaindermen, whether vested or contingent. *Watson v. Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540.

Our conclusion, therefore, is that the complaint stated a cause of action on behalf of the infant plaintiffs and that the court erred in sustaining the demurrer. The decree is affirmed as to the cause of action of Mrs. Evans, but as to the others it is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

### TRIANGLE LUMBER CO. v. ACREE.

(No. 277.)

(Supreme Court of Arkansas. April 20, 1914.

On Rehearing, May 18, 1914.)

#### 1. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—INSTRUCTIONS.

In an action for injuries to plaintiff, the fireman of the engine of a log skidder, by being struck by the tongs which slipped from a log, a requested charge that if the jury believed that plaintiff walked and stood seven to ten feet in the direction of the cable which was being operated to load logs at the skidder, and plaintiff was not in the line of his employment, but voluntarily placed himself in peril, he was guilty of contributory negligence and could not recover, though defendant was negligent, was properly modified by making such instruction conditional on finding that a person of ordinary prudence would not have acted as plaintiff did under the circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

#### 2. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A master's duty to furnish his servant with a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing their work, and to such parts as he knows, or ought to know, they are accustomed to using while doing it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 3. MASTER AND SERVANT (§ 89\*)—INJURIES TO SERVANT—PLACE OF ACCIDENT.

Where an injured servant was occupying a dangerous position at the time of his injury merely for his own convenience and accommodation, his rights are no greater than those of a licensee.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 153-156; Dec. Dig. § 89.\*]

#### 4. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—LINE OF EMPLOYMENT—EVIDENCE.

Evidence held to warrant a finding that plaintiff was engaged in the line of his employment at the time of his injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

#### 5. WITNESSES (§ 208\*)—PHYSICIANS—TESTIMONY AS EXPERTS—COMPETENCY.

The rule that a physician is incompetent to express an opinion founded in whole or in part

on information acquired during the existence of the relation of physician and patient between plaintiff and himself does not disqualify a physician, who has treated plaintiff, from testifying as an expert as to his opinion concerning plaintiff's physical condition based on the physician's observation of plaintiff at the trial and on facts having no dependence on the previous relationship between plaintiff and the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 768-770, 777; Dec. Dig. § 208.\*]

#### On Rehearing.

#### 6. APPEAL AND ERROR (§ 1140\*)—ERRONEOUS ADMISSION OF EVIDENCE—CURING ERROR—REDUCTION OF VERDICT.

Where no error has occurred at the trial except that judgment has been rendered for an excessive amount, the error may be cured by reducing the judgment to such amount as is warranted by the evidence, but where improper evidence has been admitted, or competent and material evidence excluded, such error may be cured by a reduction of the recovery only in case plaintiff is willing to accept a sum so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, uninfluenced by the improper evidence or when given the right to consider the evidence improperly excluded, would allow plaintiff a less sum than that specified.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

#### 7. APPEAL AND ERROR (§ 1140\*)—EXCLUSION OF EVIDENCE—CURING ERROR—REDUCTION OF VERDICT.

Where, in an action for injuries to a servant consisting of the breaking of both bones of one leg, the court erroneously excluded evidence of physicians to show that there had been proper union, and plaintiff was awarded \$10,000 on the theory that the bones had not properly united, there being evidence that plaintiff suffered great pain for several hours without medical attention and also after he was taken to a hospital, the judgment would be affirmed for \$2,000 or a new trial granted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

Action by Roy Acree against the Triangle Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded on condition.

Appellee recovered damages against appellant for personal injuries sustained by him while in its employment. He alleged, as his cause of action, that on July 9, 1912, and prior thereto, he was employed by appellant as fireman of an engine which ran a skidder machine that was used to drag logs from the woods; that the logs were dragged by fastening tongs into them; but the appellant negligently failed to provide good, safe, and secure tongs with which that work could be performed; but furnished to its employes, so engaged, unsafe, defective, and insecure tongs, of which fact the appellant had notice; and that the engineer operating the skidder machine, knowing appellee to be in a place of danger, where he was liable to be injured by said tongs pulling out of the

logs, negligently, carelessly, and wrongfully so operated his engine that said tongs were pulled out of the log and thrown a distance of 30 yards against appellee's leg, breaking both bones about four inches above the ankle; that the bones protruded through the flesh and were driven into the ground; and that appellee suffered and now suffers great pain and agony; and that he is permanently disabled as a result of his injury; and he prayed judgment for \$20,000 damages.

Appellant admitted that appellee was employed as fireman of the engine which operated the skidder, but denied that it was careless or negligent in providing unsafe and defective or insecure tongs, and denied that the said engineer operated the engine negligently, carelessly, or wrongfully, and alleged the fact to be that the engineer had no knowledge of appellee's position at the time of his injury; and that appellee had unnecessarily and voluntarily gone to a place where his duties did not require him to go, and where the engineer did not anticipate he would be; and that appellee was guilty of contributory negligence in unnecessarily exposing himself to danger; that appellee knew the hooks frequently pulled out of the logs, and were likely to do so at any time; but that appellee had no duties, the performance of which would expose him to danger on that account. Appellant also pleaded assumption of risk and denied the permanency of appellee's injury.

The skidder is a machine used for loading logs and is mounted on a car which runs on a railroad track. The material parts of the machine are the boiler, engine, and the drum, upon which the cable is wound. This cable is unwound and pulled out into the woods on one side of the track, and the tongs are fastened to a log and the end of the cable is attached to the tongs. The engineer starts the drum to turning and winds up the cable, and in this way the logs are pulled up to the track where they are loaded on the cars. The tongs are two curved pieces of steel fastened together with a rivet, such as are used by icemen and others. At the time of the accident in question, the leverman or engineer started the drum and the log, which was being pulled, struck a stump, as very frequently happened; and in such cases it was customary, where it was necessary to do so, to pull the log endways to enable it to pass the obstruction, and sometimes this result could be accomplished by a second pull on the cable. There were four men engaged in these logging operations. One man carried out the cable and tongs and fastened them to the logs; the flagman, stationed where he could see both the leverman and hooker, and whose duty it is to signal when the log is ready to be skidded to the track; the leverman or engineer, and the fireman, whose duty it was simply to keep up steam. Appellant insists that appellee would have

been in no danger and would not have been injured had he remained in the place provided for him in the discharge of his duties. Appellee testified, and is corroborated by the testimony of other witnesses, that it was his duty to fire the engine and that he started for a load of coal, when he stopped at the water keg to get a drink of water. This water keg was in the shade of a small sapling, and appellee stood there for a very short time after he had gotten a drink of water, and, while he was thus standing there, some one hallooed at him, when he jumped from the place where he had been standing, but unfortunately jumped in the wrong direction, and was struck by the tongs torn loose from the log to which they had been fastened, and which were hurled through the air.

Appellant asked an instruction numbered 3, which reads as follows: "It was the duty of plaintiff to exercise proper care for his own safety, and if you believe from the evidence that plaintiff got down from the engine upon which he was employed, and walked and stood seven to ten feet in the direction of the cable and the hooks thereto attached, which were being operated for the purposes of loading logs at the skidder, and further that plaintiff was not within the line of his employment, and that he voluntarily placed himself in this position of peril, then he is guilty of contributory negligence and cannot recover in this action, even though you should find that defendant was negligent in the selection of its tools or implements or in the operation of same."

But this instruction was refused, as asked, and was modified by the court and given, and as thus modified read as follows: "It was the duty of the plaintiff to exercise ordinary care for his own safety, and if you believe from the evidence that plaintiff got down from the engine upon which he was employed, and walked and stood seven to ten feet in the direction of the cable and the hooks thereto attached, which were being operated for the purposes of pulling logs to the skidder, and that a person of ordinary prudence would not have done so, and further that plaintiff was not within the line of his employment, and that his doing so placed him in a position of peril, then he is guilty of contributory negligence and cannot recover in this action, even though you should find that defendant was negligent in the selection of its tools or implements or in the manner of doing the work."

Appellant duly saved his exceptions to this modification.

Appellee testified that he had suffered great agony as a result of his injury and had also sustained a loss of earning capacity. He introduced Dr. C. E. Bentley, who testified that he lived in Little Rock and had had vast experience in surgical operations; that he had met and examined appel-

lee a few days before he was called as a witness; and that he made a physical and X-ray examination at the time; and that appellee had an ununited fracture of the large bone of the leg; and that a cure could never be effected until another operation was performed; and that the injured leg was then a half-inch shorter than the other, and after the operation would be an inch shorter. A Dr. J. B. Shaw expressed substantially the same opinion.

Appellant offered to introduce Dr. W. P. Clark of Pine Bluff, but it was admitted that appellee had been brought to the Davis Hospital in Pine Bluff after his injury, and had there been attended by Dr. Clark. Appellant also offered as witnesses Drs. Butler and Jones, who had also treated appellee; but objection was made to their testifying, and the objection was sustained. Appellant then offered the three last-named doctors as expert witnesses concerning the appellee's injuries. The court sustained the objection of appellee to this testimony. It was then agreed by the parties and the court that appellant need not actually place said witnesses on the stand, but might prepare questions and answers, and insert them in the bill of exceptions, and that all of said questions and answers should be considered objected to and the objections sustained and exceptions saved, just as though each witness was put on the stand and the questions actually asked.

Appellant requested that said doctors be permitted to examine appellee during the trial and testify regarding his injuries, but the court refused to permit this to be done.

Roscoe R. Lynn and Cockrill & Armistead, all of Little Rock, Crawford & Hooker and Danaher & Danaher, all of Pine Bluff, and W. D. Brouse, of Benton, for appellant. Mehaffy, Reid & Mehaffy, of Little Rock, and W. R. Donham, of Benton, for appellee.

SMITH, J. (after stating the facts as above). [1-3] We think no error was committed by the court in its modification of appellant's third instruction. It is true, as stated by Mr. Labatt, that "a master's duty in respect to furnishing his servant with a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing their work, and to such parts as he knows, or ought to know, they are accustomed to using while doing it. The application of this principle has frequently prevented recovery in cases where the injury proximately resulted from the fact that the injured servant was occupying a dangerous position merely for his own convenience and accommodation. Under such circumstances, his legal rights are no greater than a licensee." 4 Labatt, Master & Servant, § 1558b, and cases cited. But there is no evidence that appellee had gone beyond the line of his employment, nor

does the evidence show that he was injured while in a place where he had no right to be. Appellant does say that no one knew of appellee's presence at the time of his injury, but it does not deny the right of appellee and other employes to go to, and be at, the place where this injury occurred. It states its position in regard to appellee's presence as follows: "He attempts to justify his action by saying that it was necessary to go and get coal, and that he was getting a drink of water at the time. It is undisputed, however, that the operation of actually pulling in the logs requires much the shorter part of the time. It requires much more time to carry the cable out and attach it to the logs, etc. There is no reason why appellee could not have carried his coal and secured his water while there was no danger caused by pulling in a log. His position must have been known to him to have been dangerous; it was not necessary for him to be there, and no one else knew of his dangerous position." It is probably true that it was possible for appellee to have gotten a drink of water and to have carried his coal without being injured, but that is not the test of negligence. This third instruction, as modified, required the jury to find that appellee exercised ordinary care for his own safety and was within the line of his employment at the time of his injury, before he could recover. If he was within the line of his employment at the time of his injury, the relation of master and servant existed, and their relative duties and obligations were to be measured accordingly. Other instructions were given which correctly announced the duties of master and servant respectively, and in regard to the assumption of risk, and the jury must have found that appellant was negligent in furnishing defective tongs, and that appellee was in the line of his employment at the time of his injury, and was not guilty of contributory negligence.

[4] We think the evidence abundantly warranted the jury's finding that appellee was engaged in the line of his employment at the time of his injury, if indeed it was sufficient to require the submission of that question to the jury.

[5] Under the agreement in regard to the evidence of Drs. Clark, Butler, and Jones, the following answers given by Dr. Clark were inserted in the record: "Q. What did the wound, as exhibited there (before the jury), indicate? A. Indicated that there was no fracture existing at the present time, or nonunion of the bone of a former fracture. Q. Please go into detail and explain why it exhibits a union at the present time. A. The plaintiff forgot himself and crossed his leg, and began a continuous movement of his leg across the knee. With an ununited fracture, there is nothing to hold the leg except skin and muscles. Should such a condition exist, instead of the leg being stiff and straight, as is contended, the foot would have

dangled and bent upon the leg. Another reason: The ends of the bones rubbing against one another would irritate the nerve and cause pain, and he would be unable to do it without being conscious of having pain for so doing. Q. Please state whether, upon the limbs being thus crossed, there was anything to continue the union or nonunion, and if there was a union or nonunion of the previously fractured limb, and, if so, what was it? A. It showed positive evidence of union, because, were there nonunion, there would be sagging, or not being able to control the foot; the foot would dangle more or less, since there is nothing to hold it under such conditions except muscle and skin. Q. Did you notice whether the foot was in proper position with reference to the limb? A. Yes, the large toe was on a line with the kneecap, which is always our guide." This witness heard appellee testify, and in these excluded questions stated various other reasons, based upon his observation of appellee upon the witness stand, for his opinion that there was no nonunion of the bone, and this witness further stated that the X-ray pictures offered in evidence showed a perfect union of the bones. This witness testified that he owned an X-ray machine and was familiar with its use and the character of the pictures taken by it. In his answers he explained how these pictures were taken and stated that the pictures offered in evidence indicated a complete union of the bones.

The questions submitted to, and the answers given by, Drs. Butler and Jones, indicate their concurrence in the opinions expressed by Dr. Clark. As has been stated, none of these witnesses were permitted to testify, even as experts, for the reason stated at the time, and now urged by counsel, that these doctors had attended appellee in a professional capacity and would be unable to disassociate their knowledge as experts from the information they had acquired by their examination and treatment of appellee while attending him in a professional capacity. There was nothing in the record indicating that these physicians would have given answers to the questions asked, which were based even in part upon the knowledge acquired by them during the existence of the relation of physician and patient. If such had been the case, their evidence would have been incompetent, for the law is that a physician cannot express an opinion at all, if his opinion is founded in part upon the information acquired during the existence of that relationship. *People v. Murphy*, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

But nothing in these questions or answers would indicate that this relation had existed between the witnesses and the appellee, and the questions which were asked them had no relation to any information which they might have acquired as appellee's physicians. There was no attempt to show that these witnesses

could not disassociate their information acquired in a confidential capacity from their general knowledge on the subject of fractures. These witnesses were present in court when appellee was testifying, as a witness in his own behalf, and their answers were based upon their observation of him during that time, and these questions were so framed as to exclude the necessity of considering any information previously acquired by the physicians. But appellee says that questions were asked these physicians which were not contemplated by the parties at the time of the trial. For instance, that no offer was made in court to interrogate these witnesses in regard to the X-ray pictures; but the record shows that appellee objected to these witnesses testifying at all, for the reason that they were incompetent as witnesses.

In the case of *Miles v. St. Louis, Iron Mountain & Sou. R. Co.*, 90 Ark. 485, 119 S. W. 837, it was said: "Where a witness is rejected on the ground of his incompetency, it will be unnecessary on appeal to show what he would have testified, as it will be presumed that the witness would have been rejected, no matter how material the evidence might have been." And we must therefore presume in this case that the court would not have permitted these physicians to testify in regard to these X-ray pictures, if they had been interrogated in regard to them. But the witness Clark was actually asked these questions at the trial: "Q. Did you see the limb as exhibited here a while ago? A. Yes, sir. Q. What did the wound as exhibited there indicate?" The witness was not permitted to answer that question, nor to testify further, because of the previous relationship between him and the appellee. This question was a competent one, and the witness should have been permitted to answer it, and this is true even though the court correctly refused permission to appellant for these physicians to make a physical examination of appellee.

We think this was peculiarly a case where a physical examination should have been required. Here appellee has recovered a judgment for the sum of \$10,000, which is so large as to indicate either that it was the result of passion or prejudice, or that, if such was not the case, the jury must have accepted as absolutely true all the evidence of the physicians of appellee who were permitted to testify as to the permanency of his injury, and the future treatment that would be required on that account, and the extent of his suffering. The evidence offered by the appellant, which was excluded by the court, flatly contradicts the testimony of the physicians who did testify; but the jury were not advised of that fact, and the evidence which they heard stood undisputed and unquestioned before them. In the case of *Sibley v. Smith*, 49 Ark. 275, 55 Am. Rep. 584, it was said: "The rule to be deduced from these cases is that, where the plaintiff in an action for personal

injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition \* \* \* based upon personal examination." And the rule there announced is reaffirmed in the case of *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

The trial court must necessarily have some discretion in prescribing the time and conditions under which this examination must be made, and the physicians by whom it may be conducted, and the action of the court in allowing or permitting the examination to be made by any particular physician would not call for a reversal of the case, unless it affirmatively appeared the discretion of the court had been abused, and we do not reverse this case because of the court's refusal to grant the right to appellant to have a physical examination of appellee made by the doctors whose evidence was excluded. But we feel very confident that prejudicial error was committed in forbidding these physicians to state their opinion, based upon their observations of appellee during the trial, when he exhibited his leg to the jury. These witnesses should have been allowed to state their opinions of appellee's condition, based upon their observations of him then and there, for to have answered these questions did not require a physical examination, and none was made. Appellee argues that other physicians might have been secured, either in the town where the trial occurred, or in the neighboring city of Pine Bluff. But these physicians might not have had the opportunity of observing appellee at the trial, which was afforded the witnesses who were excluded. Moreover, if these witnesses were competent, appellant was entitled to the benefit of their evidence.

A question similar to the one now under consideration was involved in the case of *Crago v. City of Cedar Rapids*, reported in 123 Iowa, 48, 98 N. W. 354. There the plaintiff alleged that the injuries from which he was suffering resulted from a fall which he had sustained, and several physicians were permitted to express their opinions upon both sides of the question, as to the cause of the injury, when a Dr. Rumel was called as a witness, and it was shown that he had been one of plaintiff's attending physicians, and his evidence was objected to on that account. It was agreed there that the record should show that the questions propounded the other experts had been asked him and the objections separately interposed. Hypothetical questions without referring to or disclosing witness' former employment as her physician were all held incompetent under section 4608 of the Code of that state, which is substantially the same as section 3098 of Kirby's Digest of the laws of this state, excluding any physician from disclosing any information which he may have acquired

from his patient while attending him in a professional capacity, and which information was necessary to enable him to prescribe as a physician. It was there said: "But no communication, confidential or otherwise, was sought to be elicited, and any intention to attempt this was expressly disclaimed. The questions did not refer thereto, directly or indirectly. Manifestly, then, the statute did not authorize the exclusion of the testimony. The record contains no suggestion of the physician's inability to disassociate the facts stated in the questions from what he had learned from his patient. Indeed, the nature of the inquiry seems to obviate any such difficulty." And after holding that the evidence was competent the judgment of the lower court was reversed, because of its exclusion.

The rule is thus stated in 40 Cyc. 2381: "In order for a physician to be incompetent, the relation of physician and patient must have existed between him and the person, as to whose statements, symptoms, or condition he is called to testify, at the time when he acquired the information which he is called on to disclose; and so a physician may testify as to what he observed or learned as to a person's condition before the relation of physician and patient was established between himself and such person, or as to matters which transpired or which he observed after the relation had ceased." Other cases sustaining this view are *People v. Schuyler*, 106 N. Y. 304, 12 N. E. 783; *Herries v. City of Waterloo*, 114 Iowa, 377 86 N. W. 306; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730, 731; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951.

Other questions are raised and argued in the briefs, but we think it unnecessary to discuss them.

For the error in excluding the opinions of Drs. Jones, Butler, and Clark, based upon the observation of appellee in court, the judgment of the court below must be reversed, and the cause remanded for a new trial.

#### On Rehearing.

SMITH, J. [6] Appellee calls attention to the fact that the evidence, for the exclusion of which the case was ordered reversed, goes only to the question of the amount of damages; and he asks the privilege of exercising the option to remit a sufficient amount of the damages, which were recovered, to cure the error of excluding this evidence. He has the right to do this under the decisions of this court. But, when a remittitur is ordered under these circumstances, the question is not what amount of recovery would be the limit supported and justified by the evidence. Where no error has occurred at the trial, except that judgment has been rendered for an excessive amount, that error is cured by reducing the judgment to such amount as is warranted by the evidence. But a different rule obtains in cases where an improper evi-



dence was admitted, or competent and material evidence was excluded. The rule in such cases was announced by Justice Riddick in the case of *St. L., I. M. & S. R. Co. v. Adams*, 74 Ark. 326, 85 S. W. 768, 86 S. W. 287, 108 Am. St. Rep. 85, as follows: "What the court undertakes to do is simply to name an amount so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law (or when uninfluenced by improper evidence, or on the other hand when given the right to consider improperly excluded evidence), allow plaintiff a less sum than that named, and which amount the court can clearly see is not excessive."

[7] Applying this test, we have concluded in view of the pain which appellee suffered, and of the loss of time and earnings which he sustained, and the expenses of his treatment which he incurred, that he should recover the sum of \$2,000. We name this as a sum which is not excessive and which will not prejudice the defendant.

The proof on appellee's part would unquestionably support a verdict for a larger amount; but, as has been said, that is not the test. The evidence is that for several hours he suffered the most excruciating pain, without medical attention, and, even after he had reached the hospital and had received surgical aid, he must still have suffered great pain. Under all the circumstances in proof, we think it unlikely that a jury would assess the damages at less than \$2,000.

If appellee shall within one week enter a remittitur of \$3,000 to take effect as of the date of the original judgment, the judgment may stand for \$2,000, with interest thereon from the date of the original judgment; otherwise the cause will be remanded for a new trial.

#### FAKES v. STATE. (No. 285.)

(Supreme Court of Arkansas. April 27, 1914.)

##### 1. CRIMINAL LAW (§ 720\*) — ARGUMENT TO JURY—TENDENCY OF EVIDENCE.

The testimony, on a prosecution for carnal abuse of a girl, that defendant told witnesses his wife was jealous of the girl not tending to corroborate her testimony, which was that he had intercourse with her, the state's attorneys should not be permitted to argue to the jury that it does tend to corroborate it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

##### 2. RAPE (§ 38\*)—EVIDENCE.

Testimony that defendant, tried for carnal abuse of a girl, told witnesses his wife was jealous of the girl is irrelevant and incompetent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 48-50; Dec. Dig. § 38.\*]

##### 3. CRIMINAL LAW (§ 830\*)—REQUEST FOR INSTRUCTION—DUTY OF COURT.

That defendant, entitled to an instruction, had he asked it, that testimony should not be considered for any purpose, asked one that it

could not be considered to establish his guilt, but could be considered only for the purpose of impeaching, did not prevent failure to instruct that it could not be considered to establish his guilt, being error, the request being specific enough to direct the court's attention to the prejudicial character of the evidence, though he could not have complained had the court limited its consideration to his impeachment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

##### 4. CRIMINAL LAW (§ 695\*)—TRIAL—OBJECTIONS TO TESTIMONY.

A general objection to testimony is sufficient to raise the issue of its relevancy and competency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.\*]

Appeal from Circuit Court, Little River County; Jeff. T. Cowling, Judge.

Jim Fakes was convicted, and appeals. Reversed and remanded for new trial.

Appellant was convicted of the crime of carnal abuse of the person of one Birdie Honnell, and appeals to this court. Mr. Honnell, the father of the prosecutrix, died in August, 1911. Appellant was appointed guardian of the prosecutrix, who at first resided with her sister, and soon after appellant was appointed her guardian, the prosecutrix went to his home to live with appellant and his wife. After she had lived with them 22 months, owing to a disagreement between the prosecutrix and appellant's wife, appellant took her and her younger sister to live with their sister in Little River county. The prosecuting witness testified, in substance, that she was 14 years old. The appellant had had sexual intercourse with her during the time she lived in his home 10 or 11 times. The intercourse commenced the first month after she went to live with appellant, and continued until the witness went to live with her sister. It was shown that, after appellant had carried the prosecutrix and her little sister to live with their sister, Mrs. Broomfield, he stated in the presence of Broomfield that no one could say that he had mistreated the girls, and that he also made the remark that they "could ruin him if they were a mind to, but he believed they never would do it." A doctor testified that he had examined the prosecutrix in October, 1913, and found the hymen ruptured; found such a condition as he would expect to find if a woman had had intercourse. Appellant testified, denying that he had had sexual intercourse with the prosecutrix, and denying the remarks attributed to him while he was at Broomfield's. The appellant, after he was indicted and arrested on this charge, demanded that a physical examination be made of the prosecutrix, and he offered to prove that he demanded that such examination be made, but the court refused to admit such testimony. The appellant offered to prove that immediately after the term of court at which he was indicted he insisted that the prose-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cutrix be required to undergo an examination by a competent physician to determine whether she had had sexual intercourse, and permission to have such examination made was then refused. Appellant was asked, on cross-examination, the following question: "Didn't you state to Judge George, in the presence of Mr. Ed. Jones, down here in the courthouse, that the reason you brought the children back down here was that your wife was jealous of the oldest girl?" Witness answered, "No, sir." A witness, Judge George, was then asked whether or not he (Fakes) "stated to him in the presence of Ed. Jones that his wife was jealous of the oldest girl." The witness, over the objection of appellant, was permitted to answer that Fakes did state that his wife was jealous of himself and Birdie (meaning the prosecutrix). The appellant duly excepted to the rulings of the court. A witness, Ed. Jones, stated that in a conversation appellant had with Judge George he stated the reason he wanted to turn the little girls over to their relatives was that his wife was jealous of the older girl, and it caused trouble between them. He also stated, in the same conversation, that this girl (the prosecutrix) would not obey his wife, and that his wife could do nothing with her. In the opening argument, George Steel, specially employed counsel for the state, argued that Birdie Honnell was corroborated by Ed. Jones and N. A. George in their statements as to Fakes' saying his wife was jealous of the older girl. Appellant objected to the argument on the ground that the testimony might be considered only for impeachment. In the closing argument for the state the prosecuting attorney also argued that the prosecutrix, Birdie Honnell, was corroborated by the testimony of Jones and George. The appellant again objected, on the same ground as above, and excepted to the ruling of the court in overruling his objection to the argument. Among other prayers for instructions appellant presented the following: "(7) You are instructed that the evidence of Ed. Jones and N. A. George should not be considered by you as in any manner tending to establish the guilt of the defendant in this case. It may be considered by you only for the purpose as it may tend to impeach the defendant." The court refused to grant this prayer, and appellant duly excepted.

Louis Joseph, of Texarkana, and Steel, Lake & Head, of Ashdown, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streep, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). I. There was evidence to sustain the verdict.

[1-4] II. The court erred in permitting the attorneys to argue, on behalf of the state,

that the testimony of the witnesses Jones and George tended to corroborate the testimony of the prosecutrix. The prosecutrix testified that appellant had sexual intercourse with her. The testimony of Jones and George did not tend to corroborate the prosecutrix. As to whether or not appellant said that his wife was jealous of the prosecutrix, Birdie Honnell, was a matter wholly irrelevant to the issue being tried. The testimony was wholly incompetent for any purpose; and, if the appellant had objected to its introduction, the court should have excluded it. The appellant did not object, however, to the introduction of the testimony for the purpose of impeachment, and he would not be in an attitude to complain if the court had limited its consideration to that purpose. But the appellant, in his seventh prayer for instruction, did request the court to tell the jury that the testimony of the above witnesses should not be considered as tending to establish the guilt of the defendant, and requested the court to limit its consideration to the impeachment of appellant. The appellant did not make his objection to the argument, nor his prayer for instruction in regard to the testimony of these witnesses, as strong as the law warranted, but his objection to the testimony was specific enough to direct the court's attention to its prejudicial character, and therefore the court should have sustained his objection to the argument, and should have granted the prayer, at least to the extent asked by appellant. Appellant should not be deprived of the benefit of the rule of law which does not permit irrelevant and incompetent evidence for any purpose because he was willing that it might be considered for the one purpose of impeachment. Because appellant conceded more than he was bound under the law to concede is no reason why he should be deprived of the rule of evidence to which he was entitled. A general objection is sufficient to raise the issue of the relevancy and competency of testimony. *Vaughan v. State*, 58 Ark. 353-373, 24 S. W. 885.

As the testimony here was wholly irrelevant and incompetent, the court should not have permitted its consideration for any purpose to which appellant was not consenting. See *Clardy v. State*, 96 Ark. 52-57, 131 S. W. 46.

Appellant objected to other rulings of the court on prayers for instructions, which we deem it unnecessary to review, for the reason that the errors complained of relate to mere verbiage, and no specific objections were made to these prayers. They will doubtless be corrected on another trial.

We find no prejudicial error in the rulings of the court except as above mentioned, but for this the judgment must be reversed and the cause remanded for a new trial.

## BLAKE et al. v. ASKEW et al. (No. 274.)

(Supreme Court of Arkansas. April 20, 1914.)

## 1. MORTGAGES (§ 414\*) — FORECLOSURE — AMOUNT DUE—VERIFIED STATEMENT—STATUTES.

Kirby's Dig. § 5415, providing that, before any mortgagee shall proceed to foreclose any mortgage or deed of trust of personal property he shall deliver to the mortgagor a verified statement of his account, etc., has no application to a mortgage or deed of trust of real property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1202-1209; Dec. Dig. § 414.\*]

## 2. MORTGAGES (§ 415\*) — CONSIDERATION — FORECLOSURE.

Where complainants agreed to assume and pay a debt owing by defendants to B. as a part of the consideration for a deed of trust, and B. released defendants from liability on such debt, complainants were entitled to foreclose the deed for an amount including B.'s debt, though by private agreement between complainants and B. it was understood that he should not be paid until complainants' other indebtedness had been satisfied.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210-1224; Dec. Dig. § 415.\*]

## 3. MORTGAGES (§ 415\*) — FORECLOSURE — CONSIDERATION—NOTES.

Where complainants assumed certain indebtedness due from defendants to third persons, including a debt to B., as a part of the consideration for a deed of trust, and defendants were released from liability on the debt to B., it was immaterial that B. joined defendants in a note representing the entire indebtedness, which was executed for convenience.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210-1224, Dec. Dig. § 415.\*]

## 4. USURY (§ 130\*)—FORECLOSURE—USURY.

Where complainants assumed certain indebtedness due from defendants to third persons as a part of the consideration for a deed of trust, the fact that one of the debts so assumed was usurious as between defendants and the original creditor was immaterial.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 386-391; Dec. Dig. § 130.\*]

## 5. MORTGAGES (§ 415\*)—FORECLOSURE—DEFENSES.

Where a deed of trust on certain land was executed in part to secure an account for goods sold and delivered, it was no defense to a suit to foreclose that complainants sold the goods so furnished on credit at a profit greater than 10 per cent. over the price they usually charged for the same goods to cash customers.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210-1224; Dec. Dig. § 415.\*]

## 6. MORTGAGES (§ 559\*) — RIGHT OF ACTION AGAINST DEBTOR.

Where complainants assumed and agreed to pay defendant's debt to B. as a part of the consideration for a deed of trust, and B. released defendants from all liability on such debt, he was bound to look exclusively to complainants and to the security for payment, and, on foreclosure of the deed, was not entitled to a personal judgment against defendants.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

## 7. MORTGAGES (§ 559\*)—FORECLOSURE—PERSONAL JUDGMENT.

Where complainants assumed and agreed to pay a debt owing by defendants to B. as a part of the consideration of a deed of trust,

complainants were limited to the security to obtain repayment of the debt to B., and, on foreclosure, was not entitled to a personal judgment for such debt against defendants.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

Appeal from Nevada Chancery Court; Jas. D. Shaver, Chancellor.

Suit by J. H. Askew and others against C. S. Blake and others to foreclose a deed of trust. Decree for complainants, and defendants appeal. Affirmed.

This is an action in the chancery court by appellees against appellants to foreclose a deed of trust on certain lands situated in Nevada county, Ark. The facts are substantially as follows: C. S. and T. J. Blake were the owners of certain lands in Nevada county, Ark. In 1911 they owed J. M. Barr \$268, which was secured by a mortgage on a part of said lands. They owed Mrs. F. S. Brummett \$205.78, which was also secured by a mortgage on a part of their lands. They owed T. G. Boswell the sum of \$1,305.62, which was secured by some kind of a land contract, the exact nature of which does not appear from the record, for there is some conflict in the evidence as to the exact nature of it. All these amounts were due, and bore interest at the rate of 10 per cent. Mr. Barr was pressing the Blakes for payment of his debt. J. H. Askew and F. S. Brummett were merchants in Nevada county under the firm name of Askew & Brummett. About the 1st of March, 1911, the Blakes went to them and gave them a list of the indebtedness they owed, as above stated, and told them that Barr was insisting upon the payment of his debt. It was agreed between the parties that Askew & Brummett should assume these debts and advance to the Blakes certain supplies to enable them to make a crop, and that the Blakes would execute them a mortgage on their land to secure the whole of said indebtedness. Askew & Brummett demanded an abstract of title to the lands, and it was agreed between the parties that the Blakes should pay for it. It was estimated at the time that the abstract would cost \$40, but it was afterwards ascertained that it cost \$41. The amounts owed by the Blakes to Boswell, Barr, and Mrs. Brummett, and the abstract and the supplies to be thereafter furnished by Askew & Brummett, were estimated by the parties at \$2,589.61. It was agreed between them that the Blakes should execute to Askew & Brummett a note for \$2,600, but it was understood that the exact amount of the supplies to be thereafter furnished should be evidenced by a book account. On the 7th of March, 1911, the Blakes executed a deed of trust to their lands to P. H. Alsobrook, trustee, to secure Askew & Brummett for said indebtedness. The deed of trust recites that the Blakes are indebted to Askew & Brummett "in the sum of \$2,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index\*

600.00, as evidenced by their note of this date, due and payable on the 1st day of October, 1911, with ten per cent. interest from due until paid, and, being desirous of securing the payment of said sum of money, and all other indebtedness that may be due at or before foreclosure proceedings hereunder," unto Askew & Brummett that they granted, bargained, and sold and conveyed the land, etc. During the year 1911 T. J. Blake purchased of Askew & Brummett goods to the amount of \$159.40, and paid to Askew & Brummett that year \$159.50. During the same year C. S. Blake traded with them to the amount of \$508, and paid them nine bales of cotton amounting to \$397.71. The Blakes also owed them for a small amount of goods at the time the deed of trust was executed. Askew & Brummett paid to Barr the amount that the Blakes owed him. They also assumed to pay to Mrs. Brummett the amount that the Blakes owed her, and she agreed to release the Blakes from all liability on their indebtedness. They also assumed the indebtedness due by the Blakes to Boswell, and the latter released them from all liability on said indebtedness. It was agreed, however, between Boswell and Askew & Brummett that the latter should first be paid the other amounts that were due them by the Blakes, and that Boswell should not be paid by them until after the remaining indebtedness due by the Blakes to Askew & Brummett had been paid. In short, it was agreed between Askew & Brummett and Boswell that, in the event the deed of trust had to be foreclosed to obtain the payment of the indebtedness, the debt of Boswell should not be paid out of the proceeds of the foreclosure until after the remaining indebtedness to Askew & Brummett had been paid, and that they should only receive what was left after paying the other indebtedness.

The above is a brief summary of the evidence given by appellees. They also stated they were engaged in the mercantile business and sold goods on a credit; that the goods furnished appellants were sold to them at the usual prices they sold to other customers on a credit.

Appellants testified in their own behalf, and admitted that they owed to Mrs. Brummett, to Barr, and to Boswell the amounts hereinbefore set out, and that said indebtedness was secured by mortgages on their lands. They admitted they borrowed the money named above from Mrs. Brummett, and that they received checks from her for all of it, but state that they gave \$25 of this amount to F. H. Brummett, who was her husband, for his services in procuring the loan for them. They say that Askew & Brummett charged them for the goods they bought from them an amount more than 10 per cent. over what they received for sales of goods for cash.

Other evidence will be stated or referred to in the opinion. The chancellor found in

favor of appellees, and entered a decree of foreclosure in their favor. The case is here on appeal.

D. L. King, of Lewisville, for appellants  
McRae & Tompkins, of Prescott, for appellees.

HART, J. (after stating the facts as above). [1] It is insisted by counsel for appellants that the decree should be reversed, because appellees did not make and deliver to appellants a verified statement of their account before the foreclosure proceedings were instituted. Section 5415 of Kirby's Digest provides that, before any mortgagee shall proceed to foreclose any mortgage or deed of trust of personal property, such mortgagee shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit, and credit, and the balance due. This section, by its terms, applies only to mortgages of personal property; and, the mortgage or deed of trust in question being on real estate, the section has no application.

[2] Counsel for appellants also insist that appellees had no right to foreclose the mortgage for the nonpayment of the debt of Boswell. They contend that, because appellees have not yet paid Boswell, they had no right to foreclose the mortgage to obtain satisfaction of the debt. They also object that Boswell signed the \$2,600 note which they gave to Askew & Brummett. The evidence of appellee shows that Boswell released the Blakes from all liability on his debt at the time the mortgage, or deed of trust, in question was executed, and the Blakes admit this fact. It is true there was an agreement between Askew & Brummett and Boswell that the latter should not be paid out of any of the proceeds of the mortgage foreclosure until the other indebtedness had been first paid; but the Blakes were not parties to this agreement, and had no interest or concern in it. They had been released from all liability to Boswell, and it could make no difference whatever to them that Boswell was not paid at the time. Whatever agreement was made between him and Askew & Brummett as to the time he should be paid by them did not in any way concern the Blakes; neither were they injured by the fact that Boswell also signed the \$2,600 note.

[3] In the first place, it may be said that the \$2,600 note was executed for convenience' sake, and that it was understood that the real indebtedness owed by the Blakes to Askew & Brummett was the amount which the former owed to Barr, Boswell, and Mrs. Brummett, and the goods thereafter to be furnished them by Askew & Brummett. Appellants were not in any way injured by Boswell signing the \$2,600 note, and the decree should not be reversed on that ground. It is true it does not appear exactly why Boswell signed the note, but the presumption is that he signed it in order to show that

Askew & Brummett should not pay him until they had first obtained satisfaction for the remaining amount due them by appellants.

[4] It is also contended by counsel for appellants that the judgment should be reversed because the debt to Mrs. Brummett was usurious. Appellants admit that Mrs. Brummett advanced to them the money which Askew & Brummett assumed to pay her. They also admit that Mrs. Brummett released them from all liability when Askew & Brummett assumed to pay their indebtedness to her. Therefore appellees were not affected by usury in the contract between Mrs. Brummett and the appellants. Conceding that the debt was tainted with usury, appellants elected to pay it, and procured its payment by appellees, or, what amounts to the same thing, made a contract with them whereby they assumed to pay Mrs. Brummett for them, and by this agreement procured Mrs. Brummett to release them from any obligation on account of the indebtedness. See *Lowe v. Walker*, 77 Ark. 103, 91 S. W. 22.

[5] Appellants also testify that they paid Askew & Brummett for goods which they purchased from them a greater amount than 10 per cent. added to the cash price of the goods. Askew & Brummett were retail dealers in merchandise, and sold goods mainly on a credit. It was the intention of the parties at the time the mortgage was executed that Askew & Brummett should furnish them with supplies, and that the goods should be sold on a credit. Askew & Brummett had a right to sell goods on a credit for a higher price than they would have sold them for cash. It is true that they sold them to appellants at a profit greater than 10 per cent. over the price they were usually sold for for cash, but there is nothing to show that this was done to evade the usury law. On the contrary, the evidence shows that it was done in good faith, for the purpose of making a profit on the goods sold. Appellees testified that they sold the goods to appellants at the usual price they sold goods to their customers generally on a credit, and this statement is not denied by appellants. Therefore there was no usury in this transaction. *Briggs v. Steele*, 91 Ark. 458, 121 S. W. 754.

It appears from the record that the decree of foreclosure was made for the amount of money that appellants actually owed to appellees Askew & Brummett, and for the amounts which the latter had assumed to pay for them. The court rendered a decree of foreclosure for the amount of money which Askew & Brummett had assumed to pay for appellants to Barr, to Mrs. Brummett, and to Boswell. All these amounts, under the original contract, were due at the time the mortgage was executed, and bore interest at the rate of 10 per cent. No interest was charged on the goods sold by Askew & Brummett to appellants until after the ac-

counts became due in the fall. We are of the opinion that the decree of foreclosure was for the amounts actually due by appellants to appellees Askew & Brummett for goods sold by them to appellants and for the debts assumed by them for appellants.

[6] Appellees have taken a cross-appeal in the case. After the original complaint was filed, an amendment was made to it by which Boswell and Mrs. Brummett became parties plaintiff. It is insisted by counsel for appellees that Boswell should have a personal judgment against appellants for the amount of his debt. We do not agree with them in this contention. The undisputed evidence shows that at the time of the execution of the deed of trust Boswell released appellants from all liability on his debt and looked alone to Askew & Brummett and to the security they had taken for the payment of his debt.

[7] Again it is contended by counsel for appellees that Askew & Brummett should have a personal judgment against appellants for the amount of the Boswell debt. We do not think they are right in this contention. We have not set out in full all the testimony relating to the agreement between Askew & Brummett and Boswell as to the payment of his debt, but, after a careful consideration of the record we think that it was agreed between these parties that they should look alone to the security for the satisfaction of this debt, and that Boswell should be paid by Askew & Brummett only such amount as they should realize under a sale of foreclosure after their other indebtedness had been satisfied. In other words, it was agreed between them that, in the event it was necessary to foreclose the mortgage, Askew & Brummett should be first paid out of the proceeds of the other indebtedness secured by the mortgage, and that the remainder should be applied to the satisfaction of the Boswell debt. This agreement contemplated that Askew & Brummett should only pay them what they realized out of the proceeds of the sale of the mortgaged property after the other indebtedness was paid or satisfied.

Therefore we think the chancellor was correct in refusing to give Askew & Brummett a personal judgment against appellant for the Boswell debt.

We think the decree on the whole case was correct, and it will be affirmed.

STRONG, Superintendent of Workhouse, v.  
STATE ex rel. BARRETT.

(Supreme Court of Tennessee. May 9, 1914.)

CONSTITUTIONAL LAW (§ 272\*)—COSTS (§ 322\*)—JURY (§ 81\*)—ESCAPE OF PRISONER—WORKING OUT COSTS OF RECAPTURE—DUE PROCESS OF LAW.

Workhouse Act (Shannon's Code § 7423), providing that a prisoner, who escapes, when

recaptured shall be made to work out the costs of the same, in addition to the other costs in the case, and making no provision for hearing and without fixing what is a reasonable amount for recapture, is unconstitutional as denying the right to trial by jury and due process of law guaranteed by Const. art. 1, § 8.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 761; Dec. Dig. § 272; \*Costs, Cent. Dig. §§ 1202-1206; Dec. Dig. § 322; \*Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

Appeal from Circuit Court, Shelby County; H. W. Laughlin, Judge.

Application for writ of habeas corpus by the State, upon the relation of Pressly Barrett, against E. E. Strong, superintendent of a workhouse. From a judgment granting the writ, respondent appeals. Affirmed.

R. Lee Bartels and Greer & Greer, all of Memphis, for appellant. Clarence Friedman, of Memphis, for appellee.

**WILLIAMS, J.** The relator, Barrett, was convicted in the criminal court of Shelby county and sentenced to serve a term of 11 months and 29 days in the county workhouse, and to pay the costs of the prosecution. After serving a portion of the sentence period he escaped; but he was recaptured and again placed in the workhouse. After then completing the original term of service, he tendered to the proper official the amount of the costs of his prosecution, \$114, which was refused on the ground that the county had expended the further sum of \$125 in recapturing him, which sum was demanded, making the aggregate of \$239 required to be paid as the condition of his release.

A writ of habeas corpus was sued out to enforce release upon the payment of the \$114 and without payment of the \$125. The circuit judge granted the relief sought by Barrett; and the relator, who is superintendent of the workhouse, has appealed.

The record shows no denial that there was an escape from custody, and there is neither denial nor admission that the expense of recapture was properly the sum stated.

The general workhouse act (Acts 1891, c. 123, § 18; Code, Shannon, § 7423) provides: "Should any prisoner escape, he or she shall forfeit all deductions (of good time) that have been allowed, and, when recaptured, shall be made to work out the costs of the same, in addition to the other costs in the case."

It is the contention of the jailor that Barrett was properly held to work out the cost of his recapture under the statute, while Barrett insists that this provision is unconstitutional in that it works a denial of trial by a jury of his peers and of due process of law.

The statute under review makes no provision for an opportunity to the prisoner to be heard, for representation by counsel, or for the production of evidence as to the fact or intent of the escape. The amount to be ex-

pendent in recapture is not fixed by the statute, and the reasonableness of the same is not provided to be ascertained after an inquiry in which the prisoner may be heard, in which hearing the rules of procedure shall be the same as are applied in similar causes, as must be the case. In re Mallon, 16 Idaho, 737, 102 Pac. 874, 22 L. R. A. (N. S.) 1123.

It is conceded by relator that escape and prison breach are offenses at common law. The statute in question does not even undertake to declare such an escape a statutory crime and fix the payment of cost of recapture as punishment for its infraction. We have, then, to deal with an effort to enforce punishment for such an offense without a trial by a jury and without procedure that satisfies the requirement of the constitutional right of due process of law, under Constitution of Tennessee, art. 1, § 8, which provides in substance that no man shall be taken or imprisoned or deprived of his liberty but by the judgment of his peers or the law of the land. State v. Staten, 46 Tenn. (6 Cold.) 250.

A kindred question arose in this state and was decided in Knox v. State, 68 Tenn. (9 Baxt.) 202. Acts 1875, c. 83, § 4, provided that after working out the term in the workhouse fixed by the jury, and the costs in the case, the convict should be further held to work out "all costs which may accrue after conviction for clothing and other necessities." The court, in an opinion by Judge McFarland, held that this quoted provision was void under the above section of the Constitution. See, also, People v. Creamer, 30 App. Div. 624, 53 N. Y. Supp. 1111; State v. Sanders, 153 N. C. 627, 69 S. E. 272; State v. Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848.

The appellant relies upon a line of cases wherein, under prison rules, a board or some official has authority to determine how much good time should be allowed prisoners, and, after such time has been allowed to take it from them for cause not judicially passed on. It is held that such withdrawal is not a denial of due process of law. These rulings, perhaps, might have relation to that portion of the statute which makes the escape of a prisoner "forfeit all deductions of good time that have been allowed," since the allowance of good time was but the grant of a favor to a convicted criminal in confinement, and that grant may have attached to it such conditions, precedent or subsequent, as the Legislature may see fit. The withdrawal of the favor so extended on violation of such a condition is held not to be a denial of due process of law. Ughbanks v. Armstrong, 203 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582.

The distinction between such a case and the one at bar is obvious.

There was no error in the judgment of the court below holding the particular provision herein questioned unconstitutional. Affirmed.

**GRAVES v. CITY OF GEORGETOWN.**

(Court of Appeals of Kentucky. May 22, 1914.)

**MUNICIPAL CORPORATIONS (§ 978\*)—TAXATION—COLLECTION OF TAXES.**

Under Ky. St. § 3542, authorizing the council in cities of the fourth class to assess unlisted property, section 3544, providing for the collection of city taxes by the collector or treasurer, and section 3546, authorizing suits to collect tax bills uncollected on the first Monday of November, a city could not sue for taxes assessed in September, before the first Monday in November following.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.\*]

Appeal from Circuit Court, Scott County.

Action by the City of Georgetown against John B. Graves. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. C. B. Seabee, of Stamping Ground, and Jas. F. Askew, of Georgetown, for appellant. B. M. Lee, of Georgetown, for appellee.

**HOBSON, C. J.** The city council of Georgetown, on the 19th day of September, 1913, duly assessed John B. Graves with the sum of \$76,000 for property omitted from assessment. He failed to pay the taxes thereon amounting to \$1,287, and this suit was filed against him by the city on September 28, 1913, to recover the amount, with interest and cost. He demurred to the petition; his demurrer was overruled. He then filed an answer, and, the case being tried, there was a judgment in favor of the city. He appeals.

The only question we deem it necessary to consider on the appeal is whether the suit was instituted prematurely, for, if the suit was brought before the cause of action arose, the demurrer to the petition should have been sustained. Georgetown is a city of the fourth class. By section 3542, Ky. St., which is a part of the act governing cities of the fourth class, if for any reason any property subject to taxation has not been listed, the council may assess same. By section 3544, Ky. St., provision is made for the collection of the city taxes by the collector or the treasurer, and penalties are provided against those failing to pay. By section 3546, Ky. St., all tax bills uncollected in whole or in part on the first Monday of November of each year may be enforced as such by all remedies given for the recovery of debts in any court of the commonwealth. This suit was, however, brought on September 28, 1913, upon an assessment made by the council on September 19th. We do not find in the act any authority for the bringing of an action to enforce a tax bill before November 1st of the year in which it was made. If a taxpayer fails to pay his taxes by November 1st, certain penalties attach under section 3544, Ky. St., and it is then to be marked delinquent. But, when this action was brought,

only seven days had elapsed after the assessment was made. The suit was therefore premature, and the demurrer to the petition should have been sustained. The dismissal of this action will not bar a suit against the taxpayer to recover the taxes, with interest and penalty.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

**DAVIE'S EX'R v. CITY OF LOUISVILLE**  
(two cases).

(Court of Appeals of Kentucky. May 27, 1914.)

**1. JUDGMENT (§ 101\*)—DEFAULT JUDGMENT—PLEADINGS TO SUSTAIN.**

A default judgment cannot be sustained if plaintiff's petition does not state a good cause of action, or lacks those averments necessary to show his right to recover.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 168-170; Dec. Dig. § 101.\*]

**2. LIMITATION OF ACTIONS (§ 180\*)—PLEADING AS DEFENSE—NECESSITY OF PLEADING.**

Limitations is a personal defense of which the party may or may not desire to avail himself, and cannot be raised by demurrer, but must be pleaded.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.\*]

**3. JUDGMENT (§ 102\*)—DEFAULT—PLEADINGS TO SUSTAIN—BRINGING IN NEW PARTIES—AMENDMENT.**

Where, pending an action by a city against the grantee of a life tenant to enforce its lien for taxes, the life tenant died, and the city, about seven years after the filing of the original petition, filed an amended petition alleging the death, that the original defendant had no interest in the property, but that it was owned by D., the remainderman, and that plaintiff made D. a party to the action, and asked that process be issued to her, and praying relief as in the original petition, but not reiterating the allegations of the original petition, nor stating any facts showing that the property was still liable for the taxes, or that they had not been paid and the lien discharged, the amended petition would not support a default judgment against the remainderman, since, when a new defendant is brought in by amended petition, the amendment should show a cause of action against him.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 171-173; Dec. Dig. § 102.\*]

Appeals from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the City of Louisville against Addie K. Davie. From a default judgment for plaintiff, and a judgment reviving the default judgment against Addie K. Davie's executor, the executor appeals. Reversed and remanded, with directions.

Davis W. Edwards, of Louisville, for appellant. Harris Fleming, Pendleton Beckley, and Geo. Cary Tabb, all of Louisville, for appellee.

**CLAY, C.** These two appeals grow out of the same facts, and will be considered in one opinion.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

James S. Kalfus had an estate for life in a certain tract of land located on Market street in the city of Louisville. He conveyed this interest to the Fidelity Trust & Safety Vault Company, trustee of Mrs. C. W. Kalfus. The remainder interest in the land was owned by Mrs. Adeline K. Davie. The taxes on the property were assessed against the Fidelity Trust & Safety Vault Company, trustee of Mrs. C. W. Kalfus.

On March 29, 1904, the city of Louisville instituted suit to enforce its lien for taxes for the years 1901, 1902, and 1903, on the property in question. To this petition the Fidelity Trust & Safety Vault Company, as trustee for Mrs. C. W. Kalfus, and Mrs. C. W. Kalfus were made parties defendant, and process duly served on them. On November 10, 1904, an amended petition was filed setting out the fact that the Fidelity Trust & Safety Vault Company had changed its name to Fidelity Trust Company, and making that company, both in its individual capacity and as trustee for Mrs. Kalfus, and also James S. Kalfus and F. W. Samuels, parties defendant. On August 2, 1909, plaintiff filed an amended and supplemental petition, wherein it sought to recover taxes for the years 1904 and 1905. All the parties defendant to this proceeding were duly served with process, except James S. Kalfus, who had recently died.

No further action was taken in the case until March 29, 1911, when the city filed the following amended petition: "The plaintiff, city of Louisville, amends its petition herein, and for amendment states that the defendant James S. Kalfus is now dead, and that since his death, the Fidelity Trust Company, Mrs. C. W. Kalfus F. W. Samuels, and W. C. Priest Company have no interest in the property described in the petition, but that the said property is now owned by Adeline K. Davie, and the plaintiff now drops the names of Fidelity Trust Company, Mrs. C. W. Kalfus, F. W. Samuels, and W. C. Priest Company, and makes the said Adeline K. Davie a party to this action, and asks that process be issued warning her to appear and defend. Wherefore plaintiff prays as in its original petition, and for all proper relief."

Summons on the amended petition was executed on Adeline K. Davie on April 3, 1911. On May 20, 1911, judgment by default was entered for the taxes alleged to be due for the years 1901, 1902, 1903, 1904, and 1905, and the city was adjudged a lien on the property to secure the same. The judgment further appointed W. S. Sanford receiver, with power to rent the property and apply the income to the payment of the debt and costs. In case he reported that it was impracticable to rent the property, a sale thereof was directed. On May 10, 1913, the judgment of May 20, 1911, was revived against the Louisville Trust Company as executor and trustee of Adeline K. Davie. From the

default judgment of May 20, 1911, and from the judgment of revivor of May 10, 1913, the Louisville Trust Company, as executor and trustee of Adeline K. Davie, appeals.

[1, 2] Appellant insists that the pleadings, so far as Adeline K. Davie is concerned, do not support the judgment. A default admits only what is well pleaded; consequently a judgment by default cannot be sustained if plaintiff's petition does not state a good cause of action, or lacks those averments which are necessary to show his right to recover. 23 Cyc. 740; Doud, Sons & Co. v. Duluth Milling Co., 55 Minn. 53, 56 N. W. 463; Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044; Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678; Martin v. Ky. Land & Investment Co., 146 Ky. 525, 142 S. W. 1038, Ann. Cas. 1913C, 332; Stamper v. Forman-Earle Co., 158 Ky. 324, 164 S. W. 937. In the first place the point is made that the pleadings themselves show that plaintiff's lien for taxes was barred so far as Adeline K. Davie was concerned. Whether that be true or not we deem it unnecessary to decide. It has been held that, when the petition showed that the action was barred, and that plaintiff was not within any of the exceptions contained in the statute which saved his rights to sue, the question could be raised by demurrer. French v. Bowling, 85 S. W. 1182; Stillwell v. Leavy, 84 Ky. 379, 1 S. W. 590, 8 Ky. Law Rep. 821; Chiles v. Drake, 2 Metc. 146, 74 Am. Dec. 406. That rule, however, is rarely applicable, and it is now well settled that as the plea of the statute is a personal one which a party may or may not desire to avail himself of, the question cannot be raised by demurrer, but the statute of limitations must be pleaded. Baker et al. v. Begley, 155 Ky. 234, 159 S. W. 691.

[3] 2. It will be observed that the original petition, seeking to recover taxes for the years 1901, 1902, and 1903 was filed on March 29, 1904. The amended petition covering taxes for the years 1904 and 1905 was filed on August 2, 1909. The amended petition making Adeline K. Davie a party was filed on March 29, 1911. So far as Adeline K. Davie is concerned, the only allegation in the amended petition is that the former defendants had no interest in the property, and that she was now the owner thereof. Although about seven years had elapsed since the filing of the original petition, and two years since the filing of the amended petition covering the taxes for 1904 and 1905, the amended petition making Adeline K. Davie a party neither reiterates the allegations of the original petition or of the subsequent amendments, nor states any facts showing that the property in question was still liable for the taxes for which judgment was sought. For aught that appears in the amended petition, the taxes may have long ago been paid, and the tax lien discharged. It is well settled that, where a new defendant is brought in by amended petition, the amend-



ment should show a cause of action against him. *Levi v. Engle*, 91 Ind. 330; *Vance v. Schroyer*, 77 Ind. 501; *Smith v. Weage*, 21 Wis. 448; *Vass v. Peoples Building, etc., Ass'n*, 91 N. C. 55. It follows that the averments of the amended petition were not sufficient to sustain the judgment by default.

Judgments reversed, and cause remanded, with directions to set aside the judgment in question.

#### RUSSELL v. CITY OF ASHLAND et al.

(Court of Appeals of Kentucky. May 26, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTIVE STREETS—DEATH OF ANIMALS—EVIDENCE.

Where, in an action against a city and its subcontractor for the death of a horse on a defective street, there was evidence of some negligence of the city and its subcontractor improving the street, but the driver might have known of the condition of the street at the place of the accident, or the horse might have been driven to death, the court properly directed a verdict for the city and its subcontractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 2. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

An application for new trial on the ground of a newly discovered witness was properly denied, where the applicant did not endeavor to ascertain who were present at the time of the accident forming the basis of the action, or had not sought from people living in the vicinity any information as to the circumstances of the accident, though 2½ years elapsed before the trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

#### 3. NEW TRIAL (§ 150\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A party applying for a new trial on the ground of newly discovered evidence, must allege facts showing that due diligence was exercised, and a mere allegation that he exercised due diligence is insufficient.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

Appeal from Circuit Court, Boyd County. Action by Robert Russell against the City of Ashland and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. E. Wilhoit and J. S. Fullerton, both of Ashland, for appellant. John T. Diederich and Donald H. Putnam, both of Ashland, for appellees.

CLAY, C. Plaintiff, Robert Russell, brought this action against the city of Ashland and George Hunt to recover damages for the death of a horse, which he claimed was due to the negligence of the defendants in failing to put barriers or lights on the streets at the point where the horse fell, and where the streets were not in reasonably safe condition for public travel. At the conclusion of the evidence the court directed a verdict in favor of defendants. Plaintiff appeals.

[1] In the summer of 1910 the city of Ash-

land was engaged in improving a number of streets by original construction. Among the streets being improved were Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Ninth streets, and Central avenue, Bath avenue, Montgomery avenue, Carter avenue, and Lexington avenue. The work was being done by the Southern Bithulithic Company. George Hunt was in charge of the paving work under a subcontract with the Southern Bithulithic Company. At that time Robert Russell owned a livery stable in the city of Ashland. Late in the evening of July 17, 1910, Russell's stableman hired a horse and buggy to a man by the name of Lee. Lee and a companion of his drove the horse away. Late that night the stableman was informed that the horse had been found dead at the intersection of Twenty-Sixth street and Lexington avenue. On going to the place of accident he discovered the horse. A short distance from the horse he noticed a cinder pile. There was no barricade or light of any kind near the intersection of Twenty-Sixth street and Lexington avenue. George Slone and Roscoe Slone testified to the same effect. The evidence further shows that all the streets in question were being torn up and improved about the same time, and that it was practically impossible to reach the place of the accident without becoming aware that the streets were in such condition that they were not being used for travel. The two men who were driving the horse were not introduced as witnesses, though the stableman says that he saw one of them about three or four weeks before the trial. One of the witnesses states that the horse was in a sweat when he examined him. From the foregoing evidence it is manifest that no one could tell exactly what caused the death of the horse. For aught that appears, the two men in the buggy may have known of the condition of the streets at the place of the accident, and, notwithstanding this fact, attempted to drive the horse along the streets when they knew that it was practically impossible to do so. Then, too, the horse may have fallen in its tracks, not because of any hole or obstruction in the streets, but because he had been driven to death. While there was some proof of negligence on the part of the city and its subcontractor, the evidence fails to show that this negligence was the proximate cause of the horse's death. Under these circumstances, the jury could do no more than guess at the cause of the accident, and the court, therefore, properly directed a verdict in favor of the defendants. *Stone v. Van Noy Railroad News Co.*, 153 Ky. 240, 154 S. W. 1092; *Louisville Gas Co. v. Kaufman-Straus Co.*, 105 Ky. 143, 48 S. W. 434.

[2] But it is insisted that the trial court erred in refusing to award plaintiff a new trial on the ground of newly discovered evidence. The evidence relied on is contained

in the affidavits of plaintiff and of one Thornton Slone. Plaintiff's affidavit is to the effect that since the trial of the action it was discovered that Lando Slone, Thornton Slone, Cecil Green, and Herbert Boggs were eyewitnesses to the accident, and would testify to the fact that the man who was driving the horse drove off of Twenty-Sixth street on to Lexington avenue. It was in the nighttime, and Twenty-Sixth street was not lighted by artificial lights or otherwise. Lexington avenue, on Twenty-Sixth street, was graded down to a depth sufficient to make a square embankment approximately two feet or more in height. The horse, when driven over this embankment, fell and died. There were no lights or barriers of any kind or description at that point. The affidavit further alleges that affiant was diligent in his efforts to secure the above testimony, but after using due diligence, he was unable to do so until after the trial was over. Accompanying plaintiff's affidavit is the affidavit of Thornton Slone alone, which contains substantially the same allegations. It appears that the affiant, Thornton Slone, lives in the same house as George and Roscoe Slone, who testified at the trial. The suit was brought October 19, 1910. The trial took place during the month of March, 1913. The only reason why plaintiff did not secure the testimony of Thornton Slone is because he was informed that Thornton Slone did not want to be a witness in the case, and kept quiet. Although two years and a half had elapsed since the suit was brought, he does not show that he sought from people living in the vicinity of the accident any information in regard to the circumstances under which it occurred, or that he in any other way endeavored to ascertain who were present at the time of the accident, or what they would testify to concerning the accident.

[3] In a case of this kind, it is not sufficient merely to allege that affiant exercised due diligence, but he must allege facts showing that such diligence was exercised. As the affidavit fails to show such facts, we conclude that the court below did not err in refusing a new trial on the ground of newly discovered evidence, which, so far as the record shows, might have been discovered by the slightest inquiry on the part of plaintiff. Judgment affirmed.

NUCKELS v. ROBINSON-PETTETT CO.  
(Court of Appeals of Kentucky. May 26, 1914.)

1. PLEADING (§ 423\*)—WAIVER OF IMPERFECTIONS—STATEMENT OF ACCOUNT.

Where defendant made no motion and asked for no rule requiring a statement of account to be filed with the petition, he waived the right to demand that such statement be filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1418-1420; Dec. Dig. § 423.\*]

2. JUDGMENT (§ 701\*)—PERSONS CONCLUDED—CORPORATIONS—ACTIONS AGAINST DIRECTORS—DEFENSES.

Where a claim for goods sold a bankrupt corporation was approved in a proceeding wherein it was adjudged a bankrupt, a director sued by the seller on the ground that he had allowed the corporation to contract debts in excess of the limit fixed by the charter cannot question the correctness of the claim.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. § 701.\*]

3. CORPORATIONS (§ 360\*)—LIABILITY OF DIRECTORS—ACTIONS—PLEADING.

In an action against the directors of a corporation on the ground that they allowed it to incur indebtedness in excess of the charter limit permitted by Ky. St. § 539, subsec. 8, thus rendering themselves liable under section 550, providing that, if the directors of any corporation shall fail to comply with or violate any of the statutes governing the conduct of such corporation, they shall be individually liable for any damage occurring, the petition need not allege that plaintiff was not aware that the corporation had exceeded its charter limit of indebtedness; that being a matter of defense, and the statute not making any such exception which need be negated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1508, 1509; Dec. Dig. § 360.\*]

4. PLEADING (§ 193\*)—TRIAL (§ 11\*)—TRANSFER OF CAUSE—DEMURRER—OBJECTIONS.

The objection that the action should have been brought on the equity side of the court instead of the law side cannot be raised by demurrer, but must be taken by motion to transfer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.\* Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.\*]

5. CORPORATIONS (§ 357\*)—DIRECTORS—LIABILITY—STATUTES.

An action by a creditor of a bankrupt corporation which had been allowed to contract debts in excess of the charter limit permitted by Ky. St. § 539, subsec. 8, brought against the directors under section 550, declaring them individually liable in case they permit a violation of law governing the corporation, is not an equitable action in which all creditors of the corporation need join, but is an individual action that can be maintained by each creditor damaged by the directors' act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 357.\*]

Appeal from Circuit Court, Bell County.

Action by the Robinson-Pettett Company against J. Leon Nuckels. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin T. Kelly, of Pineville, for appellant. Patterson & Ingram, of Pineville, for appellee.

NUNN, J. The question on this appeal involves the personal liability of the officers and directors of a bankrupt corporation for an indebtedness incurred by them in behalf of the corporation in excess of its charter limits. Nuckels & Co. was incorporated under the laws of Kentucky in May, 1913, to operate a drug store, with permission to incur an indebtedness not to exceed \$2,000. The corporation lasted for about six months, or until October, when it was adjudged a bank-

rupt under the federal law. J. Leon Nuckels, appellant, Chesney Asher, and Hettie A. Dougherty were the only incorporators, directors, and officers of the company. They bought of appellee \$1,158 worth of drugs, no part of which they or the corporation ever paid. During the course of the six months' business, these officers and directors incurred for the corporation an indebtedness, so that when it was adjudged a bankrupt it aggregated \$5,376. The appellee with the other creditors filed claims with the trustee in bankruptcy, and on a settlement of the estate it was ascertained that the amount coming to appellee was \$231, leaving due a balance of \$926. This suit was then filed against the above-named officers and directors of the company in their individual capacity to recover the balance of the debt of \$926. The ground of recovery was that they willingly and knowingly authorized and permitted the corporation to become indebted in excess of the amount permitted by the charter, and, under the provisions of section 550 of Kentucky Statutes, appellee claimed a right to recover of these officers and directors jointly and severally for the balance of the debt, which they claim is a loss resulting from the violation of the officers of the charter indebtedness limit.

Section 550, Kentucky Statutes, is as follows: "If the directors or officers of any corporation shall fail or refuse to comply with, or shall violate any of the provisions of this article, those so failing, refusing, or violating shall be jointly and severally individually liable for any loss or damage resulting to any person from such failure, refusal or violation." Subsection 8 of section 539 requires all articles of incorporation to state: "The highest amount of indebtedness or liability which the corporation may at any time incur."

Appellant Nuckels was the only defendant before the court, and demurring to the petition, which being overruled, he refused to plead further. Judgment was then entered against him for the amount claimed. So the only question presented is the sufficiency of the petition.

[1] The first objection is that the action was one on account, and no statement of the account was filed with the petition as an exhibit. The record does not show that appellant made any motion, or asked for a rule requiring that a statement be filed, and therefore he must be held to have waived the right. *McGhee v. Sutherland*, 84 Ky. 198, 1 S. W. 5, 8 Ky. Law Rep. 87; *Preston v. Roberts*, 12 Bush, 570.

[2] Appellant states other reasons why his demurrer should have been sustained. For instance, he says there is no allegation that the goods were sold at the special instance and request of, or that they were delivered to, the corporation; it is not alleged that they were worth the amount charged, or that the corporation promised to pay for them. If

this was a direct proceeding against the corporation to recover against it on the merchandise account, there would be much force in these objections; but this suit is based upon a right given by statute to recover against officers of a corporation for an indebtedness they suffered the corporation to incur beyond the amount authorized by law. The petition does state that the corporation purchased the goods under a contract of sale, and that the amount charged was just, due, and unpaid. It is then averred that these officers and directors also incurred other indebtedness for the corporation, so that altogether it amounted to more than \$5,000. Then follows the allegation that the corporation was adjudged a bankrupt, and that all of its property and assets were in the hands of the district court of the United States for Eastern Kentucky, and that all the debts and claims including the appellee's were filed therein, their status fixed, and the sums allowed pro rata, and that the amount apportioned to appellee was \$231, which is the credit, referred to above, placed upon the whole account. As above indicated, it might be said the allegations are hardly sufficient to support an action on an account against the corporation; but, where it is alleged that the account had been proved and allowed by the bankrupt court, a court of competent jurisdiction, in a cause wherein the defendant was necessarily a party, we are of opinion that he is now estopped to raise the question above referred to.

[3] Appellant's next objection is that the petition is fatally defective because it does not say that plaintiff did not know that the corporate indebtedness exceeded the charter limit, or that there was any fraud or deception practiced in the purchase of the goods. If, in fact, appellee was aware that the corporation had exceeded its charter limit of indebtedness, this should have been alleged by way of defense. When one is relying on a statute for right of recovery, he should show affirmatively that his case does not come within any exceptions set forth in the statute. It will be noticed that the statute in question does not make any exceptions, though, as a matter of course, if the defendant could show that plaintiff had knowledge that the corporation had exceeded its indebtedness limit when the goods were sold, it would be a good defense, for it would thus appear that the plaintiff was a party to the wrong, and had itself been guilty of violating the corporation laws.

[4, 5] The next objection is that the action was brought at law when it should have been in equity. If this was a suit to recover of the incorporators any unpaid stock subscription, or if a matter of double liability was involved, or a special fund sought which should be equitably divided among all the creditors, why then, as a matter of course, the action should be in equity, and all the creditors

could be made parties; but even that question would not be raised on demurrer, for the defendants should move to or the court of its own motion should transfer it to the equity docket. In this case, however, no such questions are involved. From the bankruptcy adjudication it is not presumed that the corporation has any assets, or at least none subject to the jurisdiction of this court. This is a plain suit to recover of the officers and directors of the corporation for their willful violation of the corporation laws in permitting an excessive indebtedness, and the statute plainly fixes a joint and several liability against them to any person who shall suffer loss or damage by reason thereof. The creditors are not required to join, for each has an independent right of action. That such right of action exists is no longer an open question in Kentucky. The case of *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165, is directly in point, and has definitely settled the proposition. The bank, creditor of a defendant corporation, was allowed to recover of Randolph, a director, the balance of a note, being part of indebtedness incurred by the directors in violation and in excess of the charter limit. The court held that, "when the articles of incorporation place a limit on the indebtedness which the corporation may incur, to exceed the limit is to violate the chapter on incorporations, as it would be to engage in a business not authorized by its charter, or the statute." This rule was approved in the later case of *Croninger v. Bethel Grove C. G. Ass'n*, 156 Ky. 357, 161 S. W. 230.

Perceiving no prejudicial error in the ruling of the lower court, the judgment is affirmed.

#### MORTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 27, 1914.)

LARCENY (§ 14\*) — ELEMENTS — TAKING — FRAUD.

One who induced a woman whose confidence he had secured by becoming engaged to her to convey to him her land, representing that he could sell it to better advantage if she did so, and thereafter sold the land and converted the proceeds to his own use, as he intended at all times to do, was guilty of larceny, under the rule that one who, through fraud, obtains the possession, but not the title, to goods for a particular purpose, with intent to steal the goods, is guilty of larceny, notwithstanding the owner of the land ostensibly parted with the title thereto; since the conversion was of the proceeds of the sale of the land, title to which had never been parted with by the owner.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003; vol. 8, p. 7701.]

Appeal from Circuit Court, Webster County.

John C. Morton was convicted of grand larceny, and he appeals. Affirmed.

David Browning, of Paducah, for appellant. James Garnett and Overton S. Hogan, Attys. Gen., for the Commonwealth.

SETTLE, J. The appellant, John C. Morton, alias Wilson, was tried in the Webster circuit court under an indictment charging him with the crime of grand larceny, and by verdict of a jury declared guilty. Judgment was duly entered upon the verdict fixing his punishment at confinement in the penitentiary not less than one nor more than five years. He complains of the judgment, and, in seeking its reversal, assigns as error: (1) The refusal of the trial court to peremptorily direct his acquittal by the jury; (2) the admission of incompetent evidence; (3) failure to properly instruct the jury as to the law of the case.

The first ground of complaint rests upon the theory that the evidence failed to prove appellant guilty of the offense charged in the indictment; it being argued that, if he was shown by the evidence to be guilty of an offense at all, it was not grand larceny as charged, but that of obtaining money and property by false pretenses; and that there was such a variance between the allegations of the indictment and the facts proved as authorized the peremptory instruction directing his acquittal, asked by him and refused by the trial court, at the conclusion of all the evidence. The allegations of the indictment, omitting what is immaterial, are that appellant did "willfully, unlawfully, and feloniously take, steal, and carry away from the possession of Elizabeth Shelton \$525 of good and lawful money of the United States of America, and one land note of \$675, \* \* \* the personal property of said Elizabeth Shelton, and not the property of John C. Morton, alias Wilson, of greater value than \$20, all done by the said John C. Morton, alias Wilson, with the felonious intent to convert same to his own use and to permanently deprive the owner, Elizabeth Shelton, of same."

The facts furnished by the bill of evidence are, in brief, as follows: About August 27, 1913, the appellant, hailing from the state of Tennessee, and sometimes known as John C. Morton, at others as John C. Wilson, became acquainted with Miss Elizabeth Shelton of Webster county, this state, to whom he shortly thereafter proposed marriage. The proposal was accepted by her, with the understanding that, following their marriage, she would reside with appellant upon a farm he claimed to own in Tennessee. Immediately after entering with Miss Shelton into the marriage engagement, appellant insisted that she sell a farm of 58½ acres in Webster county owned by her, giving as a reason that after their marriage she could better manage the money that might be realized for the farm than the farm itself, and telling her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that, if she would by deed convey him the farm, he could obtain for it \$200 more than she could sell it for, and that he would at once sell it and turn over to her the proceeds. Relying upon this advice and appellant's assurance that he would sell the farm for her and at once deliver to her the proceeds Miss Shelton by deed conveyed it to him, reciting therein a pretended consideration of \$1,100 cash in hand, when, in fact, he paid her nothing for it, and was not to do so; the sole purpose of the conveyance being to enable appellant to make a more advantageous sale of the land for her than she could make of it herself, and deliver to her the proceeds. The deed was prepared by appellant's procurement and acknowledged by Miss Shelton September 17, 1913; and on the next day, September 18, 1913, the land was sold by appellant to one Noah Shelton of Union county at the price of \$1,200, to whom he at once by deed, duly acknowledged, conveyed it. Of the consideration, \$525 was paid by the purchaser in cash and certain road claims against the fiscal court of Union county, the equivalent of cash. For the remainder of the consideration, \$675, the purchaser executed to appellant, as John C. Wilson, his promissory note, payable six months after date, with interest from date; both principal and interest being secured by a vendor's lien retained by the deed on the land.

No part of the cash payment or road claims received by appellant on the land from Noah Shelton was paid over or delivered by him to Elizabeth Shelton, nor did he ever deliver to her the note of \$675 executed to him by Noah Shelton for the remainder of the consideration agreed to be paid by the latter for the land. On the contrary, immediately after obtaining the note from Noah Shelton, he repeatedly attempted to sell it at a discount of \$100, and his efforts to thus dispose of the note continued until his arrest under a warrant for the offense of which he was finally convicted under the indictment. The foregoing facts are undisputed, as no evidence whatever was introduced in appellant's behalf, and it remains to be determined whether they prove him to be guilty of grand larceny.

It is manifest from the evidence that appellant obtained of Miss Shelton the deed conveying him her land with the felonious intent to steal and convert, not the land, but its proceeds, to his own use. In order to accomplish this felony, he first gained her confidence and obtained her promise to become his wife, then induced her to believe that she ought to sell the land, and that he could by selling it for her obtain a better price than she could realize by negotiating its sale herself. To further effectuate his purpose of stealing the proceeds of the land, he fraudulently represented to her that its conveyance to him was necessary; and when, as the ostensible owner of the land, he effected its sale, the cash, road claims, and note he re-

ceived from the purchaser therefor were by him withheld from Miss Shelton, the owner, and converted to his own use, thus demonstrating that it had been his purpose from the beginning to steal from her what he realized for the land. The several transactions by which this object was accomplished were but parts of the trick or device by which she was deprived of the consideration received by appellant by the sale of the land, and its conversion effected by him.

If one obtains possession of goods or money from the owner or possessor by fraud, with intent to steal it, the taking is larceny, and is so held in every jurisdiction. If the consent of the owner to the taking is obtained by fraud, such consent will not prevent the taking from being larceny. In *Elliot v. Commonwealth*, 12 Bush, 176, we held that: "If the owner of goods parts with the possession for a particular purpose, and the person who receives the possession avowedly for that purpose has a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny. But, if the owner intends to part with the property, and delivers the possession absolutely, and the purchaser receives the goods for the purpose of doing with them what he pleases, it is not larceny, although fraudulent means may have been used to induce him to part with them." *Commonwealth v. Williamson*, 96 Ky. 1, 27 S. W. 812, 16 Ky. Law Rep. 197, 49 Am. St. Rep. 285; 1 *Wharton's Criminal Law*, § 886; *Blackburn v. Commonwealth*, 89 S. W. 160, 28 Ky. Law Rep. 96.

In *Roberson's Criminal Law*, vol. 1, p. 564, it is said: "If, therefore, the owner parts with the possession of his property for a particular purpose, and the person who receives the possession avowedly for that purpose has a fraudulent intention to make use of the possession as a means of converting the property to his own use, and does so convert it, it is larceny."

It is, however, insisted for appellant that, in view of the facts here presented and the rule announced in *Miller and Smith v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194, quoted with approval in *Commonwealth v. Schang*, 181 Ky. 405, 115 S. W. 218, he cannot be held guilty of grand larceny. The rule in question is as follows: "The rule, as stated by Russell (2 Russell, 29) and approved by this court, is that if, by trick or artifice, the owner is induced to part with the possession only, still meaning to retain the right of property, the taking by such means would amount to larceny; but, if the owner part with not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses."

In other words, it is appellant's contention that Miss Shelton, the owner of the land which he sold and converted into money a-

a note, by its conveyance to him parted with the title thereto and to any right of property she may have had in the money and note for which he sold it, and that this fact, by virtue of the rule last stated, made his offense that of obtaining property by false pretenses, instead of grand larceny. This contention is unsound. The crime of grand larceny charged in the indictment did not arise out of appellant's conversion of the land, for real estate cannot be the subject of larceny, but out of his conversion of the money and note he received for the land. In conveying appellant the land it was not the grantor's intention or his that the title thereto should pass to or vest in him absolutely, but that by means of the deed he should hold the title temporarily and for her benefit until such time as he could sell it and turn over to her the proceeds. By his fraudulent representation to Miss Shelton that by thus investing him with the title to the land for the purpose of selling it for a better price than she could receive therefor, he induced her to constitute him her agent to sell the land and immediately pay over to her the proceeds, and when, upon selling the land and receiving therefor the proceeds, partly in money and partly in the land note, he converted both to his own use, instead of delivering them to her, he committed the crime charged in the indictment, if, at the time of procuring the execution of the deed from Miss Shelton to him, he feloniously intended thereby to use the conveyance as a means of converting the proceeds of the land to his own use, following his sale and conveyance thereof.

According to the evidence, although appellant ostensibly held the title to and possession of the land for a day, it was as the agent of Miss Shelton, and only for the purpose of selling it as such agent and delivering to her the proceeds, and this arrangement having been brought about by his fraudulent procurement and with the felonious intent on his part to steal, carry away, and convert to his own use the money and note received by him for the land, he should not be allowed to escape the punishment that will result to him from the verdict of the jury and judgment of the trial court, upon the false and purely technical ground that he is guilty of a felony other than the one for which he was indicted and convicted. It is patent from the evidence that Miss Shelton never intended to part with her title to the land by conveying it absolutely to the appellant, and equally patent from the evidence that he was only temporarily invested with the title as her agent, and for the purpose of selling it and delivering to her these proceeds. His possession of the money and note for which he sold the land was as her agent and for a particular purpose; and, they being her property, if, in obtaining possession of them for such particular purpose, appel-

lant feloniously intended to make use of such possession as the means of converting them to his own use, and did so convert them, the act, as declared by the rule stated in *Commonwealth v. Williamson*, supra, constituted grand larceny.

As the instructions of the court submitted to the jury, in substantially correct language, all the law of the case, no reason is perceived for sustaining any of the objections made to them by the third contention of appellant's counsel.

The same is true as to counsel's complaint of the evidence, for we have been unable to find that any of it was incompetent.

In brief, the record furnishes no ground for disturbing the judgment, and it is affirmed. The whole court sitting.

#### HAMMOND et al. v. LESTER.

(Court of Appeals of Kentucky. May 29, 1914.)

#### 1. COUNTIES (§ 190\*)—TAXATION—POWER OF FISCAL COURTS—CONSTITUTIONAL LIMITATION.

Const. § 157, declaring that the tax rate for a county, exclusive of the school tax, shall not exceed 50 cents on the \$100, and that no county shall be authorized to incur indebtedness to an amount exceeding the revenue provided for such year without the assent of two-thirds of the voters thereof, is mandatory, and any excess is void.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.\*]

#### 2. COUNTIES (§ 190\*)—TAXATION—ASSESSMENTS—VALIDITY.

An assessment in excess of the rate prescribed cannot be justified on the ground that numerous residents in the county requested the fiscal court to make the levy and agreed not to resist its collection.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.\*]

#### 3. COUNTIES (§ 190\*)—ASSESSMENTS—VALIDITY.

A tax levied by the fiscal court of a county in excess of the 50-cent limit prescribed by Const. § 157, is void, though the order directed its collection for each magisterial district and its expenditure for the building and improving of the roads of each district.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.\*]

#### Appeal from Circuit Court, Trigg County.

Action by Dona Lester against W. H. Hammond and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Denny P. Smith, of Cadiz, G. W. Ryan, of Golden Pond, and Kelly & King, of Cadiz, for appellants. Breathitt & Breathitt, of Hopkinsville, for appellee.

SETTLE, J. The question to be determined in this case is whether the fiscal court of Trigg county has the power to levy a tax in excess of 50 cents on each \$100 worth of taxable property of the county for any one year, exclusive of the tax for school purposes. On April 3, 1913, it levied a tax of 35 cents

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon each \$100 worth of taxable property in the county, which it appropriated to the general fund for defraying the necessary expenses of the county government for the fiscal year, and, in addition, a tax of 25 cents on each \$100 worth of property for the building of roads in the county, thus exceeding by 10 cents the constitutional limit of 50 cents on the \$100. Section 157, Constitution, provides: "The tax rate \* \* \* for other than school purposes, shall not, at any time, exceed \* \* \* for counties and taxing districts, fifty cents on the hundred dollars; unless it should be necessary to enable such \* \* \* county, or taxing district to pay the interest on, and provide a sinking fund for the extinction of indebtedness contracted before the adoption of this Constitution. No county \* \* \* shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. \* \* \*"

It is not claimed that the tax levy made for the year 1913 by the fiscal court of Trigg county was necessary to enable it to pay the interest on, or provide a sinking fund for, the extinction of indebtedness contracted before the adoption of the Constitution.

The order making the levy reads as follows: "Pursuant to chapter 52, art. 5, Kentucky Statutes, it is ordered by the court that a tax of \$.35 to the general fund and a tax of \$.25 for special road and bridge fund and \$.20 for school funds, making an aggregate of \$.80, be and the same is hereby levied and laid upon each \$100 worth of taxable property as assessed and equalized for state purposes in and for Trigg county for the tax year of 1913; i. e., the fiscal year beginning on the 1st day of July, 1913. And a tax of \$1.50 is hereby levied and laid upon each male person of the age of 21 years or more residing in said county at the date of assessment, viz., the 1st day of September, 1912. Said ad valorem and poll tax being necessary and is for the purpose of paying off the existing current indebtedness and to defray the necessary and current expenses of the county for said year, and same shall be collected by the sheriff at the same time and in the same manner as the state revenue is collected and by him disbursed on the orders of the court and the county court where by laws provided, and the said tax shall be known and designated as the county levy fund for the year of 1913."

On September 9, 1913, the fiscal court amended the above order so as to make it read as follows: "Pursuant to chapter 53, art. 5, of the Kentucky Statutes, it is ordered by the court that a tax of \$.35 to the general fund and a tax of \$.20 for school funds, making in the aggregate \$.55, be and

the same is hereby levied and laid upon each \$100 worth of taxable property as assessed and equalized for state purposes in and for Trigg county for the tax year 1913 (i. e., the fiscal year beginning on the 1st day of July, 1913), and a tax of \$1.50 is hereby levied and laid upon each male person of the age of 21 years or more residing in said county at the date of assessment, viz., the 1st day of September, 1912. And it is further ordered by the court that a tax of 25 cents be and the same is hereby levied and laid at the request of the property owners of each separate magisterial district upon each \$100 worth of taxable property in each magisterial district in and for Trigg county separately as assessed and equalized for state purposes for the tax year of 1913, beginning on the 1st day of July, 1913, for road and bridge purposes in each of said magisterial districts, and the sheriff is ordered to collect and keep the tax of each magisterial district separate for the exclusive use of the magisterial districts paying the tax respectively. Said ad valorem and poll tax being necessary, and, except the ad valorem tax herein levied upon the taxpayers of the magisterial districts for road and bridge purposes, is for the purpose of paying off the existing current indebtedness and to defray the necessary current expenses of the county for said year, and same shall be collected by the sheriff at the same time and in the same manner as state revenue is collected and by him disbursed on the orders of the court, and the county court where by laws provided, and same shall be known and designated as the county levy fund and the magisterial districts road and bridge fund for the year 1913."

The appellee, Mrs. Dona Lester, a resident and taxpayer of the county, being of opinion that the fiscal court of Trigg county, in making the levies in question, violated the provisions of section 157, Constitution, to the extent of the excess over 50 cents on the \$100 contained therein, brought this action in her own behalf and that of other taxpayers of the county for the purpose of enjoining the sheriff of the county from collecting the 10 cents on the \$100 in excess of the constitutional limit. The sheriff by answer traversed the averments of the petition and alleged that the levy of 25 cents on each \$100 of taxable property for road and bridge purposes is a special tax for improving, grading, and picking the roads of Trigg county, which was levied upon each magisterial district at the instance and request of many of the citizens and taxpayers thereof, and that each magisterial district will receive for road building therein the money paid by it on the levy of 25 cents on the \$100. Furthermore, that the tax of each district as collected will be kept as a separate fund for that district and will not go into the county fund at all or be used for any general county purpose, in view of which it was alleged it cannot be said that the 35 cents and 25 cents on each \$100 worth

of taxable property together exceed the constitutional limit of 50 cents on each \$100 worth of taxable property of the county.

Numerous taxpayers of the county, by intervening petitions, concurring in the allegations of the answer of the sheriff, asked to be made parties to the action, and an order was entered making them defendants therein and treating the several petitions as their answers. Thereupon appellee filed a general demurrer to the answer of the sheriff and those of the citizens and taxpayers made defendants, which demurrers, and each of them, the circuit court sustained; and, no further defense being made, judgment was entered declaring the tax and levy made by the fiscal court to the extent of the 10 cents in excess of 50 cents on each \$100 worth of taxable property illegal and void, and perpetually enjoining the sheriff from collecting said excess of 10 cents or any part thereof. Appellants complain of that judgment; hence this appeal.

[1] The power conferred upon the fiscal courts of the several counties of the state to levy taxes must be exercised by them according to the provisions of the Constitution of the state and within the limitations imposed by that instrument; and when it is therein declared, as in section 157, that the tax rate for a county, exclusive of the school tax, shall not exceed 50 cents on the \$100, its fiscal court, in making the tax levy, cannot exceed that amount. The constitutional provision imposing the limitation upon the power of the fiscal court to tax property of the citizens of the county is mandatory and must therefore be obeyed. If the needs of the county require a sum of money greater in amount than can be produced by a tax of 50 cents on the \$100 in any one year, it may be obtained, not through a levy above that amount made by the fiscal court, but, as further provided by section 157, Constitution, by the assent of two-thirds of the voters of the county, voting at an election to be held for that purpose.

The action of the fiscal court in making the levy attacked by appellee in this case was, as to the excess over 50 cents on the \$100, viz., 10 cents, void. This question has been so frequently decided in this jurisdiction that we deem it unnecessary to do more than cite some of the cases so holding. *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35, 23 Ky. Law Rep. 1292; *Blair v. Turnpike Co.*, 4 Bush, 157; *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, 16 Ky. Law Rep. 872, 23 L. R. A. 480; *Davless County Court v. Howard*, 13 Bush, 101; *City Council v. Powell*, 27 S. W. 1, 16 Ky. Law Rep. 174; *M. & L. T. R. Co. v. Wiggins*, 104 Ky. 540, 47 S. W. 434, 20 Ky. Law Rep. 724; *Sparks v. Robinson*, 115 Ky. 453, 74 S. W. 176, 24 Ky. Law Rep. 2336; *Knipper v. Covington*, 109 Ky. 187, 58 S. W. 498, 22 Ky. Law Rep. 676.

[2, 3] It is not material that a considerable number of taxpayers in the several magisterial districts of Trigg county requested the fiscal court to make the levy of the tax of 25 cents on the \$100 for the construction of roads and bridges, or that the original or amended order directs that the tax collected in each magisterial district shall be expended in building and improving roads therein. The fact remains that the money to be expended on the roads of the several magisterial districts is to be raised by taxation, imposed by the only governmental agency of the county authorized to levy a tax; and, if the power to levy the particular tax here complained of cannot be exercised under the Constitution by the fiscal court, the fact that any number of the taxpayers of the county, or even all of them, requested the levy of the tax and pledged themselves not to resist its collection cannot give validity to the levy or confer upon the sheriff the right to collect it. The authority of the fiscal court to levy taxes cannot be made to rest upon a contract with the taxpayers, but is derived alone from the Constitution and statutes of the state.

To permit the collection of the tax levied in excess of 50 cents on the \$100, under the method attempted to be devised and executed by the fiscal court of Trigg county and some of the taxpayers thereof, would be but an evasion of the mandatory provision of the Constitution of the state, contained in section 157 of that instrument.

As it is apparent from the record that the fiscal court, in making the tax levy of 35 cents for discharging the current indebtedness or expenses of the county and 25 cents for road purposes, exceeded the constitutional limit of 50 cents on the \$100 by 10 cents, this excess of 10 cents on the \$100 the judgment of the circuit court properly enjoined the sheriff from collecting.

Judgment affirmed.

## JOB IRON & STEEL CO. v. LAYNE.

(Court of Appeals of Kentucky. May 26, 1914.)

### 1. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—INJURY TO LEG.

A verdict of \$2,000 for a servant 16 years of age, whose ankle was crushed and whose leg was broken in four places, requiring about the usual time under proper medical treatment for him to leave his bed, and who had to walk on crutches for 13 months, and whose leg was left somewhat shorter and smaller, so as to become a serious and permanent deformity, was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

### 2. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURY—QUESTION FOR JURY.

On evidence in an action by a servant 16 years of age for injury by being caught in a disconnected belt hanging over a moving shaft while engaged in "drossing" the pots in a galvanized sheet metal factory, *held*, that the ques-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion whether he was working within the scope of his employment was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**8. MASTER AND SERVANT (§ 185\*)—MASTER'S LIABILITY—FELLOW SERVANT.**

In such action, the other servants who were engaged in knocking down a temporary conveyor, so that the pots could be drossed, and who directed the work and told plaintiff what tools they wanted, and had him work as they needed him, were not his fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

**4. MASTER AND SERVANT (§ 286\*)—MASTER'S LIABILITY—QUESTION FOR JURY—GUARDING MACHINERY AND BELTING.**

In Kentucky, where there is no statutory requirement that revolving belts and gears be covered, it is not negligence per se for a master to operate such belting and gears without covering, but it is a question of fact, under the circumstances in each case, whether he has exercised ordinary care to provide a reasonably safe place for work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**5. MASTER AND SERVANT (§ 278\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—UNSAFE PLACE TO WORK.**

Evidence, in an action by a 16 year old servant employed in a galvanized sheet metal factory for injury from being caught in a disconnected belt hanging over a moving shaft while engaged in drossing galvanizing pots, held to show defendant's negligence in not furnishing a reasonably safe place for work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**6. MASTER AND SERVANT (§ 281\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

Evidence, in such case, held not to show that plaintiff was guilty of negligence in failing to apprehend that the belt would suddenly become caught on the shaft and begin to wind up with it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

**7. APPEAL AND ERROR (§ 907\*)—THEORY OF CASE—DIAGRAM OMITTED FROM RECORD.**

Where defendant, appealing from a judgment for injuries to a servant, prepared the record, the servant might insist that a diagram omitted therefrom would strengthen his theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

Appeal from Circuit Court, Boyd County.

Action by Bertis Alfred Layne, by next friend, against the Job Iron & Steel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. S. Willis and Proctor K. Malin, both of Ashland, for appellant. Zerfoss & Weakley, of Ashland, for appellee.

NUNN, J. This is an appeal from a judgment awarding damages to appellee in the sum of \$2,000 for personal injuries sustained by him while in the employ of appellant

at its sheet steel plant in Ashland. Appellee is a boy, and at the time of the injury was 16 years of age.

A belt had been taken off a pulley and was hanging loose on a revolving shaft. The shaft was about 20 feet from the floor, and the lower end of the belt just about touched, or a little of it was lying on, the floor. The boy was standing near, or came close to, the end on the floor, and suddenly the belt got caught on, or wedged between, something on the shaft, perhaps between two pulleys, and began rapidly to wind around it. The lower end of the belt caught the boy's leg, drew him up, and wrapped him around the shaft four or five times before the machinery could be stopped.

[1] His ankle was crushed, and his leg broken in four places. It is not necessary to attempt to describe the suffering incident to such an injury. It required about the usual time under proper medical treatment for the boy to leave his bed, and he had to walk on crutches for 13 months. The leg in healing and knitting became from two to three inches shorter than the other, and is somewhat smaller, so that he unquestionably has a very serious and permanent deformity. If he is entitled to recover anything, the amount allowed him by the jury is not excessive; indeed appellant does not criticize the amount.

The business of appellant was the manufacture of galvanized sheet metal, and the machinery used, so far as it pertains to this case, consisted of an acid tank, a pot for holding molten zinc, and a set of chain conveyors in two series. The first section of the conveyor was about 10 feet long, and the second about 60 feet long. The acid tank, the metal pot, and the conveyors were set close to each other and in the order named. The process of galvanizing was by starting a sheet of iron through the acid tank, from which it went between iron rolls, immersed in molten zinc contained in metal pots, from which it was carried over the first and second series of the chain conveyor, and then loaded on trucks to be carted away. The first 10-foot section of the chain conveyor was rigged on a temporary structure, consisting of iron rods bolted together so that it could be easily knocked down and moved out of the way. The purpose of this was to give easy access to the pots containing molten metal, as they had to be cleaned out every week or so. This cleaning out was called "drossing" the pots and rolls. In the run of a week certain impurities in the zinc, or "dross," as it is spoken of in the testimony, would settle at the bottom of the tanks and collect on the rolls, and, if this dross was not removed, it would very materially interfere with the process of manufacturing. This cleaning of the tank and taking out of the rolls for drossing was done by means of a crane swung overhead, and, to have free

use of the crane and access to the pots, it was necessary to remove this 10-foot section of the conveyor. Appellant had two series of pots and conveyors in operation, and they were situated within about 15 feet of each other, and parallel. Ordinarily about six employes worked with each series; that is, a man started the metal through the acid bath, another, "called the drag-out," took the sheet from the galvanizing tank and started it on its trip over the conveyors, and others, including the appellee, had special bits of work to do in the process.

Appellee was called the "chain boy," and his place of work was at the far end of the conveyor, where, by the use of tongs, he lifted the galvanized sheets, partly cooled by their trip on the conveyor, and loaded them onto the trucks above mentioned to be carted away, but on Saturday afternoon, or such days as it was found necessary to dross or clean out the pots, all the men at work on each series would assist. It was at such a time as this, and on a Saturday afternoon while preparing to dross the pots, that the accident occurred. The first thing to do was to remove the 10-foot temporary section of the chain conveyor, after taking off the drive belt, to give access to the pots and permit the rolls to be removed. All the men on this series were standing there, and some of them were engaged in unbolting the temporary structure, and two of them had caught ahold of it to pull it out of the way. The boy in stepping out of their way came in contact with the belt and received the injuries above described.

[2] No objection is urged to the instructions given by the court, but appellant insists that a peremptory instruction should have been given to find in its favor, and it suggests two reasons for this. First it says that the boy, at the time of his injury, was at a place where his duties did not require him to be, and that he was performing work not required of him nor within the scope of his employment. Appellant's superintendent swears that the boy's place of work was at the end of the chain conveyor, and that his duties were to remove the galvanized sheeting from the conveyor to the trucks; that he had no other duties; and that he had no business anywhere else in the plant. The boy, and nearly all the other witnesses, swear that every week or so the metal pots had to be drossed or cleaned out; that they would stop the chain conveyor, in fact all the work incident to galvanizing the sheets through the pots would cease; and that at such times it had always been the custom of the chain boy to aid as a "gin-hand." By this they mean that it was the custom for this boy to assist the men while they were removing the temporary conveyor structure, and, when the rolls were removed, to help dross them; that, as the men were taking down the temporary structure, the boy would stand near by to hand them

wrenches and tools, as they would need them, and, when the work was completed, he would gather up the tools and put them in their proper place.

As above indicated, the superintendent denies that the boy had any such duty, and says that he did not know that he ever had done any such work, but the testimony of the other witnesses, including the boy, shows that this had been the invariable practice, and that the superintendent was usually around when this character of work was being done, and that on this occasion he was standing between the two metal pots, or within about 15 feet of where the boy was injured. Since the evidence tended to show that at the time the boy was at a place and doing the character of work that he was accustomed to do, and also that it was with the knowledge and approval of the master, the court very properly submitted the question to the jury for their determination.

[3] The second reason urged for a peremptory instruction is the claim that, if the premises were unsafe or dangerous by reason of this revolving belt, they were made so by the fellow servants of appellee. We do not understand how the men who were engaged in knocking down this temporary structure so that the pots could be drossed were fellow servants of the boy. Assuming that he had duties there, they were merely to hand monkey-wrenches and tools to these men as they needed them in loosening the bolts and the parts. These men directed the work, and told the boy what tools they wanted, and had him to work as they needed him. What he had to do was to stand there and be ready to obey their call. This is fairly deducible from the testimony of every witness except the superintendent of the plant. The difficulty in the case in the way of recovery for the boy is not the question of fellow servant or of the insistence that he was a volunteer, but whether the position of this belt whereby he was injured is sufficient to prove that the appellant was negligent in failing to provide the boy a reasonably safe place to work.

[4] In Kentucky there is no statutory requirement that revolving belts and gears be protected or covered, nor is it negligence per se for a master to operate belting and cog-wheels without covering or guards. The question depends on the circumstances of each case, the nature of the service, the degree of exposure and notice thereof to the servant (26 Cyc. 1133), and it is a question of fact, under the circumstances of each case, for the jury to determine whether the master has exercised ordinary care to provide for the servant a reasonably safe place for the work contemplated.

[5-7] At the times when they were not drossing the pots (that is, when the plant was in full operation), this belt was connected with the pulley on the line shaft above to a pulley on this temporary conveyor section

which they were removing, and in this way the conveyor was turned or driven. There was another pulley on the line shaft above, and, as we gather from the evidence, close to the one first mentioned, and from it a belt was connected with the drossing pot for turning the rolls. Of course, when the conveyor structure was being knocked down, this conveyor belt was thrown off the conveyor pulley, and then of its own motion it would immediately run off the line shaft pulley above. In this way it would hang in a vertical position from and over the line shaft, and the line shaft would turn within it, but without friction to revolve the belt, or, if so, very slightly. The fact that the rolls in the molten metal were driven by a pulley on this same line shaft, and it was necessary to keep the rolls in motion, and until the very time they were taken out for drossing, explains the reason why the line shaft was not stopped. In this way it will be seen that this loose swinging belt from the revolving line shaft was not in its usual service, neither was it in motion, and for that reason no one could contend that it should have been guarded or protected. Neither can it be said that the boy or the men working there were in any sense guilty of negligence for failing to apprehend that the belt would suddenly become caught on the line shaft and begin to wind with it. It is true that on a nearby post there was a peg upon which the belt, under the circumstances of this case, usually hung; but, if the injury was caused in the manner the evidence indicates to us, it would have in all probability happened just as it did, even if the lower end of the belt had been hung in its accustomed place on the peg. If the pulleys on the shaft had been set further apart than the width of the belt, or if the keys or set screws wedging or fastening the pulleys onto the shaft had been properly set, there could have been nothing on the shaft to catch the belt or wind it up.

There is evidence tending to show that there was negligence of the master in placing the pulleys too close together, considering the width of the belt, and there is no evidence to the contrary, and the accident could not have occurred from any other cause, unless it was a negligent placing of the keys or set screws holding in place these same pulleys. If it resulted from either cause, it was the negligence of the master. There was introduced in evidence a sketch or diagram of the plant showing the relative location of the conveyor pots, shafts, pulleys, switchboards, etc., and the witnesses make frequent references to it in their attempts to describe the place and the cause of the action. If that diagram was with the record, it would make the evidence clearer to us, and it might disturb this theory of negligence, but it is not here. Since appellant

prepared the record, appellee might insist that its presence would strengthen the theory. Aside from all this, there is sufficient evidence, not only to take the case to the jury, but to support their finding in favor of the boy's plea that his injury "was by reason of defendant's failure to furnish him a reasonably safe place in which to do the work required of him."

The judgment is therefore affirmed.

#### BARKER v. COMMONWEALTH.

(Court of Appeals of Kentucky, May 29, 1914.)

##### 1. HOMICIDE (§ 300\*) — SELF-DEFENSE — INSTRUCTIONS.

Where there was no evidence that accused struck decedent when he was in no danger, or with the intention of bringing on a difficulty, but the evidence showed that accused struck decedent only after decedent had fired the first shot, and that thereafter accused shot decedent, an instruction on self-defense that, if accused, armed, sought decedent to engage in a difficulty to kill or injure him, and, with the intention of bringing on the difficulty, struck him when in no danger and thereby brought on the difficulty, and accused willingly entered into the conflict and engaged therein up to the time he fired the fatal shot, he was not justified on the grounds of self-defense, unless he had abandoned in good faith his intention to bring on the difficulty and withdrew in good faith from the conflict before firing the fatal shot, was erroneous as not sustained by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 2. HOMICIDE (§ 300\*) — SELF-DEFENSE — INSTRUCTIONS.

An instruction on self-defense should follow the usual language of such instruction, which permits accused to shoot and kill decedent where accused at the time believed, and had reasonable grounds to believe, that he was in danger of death or some great bodily harm at the hands of decedent, and that it was necessary or was believed by accused in the exercise of reasonable judgment to be necessary to avert the danger, real or apparent, and an instruction predicated on the facts, which merely permitted accused to shoot and wound decedent, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from Circuit Court, Garrard County.

Robert L. Barker was convicted of manslaughter, and he appeals. Reversed for new trial.

James I. Hamilton and Lewis L. Walker, both of Lancaster, and Hazelrigg & Hazelrigg, of Frankfort, for appellant. James Garnett, Atty. Gen., and D. O. Myatt, Asst. Atty. Gen., for the Commonwealth.

MILLER, J. The appellant, Robert L. Barker, was indicted for the murder of his brother-in-law, John Eason; he was convicted of manslaughter, and, having been sentenced to serve a term in the state penitentiary of from 2 to 21 years, he appeals.

Appellant assigns two grounds for a re-

versal: (1) That the judgment is not supported by the evidence; and (2) that the court improperly instructed the jury.

Eason had married a sister of appellant, and until about three days before the homicide appellant and Eason were friendly with each other. Appellant's wife had died a few months before, leaving a daughter about 16 years of age, two small boys, and a baby boy about three months old. Appellant and Eason lived only a short distance from each other, and appellant arranged with his sister, Mrs. Eason, to take and care for the baby for him, for which he was to pay her \$100 a year, and to furnish the milk for the child. The milk was furnished twice a day, and was usually delivered by appellant. Eason had living with him a nephew named Homer Luster, about 19 years of age, who had attempted to pay some attention to appellant's oldest daughter. Appellant objected to these attentions upon the part of Luster, assigning the youth of Luster, as well as the tender years of his daughter, as the grounds of his objection. No hard feelings seem to have resulted from this incident, however, although appellant shortly thereafter sent his daughter to a boarding school at Richmond, Ky. While the daughter was in school at Richmond she began a correspondence with Luster; she having written the first letter. In order to prevent a discovery of the prohibited correspondence it was agreed between them that she would direct her letters to Mrs. Eason, and would place a cross mark on the envelope of every letter that was intended for Luster. This scheme was carried out for several months; Mrs. Eason at least knowing it, if not participating therein. Mrs. Eason and Luster also testified that it was known to Eason. On Thursday before the homicide, which occurred on Sunday, Barker went to the post office and received the mail addressed to Mrs. Eason. It consisted of two letters and a card, all being addressed to Mrs. Eason and in the handwriting of Barker's daughter. Suspecting that the letters were intended for Luster, Barker opened them, and his suspicions were confirmed. The letters contained nothing derogatory, however, to the character of any one; they were simply love letters from his daughter to Luster. When Barker went to Eason's house that evening to deliver the milk for his baby he went in the back way, and, having left the milk in the kitchen, he then went forward into a front room, and after speaking to those present in the usual way, told his sister the milk was in the kitchen. When Mrs. Eason went into the kitchen to prepare the milk, Barker followed her and handed her the post card from his daughter, saying that it was given out with his mail, through mistake. Mrs. Eason read it, and told Barker it was from his daughter. Barker said nothing to Mrs. Eason as to the two letters intended for Luster and which he had opened that afternoon. There is considerable

contradiction as to what was said by Barker and by Mr. and Mrs. Eason immediately after Barker had delivered the post card to his sister. Mrs. Eason testified that Barker said people were meddling with his affairs and his daughter at Richmond, whereupon Eason spoke up and said they were not meddling with his affairs, and that Barker in turn said that he would kill the man that meddled with his affairs. She says Barker further said he was going to Richmond to see about this letter business, and repeated that he would kill the man that meddled with his affairs, and that when he got back from Richmond hell was going to be to pay. According to Barker, when he and his sister had gone to the kitchen he told her that some one was meddling with his daughter in Richmond and in somebody's name, and that she denied it; that he told her how interested he was in his daughter; that his friends had offered to furnish him the money to send her to school; and that at this point John Eason came in and the quarrel began. Eason saying that there had been a pack of damn lies told about these letters all winter. Barker also says that Eason said, "We will get you; we will burn hell with you," and that John Eason and his other relations who were present, including Luster, made such demonstrations towards him that he believed they were prepared to take his life, and for that reason he procured a pistol. Up to that time he had never owned a pistol. Barker did not go back to the house to take the milk to his baby, but sent it by his boy on Friday, Saturday, and Sunday. Elmer Lantem, a cousin of Homer Luster, testified that on Saturday afternoon he invited Luster to go home with him and spend Sunday, and that Luster told him he could not go because he was expecting trouble. Luster admits he was with Lantem on Saturday, but did not remember whether he made the statement attributed to him by Lantem; he did not, however, deny it.

Barker was the trustee of the school district, and as he was custodian of the key to the schoolhouse, he had been requested to open the schoolhouse on Sunday afternoon for the purpose of holding religious services therein. When Barker arrived at the schoolhouse he found a small crowd of men and boys gathered there, including Eason and Luster. After Barker unlocked the schoolhouse door he went to the home of his sister, Mrs. Humphrey, which was near by, to get a drink of water; and when he returned to where the crowd was standing near the schoolhouse door he saluted Eason by saying, "John, how is my baby?" to which Eason replied, "Very well." Barker then asked Eason if he could have a conversation with him, or words to that effect, to which Eason made no reply, but started walking off with Barker, side by side. Barker says he told Eason that he wanted to speak to him about his daughter, and referred to the fact that Eason had a

wife and little children, and that Barker also had some children; that Eason knew Barker was very much interested in his daughter; that it cost him a good deal of money to send her to school, and suggested that they ought to be friends, and asked Eason if he would please not have any more letter writing done at his house. Barker says Eason did not accept this in the spirit in which it was said, but immediately became enraged, and said to Barker, "What we are doing is none of your damn business"; that Barker said, "Yes, it is," whereupon Eason responded, "You God damn son of a bitch, I will knock the hell out of you," and jumped around, drawing his pistol from his left pocket and fired from under his coat at Barker. Barker then struck Eason with his left hand, and, pulling his pistol from his right pocket, fired five times at Eason, killing him almost instantly. Immediately after firing Barker made an exclamation, which has been differently reported by the witnesses. Some of them say that Barker then said, in substance, "There is another son of a bitch here, and I would like to see him," or words to that effect; while other witnesses testify that Barker said, "There is another son of a bitch here that wants to take my life, but I don't see him." Sherrow, a witness for the commonwealth, testified, that Eason said to Barker after the shooting, "Bob, you killed me for nothing." No other witness testified that Eason made that, or any other statement after he was shot. There were about 25 people at the schoolhouse, and the shooting occurred 90 feet from the crowd. Barker's version of the difficulty, to the effect that Eason fired the first shot is positively corroborated by seven witnesses, while no witness testified that Barker fired the first shot. Sherrow is the only witness who does not say that Eason fired the first shot, and says that when he first saw the difficulty Eason and Barker were striking at each other, and that he did not see Eason shoot. This testimony of Sherrow does not, however, contradict the testimony of the other seven witnesses, who say Eason fired the first shot, and that the parties then struck at each other before Barker fired; it only shows that Sherrow did not see the beginning of the difficulty. His testimony is not at all inconsistent with the testimony of the other witnesses. It further appears, without contradiction, that Barker's character as a sober, peaceable, law-abiding citizen is without reproach. Neither party was drinking, and it is not shown that either of them was given to drinking.

Under this testimony the court gave seven instructions, the complaint of appellant being, however, confined to the fifth and sixth instructions on self-defense, which read as follows:

"(5) If you believe from the evidence that at the time the defendant, Robert Barker, shot at and wounded John Eason so that he

died thereby, if he did so do, he believed and had reasonable ground to believe that he was then and there in danger of death or of the infliction of some great bodily harm at the hands of John Eason, and that it was necessary, or was believed by the defendant, in the exercise of a reasonable judgment to be necessary, to shoot and wound the deceased in order to avert the danger, real or to the defendant apparent, then you ought to acquit the defendant upon the ground of self-defense or apparent necessity therefor.

"(6) If you should believe and find from the evidence beyond a reasonable doubt that the defendant, armed with a deadly weapon, sought out the deceased for the purpose of engaging in a difficulty with the deceased for the purpose of killing or injuring him, and, with the intention of bringing on the difficulty, for the said purpose slapped or struck the deceased when he was in no danger himself, and believed himself to be in no danger, at the hands of the deceased, and did thereby bring on the difficulty in which the deceased was killed, and that the defendant willingly entered into the conflict with said Eason, and willingly engaged in same up to the time he fired the fatal shot or shots that took from him, the deceased, his life (if you believe he did so), then in that event the defendant could not be justified on the grounds of self-defense and apparent necessity therefor. Unless the jury should believe that the defendant had abandoned in good faith his intention to so bring on the difficulty for said purposes (if they believe he had such an intention and did so), and withdrew in good faith from the conflict (if they believe he entered into the same willingly with the deceased) before he shot the deceased (if they believe he did so)."

[1] Appellant claims that the instruction upon self-defense should have closed with the fifth instruction, and that the sixth instruction should not have been given, for the reason that there was no evidence to support it. There certainly is no evidence even tending to show that Barker slapped or struck Eason when he was in no danger himself, or with the intention of bringing on the difficulty. The evidence of seven witnesses shows that Barker slapped or struck Eason only after Eason had fired the first shot; and, as we have above shown, no witness testified to the contrary, since Sherrow, the only other witness upon that question, says they were striking each other before Barker fired, but he does not know which one struck the first blow.

We are advised that the trial court based the sixth instruction upon the authority of *Harris v. Commonwealth*, 140 Ky. 41, 130 S. W. 801. In that case, however, there was some evidence upon which to base the instruction. The objection is not to the form of the instruction; it insists that the instruction should not have been given at all for the want of evidence to support it. We th'

the criticism is well taken, and that the sixth instruction should not have been given. *Chaplin v. Commonwealth*, 142 Ky. 783, 135 S. W. 298; *Gamble v. Commonwealth*, 151 Ky. 372, 151 S. W. 924.

[2] Furthermore, upon another trial, the fifth instruction, instead of permitting Barker to shoot and wound Eason under the facts therein predicated, should follow the usual language of such instructions which permits the defendant to shoot and kill his opponent under the circumstances predicated in the instruction.

As this case will have to be tried again, we express no opinion upon the first ground of error, relied upon by appellant, that the verdict is not sustained by the evidence.

Judgment reversed for a new trial.

### ADKINS v. STEWART.

(Court of Appeals of Kentucky. May 26, 1914.)

#### 1. FRAUD (§ 16\*)—CONCEALMENT OF DEFECTS.

While the rule of caveat emptor applies to sales of land, yet, where the vendor conceals a hidden defect which the purchaser could not discover by ordinary examination, he is guilty of actionable fraud; for such fraud may consist as well of the concealment of what is true, as the assertion of what is false.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 15; Dec. Dig. § 16.\*]

#### 2. FRAUD (§ 16\*)—MISREPRESENTATIONS.

A vendor of land is not guilty of fraud in concealing defects, unless the defects concealed must have been known to him, or the circumstances were such as to charge him with knowledge.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 15; Dec. Dig. § 16.\*]

#### 3. FRAUD (§ 50\*)—ACTIONS—KNOWLEDGE.

Actual knowledge of a material fact concealed upon a sale need not be shown, if the facts proven warrant an inference of such knowledge.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

#### 4. FRAUD (§ 16\*)—CONCEALMENT—EVIDENCE—SUFFICIENCY.

That vendor of land who did not long own it lost by overflow the only crop planted on a part is insufficient to charge him with knowledge of defects in the soil of that part, and render his failure to disclose them to a purchaser fraudulent.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 15; Dec. Dig. § 16.\*]

#### 5. FRAUD (§ 50\*)—PRESUMPTIONS.

There is a presumption of innocence and against fraud, which must be overcome by legal evidence.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 16.\*]

Appeal from Circuit Court, Boyd County.

Action by Oscar Stewart against S. G. Adkins. From a judgment for plaintiff, defendant appeals. Affirmed.

S. S. Willis, of Ashland, for appellant. J. F. Stewart, of Ashland, for appellee.

HANNAH, J. Oscar Stewart sued S. G. Adkins in the police court of Ashland to re-

cover \$50 upon two notes. The defendant answered, alleging that Stewart had induced the execution of the notes sued on by fraud and misrepresentation in the sale by plaintiff to defendant of a lot of household furniture, in part payment for which the notes were given.

By a second paragraph of his answer, Adkins, the defendant, set up a counterclaim of \$72, based upon an alleged breach of warranty in the sale of the household furniture mentioned, alleging that he had paid plaintiff therefor the sum of \$132, whereas the furniture was not worth to exceed \$60.

By a third paragraph, the defendant alleged that he purchased a tract of land from plaintiff, containing eight acres, for which he paid plaintiff \$1,100; that plaintiff knew he purchased it for the purpose of tilling it; that there was an acre and a half of the land which had been overflowed by poisonous waters from coal mines, thereby destroying its fertility, so that it would not produce crops at the time of defendant's purchase of the farm; and that plaintiff fraudulently concealed this condition from defendant; that such condition was not discoverable by an ordinary inspection; and that, by such fraudulent concealment, plaintiff had damaged defendant in the sum of \$250.

Upon the filing of this answer and counterclaim, the case was transferred to the Boyd circuit court; and, upon a trial in that court, there was a peremptory instruction to the jury to find a verdict for the plaintiff. Defendant appeals.

It is conceded that, as to the counterclaim contained in the second paragraph of the answer, the ruling of the lower court was correct; but appellant contends that the court erred in withdrawing from the jury the claim for damages for fraudulent concealment in the sale of the land, as set up in the third paragraph of the answer.

[1] Defendant testified that when he went to examine the land he noticed that some low ground was fenced up separately, and that he asked plaintiff what he had that fence there for, and that plaintiff replied that he had planted that part in corn, but that the water in the creek had overflowed the land and drowned out the corn, so he then fenced that part of the land to keep his cow in, and to keep her out of the orchard.

Defendant further testified that after his purchase of the land from plaintiff he plowed up that part referred to, and planted it in corn; that the corn came up about "finger length high," and then perished away. He then sowed it in millet, and that it likewise perished away; and that he had never been able to produce anything on that acre and a half.

A witness for defendant testified that, before he sold the land to defendant, plaintiff planted that part of the land in corn, but the

crop failed, and that he then fenced it up. Another witness for defendant testified that the acre and a half mentioned would not produce anything when plaintiff owned it, but he does not say what Stewart tried to produce on it.

Defendant contends upon this evidence the court erred in peremptorily instructing the jury to find for plaintiff.

"According to the weight of authority, the rule of caveat emptor applies to sales of land; and the purchaser, under ordinary circumstances, is required to use reasonable prudence to avoid deception. Thus, where the subject-matter of the representation is a fact not peculiarly within the vendor's knowledge, but is one as to which the purchaser has equal and available means and opportunity for information, and there are no confidential relations existing between the two, and no fraud or artifice is used to prevent inquiry or investigation, it is a general rule that the purchaser must make use of his means of knowledge, and that, failing to do so, he cannot recover on the ground that he was misled by the vendor." 20 Cyc. 50.

"But, the rule of caveat emptor does not apply where, the fact in question is difficult of ascertainment by the purchaser, and is, or may well be presumed to be, peculiarly within the knowledge of the vendor." 20 Cyc. 57.

"In some cases it has been broadly held that, if the buyer makes no inquiry, the seller is under no obligation to disclose even secret or hidden defects known to himself and unknown to the buyer, but may remain silent and let the latter examine the property, or insist upon a warranty, and is not guilty of fraud, unless by words or acts he misleads the buyer. The better doctrine, however, and the one sustained by the weight of authority, makes a distinction between patent and latent defects, it being held that, if the defect is patent, the rule of caveat emptor applies, and the seller cannot be held liable for failure to disclose the defect, although he knows of its existence, unless he does something to prevent investigation; but that, if the defect is latent and known to him, his intentional omission to disclose it constitutes actionable fraud, his mere silence, with knowledge that the buyer is acting upon the assumption that no defect exists, being sufficient to fix him with liability, unless something is said or done to put the buyer on inquiry. And, where the defect is latent, the purchaser may recover, notwithstanding that he examined the article and failed to discover the defect. On the other hand, it is well settled that if the defect is not easily ascertainable by the purchaser, and the latter makes inquiry, the vendor is bound either to make no representation, or to disclose the whole truth in such a manner as not to mislead the purchaser; and that an intentional omission to disclose any material fact will render him liable." 20 Cyc. 64.

An actionable fraud may consist as well of the concealment of what is true as the assertion of what is false. The principles stated are in accord with the authorities in this state. See *Hughes v. Robertson*, 1 T. B. Mon. 215, 15 Am. Dec. 104; *Faris v. Lewis*, 2 B. Mon. 375; *Singleton's Adm'r v. Kennedy*, 9 B. Mon. 222; *Elsev v. Lamkin*, 156 Ky. 836, 162 S. W. 106.

[2] But fraudulent concealment implies knowledge and intention. Story on Equity Jurisprudence, § 900. The fact concealed must have been known to the seller, or the circumstances have been such as to charge him with knowledge thereof. In each of the cases above cited the material fact concealed by the seller was known to the seller at the time of the sale.

In *Kirtley's Adm'r v. Shinkle*, 69 S. W. 723, 24 Ky. Law Rep. 608, it was held that, where the seller of the shares of the capital stock of a bank had no connection with the bank from which knowledge of its condition could be inferred, and had no actual knowledge thereof, he was not liable to the buyer of such shares in an action for deceit, because he failed to disclose to the buyer the insolvent condition of the bank.

[3] Actual knowledge of the material fact concealed is unnecessary to be shown; it is sufficient if such facts be proven as to warrant an inference of such knowledge. *Welkel v. Sterns*, 142 Ky. 513, 184 S. W. 908, 34 L. R. A. (N. S.) 1035.

[4, 5] However, in the case at bar it was not made to appear that the plaintiff, the seller, had actual knowledge of the alleged fact that the fertility of the soil of the acre and a half mentioned had been destroyed by the action of poisonous waters; nor were facts proven sufficient to warrant the inference of such knowledge upon the part of the seller.

A witness for defendant testified that Stewart planted corn therein, but he assigns no definite reason for the failure of the crop, except that he "supposed" it was due to the destruction of the fertility of the soil. The testimony of Stewart, the seller, shows that he owned the land but a short time, and that this was the only time he ever tried to raise anything on this piece of land; that the water drowned this corn; and that he had no knowledge of any defect in the soil. And we are unable to say that the failure of one crop is alone sufficient to warrant the inference that the planter thereby acquired knowledge of the fact that the fertility of the soil had been destroyed.

And, assuming it to be true, although the evidence does not satisfactorily establish it, that the piece of ground in question is sterile, the facts proven were not sufficient to warrant the inference of knowledge thereof upon the part of the seller.

In an action to establish fraud, courts require such legal evidence as will overcome the legal presumption of innocence and be

a belief of the truth of the charge of fraud. The proof offered by defendant does not measure up to this standard.

The judgment is therefore affirmed.

# **FARMERS' NAT. BANK OF AUGUSTA v. FARMERS' & TRADERS' BANK OF MAYSVILLE.**

(Court of Appeals of Kentucky. May 22, 1914.)

## **1. BILLS AND NOTES (§ 296\*)—LIABILITY ON INDORSEMENT.**

An indorser of a check guarantees all prior indorsements.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 687-679; Dec. Dig. § 296.\*]

## **2. BANKS AND BANKING (§ 148\*)—DEPOSITORS—PAYMENT OF FORGED CHECK.**

A bank is bound to know the signature of its depositor, and, if it pays the check of a depositor, it thereby admits the genuineness of his signature, and is estopped to afterwards deny it, to the detriment of an innocent third party.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.\*]

## **3. BANKS AND BANKING (§ 147\*)—PAYMENT OF FORGED CHECK—RIGHT TO RECOVER MONEY PAID.**

To the general rule that money paid under a mistake of fact may be recovered, there is an exception that money paid by the drawee of a forged check cannot be recovered.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-454; Dec. Dig. § 147.\*]

## **4. BANKS AND BANKING (§ 147\*)—PAYMENT OF FORGED CHECK—FORGED INDORSEMENT.**

If a bank pays a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid or from any party who indorsed it subsequent to the forgery, since the bank is not bound to know the signatures of an indorser, and, besides, the indorser of a check warrants the genuineness of all prior indorsements.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-454; Dec. Dig. § 147.\*]

## **5. BANKS AND BANKING (§ 149\*)—PAYMENT OF FORGED CHECK—RIGHT TO RECOVER MONEY PAID.**

Where a bank cashed a forged check on another bank, the indorsement also being forged, without inquiry or question and without any identification of the holder, and indorsed it and sent it for payment to the drawee bank, the latter bank, upon discovering the forgery after having paid the check, could recover the amount thereof from the former, under the general rule which permits a recovery of money paid under mistake of fact; such case not coming within the exception to such rule which does not permit the drawee to recover money paid under a forged check, but within the rule as to forged indorsements.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 453, 454; Dec. Dig. § 149.\*]

Appeal from Circuit Court, Mason County.

Action by the Farmers' National Bank of Augusta against the Farmers' & Traders' Bank of Maysville. From a judgment on demurrer for defendant, plaintiff appeals. Reversed and remanded.

Worthington, Cochran & Browning, of Maysville, and M. Hargett, of Augusta, for appellant. A. D. Cole, of Maysville, for appellee.

MILLER, J. The appellant does a banking business at Augusta, Ky.; the appellee does a like business at Maysville, Ky. For brevity, they will be called the Augusta Bank and the Maysville Bank, respectively.

On February 5, 1913, an unknown man, representing himself to be Fred. Schatzman, presented to the Maysville Bank, at its place of business in Maysville, a check drawn on the Augusta Bank, bearing the signature of "James Ware," as drawer, and payable to the order of Fred. Schatzman, for \$375. Without inquiry or question, and without any identification of the holder, the Maysville Bank paid the check and forwarded it to its collecting bank, the Fifty-Third National Bank of Cincinnati, Ohio, which, in turn, forwarded it to the Augusta Bank, where it was received and paid on February 10th.

James Ware was a regular customer and depositor of the Augusta Bank; his account being kept in the name, however, of "James Ware, Agent." And, when the check was presented to the Augusta Bank on February 10th, an officer of that bank added the word "Agt." to Ware's name on the check, and then paid it and charged it to the account of "James Ware, Agent."

On March 14th, when Ware went over his checks, he at once discovered the check was a forgery; and it afterwards appeared that the indorsement of Fred. Schatzman was likewise a forgery, and that the man who received the money was not Fred. Schatzman. These facts are alleged in the petition and are conceded to be true.

The Maysville Bank having refused to repay to the Augusta Bank the money thus obtained upon the forged check, the Augusta Bank brought this action on August 21, 1913, to recover the money so paid; and, the circuit court having sustained a demurrer to the petition setting up the facts as above stated, the Augusta Bank appeals.

[1] When the Maysville Bank indorsed the check to the Cincinnati Bank for collection, it in terms "guaranteed all prior indorsements."

[2] It is a well-settled rule that a bank is bound to know the signature of its depositor; and if it pays the check of a depositor it thereby admits the genuineness of his signature, and is estopped to afterwards deny it to the detriment of an innocent third party. The reason for the rule is that the paying bank has in its records the genuine signature of its customer, or knows it, while the collecting bank is a stranger to the signature of the drawer.

Appellant insists, however, that, while the general rule is as above stated, it does not apply to the acts of indorsers; and further—



more that the holder is bound to know that all previous indorsements, including that of the payee, are the genuine handwriting of the parties whose names appear upon the check.

[3] The rule that money paid under a mistake of fact may be recovered is too well established to need any discussion. And the exception to the rule that money paid by the drawee of a forged check cannot be recovered is equally well settled.

In 5 Cyc. 546, it is said: "Although money paid by mistake can generally be recovered, the payment of forged paper is an exception. When payment is made to the holder of the paper who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so the bank alone must have been negligent. If neither party has been negligent, or both have been, then the bank can recover the money."

[4] But the right of the drawee against a holder under a forged indorsement is different, and is thus stated in 2 Daniel on Negotiable Instruments, § 1663: "A bank is not bound to know the signature of an indorser. And besides, the holder of the check, whether he indorses it or not, warrants the genuineness of all prior indorsements. Therefore, if the bank pay a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid, or from any party who indorses it subsequent to the forgery."

The rule and the exception are well stated by Chief Justice Taney in *Hortsmann v. Henshaw*, 11 How. 183, 13 L. Ed. 653, as follows: "The general rule undoubtedly is, that the drawee, by accepting the bill, admits the handwriting of the drawer, but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And, if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterward discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money."

As the drawee is chargeable with notice of the drawer's signature, appellee contends appellant cannot recover, while appellant contends it should recover because the appellee, as holder, was charged with knowing the genuineness of the indorsement.

The exceptional rule which does not permit the drawee to recover money which it has paid upon the forged check of its customer was applied by this court in *Deposit Bank of Georgetown v. Fayette National Bank*, 90 Ky. 10, 13 S. W. 839, 11 Ky. Law Rep. 803, 7 L. R. A. 849. In that case Wolf forged the name of Burgess, a depositor of the Georgetown Bank, to 16 checks which Wolf collected from the Fayette National Bank, which, in turn, presented the checks to the Georgetown Bank, and they were there paid and charged to the account of Burgess. These transactions extended from early in December, 1883, to April, 1884; the forgery was discovered on May 7th. Wolf was identified when he collected the checks from the Fayette National Bank, and there was no reason on the part of that bank to suspect the good faith of the transaction. Neither was there any absence of good faith upon the part of the Georgetown Bank, since it believed that Burgess was in fact the drawer of the checks. The opinion at least twice lays stress upon the fact that Wolf was identified when he collected the checks from the Fayette National Bank. These facts, therefore, bring the case within the exceptional rule which does not permit money paid under a mistake to be recovered by the drawee who has paid the forged check of its customer. The decision goes no further, however, and does not apply to the class of cases represented by the case before us, where the indorsement was likewise forged, and the check was paid on the forged indorsement before it was finally paid by the drawee.

The exceptional rule was first announced by Lord Mansfield in 1762, in *Price v. Neal*, 3 Burr. 1357, where it is said: "It was incumbent upon the plaintiff, to be satisfied, 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it."

In the opinion in *Deposit Bank of Georgetown v. Fayette National Bank*, supra, this court, speaking through Judge Pryor, recognized the fact that, while the decided weight of authority is with Lord Mansfield, it nevertheless criticised the rule laid down by him in *Price v. Neal* as being possibly too sweeping in its character, and that it could not be said that the rule which required a bank to know the signature of its depositor was without an exception, since it is undoubtedly true that the neglect or knowledge of intervening parties, who come into the possession of the check and receive the money on it from the bank where it is payable, would in some instances be of such a character as to enable the bank to recover back the money. In support of that qualification of the rule, Judge Pryor quotes from *Daniel on Negotiable Instruments*, vol. 2, p. 669, where it is said "that when one knows that it is a forgery, or takes it under circumstances of suspicion,

without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. The opinion further cites the case of *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, where a stranger, giving his name as Riskford, drew his check, payable to the order of Bangs, on the National Bank of North America. Bangs indorsed the check, and the bank paid the money; and, upon discovering the forgery, the bank notified Bangs, the payee and indorser, and subsequently sued him to recover the money back. The bank recovered a judgment, and this court, approving the ruling of the Massachusetts court, said: "This, we think, was proper, as it would be an exceedingly harsh rule to permit one who negotiates with a forger, and obtains his check payable to the use of the party advancing the money, who then indorses it to a bank, to hold onto the money when the payee has himself contracted with the forger and given credit to the paper by his indorsement that led the bank to believe the paper was genuine." 90 Ky. 17, 13 S. W. 339, 11 Ky. Law Rep. 803, 7 L. R. A. 849.

The opinion of Judge Barbour, of the superior court, in the Georgetown Bank Case, supra, is reported in 10 Ky. Law Rep. 351, and is instructive as giving the reason for applying the exceptional rule in that case. Judge Barbour said: "The rule as stated is sustained by *Price v. Neal*, 3 Burr. 1584; *Levy v. Bank of U. S.*, 4 Dall. 234 [1 L. Ed. 814]; *Bank of U. S. v. Bank of Ga.*, 10 Wheat. 333 [6 L. Ed. 334]; *First Nat. Bank v. Ricker*, 71 Ill. 439 [22 Am. Rep. 104]. Notwithstanding these high authorities and numerous other cases to the same point, Mr. Daniel, in his work on Negotiable Instruments (section 1655a), questions the correctness of the rule and says: 'Where the bank discovers the forgery immediately and demands restitution, offering to return the check before the holder has lost anything, by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount.' In support of Mr. Daniel's opinion, it is argued that, though a bank is to be taken as knowing the signature of its customers or depositors, yet, if it falls in such knowledge and innocently pays a forged check, it does not necessarily follow that he who received the money shall keep it; that the rule is one of mercantile policy whereby the courts imply knowledge when the implication is necessary for the protection of the rights of the innocent person. To this much of the argument, which is but a statement of the reason of the rule, we see no objection. But it is further, and we think inconsistently, argued that where the bank and the party to whom the check is paid are both deceived without actual fault upon the part of either, there being no collateral hardship on either side, the bank, having paid the money under a clear mistake

of fact, should be allowed to demand its return. The adoption of the latter part of this proposition would effectively destroy the rule. As between the bank and the party to whom it has paid its depositor's check, there is no necessity or occasion for the application of the rule that the bank must know its depositor's signature except where both the bank and the party to whom the money is paid are equally innocent of any wrong. If the fault is with either, the loss is upon him in fault. If the party collecting the check is guilty of negligence, if he did not receive it in the usual course of business, or if he received it under circumstances which should have excited his suspicion, another principle is interposed to prevent him from holding the money he has received. While on the other hand, if the bank pays the check when it could, by the exercise of proper care, have discovered that it was a forgery, there would be no occasion for the interposition of the rule. It cannot be said that the bank, unless it has been misled by his conduct, paid the check upon its faith in the party who presented it. It paid, as the law presumes, upon the faith of its knowledge of the drawer's signature. With the single exception of the case of *McKleroy v. Southern Bank of Ky.*, 14 La. Ann. 458 [74 Am. Dec. 438], all the cases cited by Daniel as supporting his view, so far as we have been able to examine, are cases where the party took the paper under circumstances which should have excited his suspicions, or cases where the forgery was not that of the drawer but of an indorser—very different cases. The drawer has no better means of knowing the signature of the indorser than the holder of the paper has. In such a case it is not incumbent upon the drawer to know the signatures of the indorsers, but such knowledge is incumbent upon the holder of the paper, as he must be presumed to know his title, and in presenting the paper he guarantees the genuineness of the signatures of the prior indorsers."

In the course of its opinion in the Bangs Case, supra, the Massachusetts court said: "If the suit were between the bank, or drawee, and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank, because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know these signatures, and be able to detect forgeries. \* \* \* But this responsibility, based upon presumption alone, is decisive only when the party recovering the money has in no way contributed to the success of the fraud or to the mistake of fact under which the payment was made."

And further citing *Ellis v. Ohio Life Trust Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, *People's Bank v. Franklin Bank*, 88 Tenn. 297, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884

**Espy v. Bank of Cincinnati**, 18 Wall. 604, 21 L. Ed. 947, and one or two other cases, and **distinguishing First National Bank of Orleans v. State Bank**, 22 Neb. 769, 38 N. W. 289, 3 Am. St. Rep. 294, Judge Pryor closed the opinion in the Georgetown Bank Case as follows: "While it rests upon one signing his own name, or that of a bank affixing its signature to notes to pass as current money, to know that the signature is genuine, it also rests on a bank, where checks are drawn upon it in the name of its customer, to know his signature, and, instead of the party to whom the money is paid being required to show negligence in the bank paying the money, it devolves on the drawee to show negligence in the indorser or holder who, in good faith, has received the money, before the drawee can escape liability. Where the parties are equally innocent, the drawee is the loser. There is no precedent in this court on the question; still we are not inclined to follow the views of text-writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorser when taking the check."

And as no bad faith or negligence was attributed to the Fayette National Bank when it took the check, the exceptional rule was applied in that case, and the Georgetown Bank was denied a recovery. The effect of that decision, however, is that, when the holder or indorsing bank is guilty of bad faith or negligence, the exceptional rule does not apply, and money paid under mistake may be recovered under the general rule. As was well said by Judge Pryor, the exceptional rule which does not permit the drawee to recover money paid by mistake is a harsh rule and should be kept strictly within its bounds and not extended. If the indorser or holder has been guilty of the first negligence, there is no good reason why he should not bear the loss, under the general rule which permits the recovery of money paid under a mistake. This view is supported by the great weight of authority, although there are a few cases to the contrary.

In **Ellis v. Ohio Life Insurance & Trust Co.**, 4 Ohio St. 628, 64 Am. Dec. 610, a check purporting to have been drawn by Davis & Co. on the Mechanics' & Traders' Bank was presented by a stranger to the defendant bank, which paid the check. The check proved to be a forgery. No question was asked as to who the presenter was, or as to his right to the check, and the forgery was not discovered until ten days afterwards, when the check was returned to the defendant and repayment demanded. In the course of a very able opinion by Judge Ranney it is said: "In all such cases, either of acceptance or payment, the foundation upon which the drawee is made to suffer the loss is the imputed negligence in accepting or paying, until he has ascertained

the bill to be genuine; and in case of payment, notwithstanding he has done it in mistake, and parts with his money without receiving the supposed equivalent, and notwithstanding the holder has obtained the money without consideration, the former cannot be relieved from the consequences of his negligence at the expense of the latter, and the latter may in equity and good conscience retain what he has got. But this stern rule is only exerted in favor of a holder without fault, and for a valuable consideration; and we deem it equally clear that he may, by his own negligent conduct, place himself in such an inequitable position in reference to the drawee as to deprive himself of the benefit of this rule and make it unjust and inequitable that he should keep what he has obtained by a mistake, and for which he has given no equivalent. We do not here speak of negligence as a matter at large. We only intend to deal with the case before us; and that only requires us to say that where the negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument. Both these propositions, we think, will be found fully sustained, if not in every particular, by direct adjudications, by the fixed principles upon which nearly all the cases have proceeded."

In the later case of **First National Bank of Belmont v. First National Bank of Barnesville**, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748, the court reaffirmed the doctrine it had theretofore announced in **Ellis v. Ohio Life Insurance & Trust Co.**, supra, saying: "In the case now under consideration the drawer's name was a forgery, but the name of the payee indorsed on the check was genuine, having been written by the cashier at the request of the payee. It has been urged that, if the payee had been required by the cashier to write his name upon the check, it might have shown that his name in the body of the check had been written by himself, and thus lead to a detection of the forgery. But in the above case of **First National Bank of Danvers v. First National Bank of Salem**, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450, the payee indorsed the check, and the handwriting was the same in both names, payee and indorser, and yet the forgery was not thereby detected, and the court attaches no importance to the fact in its decision of the case. In that case, and in the above case in 4 Ohio St. 628 [64 Am. Dec. 610], and in nearly all the cases in which the money has been recovered back, the bank purchasing the check or bill took it from an unidentified stranger, and this has often, though not always, been held to be

such negligence as would authorize a recovery of the money."

In *Germania Bank v. Boutell*, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, the action was by the Germania Bank against Boutell to recover money paid on a forged check drawn by Seymore to his own order and against the account of Osborne & Clark in the Germania Bank. Boutell cashed the check without making any inquiry to ascertain its genuineness, although the places of business of both Osborne & Clark and the bank were near by. The forgery was discovered in about two weeks, whereupon the bank returned the check to Boutell and demanded that he repay the money which he had received thereon. After referring to the general rule which allows money paid under mistake to be recovered, and the exceptional rule denying a recovery to the bank who pays the forged check of its customer, the court said: "But while the general doctrine is too well established to be overruled or disregarded, yet it is undoubtedly true that the trend of the modern authorities is to impose upon it some limitations and modifications, so that it is not always easy to definitely state when a case falls within the doctrine or comes within the general rule as to money paid by mistake. From what examination we have been able to make of the authorities, we have arrived at the conclusion that there are very few well-considered cases which go further than to hold that the bank may recover back money paid on a check to which the signature of one of its customers was forged, when there was a lack of good faith on the part of the payee towards the bank, as when he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank, and which he did not communicate to it, or where the holder was negligent in not making due inquiry as to the validity of the check before he took it, and the drawee, having a right to presume that he had made such inquiry, was itself thereby excused from making inquiry before paying it. In the first case the holder is really a party to the fraud, and is not a good-faith holder. In the second case, he has, by his negligence, contributed to the consummation of the mistake on part of the drawee by misleading him."

In *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884, the name of Young, a depositor of the People's Bank, was forged to a check drawn on that bank payable to the order of Morgan. Morgan's name was also forged as an indorser on the check. The check with the forged name of Young, the maker, and of Morgan, the indorser, was presented to the defendant, the Franklin Bank, which cashed it and transmitted it, after indorsing it, to the People's Bank, for payment. The People's Bank had an account with the Franklin Bank, and, upon the receipt of the

check, the People's Bank passed the amount thereof to the credit of the Franklin Bank. The People's Bank did business in Springfield, Robertson county, Tenn., while the defendant bank did business at Clarksville, in Montgomery county. The forgery was discovered 81 days afterwards, when Young came to examine his passbook, together with the returned checks. Thereupon the People's Bank canceled the charge against Young, the depositor, and promptly notified the Franklin Bank of the forgery and demanded that it repay the amount it had received upon the check; and, upon its refusal to do so, the People's Bank sued to recover it.

It will thus be seen that the Tennessee case is on all fours with the case at bar; the names of the maker and the indorser both having been forged. The trial court in the Tennessee case applied the rule which required the drawee at its peril to know the genuineness of the signature of its depositor, and dismissed the plaintiff's bill. In reversing that judgment, the Supreme Court of Tennessee said: "Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text-books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check, for notwithstanding the negligence to some degree that the paying bank has been guilty of in paying the forged check, without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence in purchasing and indorsing the forged paper. The bank upon whom the check is drawn, in the practical administration of banking business, may well be lulled to a less careful scrutiny of its depositor's signature of a check, where the same is indorsed by another bank with which it is in correspondence or interchange of business, than it would exercise in accepting and paying the same check, not so indorsed, to a stranger. The indorsement of the check by the payee may be said ordinarily to be a guaranty of the genuineness of the indorsements theretofore on the paper, and also of the genuineness of the drawer's signature, subject, perhaps, to some exception in particular cases, as, for instance, where the indorsement is made after the genuineness of the preceding signatures has been approved by the paying bank. Applying these principles to the case at bar, we are of opinion, and so adjudge, that the first fault was with the defendant bank. This bank accepted and cashed a check drawn on a bank in another county, to which the name of the drawer and the payee had both been forged, and, so far as this record discloses, without requiring any identification of the parties to whom such payment was made, certainly without reserving any evidence of

the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant bank, upon receiving such check, in due course of mail, for deposit to credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and, if not, that the indorsement would stand as a guaranty to the paying bank from loss that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser." In support of the conclusion there reached, the court cites 3 Am. & Eng. Enc. of L., 223, 225; Chitty on Bills (13th Am. Ed.) 431, 485; 2 Parsons on Notes & Bills, 80; Bolles on Banks & Depositors, § 189.

In *First National Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588, the plaintiff and defendant were banking corporations, located respectively at Lisbon and Wyndmere, N. D. Bixby & Marsh were depositors in the Lisbon bank. On July 1, 1905, the Bank of Wyndmere presented to the Lisbon bank for payment a forged check purporting to have been drawn by Bixby & Marsh upon the Lisbon bank, in favor of Theodore Larson, for \$60.25, dated June 27, 1905, and indorsed in blank by the payee. It also bore the indorsement of the Bank of Wyndmere and each of the several banks through whose hands it had passed in the usual course of collection; each indorsing bank having expressly guaranteed the genuineness of previous indorsements. Believing the check to be genuine, the Lisbon bank paid it and charged it to the account of Bixby & Marsh; but, when that firm examined its checks on July 20th, it was immediately discovered the check was a forgery. The Lisbon bank immediately notified the Bank of Wyndmere of the forgery, and, returning the check, demanded repayment, and subsequently sued to recover the money.

The North Dakota Supreme Court repudiated the rule announced in *Price v. Neal*, and held that the drawee of a forged check, who has paid the same without detecting the forgery, may, upon the discovery of the forgery, recover the money from the party who received the money, even though the latter was a good-faith holder, provided the latter had not been misled or prejudiced by the drawee's failure to detect the forgery, and that the burden of showing that he had been misled or prejudiced by the drawee's mistake rested upon him who claims the right to retain the money, for that reason. And, in refusing to follow the exceptional rule of *Price v. Neal*, the court further said: "Being convinced, as we are, that this doctrine, advocated by the great majority of the cases which have come to our attention, to the effect

that a drawee of a check should be excepted from the ordinary rules relating to the right to recover money paid by mistake, is unsound and has never been adopted in this state by usage or statute, it would be nothing less than usurpation of legislative power by this court to declare that rule to be the law of this state because courts in other states have so held. That the rule in question is unsound in principle and unjust is almost universally admitted, and the courts are showing an increasing tendency to discard it. We think, therefore, that we are showing no disrespect to precedent in taking the stand towards which the modern decisions are unmistakably tending, and from which it is generally conceded there should have never been any departure. We therefore reject as unsound the doctrine that a drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. The drawee is presumed to know the signature of the drawer of the check or draft; and the holder of such check or draft, who has acquired it in good faith, has the right to act in reliance on that presumption, provided he himself has omitted no duty, the performance of which would have prevented the success of the fraud. Consequently, if the drawee pronounces the check genuine by paying it or otherwise honoring it, the holder, who has acted in good faith and without negligence, may safely rely upon the judgment of the drawee and act accordingly. The drawee cannot, under such circumstances, recall his acceptance or payment to the detriment of the party who has rightfully relied upon his decision. In such a case the party who received the money has the superior equity, and he may justly retain the money, although he was not originally entitled to receive it. But, as is usually the case, when the party who has collected the check had previously cashed it or taken it in exchange for commodities, there is no reason why he should not refund. Every one with even the least experience in business knows that no business man would accept a check in exchange for money or goods unless he is satisfied that the check is genuine. He accepts it only because \* \* \* he has sufficient confidence in the honesty and financial responsibility of the person who vouches for it. If he is deceived, he has suffered a loss of his cash or goods through his own mistake. His own credulity or recklessness, or misplaced confidence, was the sole cause of the loss. Why should he be permitted to shift the loss, due to his own fault in assuming the risk, upon the drawee, simply because of the accidental circumstance that the drawee afterwards failed to detect the forgery when the check was presented? Our views find much support in many of the cases which still cling more or less tenaciously to the negligence rule, notably the following: *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 24 N. E. 44,

21 Am. St. Rep. 450; *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; *Canadian Bank v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955; *First Nat. Bank v. State Bank*, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221. The case of *McKleroy v. Southern Bank*, 14 La. Ann. 462, 74 Am. Dec. 438, directly supports our views, and we are gratified to note that our views are in accord with those generally advocated by the text-writers. We therefore hold that drawees of checks and drafts are not to be excepted from the general rule which permits the recovery of money paid by mistake. We hold that a drawee who has by mistake paid a spurious check or draft may recover the money paid unless the party receiving the money has been misled to his prejudice by the drawee's mistake. If any such facts exist, they are best known to the defendant, and it is his duty to prove them. The complaint discloses *prima facie* cause of action by alleging the payment by mistake."

And in *Ford v. People's Bank of Orangeburg*, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744, it was held, under what is sometimes termed the fault or negligence rule that the drawee of a forged check may recover the amount paid upon it to one whose conduct has been such as to mislead him or induce him to pay the draft without the usual security against fraud.

In *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, it was held that the principle that the drawee is bound to know the signature of the drawer of a bill or check which he undertakes to pay is not decisive in favor of the payee of a forged bill or check to which he has himself given credit by his indorsement.

In *American Express Co. v. State National Bank*, 27 Okl. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188, it was held that a payee receiving money from a bank upon a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, was not entitled to retain the same except upon the following combination of facts: (1) That the payee was not negligent in receiving the check; (2) that the payer was lacking in due care in paying the same; and (3) that upon the payer's action the payee had changed his position, or would be in a worse condition if the mistake was corrected than if the payer had refused to pay the check at the time of its presentment. In speaking of what it calls the "old doctrine" that a bank was bound to know its correspondent's signature, and could not recover money paid upon a forgery of the drawer's name, because it was said the drawee was negligent not to know the forgery, and, having parted with his money by

reason of his own negligence, he could not be permitted to recover it back, the Oklahoma Supreme Court said: "The leading case sustaining this proposition is *Price v. Neal*, 3 Burr. 1354, 1 W. Bl. 390, decided in 1762. A great many of the courts that continue to follow the old rule criticize it, but follow it upon the ground that it has been established by decisions which have been so long acted upon that it is not proper to disturb them. All the text-book writers on banks and banking that we have access to disapprove the old rule as unsound and unjust. Mr. Morse says of it: 'This doctrine is fast fading into the misty past, where it belongs. It is almost dead; the funeral notices are ready; and no tears will be shed, for it was founded in misconception of the fundamental principles of law and common sense.' 2 Morse, Banks & Bkg. § 464. Mr. Bolles says it is a hard rule. 'It runs against the great rule that money paid by mistake may be recovered back, which is constantly growing in judicial favor.' 2 Bolles, *Modern Law of Bkg.* 721. Magee and Zane say that the rule formerly prevailing has been modified by the courts with a view to doing equity between the parties. Cyc. states the modern rule to be that when payment is made to the holder of forged paper who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so, the bank alone must have been negligent. If neither party has been negligent, or both have been, then the bank can recover the money. A great many authorities are compiled in a note purporting to sustain the text, and all do so, we think, to a greater or less extent. That the old rule is unsound and illogical is unquestionably true. It is based upon the theory that the mere fact that B. was negligent gives A. a right to B.'s property, which A. did not have before the negligence, without regard to the question whether A. has sustained any loss by the negligence or not. In any other case involving the question of negligence, it is not enough to create legal liability, or to give A. a right to acquire or retain the property of B., to show merely that A. has not been negligent. One more element is necessary, namely, that damage to A., being himself innocent in the matter, should naturally and proximately result from B.'s negligence. 2 Morse, Banks & Bkg. *supra*."

[5] We are not, however, required in the decision of this case to disapprove the rule of *Price v. Neal*, since the facts here bring this case within the scope of the rule in cases of forged indorsement. According to the weight of authority, under the exceptional rule a bank which cashes a check drawn upon another bank, without requiring proof

as to the identity of the person presenting the same, or making inquiry in regard to him, the amount of which check is afterwards paid to it by the drawee, is liable to the drawee for the amount so paid, where the check proves to be a forgery; it having been guilty of the first fault. *First National Bank v. State Bank*, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; *First National Bank v. First National Bank*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *Newberry Savings Bank v. Bank of Columbia*, 91 S. C. 294, 74 S. E. 615, 38 L. R. A. (N. S.) 1200.

In *Newberry Savings Bank v. Bank of Columbia*, supra, a man who represented himself to be R. L. Crooks, and who had in his possession a depositor's passbook issued to R. L. Crooks by the Newberry Savings Bank, went into the Bank of Columbia on March 21, 1907, and asked to have cashed a check purporting to be signed by Crooks for \$100, in favor of the Bank of Columbia and drawn on the Newberry Savings Bank. Gibbs, the cashier of the Bank of Columbia, asked Norwood, the cashier of the Newberry Savings Bank, by telephone, if a check of R. L. Crooks on his bank for \$100 would be good, and, on receiving an affirmative answer, Gibbs cashed the check. The Bank of Columbia then indorsed the check and sent it forward for collection in the usual way, and the Newberry Savings Bank paid the check on its presentation by the Exchange Bank of Newberry. A second check for \$150, dated April 1, 1907, was cashed by the Bank of Columbia and paid by the Newberry Savings Bank, under similar circumstances. In May, 1908, more than a year after these transactions, Crooks having occasion to go to the Newberry Savings Bank, it was then discovered that the man to whom the Bank of Columbia had paid the money was not Crooks, and that his name had been forged. After demand made and refusal to refund, the Newberry Savings Bank sued the Bank of Columbia and obtained judgment. Upon the trial it appeared that the drawer of the checks was a stranger to the officers of the Bank of Columbia, and it was not shown that any identification was required of him. In affirming the judgment, the South Carolina Supreme Court said: "The rule that a bank should know the signature of its customers is not available to one who represents to the bank that he holds in his hand the check of the customer, without having taken precautions to ascertain the identity of the person with whom he was dealing. The law is thus stated in *Ford v. People's Bank*, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744, quoting from *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349: 'To entitle the holder to retain money obtained by a

forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the negligence of the drawee was not lessened, and that he was not lulled into a false security by any disregard of duty on his (the holder's) own part, or by the failure of any precaution from which his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken.' This case is much stronger in favor of the drawee bank than the *Ford Case*, for there the bank which received the money did not take the draft from the person who signed it, but from an indorsee in the usual course of business. All of the authorities cited by the appellant relate to the obligation of the payee bank to know the signature of its customers as against a bank not dealing with the drawer, but taking the check by indorsement from others. None of them, and none that we have been able to find, exempt a bank from liability to refund money which it has received on a forged check taken by it directly from the forger. On the contrary, in *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188, the court said: 'It seems now well settled that a person giving a security in payment or procuring it to be discounted vouches for its genuineness.' The same principle is laid down in *National Bank v. Bangs*, supra. The courts with practical unanimity go at least to the extent of holding that a bank which takes a forged check without taking due care to ascertain its genuineness must refund the money paid to it by the drawee bank. See note to *First Nat. Bank v. Bank of Wyndmere*, 10 L. R. A. (N. S.) 58."

It has been said that there are only four cases holding the contrary, namely, *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188; *Salt Springs Bank v. Syracuse Savings Inst.*, 62 Barb. (N. Y.) 101; *Com. & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; and *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727, 26 Am. Rep. 105. Of these cases, the first was decided in 1838, the second in 1863, the third in 1868, and the fourth in 1876. Of these cases it has been said that: "In so far as they allow the benefit of the exception under circumstances showing negligence or misconduct on the part of a bank purchasing, or taking for collection, \* \* \* a check drawn upon another bank, they are wholly irreconcilable with the great weight of judicial decision and opinion, as well as variant from the spirit of the exception declared in *Price v. Neal*, and the great number of subsequent decisions in which it has been observed." 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 610.

To this list there may possibly be added a fifth case (*Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. [N. S.] 605, decided in 1909). In

that case Young was a depositor of the Bank of Williamson. In September, 1907, a stranger presented to the McDowell County Bank a check drawn upon the Bank of Williamson for \$100, and purporting to have been drawn by Young and payable to the order of George Horner. The stranger wrote the name of George Horner on the back of the check and delivered it to the McDowell County Bank for collection. That bank did not cash the check or place the amount to the credit of Horner; on the contrary, it took the check for collection, and forwarded it for that purpose. On September 18, 1907, the Bank of Williamson paid the check to the Mingo County Bank, the collecting bank, which, in turn, paid it to the McDowell County Bank, where it was deposited to the credit of the person calling himself George Horner, who afterwards withdrew it from the bank. In November, 1907, the forgery was discovered upon the appearance of Young at the Bank of Williamson for the purpose of withdrawing his money; and, upon his disavowal of any knowledge of the check, the money was replaced to his credit and a demand made upon the McDowell County Bank for reimbursement. The person who delivered the check to the McDowell County Bank for collection, and who afterwards received the money from that bank, was wholly unknown to its officers, and they required from him no identification. No inquiry was made as to who he was. The failure to make inquiry or require identification, together with the indorsements and guaranties stamped on the back of the check, were the circumstances relied upon by the Bank of Williamson as fixing the liability upon the McDowell County Bank. Under these facts the West Virginia Supreme Court of Appeals denied a recovery to the Bank of Williamson, upon what seems to us to be a misapplication of the rule above shown by the great weight of authority, although the opinion fully recognized the existence of the rule and the exceptions thereto. The decision denying the recovery was based upon the single fact that both banks were negligent, the Bank of Williamson in failing to require an identification of the stranger, and the failure of the McDowell County Bank in paying the check without having discovered the forgery. The opinion says: "Negligence or omission of duty, on the part of the first taker, causing, or likely to cause, injury to the drawee, is the circumstance that deprives the former of the benefit of the exemption of dealers in commercial paper from the operation of the general rule, allowing recovery of money paid under a mistake of fact. Failure of duty, not necessarily the actual cause of the injury, has this effect. No inquiry as to whether the drawee was really misled is made. It is enough that there was technical negligence. The exemption rests upon the assumption of innocence in both parties. If both are at fault, as in this case, it seems to follow that nei-

ther, while claiming, or accorded, the benefit of the exception to the general rule, should be permitted to deny its protection to the other. It is an arbitrary rule of commercial law, and the reasoning which justifies it, when both parties are innocent, justifies it also when both parties are at fault. It was the duty of the drawee to determine at its peril the genuineness of the signature of its depositor, and its sole right to demand reimbursement from the defendant rests upon technical fault in the latter. This may or may not have occasioned the injury to the former, but an arbitrary rule, founded upon public policy, imposes liability, without inquiry as to the actual cause of injury."

This, however, seems to be a misapprehension of the full meaning of the rule announced in *Price v. Neal*, and the exception thereto, which places the case where both banks are negligent back under the general rule which allows a recovery where money is paid under a mistake.

The exceptional rule denying a recovery to the drawee who paid a forged check of its depositor is founded upon the fact that the law imputes technical negligence to the drawee in failing to discover the forgery, and that the holding bank was not so negligent. The exceptional rule has been expressly placed upon that ground; and wherever the holder or purchaser was guilty of negligence, the case was lifted out of the exceptional rule and placed back under the general rule, which permits money paid under a mistake to be recovered. *U. S. v. Nat. Exchange Bank*, 214 U. S. 302, 29 Sup. Ct. 605, 53 L. Ed. 1006, 16 Ann. Cas. 1183.

In holding that there could be no recovery because both parties were guilty of negligence, the West Virginia Supreme Court of Appeals, as we understand its language, instead of adhering to the rule declared in *Price v. Neal*, while expressly admitting the correctness of the long line of decisions enforcing it under circumstances calling for its application, wholly fails to recognize the rule in its application in the case of *Bank of Williamson v. McDowell County Bank*, supra, since the rule, as above pointed out, was based upon the negligence necessarily imputed to the drawee; the holder being guilty of no negligence. If the holder was negligent in any regard, he could not retain the money; to justify him in so doing, the drawee alone must have been negligent. If neither party has been negligent, or both have been, the case is taken out of the exceptional rule and comes under the general rule allowing the drawee to recover the money. That this is the effect of the rule is pointed out in 5 Cyc. 548, above quoted. That the court recognized this to be the rule in the *Bank of Williamson Case* appears from the following language taken from that opinion: "If a bank, in purchasing such paper, omit all inquiry as to the identity of the payee, and hand over the money to some person wholly



unknown to it, it is not in a position, on discovery of the fraud, to give the injured drawee any information or render it any aid in seeking the apprehension of the criminal or recovery of the money from him. The drawee has the right to assume that these duties have been performed. The general practice of bankers to make reasonable inquiry as to the identity of the payee in purchasing commercial paper is matter of common knowledge and judicial cognizance. Therefore the indorsement of a purchasing bank, not qualified or limited in any respect, amounts to a representation to the drawee that this precaution has been taken. Upon that indorsement, the drawee has the right to rely to that extent, and, if identification has not been required, the indorsement amounts to an imposition by the purchasing bank upon the drawee. Thus we have two prejudicial acts, one of omission and the other of commission. The purchasing bank, having assumed to perform a duty which the drawee would have performed but for its intervention, neglected to perform it. Not having performed it, it has falsely represented by its indorsement that it did. Freedom from fault on the part of the purchaser is one of the requisites or conditions of the rule exempting him from liability under the general law. This was made plain in the original case of *Price v. Neal*."

And again, in referring approvingly to the opinion in *First National Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104, the West Virginia Supreme Court of Appeals said: "It declares that the drawee or payer of a forged check can recover back the amount paid \* \* \* on it when the holder or payee has been at fault, or guilty of fraudulent practices which may have thrown the drawee off his guard. It says the holder must refund to the drawee, if the former has been at fault, notwithstanding the duty of the drawee to determine at his peril the genuineness of the signature of the drawer."

It is there further pointed out that, while the rule is based upon the innocence of both parties, some of the cases have allowed a recovery because of the negligence on the part of the bank obtaining payment, which contributed to the deception of the drawee, and that these cases do not constitute a modification of the rule; they simply do not come within the operation of the rule.

The decision in *Bank of Williamson v. McDowell County Bank* was not, however, placed upon this latter ground, and, in so far as the reason for the decision is stated, it seems to be irreconcilable with the general principles of law therein announced and approved. That case might well have been rested, although it seems not to have been done, upon the fact that the McDowell County Bank took the check for collection and did not pay the money to the forger until after the check had been honored, as genuine, by the Bank of Williamson, thereby placing

the McDowell County Bank in a very unfavorable position.

It has also been suggested that *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, overrules *People's Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 727, 17 Am. St. Rep. 884, heretofore considered. That, however, is not the effect of the later decision, since the check in that case was payable to bearer, and no identification or indorsement was necessary; and, that being true, it was held the paying bank was in no way guilty of negligence in failing to require the identification of the forger, which was the basis of the decision in *People's Bank v. Franklin Bank*, supra, and other similar cases.

The case at bar is even stronger for the drawee than many of the cases above referred to, since here both the indorsement and the maker's name are forgeries. In this case the Maysville Bank first parted with its money upon the forged indorsement, while the Augusta Bank subsequently parted with its money upon the forgery of the maker's name. Clearly, the Maysville Bank would have received nothing from a forged indorsement, even though the check had been genuine. In such a case it would have been liable to the real holder. Ann. Cas. 1912D, 497, note. When, therefore, it collected the money on the check in question from the Augusta Bank, it collected something to which it was not entitled under the indorsement through which it claimed. Neither can it be said that the Maysville Bank will be put in a worse condition, if it be required to pay this money to the Augusta Bank, for the good reason that the Maysville Bank was never entitled to the money. When it paid the check upon the forged indorsement, it lost its money, and, by subsequently inducing the Augusta Bank to pay it, it received money to which it was in no way entitled; and, that being true, it has no right to withhold it. *Leather Mfgs. Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342; *U. S. v. Nat. Exchange Bank*, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184.

That this court was right when it said in the *Georgetown Bank Case*, supra, that the rule in *Price v. Neal* was a harsh rule and should not be extended is not only apparent from the continued and severe criticism to which it has been subjected, but from the inability of the commentators to agree upon the reason for the rule and the legal principle upon which it should be made to rest.

In an unusually interesting and instructive article in 4 *Harvard Law Review*, 297, entitled "*The Doctrine of Price v. Neal*," Prof. Ames takes the ground that the true principle upon which cases like *Price v. Neal* are to be supported is that far-reaching principle of natural justice that as between two persons having equal equities, one of whom

must suffer, the legal title must prevail. And he would sustain the rule which allows the drawee to recover from a holder under a forged indorsement as follows: "Upon whom finally should the loss fall, when a party to a bill or note pays it to a holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case of the forged indorsement, on the other hand, the bill or note belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use. If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defense that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder. As a matter of positive law, the maker or acceptor, who pays the holder claiming under a forged indorsement, is allowed to proceed against the latter directly, without first paying the true owner. This, as a matter of legal reasoning, is believed to be unwarranted. But as, in the result, the loss comes where upon the legal principle of subrogation it ought to come, it is not worth while to be too critical."

Prof. Keener, in his work on Quasi Contracts, considers the rule announced in *Price v. Neal*, as wholly anomalous, and treats it in a note on page 154 to the chapter upon the recovery of money paid under a mistake, for the avowed reason that it is impossible to reconcile it with many of the legal principles announced in his text. After saying it is impossible to reconcile the exceptional

rule which denies a recovery of money paid under a mistake as to the genuineness of negotiable instruments with the principles applicable to the general rule which permits a recovery of money paid under mistake, Prof. Keener points out that the exceptional rule cannot logically be sustained upon any of the different grounds usually relied upon, that the drawee is guilty of negligence, that between equal equities the law leaves the money where it finds it, or of subrogation in the case of money mistakenly paid under a forged indorsement, thus differing radically from Prof. Ames, who maintains the later view in his article heretofore referred to. In criticising the theory of allowing a recovery upon the principle of subrogation, Prof. Keener says: "The fact that the action is brought at law in the name of the party who made the payment is fatal to allowing a recovery on the theory of subrogation, since the result is to be regarded as anomalous in point of procedure. Equally fatal to this theory is the fact that the plaintiff is allowed to recover without first paying the true owner. The theory of subrogation, however, is open to the further objection that a recovery would undoubtedly be allowed in cases on the line of reasoning adopted by the courts, where the theory of subrogation would have to be denied. Subrogation of course implies a right in another which a party seeks to acquire against the defendant. A party claiming through subrogation claims by virtue of a derivative right, and a derivative right necessarily presupposes an original right. If, therefore, for any reason, the true owner of the bill could not maintain an action against the holder thereof for a conversion of the bill, or could not sue at law in a court for money had and received to recover the proceeds received in payment thereof, then a drawee dependent upon the doctrine of subrogation could not, on the theory of subrogation, recover the money paid by him under mistake as to the genuineness of an indorsement. In conclusion it is submitted that on no theory of quasi contract can the decisions reached in the cases considered in this note be reconciled, or the results reached in many of the cases be justified."

These two articles by masters of the subject strongly tend to support the contention that the exceptional rule is unsound. But if it be treated as sound, both under the great weight of authority and the reason for it, the case at bar does not come within it, since the defendant claims under a forged indorsement. We are of opinion, therefore, that the appellant was entitled to recover under the general rule which permits a recovery of money paid under a mistake, and that the demurrer to the petition should have been overruled.

Judgment reversed for further proceedings consistent with this opinion.

**EWALD'S EX'R v. CITY OF LOUISVILLE.  
SAME v. COMMONWEALTH et al.**

(Court of Appeals of Kentucky. May 29, 1914.)

**APPEAL AND ERROR (§ 1178\*)—DETERMINATION OF CASE—REVERSAL WITH DIRECTIONS.**

The city of Louisville instituted an action to collect taxes on money deposited in another state in the name of a domestic corporation, of which a deceased resident of that city had been sole stockholder. A revenue agent instituted a suit for the benefit of the state and the county in which the principal place of business of that corporation was located, to tax the same money. The commonwealth and county were not parties to the former action, nor was the city of Louisville a party to the latter action. In both actions judgment was rendered taxing the property, and the executor, who was appointed in the county in which Louisville was situated, appealed from both judgments. *Held*, that it was impossible to pass upon the merits of either action for want of proper parties, and both judgments would be reversed, with directions to transfer the action by the county and state to the county in which the other action was pending and to consolidate it with the other action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Appeal from Circuit Court, Lyon County.

Separate actions by the City of Louisville, in the Jefferson circuit court, and by the Commonwealth and Lyon County, in the Lyon circuit court, against L. P. Ewald's executor. From judgments for the plaintiffs in each case, the defendant appeals. Both judgments reversed, with directions that the Lyon county case be transferred to the Jefferson circuit court and consolidated with the Jefferson county case.

Gibson & Crawford, of Louisville, for appellant. J. P. Whittinghill, of Owensboro, E. C. Huntsman, of Scottsville, and S. H. Hodges and E. H. James, both of Eddyville, for appellees Commonwealth and Lyon County. Pendleton Beckley, George Cary Tabb, and Stuart Chevalier, all of Louisville, for appellee City of Louisville.

TURNER, J. These two cases have been considered by the court together, and will be passed upon in one opinion.

The case from Jefferson county was one seeking to collect taxes on personal property of L. P. Ewald, deceased, for the years 1904 to 1908, inclusive; the property being large sums of money on deposit in the city of St. Louis in the name of the Ewald Iron Company, of which company L. P. Ewald was the sole stockholder.

The Lyon county case is a proceeding instituted by a revenue agent for the benefit of the state and Lyon county, seeking to assess this same money for the years of 1907 and 1908 upon the theory that it was the property of the Ewald Iron Company during those

years, and that, inasmuch as Lyon county was designated as the chief place of business of the Ewald Iron Company, this money was taxable there.

Neither the commonwealth nor Lyon county were parties to the Jefferson county suit, nor was the city of Louisville a party to the Lyon county suit.

In the Lyon county suit on the pleadings as presented a judgment was entered assessing this large sum of money in the St. Louis banks in Lyon county, and in effect rendering a judgment against the Ewald estate for a large sum of money in favor of Lyon county and the commonwealth.

In the Louisville suit against the Ewald estate it was contended by the defendant that the money was not assessable in the state of Kentucky at all, but that, if it was assessable in Kentucky, it was properly assessable in Lyon county. In that case a large volume of testimony was taken which showed that during all of those years L. P. Ewald was a resident of the city of Louisville, and that the Ewald Iron Company, while Lyon county had been designated in the articles of incorporation as its place of business, in truth and in fact had conducted its iron business in the city of Louisville exclusively since the year of 1886, and the Jefferson circuit court entered a judgment against the Ewald estate assessing this same money for the years named.

So that we have before us for consideration two judgments of two different courts assessing the same property at two different places for the same years, and in neither of the cases was the plaintiff in the other case a party. Clearly Lyon county and the commonwealth were not bound by the action of the Jefferson circuit court fixing the situs of this money in the city of Louisville for taxation, and clearly the city of Louisville is not bound by the action of the Lyon circuit court in fixing the taxable situs of the same money for the same years in Lyon county.

Manifestly this property was not taxable at both places, and, if both judgments should be affirmed, a great injustice would be done to the Ewald estate; if the Louisville judgment should be affirmed, and the Lyon county judgment reversed, it would be in effect fixing the taxable situs of this property in Louisville under the evidence taken in a case to which Lyon county and the commonwealth were not parties; if the Lyon county judgment should be affirmed, and the Jefferson county case reversed, it would be in effect fixing the taxable situs of this money in Lyon county as against the city of Louisville, in an action to which it was not a party.

Under the state of these records as we find them, it is impracticable, if not impossible, to pass upon these cases on their merits, and inasmuch as it is conceded that the city of Louisville was the home of L. P. Ewald during the years named, and his executor has

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

qualified there, we have deemed it proper to reverse both of these judgments, and direct that the Lyon county case be transferred to the Jefferson circuit court and there consolidated with the Jefferson county case, so that the issues between the parties may be made and determined in the proper way.

For the reasons given, each of the judgments is reversed for further proceedings consistent herewith.

CHESTER et al. v. GRAVES et ux.  
(two cases).†

(Court of Appeals of Kentucky. May 27, 1914.)

**1. JUDGMENT (§ 273\*) — NUNC PRO TUNC — POWER OF COURT.**

The power of courts at law and in equity to make entries of judgments and decrees nunc pro tunc, when necessary to prevent injustice, is inherent in the courts, and does not depend on any statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

**2. JUDGMENT (§ 273\*)—NUNC PRO TUNC—POWER OF COURT.**

The power of the court to make entries of judgments nunc pro tunc is exercised, not to correct judicial errors, but to supply matters of evidence, and, where a court has not rendered a judgment that it should have rendered, or where it has rendered an imperfect judgment, the errors or omissions cannot be remedied by ordering the entry nunc pro tunc of a proper judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

**3. JUDGMENT (§ 273\*)—NUNC PRO TUNC—POWER OF COURT.**

Where a judgment has been pronounced by the court, but not entered of record, because of accident, mistake, or neglect or misprision of the clerk, the court rendering the judgment may order the judgment so rendered to be entered nunc pro tunc, provided there is satisfactory evidence of the rendition and terms of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

**4. JUDGMENT (§ 273\*)—NUNC PRO TUNC—POWER OF COURT.**

Where the papers on petition for nunc pro tunc entry of a judgment showed a complete judgment, with a notation thereon, "Let the above order be entered and of effect from this date," followed by a date and signed by the judge, there was a sufficient record to justify the court in entering the judgment nunc pro tunc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

**5. JUDGMENT (§ 273\*)—NUNC PRO TUNC—RIGHTS OF "INNOCENT THIRD PERSONS."**

Heirs of a deceased wife who, with her husband, adopted infant children are not "innocent persons" within the rule that the entry of a judgment nunc pro tunc will not be allowed to injuriously affect the rights of "innocent third persons" acquiring rights without notice of the rendition of the judgment, and the court may enter the judgment of adoption nunc pro tunc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

**6. ADOPTION (§ 14\*)—PETITION—COURTS—JURISDICTION.**

Where a petition for adoption was filed in a proper court, and the parties to be affected were all before the court, and the court acted, the mere failure of the petition to name the court will not render the judgment of adoption void.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 22, 24, 25; Dec. Dig. § 14.\*]

**7. ADOPTION (§ 14\*)—PETITION—COURTS—JURISDICTION.**

The failure of a petition filed in the circuit court of a county for the adoption of infants to allege that plaintiffs in the proceedings were residents in the county did not render a judgment of adoption void.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 22, 24, 25; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Proceedings by John C. Graves and Mary C. Graves, his wife, for the adoption of Peach Ethel McGlothlin and Lida May McGlothlin, infants. Judgments of adoption were rendered, but not entered of record, and John C. Graves and the infants petition for the entry of judgments nunc pro tunc, to which Maggie Chester and others, heirs of Mary C. Graves, deceased, were made parties. From judgments entering adoption judgments nunc pro tunc, the heirs appeal. Affirmed.

Benedict Elder and R. C. Elder, both of Louisville, for appellants. Edwards, Ogden & Peak and Nat. C. Cureton, all of Louisville, for appellees.

OLAY, C. These two appeals involve the same questions, and will be considered in one opinion. They grow out of certain proceedings in the Jefferson circuit court, common pleas branch, third division, whereby John G. Graves and Mary C. Graves, his wife, sought to adopt two infant children, Peach Ethel McGlothlin and Lida May McGlothlin, and involve the propriety of that court's action in entering nunc pro tunc two judgments purporting to have been rendered by that court several years before.

On December 11, 1908, plaintiffs, John C. and Mary C. Graves, filed in the Jefferson circuit court, common pleas branch, third division, the following petition and exhibit:

"In re John C. & Mary C. Graves, on petition to adopt the child Lida May McGlothlin, a minor six (6) years of age. Now come John C. & Mary C. Graves and respectfully petition the court and show petitioners, being of full age and residents, citizens, and inhabitants of the state of Kentucky, desire to adopt a minor child six (6) years of age, by name Lida May McGlothlin, and in sex a girl, and which child is now the ward legally of the Kentucky Children's Home Society, a corporation under the laws of Kentucky, and said society has all rights of custody and control and guardianship over said child, and is legally authorized and empowered to agree upon and consummate this adoption, and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied June 19, 1914.

natural business and powers of said society, under the law, are arranging and perfecting the adoptions of children, such as exemplified in this case; that the written agreement and terms of the adoption of the said child between petitioners and said society are set forth in the paper exhibited herewith, and made a part hereof and marked 'Exhibit A.' In said written agreement said society fully and freely consents and agrees to the adoption of said child by petitioners. It is shown by petitioners that said child is destitute and helpless and without support or parental aid for the necessities or advantages of life, and that it is necessary that said child be adopted by petitioners. Said child is not the child by blood of petitioners. Petitioners show that they are of sufficient ability, financially and otherwise, to nurture, protect, and educate said child properly, and petitioners will do the same, and the adoption of said child is sought with such intention and understanding. It is sought by petitioners to adopt said child and establish and fix the name of said child as ——— and to make said child the full and complete heir at law of petitioners, and thereby give to said child all the characteristics, rights, benefits, and advantages, in law and in fact, as a child by birth and blood of petitioners. It is prayed that the court will pass an order allowing and fixing the adoption of said child by petitioners, and that the order create said child the complete heir at law and lawful child of petitioners in a manner as binding as if said child were by birth and blood the child of petitioners. And other further or necessary term or terms of such order are prayed for."

"No. Exhibit A.

"Agreement of Adoption.

"This agreement, made this 10th day of December, A. D., 1908, at Louisville in the State of Ky., between the Kentucky Children's Home Society, party of the first part, and John C. Graves and Mrs. Mary C. Graves, party of the second part, witnesseth: That, in consideration of the surrender—which is hereby made—by said first party to said second party, of a certain female child, named Lida May McGlothlin, the second party agrees to legally adopt said child and rear, nurture, and support said child tenderly and affectionately, and give it a Christian education.

"And it is further agreed that said child shall not be given away to any third party, neither before nor after adoption, without the written consent and approbation of the party of the first part.

"And it is finally agreed that if, at any time hereafter, said second party, or either of them, shall fail to legally adopt Lida May McGlothlin and to care for, support, nurture, or educate said child in the manner and time above agreed, all right of the second party to said child shall at once be at an end,

and the first party may at once, at its option, retake her with all her clothing, wherever she may be, whether in this or any other state or nation.

"Witness the hands of the said parties the day and year first above written.

"Kentucky Children's Home Society,

"By R. W. Bingham, President.

"John C. Graves.

"Mary C. Graves.

"Approved by:

"Geo. L. Sehon, State Superintendent.

"Attest:

"Ella Mayer, Secretary."

Among the papers of the case is the following order:

"Adoption Papers—Final Order.

"Jefferson Circuit Court, Common Pleas Branch, Third Division. No. 53498.

"In re John C. Graves and Mary C. Graves, on petition to adopt the child, Lida May McGlothlin, a minor six (6) years of age.

"It appearing from the petition of John C. Graves and Mary C. Graves, residents, citizens, and inhabitants of the state of Kentucky, that they desire to adopt Lida May McGlothlin, a minor child not theirs by birth and six (6) years of age, the said child being under fourteen (14) years of age, and petitioner having produced the written consent and contract of the Kentucky Children's Home Society to such adoption, and the court being satisfied of the fitness and legality of such adoption, and being satisfied that petitioners are of sufficient ability financially and otherwise to care for, bring up, and educate said child properly, it is hereby ordered and declared that from this date said child, to all legal intents and purposes, be the child and complete heir-at-law of petitioners with all the relations, rights, and benefits of such heir.

"The court on considering this matter privately examined Mary C. Graves, one of the petitioners, and wife of John C. Graves, and John C. Graves, the other petitioner, and such examination was separate and apart from her said husband, and she, said wife, agreed and consented of her own free will and accord, without fear or coercion, to said adoption, and she so stated on said private examination of the court and the court is satisfied of the same.

"Let the above order be entered and of effect from this date, the 12th day of December, 1908.

"[Signed] Matt O'Doherty, Judge."

The aforesaid judgment was never entered of record. Exactly the same proceedings were had in the case of Peach Ethel McGlothlin. After the two judgments were directed to be entered by the court, the clerk furnished Mrs. Graves certified copies of same, and her husband paid the costs. The children were then taken to Mrs. Graves' home, and

were reared as their own children. In April, 1913, Mrs. Graves died. It was then for the first time discovered that the two judgments of adoption had never been entered of record. Thereupon supplemental petitions were filed by Mr. Graves and each of the two infant children, by their statutory guardian. In each case Maggie Chester and others, the legal heirs of Mrs. Graves, were made parties defendant. The supplemental petitions set out the institution of the two actions, the hearing by the court, the fact that judgments were rendered, and that the court in writing directed the judgments to be entered of record. They also set out the failure of the clerk in each instance to record the judgment. Accompanying the supplemental petition are affidavits of the attorney who brought the proceedings, the Honorable Matt O'Doherty, the then presiding judge, and of the clerk of the court, to the effect that the two judgments purporting to be rendered were, as a matter of fact, rendered, and by mistake or oversight of the clerk, were not entered of record. The petitions then asked that the two judgments be entered nunc pro tunc. The heirs of Mrs. Graves were notified of the hearing. They introduced no evidence, but relied entirely on the insufficiency of the evidence offered by plaintiffs in the supplemental petition. The court directed that the two judgments be entered nunc pro tunc. The heirs of Mrs. Graves appeal.

[1] From the earliest times courts of law and equity have possessed and exercised the power of making entries of judgments and decrees nunc pro tunc in cases where such entries are necessary to prevent injustice to suitors. *Mohun's Case*, 6 Mod. 59; *Mayor of Norwich v. Berry*, 4 Burr, 2277; *Freeman on Judgments*, § 56. Such power does not depend upon any statute, but it is inherent in the courts. *Mitchell v. Overman*, 103 U. S. 62, 26 L. Ed. 369.

[2] The power is exercised, not for the purpose of enabling the court to correct judicial errors, but to supply matters of evidence. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry nunc pro tunc of a proper judgment. *Freeman on Judgments*, § 68; *Gray v. Brignardello*, 1 Wall. 627, 17 L. Ed. 692; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692.

[3] One of the classes of cases in which judgments may be entered nunc pro tunc is where the former judgment has been pronounced by the court, but not entered of record, by reason of some accident or mistake, or through the neglect or omission or misprision of the clerk. In such a case the court rendering the judgment has the power to order the judgment so rendered to be entered nunc pro tunc, provided there be satisfactory evidence, not only of the rendition, but of the terms of the judgment. *Freeman on Judgments*, § 61; *Whor-*

*ley v. Memphis, etc., R. Co.*, 72 Ala. 20; *Shephard v. Brenton*, 20 Iowa, 41. While there is an entire unanimity on the question of power, there is great diversity of opinion among the courts as to the character of evidence sufficient to authorize a nunc pro tunc entry of a judgment. A number of the courts hold that it seems more consonant with the purpose for which the power of making entries nunc pro tunc is exercised, and with the reasons involved, that, in determining that question of fact, the court should resort to all sources of information that are competent under the general rules, including the oral testimony of witnesses who have personal knowledge upon the subject. This view of the case is based on the idea that the proceeding presupposes the absence of a record upon the subject, and the court should receive the best evidence of which the case admits. *Jacks v. Adamson*, 56 Ohio St. 397, 47 N. E. 48, 60 Am. St. Rep. 749; *Brownlee v. Board of Comm'rs*, 101 Ind. 401; *Rugg v. Parker*, 7 Gray (Mass.) 173; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *Weed v. Weed*, 25 Conn. 337; *Bobo v. State*, 40 Ark. 224; *Gonzales v. State*, 35 Tex. Cr. R. 339, 33 S. W. 363, 60 Am. St. Rep. 51. On the other hand, a number of the courts adhere firmly to the rule that a nunc pro tunc entry can only be made upon showing some entry or memorandum on or among the records or quasi records of the court, and that parol evidence of the rendition of the judgment and of its terms cannot be received. *Metcalf v. Metcalf*, 19 Ala. 319, 54 Am. Dec. 190; *Saxton v. Smith*, 50 Mo. 490; *Swain v. Naglee*, 19 Cal. 127; *Adams v. Re Qua*, 22 Fla. 250, 1 Am. St. Rep. 191; *Coughran v. Gutcheus*, 18 Ill. 390. The same view is taken by this court. *Raymond v. Smith*, 1 Metc. 65, 71 Am. Dec. 458; *Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251; *Ralls et al. v. Sharp's Adm'r et al.*, 140 Ky. 744, 131 S. W. 998. In Missouri, where the rule of excluding parol evidence is strictly adhered to, not only notations on the judge's docket or on the clerk's minute book, but the papers and files in the cause, are admissible in evidence. *Gamble v. Daugherty*, 71 Mo. 599; *Missouri, etc., Ry. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417. In Alabama, where the same strictness is required, the written opinion of the judge, when such opinion is required by law, filed among the papers in the case is sufficient to authorize the entry of a judgment nunc pro tunc. *State v. Mayor of Mobile*, 24 Ala. 701. In each of these cases the adoption papers were regularly filed.

[4] In the papers of each case is a full and complete judgment, with a notation thereon: "Let the above order be entered and of effect from this date, the 12th day of December, 1908." Immediately beneath this notation is the signature of the judge then in office. It is the practice in the courts of Jefferson county for the court to indorse its approval

on a judgment and to direct that it be entered. Disregarding entirely, therefore, all the parol evidence heard by the court below, we conclude that the judgment directed to be entered by the court is a sufficient quasi record to justify the court's action in entering the judgments *nunc pro tunc*.

[5] While it is the rule that the entry of a judgment *nunc pro tunc* will not be allowed to injuriously affect the rights of innocent third parties, who acquired rights without notice of the rendition of the judgment (*Freeman on Judgments*, § 66; *Graham v. Lynn*, 4 B. Mon. 18, 39 Am. Dec. 493), that principle has no application to the facts of this case. The appellants were given due notice of the motion, and are not innocent third parties, within the meaning of the rule. They are mere heirs of Mrs. Graves, and are entitled to inherit her property only in the event that the two infants were not properly adopted by her.

[6] But it is insisted that the original petitions in this case are void, because they fail to set out the name of the court to which application was made. In this connection it is insisted that, unless the jurisdiction of the court was invoked in some proper way, the court, of course, was without jurisdiction to act. We are also cited to some cases holding a default judgment void because the original petition was not entitled in any court. *Bevington v. Buck*, 18 Ind. 414; *Teal v. Tinney*, 2 How. Prac. 94 (N. Y.). We are not, however, disposed to take such a narrow view of the question. Where the petition is actually filed in a certain court, and the parties to be affected are all before the court, and especially where infants are involved, whose rights are under the protection of the court, and the court is thus asked to act, and does act, the mere failure to name the court in the petition will not render the judgment void, or prevent the entry of a judgment *nunc pro tunc*.

[7] We also conclude that the failure of the petition to state that the plaintiffs in the adoption proceedings were resident in Jefferson county did not render the judgment void.

The judgment in each case is affirmed.

### JONES v. THOMASSON.

(Court of Appeals of Kentucky. May 26, 1914.)

#### 1. WILLS (§ 634\*)—CONSTRUCTION—VESTED REMAINDERS.

A devise to devisees for life, with gift over of the share of a devisee on his death to his children, vests in the children of a devisee a vested estate in remainder, and, on the death of a child without issue during the life of the devisee, the estate in remainder passes under the will of the child or as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

#### 2. WILLS (§ 634\*)—CONSTRUCTION—VESTED ESTATES IN REMAINDER.

Where a devise over is to the children of a life tenant not named or to children named,

the children take a vested estate in remainder, while, if the devise over is to the heirs of the life tenant, the heirs take only a contingent remainder, subject to be defeated by their death before the death of the life tenant, unless the word "heirs" means "children."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

Appeal from Circuit Court, Franklin County.

Action between Albina Jones and Weller Thomasson. From a judgment for the latter, the former appeals. Affirmed.

Frank Chinn, of Frankfort, for appellant. O'Rear & Williams, of Frankfort, for appellee.

CARROLL, J. The question in this case depends on the construction of so much of the will of James Dawson as reads as follows: "The balance of my property, real, personal and mixed, I will shall be equally divided among all my children, to wit: Zerilda Cook, Elizabeth Ellis, Nancy M. Bradley, Sarah E. Lyon, Albina Jones and Miriam Darnaby for and during their natural lives, free from the control of their husbands, and not to be liable for their debts, and after their death to their children." Under this will the devisee, Albina Jones, the appellant here, received 20 acres of land. She had two daughters, Lucy and Sue Jones, and no other children. Lucy died several years ago, intestate and unmarried, and Sue died about two years ago, childless, after having married the appellee, Weller Thomasson, to whom she willed all of her property. The appellant, Albina Jones, claims that upon the death of her two children, childless, she became invested with the fee-simple title in the 20 acres of land, while it is insisted for the appellee, Weller Thomasson, that his deceased wife, Sue Jones, had a vested, vendible interest in an undivided one-half of the land in remainder, to which he became entitled as the devisee under her will.

The lower court adjudged that: "Albina Jones is the owner for the period of her natural life of the 20 acres of ground described in the petition, and the owner of the fee-simple title subject to her life estate in the one-half of said land which she received by inheritance from her daughter, Lucy Jones. And it is further adjudged that the defendant, Weller Thomasson, is the owner of the other undivided one-half of the said 20 acres, subject to the life estate of the plaintiff, Albina Jones, therein, which one-half was passed to him by the will of his deceased wife, Susan Jones Thomasson."

Of this judgment Albina Jones complains, and urges on this appeal, as she did in the lower court, that Weller Thomasson did not take any interest in the land under the will, and that she is entitled to the fee in the whole thereof.

[1] It will be observed that the will does

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

not make any provision for the disposition of the estate in the event of the death of the children of the devisees. It simply provides that each devisee should take an estate for life, and that, after the death of the devisee, his share should go to his children.

It is conceded that the children of the devisee took an estate in the land, but it is argued that the estate was a defeasible fee in remainder which was defeated by their death before the death of their mother, and that, upon their death, the mother, Albina Jones, became entitled to the whole estate.

In behalf of the appellee, Thomasson, the argument is made that the will created a life estate in the children of the testator, with a vested interest in remainder in his grandchildren, and that, this estate in remainder having vested in them immediately upon the death of the testator, it could not subsequently be divested by the mere incident of their death before the death of the life tenant.

It seems quite evident under the authorities that the grandchildren did take a vested estate in remainder, and, this being so, it is difficult to perceive upon what ground a sound argument can be rested that they could be divested of this estate by their death before the death of their mother. Having taken a vested estate, this estate could be subjected to the payment of their debts and might have been deeded or devised to them; or, if either of them died intestate, his part would pass under the statute of descent and distribution, as did, for example, the share of Lucy, which her mother inherited under the statute upon the death of Lucy, the owner of the remainder, childless and intestate.

When the remainderman dies intestate during the existence of the life estate, the owner of an estate that has been derived under a will that makes no provision for the disposition of the estate upon the death of the remainderman, it passes under the statute of descent and distribution, unless the remainderman has disposed of it by a will. But, if the remainderman has disposed of it by will, then of course it would go as directed in the will. If it passes under the statute, the takers step into the place of the remainderman, and so with the devisee under the will.

There is nothing in this will to indicate that the testator intended that the ordinary rules governing the rights of the owners of a vested remainder should not be applied. It may be true, as suggested by counsel for Albina Jones, that the testator desired that the estate should not be diverted to strangers, and, doubtless if he had thought that his grandchildren would die before their mother, he would have added some provision saving to his blood the estate; but, as the clause in the will under consideration is free from ambiguity there is no room for that construction, and the estate must take the ordinary course.

In *Campbell v. Hinton*, 150 Ky. 546, 150 S.

W. 676, Ned Hinton, by his will, devised all of his property to his wife, with the provision that "at her death what of it that is left is to go equally to my heirs at law; my object is to keep my property in the Hinton family. I will to my son, John Hinton, twenty-five dollars, in addition to a home with my wife if he wants to live there, this is in addition to his rightful share of my estate after the death of my wife." After the death of the testator his son, John Hinton, who was his only child, died, of age, and before his mother. After the death of his mother, the life tenant, a controversy came up between the kindred of Ned Hinton and her kindred as to the ownership of the property. It was insisted for her kindred that John took a vested remainder which at his death passed to his mother and at her death to them, while it was maintained by the kindred of Ned Hinton that John Hinton took a contingent remainder, which was defeated by his death before his mother, and that at her death the property passed to them under the will of Ned Hinton; but we held that John Hinton took a vested remainder which at his death passed to his mother, and at her death to her heirs. There is no material difference between that case and this.

Another case in point is *Well v. King*, 104 S. W. 381. In that case the devise was to the widow for life, and after her death to her children. In holding that the children took a vested estate in remainder, although there was no devise over, we said: "Enjoyment, \* \* \* however, was uncertain, inasmuch as the life tenant might live longer than the remainderman, as did happen in the case of the grandchild. But this did not affect the vested character of the estate, for there was no limitation over nor other contingency by which the estate would be determined. Charles Moore having a vested interest in the property, \* \* \* it passed to his mother at his death."

In *Hackney v. Tucker*, 121 S. W. 417, the testator provided that "E. McLeod and Martha, my daughter, shall have two hundred acres of land in the west side of my land and the rest to my wife, and at her death is to fall back to them." After the death of the testator, Martha died before her mother, and the question was: What estate did Martha take in the land? And we said: "We find that the testator conveyed the lands in question to his wife, and upon her death to E. McLeod and Martha, the testator's daughter. Thus the wife was given a life estate, while E. McLeod and Martha were given the remainder interest. As the persons to take were certain, and as they had the present capacity of taking possession if the possession should at any time become vacant, there can be no doubt that they took a vested remainder. The fact that, through subsequent contingencies not provided for by the testator, the land devised went to parties other than those who the testator intended should



have his property is no reason for giving to the will a construction different from that which the language itself plainly indicates. If such a rule of construction were to be adopted, the meaning of a will would be determined, not by the language employed, but by unforeseen contingencies not provided against by the testator. In the case before us the language of the will is plain and certain. It is not susceptible of two constructions." And the court held that, upon the death of Martha without other heirs capable of inheriting, her interest in the estate passed to her mother. To the same effect are *Cruse v. Cruse*, 147 Ky. 313, 144 S. W. 49; *Fischer v. Stoepler*, 152 Ky. 317, 153 S. W. 420.

These cases seem conclusive of the one at bar.

Lucy had a vested estate, and when she died, intestate and childless, it passed, under the statute of descent and distribution, to her mother. Sue had a vested estate, and upon her death, testate, it passed to the person to whom she devised it.

[2] The rule is well-settled that where the devise over is to the children of the life tenant, although they may not be named, or to the children, naming them, they take a vested estate in remainder; but if the devise over is to the "heirs" of the life tenant, unless the word "heirs" means children, the heirs take only a contingent remainder, subject to be defeated by their death before the death of the life tenant. *Williamson v. Williamson*, 18 B. Mon. 329; *White's Trustee v. White*, 86 Ky. 602, 7 S. W. 26, 9 Ky. Law Rep. 757; *Leppes v. Lee*, 92 Ky. 18, 17 S. W. 146, 13 Ky. Law Rep. 317; *Mercantile Bank of New York v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 160; *Grayson v. Tyler*, 80 Ky. 358; *McAllister v. Ohio Valley Banking & Trust Co.*, 114 Ky. 540, 71 S. W. 509, 24 Ky. Law Rep. 130; *Tanner v. Ellis*, 127 S. W. 995.

The judgment is affirmed.

#### BENGE v. MARTIN et al.

(Court of Appeals of Kentucky. May 28, 1914.)

#### JUDGMENT (§ 747\*)—CONCLUSIVENESS—NATURE OF ACTION—TRESPASS.

A judgment for the plaintiff, in an action for trespass for the cutting of timber on certain land, in which action the defendant admitted the cutting, but claimed title to the land, is conclusive as to the title in a subsequent action to quiet the title to the same tract between the same parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1294-1296; Dec. Dig. § 747.\*]

Appeal from Circuit Court, Clay County.

Action by Susan Benge against Angeline Martin and others to quiet title to a tract of land. Judgment for the defendants, and plaintiff appeals. Affirmed

H. C. Faulkner & Sons, of Barbourville, for appellant. Rawlings & Wright, of Manchester, for appellees.

HANNAH, J. This is an appeal from a judgment of the Clay circuit court in an action wherein Susan Benge was plaintiff, and Angeline Martin and her children were defendants, and in which the plaintiff sought to have her title quieted to a tract of land.

Though there are several questions presented upon the appeal, it is only necessary to pass upon the sufficiency of the plea of *res judicata* interposed by the defendants.

On March 8, 1885, David Benge conveyed to his son, John Benge, a part of his farm; thereafter, on June 28, 1900, he conveyed the remainder of his farm to his daughter, Susan Benge. John Benge, on June 29, 1887, conveyed the land he received from his father to James Martin, who died in November, 1903. On December 21, 1903, the widow and children of James Martin instituted an action in the Clay circuit court against Susan Benge and others, alleging that the plaintiffs were the owners of the land conveyed by John Benge to James Martin, and that the defendants had entered thereon and had cut and removed timber therefrom without right, and seeking to recover damages in the sum of \$612 for the value of the trees so cut and removed, and \$200 as damages to the other growing timber resulting from the cutting and removal of the trees so cut and removed. The defendants answered, denying that the plaintiffs were the owners of the land, admitting the cutting and removal of the timber, and asserting that defendant Susan Benge was herself the owner of the land from which the timber was so cut and removed. Upon a trial of the case, the jury returned a verdict in favor of the plaintiffs in the sum of \$300 for the timber and \$50 as damages. Judgment thereon was entered, and that judgment has never been appealed from, modified, or vacated.

On September 2, 1910, Susan Benge instituted this action in the Clay circuit court against the widow and heirs of James Martin, seeking to quiet her title to a strip of land along the northern line of the boundary described in her petition, which is the same tract of land, the ownership of which was asserted by her in her answer in the action above mentioned, brought against her and others by the widow and heirs of James Martin. The defendants answered, pleading ownership of the land in controversy, and further interposed a plea of *res judicata* by virtue of the proceedings above mentioned in the action wherein the present defendants were plaintiffs, and the present plaintiff was a defendant. By reply, the plaintiff traversed the plea of *res judicata*; but she testified that the land from which the timber was cut, for the cutting of which and damages to

other timber there was a recovery against her in the former action, is the same land, the title to which is by the present action sought to be quieted by her, that the parties are the same, and the record of the former action was introduced in evidence, showing that the case was tried before a jury, and a verdict was returned in favor of the plaintiffs, upon which judgment was entered.

Appellant contends that the title to the land in question is not *res judicata* because of the former judgment; but in *Hoskins v. Hoskins*, Adm'r, 157 Ky. 738, 164 S. W. 77, this question was directly decided, and the court held that where, in an action to recover damages for trespass to land, plaintiff alleges title in himself, and defendant denies plaintiff's title, admits the act alleged as constituting the trespass, but seeks to justify it upon the ground that he himself is the owner of the land upon which such act was committed, the material issue is the question of title, and the amount of damages recoverable by plaintiff, if he succeeds, is a matter purely incidental to the main issue, and, if there be a verdict in such case for either party, the judgment thereon entered determines the question of title in favor of the party receiving the verdict, and the question of title is thereafter *res judicata*. In the former action above mentioned in the case at bar, the plaintiffs asserted title to the land from which the timber was cut; the defendant admitted the cutting of the timber, but asserted title in herself to the land from which it was cut. Thus the issue was tendered and clearly joined as to which of the parties owned the land from which the timber was cut, and the question of the ownership of the land was necessarily tried and determined, for the ownership of the timber followed the land. The judgment in that action, therefore, concludes the parties, and the plea and defense of *res judicata* interposed in this action was a complete bar to plaintiff's action.

Judgment affirmed.

#### PATTON et al. v. SALLEE et al.

#### JETT et al. v. JETT et al.

(Court of Appeals of Kentucky. May 28, 1914.)

#### 1. WILLS (§ 356\*)—REJECTING OR PROBATING WILLS — VACATION — REVIEW — JURISDICTION OF COURT.

The Statute of Wills (Ky. St. §§ 4824-4866), relating to wills, and containing no express authority for the vacation by the county court of its judgment rejecting or probating a will, is a complete legislative act on the subject, and the remedy for improperly rejecting or probating a will is by appeal to the circuit court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 820; Dec. Dig. § 356.\*]

#### 2. WILLS (§ 221\*)—REJECTING OR PROBATING WILLS — VACATION — REVIEW — JURISDICTION OF COURT—"NECESSARY PARTIES."

Civ. Code Prac. § 518, subsec. 5, providing that erroneous proceedings against persons un-

der disability, except coverture, where the fact of disability does not appear of record, may be relieved against by the court in which the judgment was rendered, does not authorize the county court to set aside an order rejecting a will, where infants not parties to the proceedings apply for relief, since they were not necessary parties within Ky. St. § 4860, authorizing the county court to proceed to probate and admit or reject a will without summoning any party.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539-541; Dec. Dig. § 221.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4720, 4721.]

#### 3. WILLS (§ 221\*)—REJECTING OR PROBATING WILLS — VACATION — REVIEW — JURISDICTION OF COURT.

Civ. Code Prac. § 518, subsec. 4, empowering the court rendering a judgment to vacate or modify it after the term for fraud practiced by the successful party, refers only to an action wherein complainant is the unsuccessful party, and does not authorize an action in the county court by infants to set aside an order rejecting a will in proceedings in which they were not parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539-541; Dec. Dig. § 221.\*]

#### Appeal from Circuit Court, Madison County.

Action by Lucy B. Sallee against Lucien Patton and others, in which certain of the defendants filed a cross-petition, and action by Lucien Patton and another, by guardian, to set aside an order rejecting the probate of the will of Joel W. Gibbs. From a judgment for Lucy B. Sallee against Clarence H. Jett, rendered on sustaining a demurrer interposed by plaintiff to the answer and cross-petition of defendant Jett, he appeals; from judgments dismissing the answer and cross-petition of defendants Lucien Patton and another, they appeal; and from a judgment sustaining a demurrer to the petition of Lucien Patton and another, and dismissing it, they appeal. Judgments affirmed.

Grant E. Lilly, of Richmond, and Forman & Forman, of Lexington, for appellants. T. L. Edelen, of Frankfort, and Burnam & Burnam, of Richmond, for appellees.

HANNAH, J. In August, 1902, Joel W. Gibbs died, domiciled in Madison county. A few days before his death, he made and published a will, by the terms of which he devised to his daughter, Lucy Gibbs Patton, a certain farm in Madison county, in trust for and during her life, with remainder to the heirs of her body. On September 1, 1902, the widow of Joel W. Gibbs offered the will for probate in the Madison county court, whereupon the daughter mentioned objected to the probate thereof, upon the ground that at the time of the execution of the writing purporting to be his will, Joel W. Gibbs was of unsound mind and lacking in testamentary capacity. On September 6, 1902, the widow asked the court to be permitted to withdraw her motion to probate the writing mentioned; but the court brought before it the attesting witnesses, and, they having testified that at

the time of the execution of the writing in question Gibbs was not of sound and disposing mind, the court sustained the objection to the probate thereof and rejected it. The widow of Joel W. Gibbs, the daughter mentioned, Lucy Gibbs Patton, and the son of deceased, Alex R. Gibbs, being the only heirs at law, thereupon made an agreed division of the estate, in which Lucy Gibbs Patton became the owner of a portion of the farm in which, under the will, she would have taken only a life estate with remainder to her children. She sold and conveyed a portion of that land, on January 3, 1908, to Lucy B. Sallee. Lucy B. Sallee, by a contract in writing entered into on December 15, 1913, sold and agreed to convey to Charles H. Jett a portion of the land so acquired by her from Lucy Gibbs Patton. Jett was to pay a certain sum in cash, and to execute his notes for the remainder of the purchase price on January 1, 1914. He refused to comply with his contract, and Lucy B. Sallee instituted an action in the Madison circuit court on January 10, 1914, against Jett, seeking to coerce a specific performance of the contract. Jett answered, admitting the execution of the contract and the tender of a deed, but alleging that the title tendered to him by the plaintiff's deed was not a good and sufficient title, averring that Lucy Gibbs Patton, from whom the plaintiff Lucy B. Sallee derived her title, was the owner only of a life estate in the lands so conveyed with remainder to her children, and that the interests of the infant children of Lucy Gibbs Patton were not properly protected in the proceeding in the Madison county court wherein the alleged will of Joel W. Gibbs was rejected and refused to be probated. The answer was made a cross-petition against Lucien Patton and Sarah Patton Gay, the children of Lucy Gibbs Patton, and they were called upon to assert whatever claim they had to the land in question under and by virtue of the alleged will of their grandfather. Lucien Patton and his sister, Sarah Patton Gay, by her guardian, thereupon filed an answer and cross-petition, alleging that, at the time the will of Joel W. Gibbs was rejected from probate in the Madison county court, they were infants and not before the court; that the proceedings therein whereby said will was refused to be probated were procured by a collusive arrangement entered into between their grandmother, the widow of Joel W. Gibbs, and their mother, Lucy Gibbs Patton, and their uncle, Alex R. Gibbs, for the purpose of defeating their remainder interest as devised in the will in the tract in question, which arrangement was in law a fraud upon the defendants Lucien Patton and Sarah Patton Gay, and further alleging that they had filed in the Madison county court a petition to vacate the order rejecting the will of Joel W. Gibbs from probate, upon the ground that the rejection thereof was procured by fraud, which action was then

pending. The cause being submitted on demurrer filed by plaintiff Lucy B. Sallee to the answer and cross-petition of defendant Jett, the court sustained the demurrer, and defendant declining to plead further, the court rendered judgment against him decreeing a specific performance of his contract of purchase of the land; from that judgment he appeals.

The cause being submitted upon demurrer filed by plaintiff to the answer and cross-petition of defendants Lucien Patton and Sarah Patton Gay, the court sustained the demurrer, and, those defendants declining to plead further, their answer and cross-petition was dismissed; from that judgment they appeal.

In the meantime, as heretofore mentioned, Lucien Patton and his sister, Sarah Patton Gay, by guardian, had instituted in the Madison county court an action to vacate and set aside the order entered in that court on September 8, 1902, rejecting and refusing to probate the writing purporting to be the last will and testament of Joel W. Gibbs, the action being based upon the ground that the proceedings mentioned and the judgment therein were had and obtained by fraud practiced by the grandmother, the mother, and the uncle of the plaintiffs mentioned. A demurrer to the petition was sustained in the county court. Plaintiffs appealed to the circuit court, and a demurrer to the petition was sustained in that court, and, plaintiff declining to plead further, the petition was dismissed. From that judgment, plaintiffs appeal.

The appeals mentioned have been consolidated in this court, and will be considered in one opinion.

[1] They involve a single inquiry—whether the county court has authority to vacate the judgment rendered by it on September 8, 1902, declaring the writing offered for probate not to be the last will and testament of Joel W. Gibbs. The statute of wills, chapter 135, Kentucky Statutes 1909, contains no express authority for the vacation by a county court of its judgment rejecting or probating a will. But it is the contention of appellants that, although the statute with reference to the probating of wills is silent upon the subject, the county court has an inherent right under the common law to vacate a judgment obtained therein by fraud, rejecting or probating a will. Appellees contend that the statute of wills is a complete act of legislation upon that subject; that the only remedy, when a will is improperly rejected or probated, is by appeal to the circuit court, and that as to this remedy, the appellants are barred by failure to prosecute an appeal within the time prescribed by the statute. A consideration of the authorities shows that this court has established the rule that the remedy by appeal provided in the statute is exclusive.

Section 11 of the act of 1785, Morehead v.

Brown's Statute Law of Kentucky, page 1537, provided that an order of the county court probating or rejecting a will, could be attacked by the filing of a petition in equity in the circuit court within seven years thereafter.

In *Taylor v. Tibbatts*, 13 B. Mon. 180, where the act and section mentioned were involved, the court said: "The law makes no provision for a retrial in the same court; but, instead of permitting that to be done, substitutes a proceeding in a court of equity by which the validity of the will may be contested. The decision of the court of probate may also be revised in a superior tribunal, but the same court has no power at a subsequent term to set aside \* \* \* an order establishing a will and directing it to be recorded. A decision of the county court upon the validity of a will is a bar to a renewal of the controversy in that court upon the same subject-matter. *Wells' Will*, 5 Litt. 273. Consequently, the whole proceeding in the county court, so far as its object was to annul or vacate the order of that court, made at a previous term in pursuance of the mandate of the circuit court establishing the will, and requiring it to be recorded, was unauthorized, and is erroneous." It will thus be seen that the court at an early date held the remedy by appeal to be exclusive upon the ground that the statute of wills then in force made no provision for attack upon the order of probate except by appeal.

The act of February 24, 1842 (Laws 1841-42, c. 300), provided for an appeal to the circuit court from an order of the county court probating or rejecting a will, in lieu of the remedy provided in section 11 of the act of 1785 before mentioned, this latter act being later carried into the Revised Statutes of 1852. By this act, jurisdiction was reserved to a court of equity to impeach the decision of the county court for such reason as would confer jurisdiction over any other judgment at law; and the chancellor was also empowered to review the final decision of the circuit court on appeal from the county court.

Under this state of the law, certain heirs of one Johnson brought a suit in equity in the Pike circuit court, seeking to vacate an order of the Pike county court probating the will of their father, upon the ground that he was incompetent and lacking in testamentary capacity at the time of the alleged execution thereof. A demurrer to the petition was sustained. Upon appeal (*Walters v. Ratliff*, 5 Bush, 575) the court held that the remedy by appeal from the county court to the circuit court was exclusive, citing as authority, the case of *Hughes v. Sidwell*, 18 B. Mon. 259. In that case, the court said: "There is, at present, but one mode of reaching it, and that is by appeal to the circuit court of the county where the order (of probate) was made. Revised Statutes, chapter on Wills (chapter 106) §§ 28, 29; Civil Code, § 20. Original proceedings in chancery, to

set aside or vacate wills which have been admitted to probate, are now only allowed in two classes of cases; the one, to impeach the final decision of the circuit court affirming an order of probate, upon any ground that would give jurisdiction to a court of equity over any other judgment at law, as provided in Revised Statutes, c. 106, § 38, p. 700, and the other, in behalf of nonresidents and other persons interested in the probate, who were not made parties to the proceedings (in the circuit court) by actual appearance or personal service of process. See same chapter, § 38."

In the case of *McCarty v. McCarty*, 8 Bush, 504, the statute of wills involved was chapter 106, Revised Statutes, the provisions of which were the same as chapter 113, General Statutes, and the present statute of wills, chapter 135, Kentucky Statutes, i. e., that the county court has jurisdiction to probate or reject any paper purporting to be a will, subject to an appeal to the circuit court to be taken within five years from the date of such action of the county court, and to the further provision that any party interested, who was not brought before the circuit court upon the appeal, should have three years in which to apply for a retrial therein, or, if such party were an infant, he should not be barred of such application for a retrial until 12 months after attaining full age. In that case, there was called in question the legal effect of an order of the county court setting aside a former order admitting a will to probate, and upon appeal, the court said: "A will once admitted to probate by the county court must be contested in the manner pointed out by the statute. This special proceeding is adopted and regulated by law as applicable to wills alone, and the remedies afforded in such cases must be found in the statute, and nowhere else. There is no power given to the county court, after a will has been admitted to record or rejected, to grant to the parties a new trial, or at a subsequent term to annul all the orders made in regard to the case at a previous term. The rights of parties to property acquired under a will would be almost worthless if a county court, with its limited jurisdiction in such cases, could try and retry the question of will or no will whenever, in the opinion of that court, an erroneous judgment had been rendered."

In *Abbott v. Traylor*, 11 Bush, 335, this court said: "There is but one way in which such a judgment [of probate] can be affected, and that is by appeal to the circuit court of the county in which the order is made. Proceedings in chancery to set aside or vacate wills that have been admitted to probate can only be maintained in two classes of cases (section 37, chapter 113, General Statutes), and not in these cases until after action by the circuit court."

In *Arterburn v. Young*, 14 Bush, 509, it is said: "The chapter on Wills, found in the Revised Statutes and the old Code, contains

a complete law on the subject. The mode of executing such instruments, the manner of probate, the county in which the probate must be made, the manner of contesting, its effect when admitted to probate, the time and manner in which appeals are to be prosecuted, and the saving in favor of infants, etc., are matters all regulated and determined by the provisions of the law as contained in the two chapters referred to. A similar chapter, containing like provisions, is also found in the General Statutes, evidencing a plain intention that its provisions were intended to regulate the entire proceedings with reference to wills. By the provisions of both the General and the Revised Statutes appeals or writs of error from the circuit court shall 'be sued out within five years after rendering the order of probate or rejection in the county court, and from the Court of Appeals within one year after the final decision in the circuit court.' As to all persons not parties to the record, they 'may, within three years after such final decision in the circuit court, by bill in chancery, impeach the decision, and have a retrial of the question of probate, and either party shall be entitled to a jury.' 'An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age.' Sections 28 and 38, chapter 106, on Wills, Revised Statutes; sections 27 and 37, chapter on Wills, General Statutes." In that case, it was protested that unless an appeal was taken to the circuit court from the order of the county court within five years, the saving in favor of infants would not avail them; and this court said that the attention of the lawmakers must have been called to this question when legislating thereon, and the court would not enlarge the provisions of the statute.

In *Maynard v. Hatcher*, 107 S. W. 241, 32 Ky. Law Rep. 720, the foregoing authorities were followed, and it was held that the only remedy is the appeal provided for in the statute.

It will thus be seen that the broad principle has been established that the provisions of the statute of wills constitute a complete act of legislation upon that subject, and that, the remedy therein provided being exclusive, the county court is not empowered to vacate its order probating or rejecting a will. That order may only be attacked by appeal to the circuit court; and, in the event that upon the appeal to the circuit court, a person interested, who at the time of the final decision in the circuit court was a nonresident, was proceeded against by warning order only, without actual appearance or personal service of process, or any other person interested was not brought before the court by actual appearance or personal service of process, then such person has three years after such final decision in the circuit court in which to apply for a retrial thereof; or if he be an infant, he has until 12 months after

attaining full age in which to make such application. And in the latter case the proceeding instituted by the person who was an infant at the time of the final decision in the circuit court only operates to the extent necessary to establish the rights of such person, and does not affect the rights of any other person interested in the probate. Section 4862, Kentucky Statutes. The statute makes no provision for impeaching the order rejecting or probating a will, except where there has been an appeal to the circuit court, and then the attack must be made in that court. Why the Legislature should provide that an infant not made a party when the appeal is taken to the circuit court from an order rejecting or probating a will should have until 12 months after attaining full age in which to attack the decision in the circuit court, and make no provision for an attack by such infant in case there is no appeal taken to the circuit court from the county court from the order rejecting or probating a will, is not apparent, but such is the present condition of the legislation upon this subject; and, while it would seem that legislative action in this respect might be desirable, yet it must be presumed that with this unbroken line of decisions thus construing the law, the Legislature would have amended the statute had such been its desire.

[2] 2. It is the further contention of appellants that the action brought in the county court seeking to set aside the order rejecting the will of Joel W. Gibbs is authorized under section 518 of the Civil Code. But, even if it were not well established that the provisions of the statute of wills constitute a complete law upon that subject, and that the remedies therein prescribed for attack upon the order probating or rejecting a will are exclusive, it is manifest that section 518 does not authorize an action of this character. Subsection 5 of that section provides that erroneous proceedings against persons under disability, except coverture, where the fact of disability does not appear of record nor the error in the proceedings, may be relieved against by the court in which the judgment was rendered, modifying or vacating the judgment after the expiration of the term. But the appellants Lucien and Sarah were not parties to the proceeding wherein the will of their grandfather was probated, nor was it necessary that they should have been made parties therein. Section 4860, Kentucky Statutes.

[3] Subsection 4 of section 518 of the Civil Code provides that the court rendering a judgment shall have power to vacate or modify it after the term, for fraud practiced by the successful party in obtaining the judgment. This can only have reference to an action wherein the complainant was the unsuccessful party. In the proceedings wherein the will in question was probated, there were no parties. That proceeding was *ex parte* and *in rem*, and the judgment therein ren-

dered conclusive against the world until annulled upon attack in the manner provided by the statute of wills.

The judgments appealed from are all affirmed.

### BOWMAN v. HAMLETT et al.

(Court of Appeals of Kentucky. May 26, 1914.)

#### 1. STATUTES (§ 61\*)—CONSTRUCTION.

The constitutionality of an act should be sustained, if possible, without doing violence to the manifest legislative purpose, and so portions of the act should not be stricken as in conflict with the title if the two can be reconciled.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 196; Dec. Dig. § 61.\*]

#### 2. STATUTES (§ 207\*)—CONSTRUCTION—CONFLICTING PORTIONS.

Conflicting portions of a legislative enactment should be reconciled, if possible, without disregarding the intent of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 284; Dec. Dig. § 207.\*]

#### 3. STATUTES (§ 110½\*)—TITLE OF ACT—CONSTITUTIONAL PROVISIONS.

Const. § 51, requiring the title of legislative acts to express the subject legislated upon, does not require the title to state what former acts are repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 139, 161, 162, 163; Dec. Dig. § 110½.\*]

#### 4. STATUTES (§ 122\*)—TITLE OF ACT—SURPLUSAGE.

School Text-Book Commission Act of 1914, entitled "An act creating a state text-book commission to adopt a uniform series of text-books, etc., and repealing chapter 13 of the acts of 1910," provides in section 7 that the Commission shall select a uniform system of text-books for the schools of the state, except in cities of the first, second, third, and fourth classes, and in section 8 that the act shall not apply to cities of the first, second, third, and fourth classes, but that the act of 1910, regarding such cities, and act of 1912, regarding cities of the second class, shall remain in force. Const. § 51, requires the title of an act to express the subject legislated upon. *Held* that, as the purpose of this provision is only to prevent surreptitious legislation, and as the title need not specify what acts are repealed, that portion of the title declaring that the act of 1910 was repealed should be disregarded as surplusage, for no one interested in the act could have been misled thereby, and sections 7 and 8 show that the Legislature intended it to remain in force as to cities of the first, third, and fourth classes, and hence the variance between the title and the act is immaterial.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. § 122.\*]

#### 5. STATUTES (§ 211\*)—CONSTRUCTION—TITLE.

Where the body of the act clearly shows the legislative intent, the court need not refer to the title to determine such intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

#### 6. SCHOOLS AND SCHOOL DISTRICTS (§ 167\*)—PUBLIC SCHOOLS—SCHOOL BOOKS—STATUTE.

Text-Book Commission Act of 1914, § 11, requires that the retail price of text-books shall not exceed the retail price of the same books in other states; section 14 provides that retail dealers shall receive 15 per cent. of the retail price, while section 18 requires that the wholesale price shall not be higher in this state than

elsewhere. *Held*, that the provision that retail dealers shall receive 15 per cent. of the retail price merely fixes the maximum profit of retailers which may be reduced by the Commission upon proper showing, and does not require wholesalers to make retailers prices at which they could receive 15 per cent. of the retail price, and hence the act is not invalid as imposing conditions impossible of fulfillment by the majority of the publishers of text-books, and thus unreasonably restricting competition.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 338; Dec. Dig. § 167.\*]

Appeal from Circuit Court, Franklin County.

Action by Andrew Bowman against Barksdale Hamlett and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hazelrigg & Hazelrigg, of Frankfort, and A. J. Carroll, of Louisville, for appellant. Arthur M. Rutledge, of Louisville, for Board of Education, on appellant's side. Jas. Garnett, Atty. Gen., Chas. H. Morris, Asst. Atty. Gen., and Jno. C. Duffy, of Hopkinsville, for appellees.

HANNAH, J. Andrew Bowman instituted this action in the Franklin circuit court against the superintendent of public instruction and the Attorney General; the purpose being to test the constitutionality and to obtain an interpretation of the act of March 9, 1914, commonly known as the School Text-Book Commission Law. The lower court sustained a demurrer to the petition, and, from the judgment dismissing it, plaintiff appeals.

We find in the brief of the Attorney General that the lower court, in passing upon the questions submitted, delivered the following opinion: "This cause arises upon petition of plaintiff asking that the School Text-Book Commission Act of 1914 be declared void because it is in contravention of section 51 of the Constitution, and further, because it is so contradictory as to make it impossible of execution. This court can agree with neither position of plaintiff. The title of the act relates to only one subject, viz., the establishment of the state text-book commission, to secure, for the benefit of the patrons of common schools, uniformity in series and price of such books. The last lines of the title, in these words, 'and repealing chapter 13, etc.,' have in reality no relation to the title and in no sense can be considered except as surplusage. The inconsistencies complained of are capable of reconciliation by simply seeking the legislative intent, and that was to establish this Commission for the benefit of the schoolchild, and not for the benefit of book concerns or retail dealers. When the act undertook to say that the retail dealer should have 15 per cent. commission, and in the same breath says that the books shall be sold as cheaply as elsewhere, then manifestly the commission must be less

than 15 per cent., if the price is to be met only in that way. The complaining of section 8 in the act is perhaps more serious, and the difficulty is solved by striking out section 8, thus leaving the act as was evidently intended. For these reasons the demurrer of defendant is sustained, and the judgment herewith inclosed ordered entered."

This opinion is not copied in the record, and is no part of the judgment. It is conceded by appellant that this is the view which was entertained by the lower court, and which actuated said court in rendering the judgment appealed from. With this opinion we do not fully concur.

For a number of years prior to 1910, the books used in the common schools of this state were selected by the county judge, the county attorney, and the county superintendent of schools of each county. This manner of selecting the text-books of the schools of the state never seemed to be satisfactory, and the Legislature of 1910 attempted to improve conditions by the enactment of chapter 13 of the Acts of 1910, approved March 15, 1910, which provided for the creation of a county text-book commission in each county, consisting of the county superintendent of schools, two members of the board of examiners, the principal of a high school in the county, and one member of the county board of education. These commissions were authorized to adopt a uniform series of text-books for use in their respective counties, but under this act each county in the state could have a different series of text-books. While this method was probably an improvement upon the former plan, there seems to have been a demand for further improvement and for a more general uniformity or an entire state-wide uniformity in text-books.

The act referred to (chapter 13 of the Acts of 1910) expressly provided that the boards of education in cities of the first, second, third, fourth, fifth, and sixth classes should constitute the text-book commission for such cities, and, as such, its powers and duties should be identical with those provided by law for county text-book commissions. It was with the law in this condition that the Legislature of 1914 enacted the act of March 9, 1914, here in question.

[1-5] 1. It is the first contention of appellant that the act violates section 51 of the Constitution and is therefore void, for the reason that the title is in direct conflict with the body of the act.

The title of the act is as follows: "An act creating a state text-book commission to adopt for use in the common schools of Kentucky a uniform series of text-books, regulating the price thereof, defining the powers and duties of said commission and the method of selection of such text-books, and their distribution, prescribing penalties for the violation of this act, and repealing chapter 13 of the acts of the General Assembly of Kentucky, approved March 15, 1910."

Section 7 contains the following language: "It shall be the duty of the said commission in the years in which existing contracts expire, by a majority vote of the entire commission, to adopt from the authorized state list of books submitted, a uniform series or system of text-books for use in the common schools and the high schools of the state, except in cities of the first, second, third and fourth classes."

Section 8 of the act is as follows: "The provisions of this act shall not apply to boards of education in cities of the first, second, third and fourth class; but the act of 1910 regarding cities of the first, third and fourth class, and the act of 1912 regarding cities of the second class shall be and remain in force unaffected by this act."

It will thus be seen that the title states that chapter 13 of the Acts of 1910 is repealed, while in the body of the act, in section 8, it is provided that that chapter shall remain in force as to cities of the first, third, and fourth classes.

Appellees argue that the act would be rendered harmonious in all its parts by striking out section 8 and that portion of section 7 which refers to cities of the first, second, third, and fourth classes, leaving the remainder of the act in complete harmony and constitutional in every respect, and that this should be done. But, under the rule that the constitutionality of an act must be sustained, if possible, without doing violence to the manifest legislative purpose (which rule applies with like force to all the parts of the act), and the rule that conflicting provisions of the act should be reconciled, if possible, without disregarding the intent of the Legislature, section 8 and that portion of section 7 mentioned should be permitted to remain, if that can be done.

Section 51 of the Constitution provides that no law enacted by the General Assembly shall relate to more than one subject, and that that subject shall be expressed in the title. This section of the Constitution has always been liberally construed; all doubts being resolved in favor of the validity of the legislative action. The purpose of this constitutional provision is the prevention of surreptitious legislation; as said in Cooley on Constitutional Limitations: "To prevent surprise or fraud upon the Legislature by means of provisions in bills, of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly or unintentionally adopted." So, having in mind the purpose of this provision and the evil against which it is aimed, before any act of the General Assembly should be nullified by this court, upon the ground that the subject of the act is not expressed in the title by reason of a variance between the title and the body of the act, it should be made to appear, and the court should be satisfied, that the variance complained of is such as to bring it within the range of the evils sought to be guarded

against, and such as to justify its condemnation upon that ground alone. There is no such variance here. A casual reading of the title of this act could have mislead no one, for, even if interested in the subject, it would have been necessary for such person to have learned what chapter 13 of the Acts of 1910 contained before he would understand the effect of the part of the title which states that chapter 13 of the Acts of 1910 is repealed; and any one interested to that extent would also be sufficiently interested to read the body of the act itself.

Section 51 of the Constitution requires that the title shall express the subject legislated upon; but there is no requirement that the title of an act shall also undertake to state what former acts are thereby repealed. Such a requirement would not only be unreasonable; it would be impracticable; and it would lay upon the Legislature the duty of weighing the legal effect of prior legislation and determining just what legislation is repealed by the act proposed.

The title of the act in question fully expresses the subject of the act, excluding that part of the title which states that chapter 13 of the Acts of 1910 is repealed; and, it being unnecessary that the title of the act should state what former legislation is thereby repealed, that part of the title which states that chapter 13 of the Acts of 1910 is repealed is surplusage and may be disregarded.

Where the variance between title and body is not such as to create a strong inference that it has resulted in the enactment of legislation under misapprehension by the Legislature, and where the surplusage or apparent error in the title of the act is in regard to a particularity not required by the Constitution, it will not invalidate the statute, and such apparent error or surplusage in the title may be disregarded. See 36 Cyc. 1033, and authorities cited.

Of course, where the entire title, or the essential part thereof, is in conflict with the body of the act, there is a failure to conform to section 51 of the Constitution, for in such case the title does not express the subject of the act. But in the title of the act in question, that part which states that chapter 13 of the Acts of 1910 was repealed is not only surplusage, it is also apparently erroneous, as is shown by a consideration of the legislative intent. As to the intent of the Legislature with respect to this seeming conflict between the title and section 8 and part of section 7, there can be no uncertainty.

Doubtless the draftsman of the title of the act expected to have enacted a law which would give a uniform system of text-books throughout the entire state, including cities of all classes; and, while that part of the title referred to is of no importance in construing the act or in affecting its validity, it may nevertheless have served a purpose intended by the Constitution by giving notice to the

members of the Legislature that the bill was intended to apply to the whole state without excluding any of the cities mentioned in the former act. If it did this, it served no bad purpose. That such notice was given, and that the full purpose of the bill was understood by all, there can be no doubt. Nor can there be any doubt that the intent of the Legislature, or those voting for the act, is plainly expressed in sections 7 and 8 when read together; and the intention is clear that no part of the act should apply to cities of the first, second, third, and fourth classes. This being conceded, then the latter part of section 8, which seems to be a cause of complaint, is of no importance, for with or without these provisions, not only the "act of 1910 regarding cities of the first, third, and fourth classes and the act of 1912 regarding cities of the second class" remained in force unaffected by the act here in question, but all other legislation in effect at that time relating to those cities also remained in force and unaffected thereby.

The mere fact that section 8 may be divided into two parts, the first saying that the old law shall remain in force unaffected by the new, and the second saying that a part of the old law shall remain in force, without saying that the remainder shall not remain in force, cannot re-enact the part of the former law referred to nor repeal that part of the old law to which reference is not made. The only part of section 8 which has any force is that part which, read in connection with section 7, provides that the provisions of the present act shall not apply to cities of the first, second, third, and fourth classes. Viewing the act in this light, then to dispose of the contention of appellant that the act is void because of the conflict between the title and the body of the act, or because the legislative intent as to the cities mentioned cannot be ascertained, it is only necessary to determine whether that part of the title of the act which refers to chapter 13 of the Acts of 1910 actually repeals that chapter in all respects. When the title is read in connection with sections 7 and 8, there can be no doubt that the act repeals all of that chapter except as to its application to cities of the first, second, third, and fourth classes, for the whole of the act in effect so declares; and the last section in express words declares repealed all laws in conflict with the provisions of the act. But unless the title can write into the act a thing which it does not contain, but which, on the other hand, it expressly and in plain language provides against, then chapter 13 of the Acts of 1910 is not wholly repealed.

It is a well-settled rule that the act cannot contain certain matters not germane to the subject of the act, as expressed in the title thereof, but does it necessarily follow that, because an act cannot go beyond the title, it may not fall short of it?

If an act itself is ambiguous, then the



title may very properly and should be looked to in construing the meaning thereof; but when there is no ambiguity in the meaning of the act, and it is not otherwise defective, the title should not be allowed to override the plainly expressed provisions of the act and to read into the act something that was not intended by those enacting it.

After striking out or disregarding that part of the title which states that chapter 13 of the Acts of 1910 is repealed, the title of the act in question is full, explicit, sufficient, and complete, and harmonizes with the body of the act. That part of the title is surplusage and should therefore be disregarded. We have been referred to no authority in conflict with this construction. In the authorities cited by appellant where the act was held to be unconstitutional (*Wiemer v. Commissioners*, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523; *Commonwealth v. Barney*, 115 Ky. 475, 74 S. W. 181, 24 Ky. Law Rep. 2352; *Board of Trustees v. Tate*, 155 Ky. 296, 159 S. W. 777), the body of the act was broader than the title; here it is contended that the body of the act is narrower than the title. In those cases the body of the act was so extended as to include therein subjects not expressed by the title. Here the body of the act does not go as far as the title would indicate. However, in all those authorities, it will be found that the constitutional provision is held to confine the body of the act within the scope of the subject expressed by the title, not to declare that the title controls when in conflict with the body of the act.

In *Commonwealth v. Barney*, supra, it is said: "It (the title) is therefore not only useful, in affording a fair index of the legislative intent in case of ambiguity in the context, but it must be read in connection with the remainder of the act—as a part of it—in determining \* \* \* the law."

And in *Joyce v. Woods*, 78 Ky. 386, cited by appellant, it is said: "Instead of its being the duty of the courts to disregard the title, they are compelled by the Constitution to consider both the body and the title in order to arrive at the Legislative intention."

This is in accord with the conclusions we have reached in the case at bar. Should the title alone be considered, it might be clear that chapter 13 of the Acts of 1910 was repealed as a whole; but, when both body and title are considered together, the legislative intent is made clear, and the act will be construed to conform thereto.

[6] 2. It is also contended that the act is unconstitutional because it imposes certain conditions impossible of fulfillment by the majority of the publishers of text-books and thereby unreasonably restricts the bidding for the furnishing of books for use in the schools.

Section 14 provides that the retail dealers shall receive 15 per cent. of the retail price. Section 11 requires that the retail price in this state shall not exceed the retail price

of the same book in other states, while section 18 requires that the wholesale price shall not be higher in this state than elsewhere. It is claimed that it would therefore be impossible for many publishers to comply with our law without forfeiting their bonds in other states, because by paying the dealers in this state 15 per cent. based on the retail price, whereas in other states they pay the retail dealer less, would necessarily cause the books to be sold higher in this state than in other states; and that under this state of case, if the retail prices in this and other states are made the same, then the wholesale prices in this state must be lower than in those states where less than 15 per cent. is paid the retail dealer; and that, under these conditions, many publishers will be prohibited from bidding. However, section 14, in so far as it fixes the compensation of the retail dealer, may, upon a proper showing made to it, be made by the commission to yield to the other provisions of the act and to the fair exigencies of the situation.

The one demand for this legislation, the one purpose sought to be accomplished, the one intent of those favoring the act was to protect the consumer, to procure for the users of school text-books the lowest prices for which such books could be sold anywhere. The object of the Legislature was to benefit the last purchaser—the people. The law was enacted in the interest of this class, and of this class alone. The Legislature fully understood that the publishers and the retail dealers could take care of themselves without any assistance from the lawmaking power, if it should be conceded that the lawmaking power could legally assist them, and that no provision of the act was intended to advance the interests of either.

Looked at from any angle, it will readily be seen that the advocates of the law were apprehensive that the people would be imposed upon by those who controlled the furnishing of such books, whether such apprehension was well-founded or not. And it was in the interest of the public that the law was enacted. It cannot be thought that the Legislature, in the effort to procure for the people school books at the lowest prices, intended to limit the rights of parties to contract or to interfere with any contract entered into between the Commission, the publishers, and the dealers, provided such contract did not serve to defeat the purpose for which the law was enacted. To construe the act to mean that the retail dealer could not as his profit agree to accept 5 per cent. of the retail price agreed upon between the publisher and the Commission, that he must accept 15 per cent., and that it would violate the act to pay him less, would be to say that the legislation was enacted in the interest of the dealer, to the injury of the consumer, because the publisher, in bidding on the contract, must take into consideration and add

to his bid the difference between the 5 and the 15 per cent., and this difference must therefore be added to the price the publisher expects to receive from the dealer and the price the consumer would be required to pay; and this would be in direct conflict with the purpose of the act.

But, if we look solely to the intent of the Legislature, it is not difficult to harmonize this suggested trouble by construing the act to mean that the parties, in entering into the contract to supply the public with text-books, may understand that the retail dealer may charge nothing for his services in the distribution of books to the public, if he so desires, but must also understand that, if he charges anything, it must not exceed 15 per cent. of the retail price; that the law will not arbitrarily fix the amount he must charge, and thereby abridge his right to underbid another dealer for the contract; but that, if a charge is made by him, it must not exceed 15 per cent. of the retail price. This would do no violence to the act or the claim of any one interested, but would probably be of great benefit to the public and carry out the purpose and intention of the act.

It is well settled in this state that where words used in a statute do not convey the meaning intended by the Legislature, and where, from the context and a general survey of the attending circumstances and a consideration of the object sought to be accomplished, the true intention is apparent, the words may be modified so as to express the legislative intent.

In *Morrell Ref. Car. Co. v. Commonwealth*, 128 Ky. 455, 108 S. W. 928, 32 Ky. Law Rep. 1383, 1389, the court said: "We had occasion to review at some length the question when and how far the courts are justified in expanding or contracting, adding to, or subtracting from the language of a statute in order to preserve the integrity of the law, as in the case of *Commonwealth v. Rosenfield Bros. & Co.*, 118 Ky. 374, 80 S. W. 1178, 82 S. W. 433, 26 Ky. Law Rep. 728, and we said on this subject in the opinion: 'The cardinal rule of statutory construction is that the intent of the Legislature shall be effectuated, even at the expense of the letter of the law; and, to accomplish this, the meaning of words may be modified the structure of sentences changed, or some words rejected altogether, and others interpolated. Endlich, in his work on the Interpretation of Statutes, § 295, thus states the rule: "Where the language of a statute in its ordinary meaning and grammatical construction leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation, or by rejecting

them altogether, or by interpolating other words under the influence no doubt of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections or careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even if, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter.'"

In *Commonwealth v. Herald Publ. Co.*, 129 Ky. 432, 108 S. W. 894, 32 Ky. Law Rep. 1293, 16 Ann. Cas. 761, this court said: "Section 1352 [Ky. St.] is said to be meaningless and uncertain, because there is contained in it no prohibition against the things mentioned in the section, nor is it declared that it shall be unlawful to do them. In the respects mentioned, the section is technically defective, but there can be no reasonable doubt that it was the intention of the Legislature to make it unlawful to commit the acts mentioned and to prohibit any person or corporation from doing the forbidden things. The intent of the section being clear, the purpose of its enactment being plain, it will not be allowed to fail because of the omission of the words 'it shall be unlawful for,' which should have been placed at the beginning of the section, or the words, 'shall be guilty of the offense,' which should have been added to the section. In *Sams v. Sams' Adm'r*, 85 Ky. 396, 3 S. W. 593, 9 Ky. Law Rep. 24, the court said: 'It is a well-settled rule of construction that the letter of a statute will not be followed when it leads to an absurd conclusion; but, on the contrary, the reason for the enactment must enter into the interpretation, so as to determine what was to be accomplished by it.' This court has frequently inserted words in a statute, and has often modified expressions for the purpose of carrying out the legislative intent, when it was apparent from a reading of the statute that the omission of words or their insertion in the wrong place was merely an error. \* \* \* *Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, 21 Ky. Law Rep. 1444; *Bird v. Commissioners*, 95 Ky. 195, 24 S. W. 118, 15 Ky. Law Rep. 578; *Maysville, etc., v. Herrick*, 13 Bush, 123. Nor will this statute be held insufficient to punish violators of it. The omitted words necessary to perfect it will be supplied in accordance with the settled rules of statutory construction."

With these principles in mind, there is no difficulty in such an administration of the law in question as will render it possible of fulfillment by all publishers having reasona-

ble contracts in other states, and such as will place no restriction upon the bidding for the furnishing of books under the act. If the commission, upon a proper showing, sees fit to require it of the retail dealer, he may accept less than 15 per cent. of the retail price as his compensation, and the publisher thus be enabled to comply with his contracts and the laws of other states. The difficulties in administering the law with these principles in view is not so great as to render the act impracticable or uncertain.

The court therefore holds that the act in question is constitutional; that, so far as affected by this act, all laws respecting cities of the first, second, third, and fourth classes, which were in force at the time of its passage, are still in force and unaffected by anything contained in the act in question; and that, in fixing the compensation of the retail dealer, the basis shall be the retail price, but the commission and the parties may fix the compensation of the retail dealer in any amount so that it does not exceed 15 per cent. of the retail price.

The judgment of the circuit court sustaining the demurrer and dismissing the petition is affirmed.

#### RICE v. BRADLEY'S TRUSTEE et al.

(Court of Appeals of Kentucky. May 28, 1914.)

##### 1. WILLS (§ 731\*) — DEBTS DUE FROM LEGATEES—EFFECT OF TAKING ADDITIONAL SECURITY.

A testamentary trustee who took additional security for a debt due to the estate from a legatee by taking a mortgage on other property of the legatee was not thereby deprived of his right to rely on the lien created by law on the interest of the legatee, and the right of a creditor of the legatee having a junior lien has only the right to ask that the trustee shall first exhaust his lien on the property not pledged to the creditor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793-1800; Dec. Dig. § 731.\*]

##### 2. WILLS (§ 731\*)—DEBTS DUE ESTATE FROM LEGATEES—LIENS—SATISFACTION.

That the money advanced by a creditor of a legatee was applied in payment of his debt to the estate of testator did not postpone the right of the testamentary trustee to assert his lien on the interest of the legatee in the estate until the debt of the creditor was paid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793-1800; Dec. Dig. § 731.\*]

##### 3. WILLS (§ 731\*)—DEBTS DUE ESTATE FROM LEGATEE—LIEN—WAIVER.

A testamentary trustee has no authority to waive his lien on the interest of a legatee indebted to the estate, to the prejudice of the estate, for the benefit of a subsequent creditor of the legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793-1800; Dec. Dig. § 731.\*]

##### 4. WILLS (§ 744\*)—DEBTS DUE ESTATE FROM LEGATEE—LIEN—WAIVER.

A testamentary trustee entitled to a lien on the interest of a legatee in the estate to secure a debt due from the legatee to the estate, who consented that a creditor of the legatee might take a mortgage on the interest of the

legatee, did not thereby make the mortgage a superior lien on the legatee's interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1911-1917; Dec. Dig. § 744.\*]

Appeal from Circuit Court, Scott County.

Suit by A. S. Bradley's Trustee to settle the estate of A. S. Bradley, deceased, in which Katie Bradley Rice intervened, asserting a lien on the interest of J. N. Bradley, legatee. From a judgment denying adequate relief to Katie Bradley Rice, she appeals. Affirmed.

Tomlin & Vest, of Walton, for appellant. Bradley & Bradley, of Georgetown, for appellees.

CARROLL, J. In this suit by his trustee to settle the estate of A. S. Bradley, the appellant, Mrs. Rice, came into the case by a petition in which she asserted a lien on the interest of J. N. Bradley, one of the legatees of the estate. In one clause of his will the testator provided that upon the death of certain named legatees his estate should be divided into ten equal parts and distributed between ten named legatees. He further directed his executor to sell and dispose of any real estate of which he died possessed, and to reinvest the proceeds in other real estate or in safe securities. V. F. Bradley was nominated as executor and trustee, and upon his death, in 1908, J. Craig Bradley was appointed trustee.

It is conceded that the estate in the hands of the trustee is to be treated as personal estate, and the rights of the parties to this controversy determined upon that basis.

It appears that in 1895, two years before the death of A. S. Bradley, J. N. Bradley executed to him a note for several thousand dollars, and in 1898, after V. F. Bradley was appointed trustee, J. N. Bradley took up this old note and executed another note to V. F. Bradley, as trustee, for the balance due on the old note, and secured the same by a mortgage on some real estate. Payments from time to time were made on this note by J. N. Bradley; but, when this suit was brought to settle the estate of A. S. Bradley, there was a balance remaining on the note of J. N. Bradley, and he had no estate out of which to pay it, and the trustee seeks in this suit to charge what is coming to him from the estate of A. S. Bradley with the payment of this debt.

It further appears that in 1903 J. N. Bradley executed a mortgage on his interest in the estate of A. S. Bradley to the appellant, Mrs. Rice, as security for any indebtedness that might be due her, and she claims that by virtue of this mortgage she has a lien on the interest of J. N. Bradley superior to the lien of the trustee, and that her indebtedness should be first satisfied. The lower court, on the pleadings, held that the interest of J. N. Bradley in the estate of A. S.

Bradley should be first applied to the payment of J. N. Bradley's indebtedness to the estate, and adjudged that the lien of Mrs. Rice to secure her indebtedness by virtue of the mortgage was subordinate to the lien of the trustee, and it is from this judgment that Mrs. Rice appeals.

In *Brown v. Mattingly*, 91 Ky. 275, 15 S. W. 353, 12 Ky. Law Rep. 869, it was decided that the personal representative had a right to set off a distributee's indebtedness to his intestate's estate against the distributee's interest therein, and that this right would prevail over the right of the creditor, who had attached the distributee's interest; so that, unless there are exceptional circumstances to take the claim asserted by Mrs. Rice out of this general rule, the judgment of the lower court was correct.

Counsel for Mrs. Rice, while recognizing the correctness of the rule laid down in *Brown v. Mattingly*, argue that it is not controlling authority in this case for several reasons: It is said that the money she advanced was used in making payments upon the indebtedness of J. N. Bradley to the estate; that the trustee recognized the validity of her mortgage as a superior lien on the interest of J. N. Bradley; that, by taking a mortgage upon property owned by J. N. Bradley, the trustee waived his right to a lien upon the interest of J. N. Bradley; and, furthermore, that she was lulled into security and prevented from sooner seeking to collect her indebtedness from J. N. Bradley by the belief that the mortgage taken by the trustee amply secured the indebtedness of J. N. Bradley to the estate, and therefore her lien on his interest in the estate should be prior to the lien asserted by the trustee.

[1] We cannot agree with counsel that the fact that the trustee, as additional security, or for the better protection of the estate, took a mortgage upon other property owned by J. N. Bradley deprived the trustee of his right to also look to the lien created by law upon the interest of J. N. Bradley to secure his indebtedness to the estate. A creditor who has a lien to secure a debt is not precluded from taking other steps to secure it, and the fact that he takes other steps does not work a surrender of his right to his original

lien. He may take as many liens as he pleases and secure his debt in as many ways as he can without prejudicing his right to look to all of them for security, and the creditor of a debtor who has a junior lien has only a right to ask that the creditor with the senior lien on several pieces of property shall exhaust his liens on the property not pledged to the junior creditor. In this case the trustee exhausted his mortgage security, and is only seeking to subject the interest of J. N. Bradley in the estate to what remained of his indebtedness after applying to it the proceeds of the mortgage.

[2] Nor do we think that the mere fact that the money advanced by Mrs. Rice was applied by the debtor in part payment of his debt to the estate had the effect of postponing the right of the trustee to assert his lien on the interest of J. N. Bradley in the estate until the debt of Mrs. Rice was paid. Clearly the fact that a creditor advances money to a debtor that is used by the debtor in satisfying in part a superior lien on his estate does not give to the creditor advancing the money a lien prior to the lien of the original creditor for the balance of his debt.

[3, 4] It is further said that the trustee, V. F. Bradley, waived his right to a superior lien upon the interest of J. N. Bradley by consenting that the lien of Mrs. Rice should be superior. We do not think so. In dealing with the trust estate, V. F. Bradley had no authority to waive his lien to the prejudice of the estate, and to the benefit of Mrs. Rice. But, aside from this, it appears from the pleadings that all that V. F. Bradley did was to recognize the validity of the mortgage of Mrs. Rice, and to consent that she did have a mortgage on the interest of J. N. Bradley in the estate, and we are unable to perceive how the mere fact that the trustee consented that Mrs. Rice might take a mortgage on the interest, or the mere fact that he had knowledge of her mortgage and recognized its validity as a mortgage, would have the effect of establishing it as a superior lien on the estate.

Under the facts of the record, Mrs. Rice occupies the place of a junior mortgagee, and, as the lower court so adjudged, the judgment is affirmed.

## VOLZ et al. v. SCULLY et al.

(Court of Appeals of Kentucky. May 27, 1914.)

## 1. CONTRACTS (§ 99\*)—VALIDITY OF ASSENT—EVIDENCE—MENTAL CONDITION OF PARTY.

In an action to cancel a contract involving the settlement of title to real estate, evidence held to sustain a finding that at the time of its execution one of the parties was in such a weak mental and physical condition as to be incapable of contracting, and hence, not being binding upon her, was unenforceable against the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. § 99.\*]

## 2. SPECIFIC PERFORMANCE (§ 32\*)—MUTUALITY OF OBLIGATION.

An executory contract, upon which only one of the parties is bound, and under which the party not bound has not acted, is not enforceable in equity by either party.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by J. J. Scully and others against Rosa Volz and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

B. S. Washer and John Woodbury, both of Louisville, for appellants. E. J. McDermott, McDermott & Ray, and Eugene J. Cooney, all of Louisville, for appellees.

TURNER, J. M. R. Scully died on the 31st of May, 1911, a resident of Oldham county, leaving a large estate, consisting of real estate, valued at from \$180,000 to \$175,000, situated chiefly in Louisville, and personal property valued at about \$100,000. He had no children or descendants, and left as his only heirs at law a brother, J. J. Scully, the appellee, who was then a resident of Bridgeport, Conn., and his wife, Emma Scully, a daughter of the appellant Rosa Volz.

His brother came to Louisville to the funeral, and after the funeral had a conference with Mr. Nugent, who had been the real estate agent of M. B. Scully, and was correctly informed by him of his rights in the estate in the event there was no will. Thereafter, being in possession of this information, he went to see the widow, Emma Scully, and proposed to her that they divide the whole estate equally. She, however, hoping that there was in existence a will by which she would get a larger portion of the estate, and for which will she had already been searching, declined this offer. They, however, made an appointment to meet the next day in Louisville, and that night she made a still further search for the will, but failed to find it. The next day, when they met, she offered to accept his proposition, made the night before; but he had changed his mind and withdrew it. Thereupon the widow qualified as executrix, and employed an attorney to represent her, and the appellee employed his attorney.

After this there was further negotiation between the parties looking to a final settlement, but no terms were agreed upon. Shortly thereafter, and about the middle of June, appellee returned to Bridgeport, Conn., and about the same time the attorney for Mrs. Scully went abroad, and did not return until about the middle of September. During his absence there was nothing further said about an adjustment or settlement; but upon his return negotiations were again opened up between the attorneys for the parties. Mrs. Scully's attorney first insisted that she should have the value of one-half of the real estate in fee, and subsequently asking a smaller percentage, even down to 25 per cent., all of which propositions were declined by Scully's attorney, who all along insisted that Scully would agree only to give to his brother's widow in fee the value of her part of the real estate according to the life tables. The matter was in this condition in November or December of that year, when Scully and his daughter returned to Louisville. After his return Scully himself did not see his brother's widow; but his daughter saw her upon two occasions, the last time on Christmas Eve, 1911. During all this period negotiations were going on between the attorneys, but no settlement was reached; J. J. Scully's attorney insisting that they would settle only upon the basis of the life tables, the interest of the widow under the life tables being 22.4 per cent.

Finally on Wednesday, January 24, 1912, Mrs. Scully had a long conference with her attorney, and they agreed that she should accept a conveyance in fee of 22.4 per cent. in value of the real estate, and she directed her attorney to close up the trade on this basis. But her attorney, notwithstanding this authority, still entertaining a lingering hope that he might procure for his client a larger percentage, insisted upon a settlement upon the basis of 25 per cent. in value of the fee. This, however, was again refused, and finally on Monday, January 29th, the two attorneys agreed to settle upon the basis fixed by the life tables, and they jointly dictated to a stenographer the terms of the agreement, which were in some respects somewhat complicated, and late that afternoon appellee J. J. Scully signed this agreement in duplicate at the office of his attorney. The next morning Mrs. Scully's attorney went by the office of Mr. Scully's attorney and procured these two signed agreements, and that afternoon about 4 o'clock Mrs. Scully signed them while ill in bed, and the next morning at 7 o'clock she was dead. Shortly after the death of Emma Scully this action was instituted by the appellee against her personal representative and Rosa Volz, her sole devisee, seeking a cancellation of the contract, and the chancellor below entered a judgment canceling it. This relief was sought upon three grounds:

(1) That Emma Scully and the members of her family acting for her had by active and fraudulent concealment of the facts relating to her state of health induced J. J. Scully to enter into the contract, which he would not have done, except for such fraudulent concealment; and (2) that the contract was not in fact signed by Emma Scully, but was in truth signed by her sister; and (3) that at the time of the execution Emma Scully was in such a weakened condition mentally and physically that she did not have mind enough to comprehend or understand the import of the writings which she signed, or the obligations therein, or the significance of her act in so doing.

[1] In our view of the case, it is unnecessary to consider either of the first two propositions, for if Emma Scully was, at the time the contract was executed, incapable mentally of understanding its import and significance, and the obligations which it imposed upon her, then it could not have been enforced against her, if she had recovered and had sought to avoid it; and manifestly, if it was unenforceable as to one party it should not be enforced against the other.

On the Friday night before the Wednesday of her death Dr. Rapp was called in to see her, and found her in a very weakened condition, which indicated that she had been sick for some time. She had fever, and her pulse was rapid, and she seemed to be dull; and upon this first visit the doctor notified the family that he suspected that she had or would have typhoid fever. He again called on her the next morning and then pronounced it typhoid fever, and suggested that she either be sent to an infirmary or that a trained nurse be procured; but at that time her mother thought she could care for her, although on Monday morning the trained nurse was sent for and came. The doctor also stated that on Saturday he suggested the calling in of a priest, and also made some suggestion about the making of a will. He also stated that she was very weak at all times after he was called in, and in a sort of stupor, her pulse weaker than her temperature would indicate, and at times she had a mild delirium. He stated that upon the occasion of the signing of the two papers he was present, and when asked by her brother if she could sign the papers he told him that he could bring them up and let her try; that her brother and his brother-in-law explained to the sick woman that she ought not to worry any more, that the business had all been attended to, and that all she had to do was to sign the papers; and that the papers were not read to her or by her; that she was propped up in bed and supported by her sister, and that her sister put her hand over that of Mrs. Scully's, and in that way the writing was signed; that she never spoke a word during this time, but nodded her head once or twice when spoken to; that during

all of her illness he never heard her speak a word.

The trained nurse, Miss Seel, stated that she was called to the Volz residence in the forenoon on Monday, the 29th; that Mrs. Scully was then a very sick woman; that her heart action was weak, and that, although she was conscious, she was stupid and dull and drowsy, and paid little attention to her surroundings; that she had nothing to say, and she only spoke four words in her presence in the two days she was there, and they were in response to a suggestion made by the witness; that in her opinion she was too sick to be worrying about business matters, and from her symptoms she would have supposed it the third week of typhoid fever; that from her experience as a nurse the patient was not then in such mental condition as to be able to understand any business matters, or to understand her rights, or to take care of her interests in a business transaction, or to put her mind on business; that when the papers were signed they were neither read to nor by Mrs. Scully, and that her sister supported her while they were signed; that the patient was weaker mentally than physically when she signed the papers, and that she was physically too weak to have signed her name as well as it appears to have been signed without considerable help.

Two other physicians were introduced as witnesses, and in answer to hypothetical questions, based upon the statements of Dr. Rapp and the trained nurse, testified in substance that Mrs. Scully was probably suffering from typhoid fever, and was not mentally capable of understanding the nature and effect of the papers which were executed.

For the defendants, Mrs. Volz, her two daughters, her son, and his brother-in-law testified in a general way that Mrs. Scully was perfectly conscious and had mind enough to fully understand the papers which she signed. However, they did not deny many of the essential facts as to the condition of Mrs. Scully. Some of them admitted that Dr. Rapp diagnosed her case as typhoid fever. They admitted the procurement of the trained nurse. They admitted sending for one or more priests. They admitted some talk about a will. They admitted that Mrs. Scully was very sick, and had to be supported while the writings were signed. They admit that her sister supported her arm or wrist while she was signing. They admit the paper was not read to or by her.

[2] Under this evidence it is apparent that in no event was this contract enforceable against Mrs. Scully, and it is elementary that there must be mutuality of obligation in all contracts; that is to say, that both parties to it must be bound, or neither party will be. An executory contract, upon which only one of the parties is bound, and under which the party not bound has not acted, is enforceable in equity by neither party.

Under the evidence in this case no chancellor would have hesitated to relieve Mrs. Scully from the obligations undertaken by her in this paper. It was an important contract, involving the settlement of the title to very valuable real estate in which she was interested, and in which her interests, based upon the life tables, amounted to \$35,000 or \$40,000, and yet the evidence is undisputed that she signed that contract without ever having read it or having it read to her; that at the time she signed it she had been seriously ill with a wasting disease for several days; that she had to be supported or held up, and her arm guided or supported, while she signed it; that at the time she was not only under the care of a physician, but also her condition required a trained nurse; that at the time she signed it she was actually on her deathbed, and died 15 hours later.

If the nature of this contract was such that her personal representative and devisee desired to escape liability thereon, can it be doubted that they might easily do so? In the light of the mental and physical condition of Mrs. Scully at the time this paper was executed it was nothing more nor less than the promise by J. J. Scully to convey to her in fee \$35,000 or \$40,000 worth of real estate without any corresponding obligation upon her part which was enforceable.

The doctrine that, where one party to an executory contract is not bound, it will not be enforced against the other party, is so clearly based upon equitable principles, and is so universally recognized and applied that citation of authority would be superfluous.

The chancellor properly canceled the contract, and the judgment is affirmed.

#### BOARD OF PENITENTIARY COM'RS v. SPENCER et al.

(Court of Appeals of Kentucky. May 28, 1914.)

#### 1. STATUTES (§ 141\*)—AMENDING ACTS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. § 51, requiring an amended, revised, or extended act to be re-enacted and published at length, should be liberally construed, so as not to hinder or embarrass the Legislature, but not given so loose a construction as virtually to nullify the section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

#### 2. CONSTITUTIONAL LAW (§ 12\*)—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS.

The Constitution is not a technical instrument, and should not be so construed as to defeat the substantial purposes of its adoption.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.\*]

#### 3. CONSTITUTIONAL LAW (§ 70\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—WISDOM OF STATUTE.

Unless it appears that a particular statute is forbidden by or conflicts with some provision of the Constitution, the court will not attempt to control the legislative department,

and will not pass on the propriety or wisdom of the laws that are enacted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

#### 4. CONSTITUTIONAL LAW (§ 45\*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—DUTY OF COURTS.

It is the duty of courts to prevent the ignoring of the Constitution by individuals or by other departments of the government, and, when the Constitution has been ignored or disregarded, the court should interpose its authority, which is as extensive as the exigencies of the case may require.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.\*]

#### 5. STATUTES (§ 141\*)—AMENDING ACT—SETTING FORTH PROVISIONS.

The act of 1910 entitled "An act to amend an act entitled 'An act to create a board of penitentiary commissioners and to regulate the penal institutions of this commonwealth,' which became a law March 5, 1898" (Laws 1910, c. 15), which provided that the act referred to in the title be amended by adding thereto a section, styled section 1a, which provided for the division of convicts into two classes, one to be confined in the penitentiary, and one in the reformatory, and authorized the board of penitentiary commissioners to place a portion of the earnings of the inmates of the reformatory to their credit, is contrary to Const. § 51, which provides that no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but that so much thereof as is amended, revised, or conferred shall be re-enacted and published at length; the title and body of the act both indicating that it was the intention of the Legislature to amend the former act, and not to enact a new law under a separate title relating to the same subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

#### 6. STATUTES (§ 156\*)—AMENDMENT—SETTING FORTH PROVISIONS—REPEAL OF FORMER ACT.

It is not necessary, when the body of a new act repeals, expressly or in effect, all or part of an existing act, to re-publish the parts repealed, although the title of the repealing act may purport to be an amendment of the existing act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 222; Dec. Dig. § 156.\*]

#### 7. STATUTES (§ 141\*)—AMENDMENT—SETTING FORTH PROVISIONS—PROVISIONS OF REVISED STATUTE.

An amendment of one or more sections of the Kentucky Statutes, or of an entire act, should contain the section or sections as they will read when revised or amended, if any part of the section or sections remain in force, but, if one or more sections are to be repealed, they need not be set forth in the repealing act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

#### 8. STATUTES (§ 156\*)—AMENDMENT—SETTING FORTH PROVISIONS—NEW ACT.

A new act which does not purport to be an amendment to an existing law need not set out or republish any part of any former law that may be changed or repealed by the new law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 222; Dec. Dig. § 156.\*]

#### 9. STATUTES (§ 141\*)—AMENDMENT—SETTING FORTH PROVISIONS.

A new act which purports to amend an existing act, and not a particular section or part

of the existing act, must set forth the whole of the existing act as it will appear when extended, revised, or amended, but, if only a particular section or sections are amended, it is necessary to specify and republish only the section or sections affected.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

10. STATUTES (§ 141\*)—AMENDMENT—SETTING FORTH PROVISIONS—CARRYING PROVISIONS INTO NEW LAW.

When it is desired to confer or carry into a new law provisions of an old law, so much of the old law as is thus conferred or carried into the new law must be published at length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

Appeal from Circuit Court, Franklin County.

MANDAMUS by Louis Spencer and others, against the Board of Penitentiary Commissioners. Judgment for the plaintiffs, and defendant appeals. Reversed, with directions to dismiss the petition.

JAMES GARNETT, Atty. Gen., and M. M. Logan, Asst. Atty. Gen., for appellant. HAZELRIGG & HAZELRIGG, Scott & Hamilton, and Guy H. Briggs, all of Frankfort, for appellees.

CARROLL, J. The appellee Louis Spencer and several other convicts serving terms of imprisonment in the Kentucky State Reformatory, in behalf of themselves and other convicts, brought this suit against the board of penitentiary commissioners, asking a mandamus to compel the board to set apart and place to their credit as convicts certain sums of money to which they asserted they were entitled under an act passed by the Legislature during the session of 1910. Acts 1910, c. 15. The lower court granted the relief prayed for, and the board of penitentiary commissioners appeal.

On behalf of the board several grounds are assigned why the judgment of the lower court should be reversed, but, as we have concluded that the objection urged to the validity of the act under which the relief was sought and granted is well taken, it will not be necessary to do more than state the reasons that have influenced us in coming to this conclusion.

Section 51 of the Constitution provides: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

The objection to the act of 1910 is found in the failure of the Legislature to conform the act to the mandatory requirements of this section of the Constitution. The title of the act reads: "An act to amend an act entitled 'An act to create a board of penitentiary commissioners and regulate the penal

institutions of this commonwealth,' which became a law March 5, 1898." The act then reads: "Be it enacted by the General Assembly of the commonwealth of Kentucky: Section one: That an act entitled 'An act to create a board of penitentiary commissioners and regulate the penal institutions of this commonwealth,' be amended by adding after section one of said act the following." Then follows a section styled section 1a, providing, in substance, that the board of penitentiary commissioners are authorized to convert one of the two penitentiaries into a penal institution to be known as the Kentucky Penitentiary in which shall be incarcerated all convicts of a certain class. In the other penitentiary, which was to be known as the Kentucky State Reformatory, there was to be incarcerated another class of convicts. After providing in another paragraph for the training and education of the convicts, the last paragraph, and the one involved on this appeal, authorized the board to place to the credit of each prisoner such an amount of the average per capita earnings of the inmates as the board might deem equitable and just, taking into consideration the character of the prisoner, the nature of the crime for which he was imprisoned, and his general deportment; the granting of this authority being followed by directions relating to the manner in which the fund accruing to the credit of the prisoners should be set apart and distributed.

Another paragraph authorized the board to enter into agreements with the contractors for the prison labor for such modifications of existing contracts as would enable the board to carry out the provisions of the act. Section 2 merely repealed all acts and parts of acts in conflict with the act.

[1] At the threshold of what we have to say it might be well to observe that this court has no disposition to give a narrow or technical construction to the section of the Constitution under consideration, or a construction that would make it difficult or impracticable for the Legislature to phrase or construct titles or acts that would not be obnoxious to this provision of the Constitution. The section should be liberally construed, so as not to hinder or embarrass the Legislature in its efforts to enact laws, but at the same time a construction so loose as to virtually nullify the section, which is mandatory in its terms, should not be adopted.

[2] The Constitution is not a technical instrument, and should not be so construed as to defeat the substantial purposes of its adoption as the organic law of the state. It was intended to operate upon and regulate the practical matters that are continually presenting themselves in governmental affairs, and generally speaking, the language employed is simple in expression and free from ambiguity. But, of course, when any of its sections are attempted to be applied to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



any one of the multitude of things constantly coming up, there naturally and reasonably comes into existence, in company with these attempted applications, differences of opinion as to the meaning of certain provisions, and this unavoidable difference of opinion has given rise to much litigation. But this, in more or less degree, is true of every law that has ever been enacted, as well as every contract dealing with private rights that has ever been written.

The section now under consideration however, is so short and readily understood that it would seem not difficult to so construe it as to render it an easy matter for the Legislature to observe its provisions. But, notwithstanding this, the number of legislative acts in which its provisions have been disregarded is surprising. Time and again this court has found it necessary to declare legislative acts invalid on account of fatal defects arising under this section, and time and again it has, with painstaking care, endeavored to point out the necessity for a substantial observance of its requirements, and fully explained, if, indeed, explanation were necessary, how they might be complied with. So often has this been done that it would seem superfluous to repeat what has been said, especially in view of the fact that, under all the opinions of this court, this act must be adjudged insufficient.

[3] It might also not be out of place to again observe that it is not either the duty or the pleasure of the court to interfere with the freedom of the legislative department or to attempt to control or restrain its activities, unless it appears that the legislation is forbidden by or conflicts with or violates some provision of the Constitution. We fully appreciate the fact that the Legislature is at liberty, so far as the Constitution of the state is concerned, to enact such laws under such titles as its judgment dictates, subject to the single limitation that they do not disregard in some material way the restrictions imposed by the Constitution. Except when it transgresses the bounds of its authority as marked out by the people in the Constitution, this court, in its judicial capacity, has no authority and no disposition to interfere with the Legislature of the state or to pass judgment on the propriety or wisdom of the laws that it may enact.

[4] But to the judicial department of the state has been committed the authority to save the Constitution from being ignored or disregarded by individuals and collections of individuals, as well as by other departments of the government, and, when it is made plain to the court that the Constitution has been ignored or disregarded, its duty to interpose its authority is as extensive as the exigencies of the case may require.

It is also true that this supervising power and large jurisdiction is not conferred by any express grant of the Constitution, but it has

become so firmly established as a part of the jurisprudence of the state that no thoughtful persons can be found to question it. It has been exercised by this court from the very beginning of the state, always, however, with reluctance, and never, unless imperatively demanded by a sense of duty that could not be set aside without disregarding the obligations assumed on taking the office.

In the case of *Bliss v. Com.*, 2 Litt. 90, 13 Am. Dec. 251, decided nearly a century ago, this court said, in declaring an act unconstitutional: "It is emphatically the duty of the court to decide what the law is; and how is the law to be decided, unless it be known? And how can it be known without ascertaining, from a comparison with the Constitution, whether there exists such an incompatibility between the acts of the Legislature and the Constitution as to make void the acts? A blind enforcement of every act of the Legislature might relieve the court from the trouble and responsibility of deciding on the consistency of the legislative acts with the Constitution; but the court would not be thereby released from its obligations to obey the mandates of the Constitution, and maintain the paramount authority of that instrument; and these obligations must cease to be acknowledged, or the court become insensible to the impressions of moral sentiment, before the provisions of any act of the Legislature which, in the opinion of the court, conflict with the Constitution can be enforced. Whether or not an act of the Legislature conflicts with the Constitution is, at all times, a question of great delicacy, and deserves the most mature and deliberate consideration of the court. But, though a question of delicacy, yet, as it is a judicial one, the court would be unworthy its station were it to shrink from deciding it whenever, in the course of judicial examination, a decision becomes material to the right in contest. The court should never, on slight implication or vague conjecture, pronounce the Legislature to have transcended its authority in the enactment of the law; but, when a clear and strong conviction is entertained that an act of the Legislature is incompatible with the Constitution, there is no alternative for the court to pursue but to declare that conviction, and pronounce the act inoperative and void."

Again, in *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457, 9 Ky. Law Rep. 743, these well-expressed principles were set forth: "The Constitution of the state was adopted by the people of the state as the fundamental law of the state. This fundamental law was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it. It was intended by the people that all departments of the state government should shape their conduct by this fundamental law. Its every section was doubtless regarded by the people adopting it as of vital importance,

and worthy to become a part and parcel of the constitutional form of government, by which the governors, as well as the governed, were to be governed. Its every mandate was intended to be paramount authority to all persons holding official trust, in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be ingrafted in it; but each section and each article was solemnly weighed and considered, and found to be essential to the form of constitutional government adopted. Whenever the language used is prohibitory, it was intended to be a positive and unequivocal negative. Whenever the language contains a grant of power, it was intended as a mandate. Whenever the language gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed, and in no other manner. It is an instrument of words, granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit except the spirit to be found in them. To say that these words are directory merely is to license a violation of the instrument every day and every hour. To preserve the instrument inviolate, we must regard its words, except when expressly permissive, as mandatory, as breathing the spirit of command."

Again, in the late case of *McCreary, Governor, v. Speer*, 156 Ky. 783, 162 S. W. 99, in holding an amendment to the Constitution adopted by the people invalid, because the question was submitted to the people in a manner not authorized by the Constitution, we said: "It is true our Constitution contains no provision to the effect that all its provisions are mandatory; but we deem this immaterial, for the reason that this court has held before the adoption of the present Constitution that all the provisions of a Constitution are mandatory; and the Constitution must be presumed to have been adopted with this understanding of its meaning. Since the adoption of the Constitution the court has steadily maintained the same rule."

In the many years that have passed between the decision in *Bliss v. Com.* and the case of *McCreary, Governor, v. Speer*, perhaps 100 cases touching on this subject have been written, but in no one of them has there been any departure from the principles announced in *Bliss v. Com.* and *Varney v. Justice*. And it is in the spirit expressed in these cases and actuated by the conception of its power and duty as therein set forth that this court has always approached the consideration of cases which imposed upon it the necessity of setting aside a legislative act.

[5] The title of this act expressly declares that it is "An act to amend an act entitled 'An act to create a board of penitentiary commissioners and regulate the penal institutions

of this commonwealth,' which became a law March 5, 1898," and then the act immediately proceeds to amend the act of March 5, 1898, by adding to it a new section styled "1a," leaving the whole of the act of 1898 in effect. The Constitution expressly declares that no law shall be amended by reference to its title only, but that so much thereof as is amended shall be re-enacted and published at length. This mere statement would seem sufficient to demonstrate that the title of this act flagrantly disregards the provisions of the Constitution referred to. This proposition is so plain that the only argument advanced in support of the act is that the act is not in fact, an amendment to the act of 1898 (Acts 1898, c. 4), but is a new law entirely distinct from the act of 1898, and creates new rights and confers new authority no reference to which was made in the act of 1898. Therefore it is said the sufficiency of the act is not to be measured by section 51, but that the title, as well as the act, should be treated as new legislation.

The conclusive answer to this argument, it seems to us, is that the Legislature did not treat this act as a new act, but saw proper to style it an amendment to the act of 1898.

If the Legislature had, in a separate act, with an appropriate title, invested the board of commissioners with the authority conferred by this act, then the argument of counsel would be well sustained. But in determining what the Legislature intended to and did do, and for the purpose of ascertaining whether it intended to amend the old law or enact a new one, we must of necessity look to the title and the body of the act, and when we do this there is no difficulty in determining what the Legislature intended to and did do. It said in so many words that it intended to and did by this act amend the act of 1898, and, to further make plain this intention, it did amend the act of 1898 by a mere reference to the title of that act, without setting forth, as required by section 51, the act that was to be amended, or so much as a single word of it, although all of it was left in force.

In view of this situation, the question is directly presented whether the Legislature can, in the broadest possible way, ignore section 51 of the Constitution and treat its requirements as of no moment. We must either uphold the act and say the Constitution does not mean what it plainly says, or else declare the act invalid. These are the only alternatives presented. If this act should be sustained, it is plain that the Legislature would not only be authorized, but invited, to amend by its title any act that it thought proper to so amend, and presently we would have the same situation that existed before the adoption of the present Constitution, and that influenced that body to incorporate into the present Constitution so much of section 51 as we are now considering.

To say that this act does not boldly violate section 51 would be to say that the words of the section have no meaning or effect, and that a section of the Constitution that in a number of cases has been declared mandatory has no more force than a legislative act that each succeeding Legislature may amend or repeal at pleasure. A decision like this would virtually destroy the influence of the Constitution as a controlling guide and restraint upon the conduct of the people and their political agents, and leave them free from the limitations that it imposes. This is putting the matter in a strong light, and yet it is only stating that which a comparison of the act with the section of the Constitution shows to be true. This part of the section has, of course, no application to acts that do not purport to revise, amend, or extend another act or law. When the Legislature comes to enact new laws under appropriate titles, its power is not in any manner limited by this provision, and it may act entirely independent of and without reference to it. Of course, many laws that are enacted by the Legislature touch in some way existing laws, either by amending, extending, or repealing them, but, notwithstanding this, the Legislature, by a new act that does not purport in its title or body to amend, revise, or extend an existing law, may, in fact, revise, amend, or extend it, free from the control of section 51, and this has been often done.

In *Purnell v. Mann*, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 284, 20 Ky. Law Rep. 1146, 1396, 21 Ky. Law Rep. 1129, in which was involved the validity of an act of 1898 entitled "An act to further regulate elections," it was insisted that the act was invalid, because it did not conform to section 51 of the Constitution. At the time this act, which made radical changes in the general elections laws of the state, was passed, there was another law in force completely covering the subject of elections, and it was argued that, as the act of 1898 made many radical changes in the existing law, it was, in fact, an amendment to the old law, and should be so treated, and was therefore violative of section 51, because it did not re-enact and publish at length so much of the old law as was revised or amended. But the court rejected this view, saying: "We think the manifest intention was that the provision should apply only to so much of the law as, after passage of the new act, remains in force amended. To construe it otherwise would involve an absurdity, for, while a law, or part of a law, that is repealed, or for which a substitute has been adopted, might be republished, though to no purpose, it certainly was not intended it should simultaneously die and be re-enacted. \* \* \* We have been referred by counsel to a number of cases sustaining Judge Cooley, but need not mention them, because satisfied that republishing of a law then and thereby re-

pealed is not required by section 51 of the Constitution. There is no direct reference made in the act in question to any particular section of the general election law amended or repealed by it, nor do we think section 51 expressly or impliedly requires it done."

Another instance is an act of 1908 entitled "An act for the government and regulation of the common schools of this state." Laws 1908, c. 56. This act made radical changes in the existing school laws of the state, but it did not profess to amend, revise, or extend any existing laws, and therefore did not come within the scope of section 51. *Prowse v. Board of Education*, 134 Ky. 365, 120 S. W. 307. Other examples are found in *Herdon v. Farmer*, 114 Ky. 200, 70 S. W. 632, 24 Ky. Law Rep. 1045, and *Murphy v. City of Louisville*, 114 Ky. 762, 71 S. W. 934, 24 Ky. Law Rep. 1574, in which the ruling of the court in *Purnell v. Mann* was adhered to.

In *Com. v. Reinecke Coal Mining Co.*, 117 Ky. 885, 79 S. W. 287, 25 Ky. Law Rep. 2027, the title of the act considered read: "That section one of an act entitled 'An act concerning the employes and servants in mining work or industry in this commonwealth,' which was received by the Governor March 2, 1898, \* \* \* and became a law at the expiration of ten days without the Governor's approval, be, and the same is hereby, repealed, and the following is enacted in lieu thereof." The objection was made that this act did not comply with section 51, but the court said: "The act of 1902 sets forth in explicit terms that section 1 of the original act is repealed, and that the single section constituting the amendment shall be, and is, substituted therefor. No other section or provision of the original act was amended by the act of 1902, and, as section 1, enacted in lieu of the one repealed, is set out in full—that is, 'published at length'—in the act of 1902, such publication was and is a substantial compliance with section 51 of the Constitution."

It will be observed that in this case the Legislature merely repealed a section of an existing act, and substituted in its place a new section, and it has never been doubted that the Legislature may repeal one or more sections of a law and substitute in their place other sections without incorporating in the new act these repealed sections. This rule was also applied to sections of the Kentucky Statutes in *Ex parte City of Paducah*, 125 Ky. 510, 101 S. W. 898, 31 Ky. Law Rep. 170, where it was said, with reference to a title reading "An act to amend and re-enact section 3140 of the Kentucky Statutes": "When the Legislature amends or repeals a section of the Kentucky Statutes, and the title of the repealing or amendatory act mentions the section affected, the members of the General Assembly can at once conveniently examine the statute and ascertain the nature of the amendment. \* \* \* We therefore conclude that the intention of

the constitutional provision will be fully carried out when the title of an act calls attention to the section or chapter of the Kentucky Statutes to be repealed or amended."

Again, in *Com. v. McNutt*, 133 Ky. 702, 118 S. W. 978, it was urged that an act entitled "An act to amend section 1214 of the Kentucky Statutes" was invalid, because the title was not sufficient, but the court held the title good, as the act set forth section 1214 as it would read when amended.

In *Flynn v. Barnes*, 156 Ky. 498, 161 S. W. 523, the title of the act read, "An act to amend section 4425 of the Kentucky Statutes relative to the examination of teachers for county and state certificates and state diplomas," and, following the *Paducah Case* and the *McNutt Case*, the court said the title was not obnoxious to section 51, holding that the act of 1906 (Laws 1906, c. 29) was a substitute for, and repealed, section 4425. As said by the court: The act "shows on its face an intention not to add words to the existing section, but to change the section so as to make it read as therein set out," and that therefore it was not necessary to re-enact or publish at length the sections that were repealed.

In *Com. v. Burk's Springs Distilling Co.*, 137 Ky. 224, 125 S. W. 806, the title of an act passed by the Legislature in 1908 read: "An act to amend an act entitled 'An act to regulate the sale of intoxicating liquors by wholesale in this commonwealth,' which was approved March 22, 1904, and amended by an act approved March 21, 1906." The act of 1908 in its body did not set out the act that was amended, but it provided that "said act as amended shall read as follows," and then followed the amendatory act. This legislation was assailed upon the ground that it violated section 51. But we said: "The act in question does not purport to amend the acts of March 22, 1904, \* \* \* and of March 21, 1906, \* \* \* by reference to their titles only; but so much of those acts as is amended is re-enacted and published at length."

In *Mark v. Bloom*, 141 Ky. 474, 133 S. W. 203, the title of the act was in these words: "An act to amend the school laws and to create boards of education, and to define their duties in cities of the first class." This act made radical changes in the existing school laws, and the title was held not to offend section 51, because, as said by the court: "The act deals with a subject, the creation of a board of education, and the defining of its duties. The Legislature may select a subject of this sort, and deal with it, in one act without incorporating into the act all the existing laws touching the subject." In other words, the court treated this act as a new law repealing a number of provisions in existing laws, and said that it was not necessary to incorporate into a new law sections of the old law that had been repealed.

In *Bryan v. Voss*, 143 Ky. 422, 136 S. W.

884, the title of the act read: "An act to amend an act entitled 'An act for the government of cities of the second class in the commonwealth of Kentucky,' which was approved March 19, 1894, and thereafter in due course became a law, and as same, has since been amended, all of which said act and amendments now appear as article 3 of chapter 39 of the Kentucky Statutes, in John D. Carroll's Edition thereof in 1909."

The validity of this act was assailed upon the ground that the title violated section 51. But the court, treating the act as one intended to establish a new form of government for cities of the second class in place of the existing form, and as repealing, when it became effective, all previous laws in conflict with it, said that it should be regarded as "if the title to the act had read: 'An act to further regulate the government of cities of the second class.'"

It may be conceded that in *Bryan v. Voss* and in *Mark v. Bloom* the court came near giving its approval to acts the title of which violated section 51, and yet it was careful to recognize in each of these cases the mandatory nature of section 51, and to put its decision upon the ground that the acts in these cases, although purporting to be amendatory, were, in fact, new laws that were intended to, and did, repeal existing laws.

Adopting the view upon which the court in these cases sustained the validity of these acts, they may be well distinguished from the question as presented in this case, because the act of 1910 is not, and did not profess to be, a substitute for the act of 1898, nor did it undertake to repeal, or repeal, any part of that act. It simply amended it by adding to it, leaving the act of 1898 undisturbed, except in so far as it was added to by the act of 1910. It is therefore clear that this act cannot be sustained upon the ground that the acts in the two cases last mentioned were sustained. Indeed, there is no ground upon which this act can be upheld, except the single ground that section 51 of the Constitution does not mean anything.

It was said in argument by counsel on both sides of this case that the decisions of this court in the construction of this section were, in material respects, harmonious, and this statement is, we think, fully supported by the decisions we have referred to, which include all that have been handed down on this subject. Here and there in these opinions there may be found expressions apparently in conflict with expressions in other opinions, and in some of them the acts assailed as violating it were sustained upon one ground, and in others upon another; but running through all of them will be found the determined purpose of this court to enforce substantial compliance with this section, while giving to it a reasonable and liberal construction.

The effect of the decisions, when considered as a whole, is:

[8] (a) That it is not necessary, when the

body of the new act repeals, or has the effect of repealing, all or part of an existing act, to republish or set forth the parts repealed, although the title of the repealing act may purport to be an amendment to the existing act.

[7] (b) That when it is proposed to revise or amend one or more sections of the Kentucky Statutes, or an act, the body of the new act should contain the section or sections as they will read when revised or amended, if it is proposed to re-enact or leave in force any part of the section or sections that are amended or revised. If, however, it is intended to repeal one or more sections, then it is not necessary to set forth in the body of the act the section or sections repealed.

[8] (c) That when the act does not purport to be an amendment to an existing law, but a new act, it is not necessary to set out or republish any part of any old law that may be changed or repealed by the new law.

[9] (d) When the new act purports to amend an existing act by extending, revising, or amending it, and no particular section or part of it is specified, then the body of the new act must set forth the whole of the existing act as it will appear when extended, revised, or amended; but, if only a section or several sections of an act are extended, revised, or amended, it is only necessary to specify and republish the section or sections that are extended, revised, or amended.

[10] (e) That, when it is desired to confer or carry into a new law provisions of an old law, then so much of the old law as is thus conferred or carried into the new law must be published at length.

These very liberal rules, gathered from the opinions, cover, as we think, every aspect in which the construction of that part of section 51 now under consideration can be presented, and the act in question cannot be sustained under any of them. It purported to, and did, amend another act by its title—not republishing any other part of it—without specifying the part proposed to be amended, and without repealing, or intending to repeal, any part of the act that was amended.

Passing now, for a moment, to the reasons why this provision was inserted, it will be noticed that the section uses the words "revised, amended, extended or conferred," and the purpose of using these words, when perhaps fewer would have answered, was to make plain the meaning and purpose of the section, and to make sure that no evasion of its provisions could be resorted to. If only the word "amended" had been used, it might be said that the extension of a section was not an amendment to it; or that the revision of a law by correcting it was not an amendment, however little foundation there might be for assertions like these. And so, too, the use of these several words can be better understood by one who has taken occasion to look through the acts of the Legislature previous to the adoption of the present Con-

stitution. In these acts will be found numerous laws that were revised, amended, and the provisions thereof extended or conferred by a mere reference to the title of some other act. For example, it was a common practice to create a private corporation and merely provide that it should be vested with all the powers and privileges and rights and liabilities conferred on similar corporations, or on some like corporation named in the act, without attempting to set forth in the act the powers or privileges or rights or liabilities of the corporation created, or that were conferred on it by the reference to the other corporation.

The word "conferred" can be found in great numbers of these local acts in which was conferred upon the corporation created the powers and privileges of some other corporation. Under the legislative custom, recognized as legitimate and upheld as lawful under the old Constitution, it was also a common practice to amend or revise sections of existing laws by adding certain words to the existing law, or by repealing certain words in the existing law, and to extend the provisions of an existing law by adding to it certain words or certain sections, without, in any instance, setting forth the law as it would appear when thus amended or revised.

It can readily be seen that, under this practice, no person, by reading an act the provisions of which had been extended or conferred in the manner indicated, could obtain any idea of the meaning or effect of it, without reading it in connection with the old law the provisions of which had been carried into the new law, by reference to the title of the old law; nor could any person, by reading an old law that had been revised or amended, by adding to it certain words or taking from it certain words, understand the meaning and effect of the old law without reading it in connection with the new one that amended or revised it in this manner. And it was largely to prevent this deceptive and misleading manner of legislating, which afforded so many opportunities for fraud, as well as to make the laws more convenient and accessible, that this section was adopted. As aptly said on this subject by Mr. Spalding, the chairman of the legislative committee, in volume 3, p. 3792, of the Debates of the Constitutional Convention: "The members of the General Assembly did not know what they were voting for half the time, and this section in the report provides when an act is amended it shall not be amended in that way, but that the act, as amended, shall be set out in full, so every man will understand what it is when voting on it, and the people will know what change has been made when they see it."

This was the whole purpose of this provision in the Constitution, and that it is a wise provision is not open to doubt. When any person, lawyer or layman, takes up an

act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act, and so the convenient and the proper way to revise or amend an old law, by either adding to it or taking from it, or extending its provisions, is to set forth in the new act the law as it will read when revised, amended, or extended. It is not, however, indispensable that the old law, as it read before being revised, amended, or extended, should be also set forth, although it would manifestly be more convenient if this were done, so that the new law would show not only the old law, but the changes that were made in it by the new one.

With these expressions of our views, it follows that the judgment of the lower court must be reversed, with directions to dismiss the petition, and it is so ordered.

#### BANK OF TAYLORSVILLE et al. v. VANDYKE et al.

(Court of Appeals of Kentucky. May 26, 1914.)

##### 1. TRUSTS (§ 134\*)—CONSTRUCTION—ESTATE OF TRUSTEE.

Upon a devise of real property to a son, in trust for the support and maintenance, during his life, of his wife and children, the son to have the use, occupation, and control of the property during such time, and to apply the profits for such purpose, and none other, at his discretion, without bond of any kind, the trust to end at his death, and the property to descend to his heirs per stirpes, the trustee, aside from his use and control of the property, had no other interest.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. § 134.\*]

##### 2. TRUSTS (§ 151\*)—CONSTRUCTION—INTEREST OF CESTUI QUE TRUST—LIABILITY TO DEBTS.

In such case the interest of a beneficiary was not liable to the claims of his creditors, unless such interest was separable from the interest of other beneficiaries, or unless the creditor could show that the amount provided was more than adequate for his suitable maintenance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. § 151.\*]

##### 3. TRUSTS (§ 147\*)—CONSTRUCTION—INTEREST OF BENEFICIARY.

In such case, where a beneficiary, during the life of the trustee, assigned all his property for the benefit of creditors, and the trustee purchased at the assignee's sale, and the beneficiary and his wife, who had a one-fourth interest in the trust property, signed a deed describing his interest as a one-fifth interest, he retained no interest that his creditors might subject to their claims; since the transaction conveyed his entire interest to the purchaser, and since, if it did not, it was owned by the assignee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. § 147.\*]

##### 4. WILLS (§ 634)—CONSTRUCTION—INTEREST OF DEVISEE—CONTINGENT REMAINDER.

Under a devise of real property to a son in trust for the support, during the son's life,

of his wife and children, the son to have the use and control of the property for such purpose, and none other, at his discretion, without security of any kind, and at his death the trust to end, and the property to descend to his heirs per stirpes, a beneficiary took a contingent remainder, subject to be defeated only by his death before that of the trustee, and which, on his survival of the trustee, was converted into a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

##### 5. REMAINDERS (§ 14\*)—CONTINGENT REMAINDER—CONVEYANCE.

A contingent remainderman has the right to convey his interest.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Spencer County.

Suit by the Bank of Taylorsville and others against John A. Vandyke and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

L. W. Ross, of Taylorsville, for appellant Bank of Taylorsville. J. M. Crume, of Taylorsville, and Benedict Elder, of Louisville, for appellant Hardesty. Edwards, Ogden & Peak, of Louisville, for appellee Abe Vandyke. Willis, Todd & Bond, of Shelbyville, for appellee Carpenter. Samuel K. Baird, of Taylorsville, for appellees Geo. Vandyke's executor and Thomas Vandyke.

CARROLL, J. This case involves the construction of the will of A. Vandyke, who died testate in March, 1883, and especially the second item thereof. The testator had several children, among them George A. Vandyke, and in the second clause of his will he said: "I hereby will and devise to my son, George A. Vandyke, in trust for the support and proper maintenance during his life of his wife and children, my home farm lying in Spencer county, state of Kentucky, on the Taylorsville & Waterford road about two miles from Taylorsville, and being the same farm upon which said George now resides under a lease from me, and containing about 430 acres, more or less. Said George, as trustee, to have the use, occupation, and control of said premises during said time, and the profits thereof to be used for the purposes aforesaid, and none other, at his discretion. I hereby release him from any rents which may be due me at my death for the rent of said farm. No security of any kind is to be required of said George as trustee as aforesaid, and at his death the trusteeship is to end, and said land I direct shall then descend to his heirs per stirpes."

George A. Vandyke had four sons and one daughter, but one of his sons died intestate and without issue before the death of George, who died in 1912, leaving surviving him his daughter and three sons, one of whom was John A. Vandyke. During the life of his father, John A. Vandyke became involved financially, and made an assignment of all of his property for the benefit of his credi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tors, and his assignee, before the death of his father, sold whatever interest John had in the 430 acres of land mentioned in the will of his grandfather. At this sale by the assignee, George A. Vandyke, the father, became the purchaser of this interest, and John Vandyke and his wife joined in the deed made by the assignee to him. George Vandyke left a will by which he gave to the children of John A. Vandyke one-fourth of his estate, not leaving anything to their father.

After the death of George Vandyke, the Bank of Taylorsville and other creditors of John A. Vandyke brought this suit, in which they sought to subject to the payment of their debts the interest of John A. Vandyke in the estate of his grandfather, proceeding upon the theory that, under the will of George A. Vandyke, John A. Vandyke took no estate in the land that he could dispose of before the death of his father, and therefore neither the deed of assignment nor the deed subsequently made by him to his father in connection with the assignee, conveyed any interest in the land, and, this being so, J. A. Vandyke, upon the death of his father, came into the title under the will of A. Vandyke of an interest that could be subjected by these creditors.

It further appears that although John A. Vandyke conveyed all the estate he had, including his interest in this land, to the assignee, that when the assignee and John conveyed John's interest in the land to his father, George, that the deed described the interest of John as a one-fifth interest in the land, when, in fact, at that time his interest was one-fourth, as there were then only four children of George living, and so it is said that in any event George owned, at the death of his father, five-twentieths of the land, and this interest the creditors had the right to subject.

It is further set up that George A. Vandyke had never rendered an account as trustee, and they prayed for an accounting by him, and that John's share in the proceeds of the farm, if any remained, be adjudged to them.

On hearing the case, the lower court adjudged that: "John A. Vandyke took a contingent remainder under the will of A. Vandyke in the tract of land described in the petition; that he thereafter conveyed his interest therein to W. P. Beard, assignee, for benefit of the creditors; that the said W. P. Beard, assignee, conveyed said interest to George A. Vandyke; and that said George A. Vandyke died seised of said interest, to wit, an undivided one-fourth interest in said land. The court further adjudges that Wade Vandyke, he having died before his father, George A. Vandyke, took nothing under the will of A. Vandyke. It is therefore adjudged that the defendant John A. Vandyke has no interest in the land described in the petition, and that the petition be dismissed."

From this judgment, the creditors appeal.

[1, 2] We think the testator intended to, and did, by the second clause of his will give to George A. Vandyke during his life, for the support and maintenance of not only himself, but his wife and children, the land therein described. At the death of George A. Vandyke the trusteeship was to end, and the land to descend to his heirs per stirpes, but during his life George, as trustee, had full discretion to use and control the estate in execution of the trust, but he had no other or larger estate in the land. It is very evident that the testator intended by this clause to make provision for his son George and his wife and children during the life of George, and whatever income was derived from the estate the trustee had the unqualified right to devote to the purposes of the trust, which was the support and maintenance of himself and his wife and children.

This provision of the will is very similar to a provision in the will of B. C. Hackett construed by this court in *Hackett v. Hackett*, 146 Ky. 408, 142 S. W. 673. In that case, as appears from the opinion, the creditors of the beneficiaries of the trust sought to subject their interest, but it was said: "A number of cases may be found in which it has been held that, where the interest of one of several beneficiaries of a trust is separable from the interest of other beneficiaries, it may be taken for his debts. Such was the doctrine announced in *Stevens v. Bakrow*, 104 Ky. 181 [46 S. W. 686, 20 Ky. Law Rep. 465], and *White v. Thomas, Trustee*, 8 Bush, 661. There are yet other cases which hold that an income given in trust for the cestui's support cannot be reached by creditors, and thus diverted from the purpose for which it has been set apart, unless the creditor who seeks to subject it to his claim can show that the amount provided is more than adequate for the suitable maintenance of the beneficiary. But this case does not fall within either of these rules, for the interests of Jacob and T. B. Hackett are not separable from those of the other cestuis que trust, nor does it appear that the income or profits derivable from the land devised either of them is more than sufficient for the support of his wife and children. Indeed, it is alleged in their answers and in that of the guardian of the children that there are no profits arising from the lands over and above what is necessary for the support of the wives and children, and these averments of the answers are not denied."

Adopting the views of this opinion, it disposes of the claim of the creditors that they had the right to require George Vandyke, as trustee, to settle his accounts and to subject to their debts any surplus in his hands that might be due to John A. Vandyke, as it does not appear from the record that the trustee had any surplus or indeed any estate in his possession to which John A. Vandyke was entitled. As said in the *Hackett* or

ion, there are cases in which an income given in trust for the support of the cestui que trust could be reached by his creditors, but the record does not bring the case we have within the exceptions to the general rule. The income of the estate placed in the hands of George, as trustee, was set apart to be applied for the use of all of the beneficiaries, or such of them as George, in the exercise of a reasonable discretion, might see proper to devote it, and it does not appear that the income was larger than was needful for the purpose intended. He was not obliged to distribute the income equally between them or to save any part of the income, but had the right to use all of it for all of them or part of them, in his sound discretion. None of the beneficiaries had a distinct or severable interest that could be subjected to the payment of his debts, and there was no surplus. This disposes of so much of the claim of the creditors as asked an accounting.

[3] Nor do we think the error in the deed made by the assignee and John Vandyke to George Vandyke, conveying to him the interest of the assignee and John, left John the owner of any interest in this estate that the creditors might subject. John Vandyke conveyed all his right, title, and interest in this land to his assignee, and it was plainly the purpose of the assignee and John to convey all of it to George Vandyke as purchaser from the assignee. It is true that, at the time the deed was made by the assignee to George Vandyke, John had a one-fourth, not a one-fifth, interest in the land, while their deed only conveyed to George a one-fifth interest. But this error, which was merely in a description of the estate, should not, under any rule of construction that we are acquainted with, be held to deprive George of the interest that it was intended to convey to him by the assignee of John A. Vandyke. Possibly the error in the deed to George Vandyke should have been corrected in a proper proceeding, but it would be mere trifling with the substance of the transaction to say that, under the circumstances of this case, John A. Vandyke had some interest in this land that the exact words of the deed made by himself and the assignee did not embrace.

But, if the view of counsel for the creditors should obtain, this unconveyed interest is not owned by John, but by his assignee, because unquestionably he conveyed to his assignee all of his interest in the estate, and, if the assignee by inadvertence failed to convey to the purchaser all the interest that George had in the estate, or the whole of the interest purchased, the title of what was not conveyed would remain, of course, in the hands of the assignee for the satisfaction of the trust. So that, looking at the matter from any standpoint, John has no interest growing out of this mistake that the creditors can subject.

[4, 5] The remaining question, and the principal one argued by counsel for the creditors,

relates to what estate John A. Vandyke took under the will of A. Vandyke, and whether it was a vendible estate or not. This question has been settled in more than one case, and is therefore free from difficulty. In *White's Trustee v. White*, 86 Ky. 602, 7 S. W. 28, 9 Ky. Law Rep. 757, the deed under which the controversy arose read: "To the grantee Elizabeth Taylor for and during her natural life, with all the rents and profits thereof, to be held and enjoyed by her, and at her death to the grantee Lucy Ann White (should she survive Elizabeth) for and during her life, free from all control or liability of every kind of her husband, except the right to a house with the family during his life, which is secured to said R. J. White, Sr., and at the death of both of said grantees, Elizabeth Taylor and Lucy Ann White, to vest in fee simple in the children of Lucy Ann White then living, and the representatives of such as may be dead, in equal parts." R. J. White, Jr., was one of the five living children of Lucy Ann White. He made a deed of assignment for the benefit of his creditors, and the assignee sought to sell, for the benefit of the trust, the one-fifth interest that R. J. White, Jr., owned in the land described in the deed. The lower court held that the interest of R. J. White was that of a contingent remainder, and therefore, as the life tenant was alive, could not be sold; but this court, in holding that R. J. White took a contingent remainder in the land, and as he conveyed all of his estate to his assignee, held that the lower court should have ordered the sale of his undivided one-fifth interest in the land, saying: "The distinction between a vested and contingent remainder is that in the former the interest must vest immediately, but the right to the enjoyment of the property is made to depend on some future event; in the latter, the interest does not vest immediately, but is made to depend upon some uncertain future event. Here no interest in the land vests in the children of Lucy Ann White, except such as may be living at the time of her death. It is clear, therefore, that R. J. White's interest in said land is that of a contingent remainder." To the same effect is *Williamson v. Williamson*, 18 B. Mon. 329.

In *Leppes v. Lee*, 92 Ky. 16, 17 S. W. 146, 13 Ky. Law Rep. 817, the court, quoting with approval the *White Case*, said: "But, while a contingent interest may be conveyed or devised, \* \* \* yet, if the grantor or deviser dies before it becomes effective, and no estate has ever vested in him, the grantee or devisee takes nothing. No right having ever vested in the deviser or grantor, nothing passes. It is merely a devise or grant that may become effective if the devise to him becomes so; and, this never having taken place in this case, it results that the appellant has no right to any part of the estate in contest." To the same effect is *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160.



In *Grayson v. Tyler*, 80 Ky. 358, it appears from the opinion that Frederick Grayson died leaving a will by which he made a devise to his wife and mother of portions of his estate during their respective lives, and upon their death the residue was to be divided among his nieces and nephews "then living, that are now, or may before that time be born." One of the nephews, John C. Grayson, during the life of the wife and mother, sold to John W. Tyler all his interest in the estate. After this John W. Tyler and the wife and mother died, and John C. Grayson sought to recover the interest that he had sold to John W. Tyler during the life of the wife and mother, upon the ground that at the time of the sale to John W. Tyler he had no interest that could be the subject of a sale, as his right to an interest depended upon his surviving the life tenant. It was further insisted that a contingent remainder was not capable of alienation, where the person who is to take it is not ascertained, or because the remainder may be defeated before it becomes vested. The court, in rejecting the claim of Grayson, said that the only contingency upon which his right to the interest in the land could be defeated was by dying before the life tenant. That he had an interest in the estate under the will that nothing could defeat, so far as he was concerned, but the happening of the contingency of his death before that of his mother.

In *McAllister v. Ohio Valley Banking & Trust Co.*, 114 Ky. 540, 71 S. W. 509, 24 Ky. Law Rep. 1307, McAllister made a general deed of assignment for the benefit of creditors, and, at the time the deed was made, owned an interest in a tract of land depending upon the contingency of the life tenant dying without heirs of his body. When this

happened, the assignee sought to subject this interest, upon the ground that it had passed to him under the deed of assignment. The court held that McAllister took a contingent remainder in the land that was the subject of sale, and that, although the deed of assignment did not specifically mention this contingent remainder, it passed under the deed to the assignee. To the same effect are *Davis v. Willson*, 115 Ky. 639, 74 S. W. 606, 25 Ky. Law Rep. 21; *Campbell v. Hinton*, 150 Ky. 546, 150 S. W. 676.

Under the authority of these cases, John A. Vandyke took a contingent remainder, subject to be defeated only by his death before that of George A. Vandyke. And this contingent remainder John A. Vandyke had the right to, and did, convey to his assignee. As John A. Vandyke survived George, upon the death of George this contingent remainder was converted into a fee, and this fee, being owned by George at his death, passed under his will, which excluded John A. Vandyke from participation in his estate.

The judgment is affirmed.

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#### TURNER v. JOHNSON'S EX'RS.

(Court of Appeals of Kentucky. May 15, 1914.)

Appeal from Circuit Court, Montgomery County.

Action between Anna May Turner and Thomas Johnson's Executors. From a judgment for the latter, the former appeals. Affirmed.

John A. Judy, of Mt. Sterling, for appellant.  
W. B. White, of Mt. Sterling, for appellees.

MILLER, J. The judgment in this case is affirmed by an equally divided court.

TURNER, J., not sitting.

STATE ex rel. CAVE, Pros. Atty., v. TINCHER, Probate Judge. (No. 18005.)

(Supreme Court of Missouri. May 4, 1914.)

1. INFANTS (§ 66\*)—CAPACITY—CRIME.

A child over 7 and under 14 years of age is prima facie incapable of crime.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 172; Dec. Dig. § 66.\*]

2. STATUTES (§ 93\*)—SPECIAL LAWS.

Laws 1913, pp. 148-154, giving the probate court in counties of less than 50,000 inhabitants jurisdiction to provide for the care and control of delinquent children under 17 years of age, is not special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.\*]

3. PARENT AND CHILD (§ 2\*)—PARENTAL CONTROL—RIGHT.

While the parent has a natural right of control, it is not inalienable, and, even in absence of statute, courts of equity may place children under guardianship.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

4. INFANTS (§ 12\*)—DELINQUENT CHILDREN—CONTROL BY STATUTE.

The state as parens patriæ may promote the well-being of persons of defective understanding or delinquents, or those who are burdened with other misfortunes or infirmities so as to be unable to care for themselves, and the constitutional limitations will be so construed, if possible, to permit such supervision by the state.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. § 12.\*]

5. CONSTITUTIONAL LAW (§ 274\*)—INFANTS (§ 12\*)—DUE PROCESS OF LAW—CONTROL OF DELINQUENT CHILDREN.

Laws 1913, pp. 148-154, giving the probate court in counties of less than 50,000 population jurisdiction to provide for the care and control of delinquent children under 17 years of age, is not an invasion of personal right or a denial of due process of law in that it interferes with the parental right of control of children.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 726; Dec. Dig. § 274.\* Infants, Cent. Dig. § 18; Dec. Dig. § 12.\*]

6. COURTS (§ 1\*)—JURISDICTION—ENLARGEMENT.

Where the jurisdiction of the court is defined by the Constitution, the Legislature cannot ordinarily diminish, enlarge, or interfere with such jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1-4, 6-9, 91-106; Dec. Dig. § 1.\*]

7. COURTS (§ 199\*)—JURISDICTION—PROBATE COURTS—ENLARGEMENT.

Notwithstanding that the powers of the probate courts are defined by the Constitution, the Legislature may add to such powers, provided the additional powers conferred apply alike to all probate courts in the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 470; Dec. Dig. § 199.\*]

8. STATUTES (§ 93\*)—JURISDICTION—PROBATE COURTS.

Laws 1913, pp. 148-154, conferring on probate courts in counties of less than 50,000 inhabitants jurisdiction to provide for the control of delinquent children under 17 years of age, is objectionable as conferring upon probate courts in such counties powers not given alike to all probate courts by the constitutional provisions

defining the jurisdiction of probate courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.\*]

9. INFANTS (§ 12\*)—CONTROL OF DELINQUENT CHILDREN—VALIDITY OF STATUTES—"DELINQUENT CHILD."

Laws 1913, pp. 148-154, confers on probate courts in counties of less than 50,000 inhabitants jurisdiction to provide for the control of delinquent children under 17 years of age. Section 2 defines a "delinquent child" as one which "violates any law of this state" except those punishable by death or imprisonment in the penitentiary. Section 3 permits any reputable person residing in the county and having information of a child who appears to be neglected or delinquent to file with the clerk of the probate court a verified petition stating the facts, which may be on information and belief. Under sections 4, 5, and 6, upon the filing of such petition a summons is issued, and the subsequent proceedings are similar to those authorizing the appointment of guardians for minors; and there is no provision for the filing of an information or the finding of an indictment against the delinquent according to the process of criminal law. Held, that that statute was invalid as attempting to include within its scope strictly criminal offenses without requiring the constitutional procedure in prosecutions for public offenses, such as the filing of an information or indictment, as required by Const. art. 2, § 12.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 13; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1956A.]

10. INFANTS (§ 16\*)—DELINQUENTS—INDICTMENT.

The indictment or information required by Const. art. 2, § 12, must be such a one as is contemplated by the common law, viz., an indictment found and presented by a grand jury or an information filed by a public officer authorized to prosecute criminals.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

11. INFANTS (§ 12\*)—DELINQUENTS—CONSTITUTIONALITY OF STATUTE—TRIAL—DEFENSE BY COUNSEL.

Laws 1913, pp. 148-154, defining a delinquent child as one "who violates any law of this state" except those punishable by death or imprisonment in the penitentiary, and authorizing the probate court in proceedings to commit a delinquent child to hear the case in a summary manner and examine witnesses without the assistance of counsel, violates Const. art. 2, § 22, entitling an accused to appear and defend in person and by counsel and to meet the witnesses face to face, etc.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 13; Dec. Dig. § 12.\*]

In Banc. Appeal from Circuit Court, Callaway County; David H. Harris, Judge.

Mandamus by the State, on the relation of Cave, Prosecuting Attorney, against J. W. Tinch, Probate Judge. From a judgment denying the writ, relator appeals. Affirmed.

John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen. (S. P. Howell, of Jefferson City, of counsel), for appellant. J. R. Baker, of Fulton, for respondent.

WALKER, J. Mandamus to compel the probate court of Callaway county to assume jurisdiction and hear and determine a charge

of petit larceny against a boy of the age of 12 years.

The prosecuting attorney of Callaway county filed in the circuit court an information charging a boy of the age of 12 years with the crime of petit larceny. Upon the case being called in the circuit court for trial, the judge of said court, in accordance with the provisions of section 7, p. 152, Laws of Missouri 1913, ordered the same transferred to the probate court for hearing and determination. The judge of said court refused to docket the case or make any disposition of same. By petition the prosecuting attorney submitted these facts to the circuit court, which issued an alternative writ of mandamus directing the probate judge to assume jurisdiction and docket, hear, and dispose of the charge against said minor, or show cause why he should not comply with such order. The probate judge in his return admitted that he had refused to obey the order of the court, and alleged as a reason therefor that the act in which said section 7 appears, entitled "An act conferring jurisdiction on probate courts in counties of less than 50,000 inhabitants and providing for the care and control of children under seventeen years of age, who are delinquent," etc. (Laws Mo. 1913, pp. 148-154), was violative of certain sections of the Constitution set out in the return, and therefore void. The circuit court sustained the contentions of the probate judge, and refused to grant a peremptory writ, from which ruling the prosecuting attorney, complying with the formal procedure in regard thereto, appealed to this court.

The act in question is declaratory of the original and exclusive jurisdiction of probate courts, in counties of less than 50,000 population, over neglected and delinquent children. Jurisdiction once acquired is to continue until the child attains its majority. Within the designated classes are included every offender under 17 years of age, from the actual criminal to those guilty of evil associations, or improper conduct or conversation. Those excepted from the provisions of the act are children who are inmates of state institutions, or those now in institutions incorporated under the laws of the state, and children charged with offenses punishable by death or imprisonment in the penitentiary.

Regardless of the nature of the offense with which the child may be charged, within the limitations above stated, any reputable person who has knowledge of same, and who is a resident of the county, may file a petition verified by affidavit, with the clerk of the probate court, setting forth the facts in regard to such child, which affidavit may be on information and belief. A summons shall thereupon issue, requiring the child or the person having it in custody to appear within the next 24 hours after service or as directed by the court. The parent or guardian is also to be notified to attend, and upon fail-

ure to do so he may be proceeded against as for contempt. A summary hearing is thereupon had by the court in the absence of counsel, and provision is made in regard to costs. If the child be adjudged neglected or delinquent, the court proceeds to provide for its future care and custody. When a child is arrested with or without a warrant, it is to be taken before the judge of the probate court, and, while courts and magistrates may issue warrants for children, the subsequent proceedings must be before the probate court. Appeals are authorized to be taken, presumably to the circuit courts, but the act is silent in this regard. County courts are required to provide places of detention for children within the provisions of the act. The probate court is authorized to appoint a probation officer to serve under the direction of the court, and the board of charities and corrections is required to approve of the appointment of probation officers. The powers, duties, etc., of probation officers are defined, and county and municipal officers are required to lend their assistance to further the objects of the act. When a probate court takes a child from its parents, the ability of the latter to support the child may be inquired into, and, if found able, the court may order the parents to support the child or contribute thereto. Laws in regard to the Girls' Industrial Home and the Boys' Training School are declared not repealed by this act. The court is empowered to formulate and publish rules and regulate the proceedings necessary to the enforcement of the act, and the county is to pay the expenses of same. Lastly, it is provided that the act is to be liberally construed.

The foregoing presents the principal provisions of the act by the terms of which jurisdiction is conferred on probate courts over neglected and delinquent children in the counties designated; such sections as are necessary to be considered in discussing the validity of the act will be particularly referred to in the opinion.

[1] I. The legislation exemplified by the act in question may not only be characterized as progressive, but humanitarian as well. In effect, it extends the rule as to an infant's irresponsibility for crime from 14 to 17 years of age, except as to offenses punishable by death or imprisonment in the penitentiary. While the rule has long prevailed that a child over the age of 7 and under 14 years is prima facie presumed incapable of committing crime (*State v. Adams*, 76 Mo. 355; *Martin v. State*, 90 Ala. 602, 8 South. 858, 24 Am. St. Rep. 844; *Hellman v. Comm.*, 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; *Carr v. State*, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *State v. Yeargan*, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196), under the administration of the criminal laws of England, within the last century, children have been hanged for what we now regard as trivial offenses. Earlier, under the rigor-

ous enforcement of the law by Coke, Scroggs, Sawyer, Jeffries, Saunders, et id omne, as evidenced by those chronicles of cruelty, the reports of the Court of King's Bench and others having jurisdiction in criminal cases, there were more than 200 offenses punished capitally, and the law made no distinction between offenders of tender years and the most hardened criminals. The far cry, therefore, between the present statutes in regard to juvenile offenders and those records of barbarism affords ample reason and excuse for contrast and comment by the student of jurisprudence.

In accord with the general forward movement towards a better citizenship, especially evident during the past decade, legislation, usually last to respond to the spirit of progress, manifests a marked change in its attitude towards children; they are no longer regarded as criminals to be punished without effort at reformation and after their detention to continue as menaces to society, but as wards to be aided, encouraged, and educated, that they may, in the language of the ledger, become assets instead of liabilities.

[2, 3] Courts, not unmindful of the underlying spirit prompting modern legislation in regard to juvenile offenders, have, wherever it has been possible to do so, without violating the cardinal canons of construction, upheld laws of this character. An apt illustration in this regard is to be found in our own reports. In *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508, this court sustained a statute in regard to neglected and delinquent children in counties of 150,000 inhabitants and over; the ruling being confined, however, to the title of the act and that same was not a special or local law. This case may properly be regarded as an authority in support of the conclusion that the act in question is not special legislation. Further, it may be contended that the natural rights of parents in the care, control, and education of their children cannot be interfered with by the state; but if it be shown, as it is required to be in the act under consideration, that parents are corrupt, immoral, or otherwise incompetent, the state, which has a paramount interest in the proper personnel of its members as citizens, may, where it is found necessary, regulate their conduct in this regard. *Comm. v. Fisher*, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; *Ex parte Grouse*, 4 Whart. (Pa.) 91. This power, exercised without abuse, is held to be a legal and just restriction upon personal liberty required on account of the welfare of the community. *Re Ferrier*, 103 Ill. 387, 42 Am. Rep. 10; *Roth v. House of Refuge*, 31 Md. 329; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388. While the right of parental control is a natural, it is not an inalienable, right, and even in the absence of a statute the power of courts of equity to place children under guardianship has been exercised

from time immemorial. *Home of Friendless v. Berry*, 79 Mo. App. 566; *Wis. Indus. Schl. v. Clark Co.*, 108 Wis. 651, 79 N. W. 422; *Wellesley v. Wellesley*, 2 Bligh, N. R. 142. In the last case Lord Redesdale said that the right of a chancellor to exercise this power had not been questioned in 150 years.

[4] The conclusion is therefore authorized that the state in its character of *parens patriæ* may provide for the comfort and promote the well-being of not only infants but persons of defective understanding, or so burdened with other misfortunes or infirmities as to be unable to care for themselves. So important is this governmental function that the limitations of the Constitution are to be so construed, if possible, as to not interfere with its legitimate exercise. *Jarrard v. State*, 116 Ind. 98, 17 N. E. 912; *Ex parte Ah Peen*, 51 Cal. 280; *McLean County v. Humphreys*, 104 Ill. 378; *Re John Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886.

[5] From the authorities cited and many others of like character, omitted to avoid further incumbering this opinion, these conclusions may be deduced: That acts of the character of the one under discussion, if properly entitled, cannot be classed as special legislation, do not constitute an invasion of personal rights, and are not a denial of due process of law.

[6] II. An equally important question, however, remains for solution in regard to the manner in which the power attempted to be conferred, under the act in question, is to be exercised. No aid is to be derived from the judicial interpretation of the two earlier acts (now articles 6 and 7, c. 35, R. S. 1909) in regard to juvenile courts and offenders, because in each the power of enforcement is lodged in the circuit or criminal courts which have general jurisdiction of offenses (sections 1, 22, 31, art. 6, Con. Mo.), while in the act under review probate courts are empowered to enforce it; the first section of the act providing that: "In all counties of less than 50,000 population, the probate court or judge thereof in vacation shall have original and exclusive jurisdiction of all cases coming within the \* \* \* provisions of this act." *Laws 1913*, p. 149. The effect of the act is to transfer the jurisdiction of offenses committed by minors under 17 years of age, other than those punishable by death or imprisonment in the penitentiary, from the circuit and criminal courts to the probate courts. In view of the fact that the general jurisdiction of the latter courts is fully and completely defined by the Constitution and the purpose of their creation is foreign to the enforcement of the criminal law, the question may well arise as to whether the attempted extension of their jurisdiction is authorized. The general rule being that where a court is established and its jurisdiction is specifically defined by the organic law, the Legis-

lature is powerless to diminish, enlarge, transfer, or otherwise infringe upon the powers thus conferred. For example, it is held by the Supreme Court of Michigan (*Allen v. Cir. Judge*, 87 Mich. 474) that, where jurisdiction is conferred on certain courts by the Constitution, they are, beyond the reach of legislation; and in New Jersey the Court of Errors and Appeals holds (*Flanigan v. Guggenheim*, 63 N. J. Law, 647, 44 Atl. 762) that where the Constitution (section 1, art. 7, Con. N. J.) guarantees the integrity of certain courts of which the Supreme Court is one that whatever power this court had or jurisdiction it exercised at the date of the adoption of the Constitution was by such adoption incorporated into the organic law and thereby insured against destruction or abridgment except through a change in the Constitution itself, that to abolish the court or alter its organic character is beyond legislative power.

In North Carolina (*Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880; *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57) it is held that, while the General Assembly may allot and distribute such power among the courts as does not pertain to the Supreme Court, it has no power to deprive the judicial department of any jurisdiction conferred by the Constitution. See, also, 11 Cyc. p. 706, where the general rule is announced and cases cited.

The Supreme Court of Florida (*Ex parte Cox*, 44 Fla. 547, 33 South. 509, 6 L. R. A. 734), in discussing the right of that court to review by writ of error a judgment in a habeas corpus proceeding, said: "The Constitution of this state in organizing the judiciary thereof has assigned to each court created thereby certain jurisdiction therein designated, and has provided that the Legislature may give to certain of these courts additional jurisdiction. Where no such provision is made in the Constitution, the Legislature cannot confer upon one of these courts jurisdiction."

The following recent cases from our own reports contain rulings illustrative of the limitations placed by the Constitution upon legislation:

In *Redmond v. Railroad*, 225 Mo. 721, 731, 126 S. W. 159, it is held that the General Assembly has no authority to enact a statute (as is attempted in Laws 1903, p. 200) providing that "the probate court shall have no jurisdiction to inquire into the insanity of any person who is the owner of no property," for the reason that the Constitution vests the probate court with general power to appoint guardians for insane persons; and that, where such general power is conferred, the General Assembly is not authorized to prescribe the manner in which it is to be exercised.

In *State v. St. L., I. M. & S. Ry. Co.*, 253 Mo. 642, 162 S. W. 144, in which a statute was construed providing that certain penal-

ties imposed on railroad corporations should be paid into the good roads fund instead of the county school fund, it was held that such act was invalid as being in contravention of that provision of the Constitution which provides that all penalties shall belong to the county school fund. Bond, J., speaking for the court in this case, says: "The clear proceeds of all penalties and forfeitures shall belong to the county public school fund. Article 11, § 8, Con. Mo. Unquestionably the attempted diversion of any such penalties or forfeitures by the Legislature would nullify the act, if it was passed for that sole purpose; for, the Constitution having spoken as to the proper receptacle of such funds, the power of the Legislature to speak in a contrary way is stilled and ceases to exist until the constitutional provision shall be amended or abrogated. It is evident that so much of the penalty clause of the act under review, as purports to create a penalty payable to the good roads fund, is void."

In *Board of Com'rs v. Peter*, 253 Mo. 520, 161 S. W. 1155, in construing an act of the General Assembly (Laws 1911, p. 130, § 8, amended by Laws 1913, p. 143 et seq.), providing for the establishment of public tuberculosis hospital districts in certain counties, this court, speaking through Lamm, C. J., held that the taxing power of the General Assembly was limited under section 1, art. 10, of the state Constitution, to state, county, and municipal purposes; that a hospital district could not be held to be a municipal corporation, and hence the Legislature was not authorized in attempting to confer taxing power on same. The rate of taxation provided for by the act was found to exceed the constitutional limit, and the act was also held invalid on this account.

These cases, while aptly illustrative of the application of the general rule in regard to the limitations placed by the Constitution upon legislation, do not, except in the *Redmond Case*, supra, have particular reference to the jurisdiction of courts as defined by the organic law. The rule, however, was by clear implication approved in *Vall v. Dinning*, 44 Mo. 210, construing an act of the Legislature which authorized a contestor for the office of circuit judge to institute an original proceeding in the Supreme Court to determine the issue. Wagner, J., speaking for the court, said: "In the first place, \* \* \* the jurisdiction of this court is defined and limited by the Constitution. It has such powers and jurisdiction as the Constitution has conferred upon it—no more, no less. It cannot shirk any duty imposed on it by the organic law, nor can it extend its powers to take cognizance of any matter not within the scope of its limited authority. The Legislature can neither add to nor diminish its rightful jurisdiction. That body can invest it with no jurisdiction when it is not given by the Constitution, nor can they deprive it of its ar-

pellate jurisdiction." The doctrine here announced was approved in *State ex rel. v. Flentge*, 49 Mo. 488, in which the court held that the Legislature was not authorized to enact a law subjecting clerks of courts to trial in the Supreme Court for misdemeanors in office. By parity of reasoning it would seem that this rule should apply with equal force to any other constitutional court whose powers are therein definitely defined as is the case in regard to probate courts. Section 34, art. 6, Con. Mo.

It may be contended, however, that as the Constitution, in defining the jurisdiction of probate courts, uses no words of restriction, the Legislature is authorized in conferring upon such courts or the judges thereof other duties, powers, and functions. Notwithstanding the approval of the general rule elsewhere in regard to the jurisdiction of constitutional courts, and its implied approval here, our Legislature has, in several instances, before and since the adoption of the present Constitution, in evident recognition of the rule in regard to the absence of words of restriction, added to the powers of probate courts, and the Supreme Court has, in some instances, put the seal of its approval upon such enactments. Illustrations of these added powers are to be found in the statute (section 2442, R. S. 1909), which prescribes that applications for writs of habeas corpus may be directed to "some court of record or to any judge thereof in vacation"; this court holding in *State v. Millsaps*, 69 Mo. 359, that a probate judge, under this statute may issue the writ and admit to bail. The authority to grant writs of injunction, under certain conditions, is also conferred by the Legislature on probate courts or judges thereof in vacation (sections 2512, 2513, R. S. 1909); and the judges of such courts are declared to be conservators of the peace, with power to let to bail persons indicted for bailable offenses (section 4061, R. S. 1909; *State v. McElhaney*, 20 Mo. App. 584); and probate judges are authorized in the absence of county judges to hold county courts (section 4062, R. S. 1909).

[7] Despite the constitutional provision, therefore, in regard to jurisdiction and the evident purpose in view in the establishment of probate courts, it is no longer an open question here as to the right of the Legislature to add to the powers of such courts. However, if this right be conceded, the powers conferred must apply alike to all of the probate courts in the state, otherwise the statute conferring the powers will contravene that provision of the Constitution (section 35, art. 6) which requires that probate courts shall be uniform in their organization, jurisdiction, duties and practices.

[8] Under this act it will scarcely be contended that probate courts, clothed with the power to hear and determine offenses against neglected and delinquent children, are uniform in any of the constitutional requirements with those not possessing this power.

[9] III. Further considering the power conferred by the act in question upon probate courts and the manner in which the same is to be exercised, we find that a "delinquent child" is defined, among other things, to be one which "violates any law of this state." This definition includes under the exceptions, heretofore noted, any child which may violate any law not punishable by death or imprisonment in the penitentiary (section 2, Laws 1913, p. 149); or, in other words, this definition includes any felony or misdemeanor of which a child may be guilty save those expressly excepted.

The manner of procedure prescribed by the act is as follows: "Any reputable person, being a resident of the county, having knowledge or information of a child, who appears to be a neglected or delinquent child, may file with the clerk of the probate court a petition, in writing, setting forth the facts, verified by affidavit. It shall be sufficient that the affidavit be on information and belief." Section 3, Laws 1913, p. 150. Upon the filing of this petition a summons is issued, etc., and the subsequent proceedings are much akin to those authorizing the appointment of guardians for minors. Sections 4, 5, and 6, Laws 1913, pp. 150 and 151.

While this act extends the *prima facie* rule of an infant's nonliability for crime to 17 years, it could not, without revolutionizing the entire system of the criminal law, nor, in fact, does it attempt, by its terms, to change the class or character of offenses designated in the Constitution and the statutes as felonies and misdemeanors. These classes or character of offenses not being changed, the same procedure must be observed in their prosecution whether the offender be an adult or an infant, and that provision of the Bill of Rights which prescribes that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information," etc., must be complied with. Section 12, art. 2, Con. Mo. It does not help matters here that the prosecuting attorney did proceed by information against the offender, because there is nothing in the act to authorize this course of procedure.

It is, in our opinion, begging the question to assert that the same rules of construction should not be applied to this act where it refers to "violations of laws of the state" as is applied to the Constitution and other statutes having a like reference. It is true, the purpose of the act is salutary, and every effort should be made to sustain it; but where it seeks to include, as it does, the entire category of crimes within its purview, save as to the exceptions noted, and attempts to ingraft upon our procedure powers foreign to the Constitution and the laws passed in conformity therewith in regard to crimes, it should not receive judicial sanction.

[10, 11] An indictment or information being necessary to a prosecution for a violation of the laws of the state, it must be such

as is meant by the common law, viz., in the one instance be found and presented by a grand jury, and in the other be instituted by a public officer authorized to prosecute crimes. *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; *State v. Hicks*, 178 Mo. 433, 77 S. W. 539; *State ex rel. v. Bland*, 189 Mo. loc. cit. 208, 88 S. W. 28, 3 Ann. Cas. 10-14; *State v. Minor*, 193 Mo. loc. cit. 605, 92 S. W. 466. Failing to require these necessary prerequisites in the exercise of jurisdiction over offenders, the act cannot be sustained. Furthermore, the power conferred on the court to hear in a summary manner and to conduct the examination of witnesses without the assistance of counsel, or, as is evident from the entire purport of the act, to conduct the hearing in an ex parte manner, is contrary not only to the letter but to the spirit of the Constitution (section 22, art. 2, Con. Mo.) which provides that: "In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

IV. In the two earlier acts (articles 6 and 7, c. 35, R. S. 1909) in regard to neglected and delinquent children in certain counties, it is expressly provided that the practice and procedure prescribed by law for the conduct of criminal cases, so far as the same may be applicable, and when not otherwise provided therein, shall govern all proceedings under said articles; and in all trials under same any person interested therein may demand a trial by jury (parts of sections 4099 and 4124, R. S. 1909).

Rejecting, therefore, such portions of said statutes as are obnoxious to the Constitution, enough remains to render a proceeding under either valid. The record in the *Loving Case*, supra, discloses that the proceeding therein was based upon an information filed by a prosecuting attorney, and that the other provisions of the act, there under review, in regard to summons, summary hearing, trial without a jury, etc., were disregarded. While these acts have been repealed, the statute enacted in lieu thereof (Laws 1911, p. 177) contains a like provision in regard to the right to a trial by jury. The act in question, however, contains no such plenary provisions, and, being in contravention with the organic law, it must be declared invalid.

The presence of a 'prentice hand is evident in the framework of this act. Given a laudable purpose, the Legislature, looking only to results, proceeds to enact a substantive law embodying a system of procedure applicable to certain counties, for the hearing and determination of cases against infant offenders. While such legislation should be sustained and encouraged, it cannot be when

it is, as in this case, in conflict with the organic law and as a consequence out of accord with our entire system of criminal jurisprudence.

From the foregoing it follows that the judgment of the trial court should be affirmed. It is so ordered. All concur.

### McGREW v. MISSOURI PAC. RY. CO. (No. 16475.)

(Supreme Court of Missouri. April 2, 1914.  
Rehearing Denied May 4, 1914.)

#### APPEAL AND ERROR (§ 179\*)—PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS.

Though the trial court struck out appellant's amended answer attacking the constitutionality of a statute, such question was open to review on appeal, where appellant preserved an exception and stood upon its answer without pleading further.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.\*]

In Banc. Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by John C. McGrew against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The petition alleges: A freight overcharge for 110 shipments of coal over the line of defendant railway and between the stations thereon of Myrick and Sedalia, a distance of 57 miles, as contrasted with the rates charged for similar shipments over two other stations of defendant road, Liberal and Grandy, distant from each other 77 miles. For the transportation between the first two points the rate exacted was 65 cents per ton by the car load, and between the others the charge was only 50 cents per ton by the car load. That the aggregate of the excess plaintiff was thus compelled to pay was \$16,141.91. Upon the trial it was admitted in open court by counsel for defendant that the 110 counts of plaintiff's petition are true and correct. And plaintiff by stipulation waived his claim for all penalties for violation of the laws upon which his petition was founded. Upon the submission of the case to the court without a jury, judgment was given for plaintiff for the sum stated in his petition as the total of the excess payments made by him. Defendant duly appealed.

Martin L. Clardy and Robert T. Railey, both of St. Louis, and H. C. Clark and Scott & Bowker, all of Nevada, Mo., for appellant. Alexander Graves, of Lexington, for respondent.

BOND, J. (after stating the facts as above). Appellant claimed in its amended answer which was stricken out by the trial court, whose ruling it assigned for error: First, that sections 3173 and 3211 of the

Revision of 1909, which were enacted in 1872 and brought forward through all the subsequent revisions and are now found without change in our present statute, were in contravention of the state Constitutions of 1865 and 1875 and the federal Constitution; second, that said acts were repealed in 1887 at an extra session of the Legislature; third, that section 12, art. 12, of the Constitution of Missouri of 1875, is in violation of section 1, art. 14, of the Constitution of the United States. If there is any merit in these contentions, they are still open to review, for, when they were stricken out of its answer, appellant preserved an exception and stood upon its answer without pleading further, and by its appeal has invoked the ruling of this court upon these questions. This, however, is not the first time that duty has been imposed upon this court by appellant. A petition of which the present is a copy, except as to dates and amounts of shipments, was before this court for review upon an appeal by the present plaintiff from the judgment sustaining a demurrer of the present defendant in a similar action. *McGrew v. Railway Co.*, 177 Mo. 533, 76 S. W. 995. The theory upon which the lower court dismissed the petition in that case was that the same section of the statute now before this court had been repealed by the act of 1887 (Laws Extra Sess. p. 15). Judge Gantt, speaking for this court, held that the trial court had misconceived the law, and that the section of the statute on which that case was bottomed (same as the one on which this petition is founded) was not impliedly repealed by the latter act of 1887, and that the petition in that case stated a good cause of action. This decision and its ruling as to a sufficiency of a petition framed under this statute to state a cause of action was approved and repeated in *Cohn v. Railway Co.*, 181 Mo. loc. cit. 45, 79 S. W. 961, and it was followed in the same case which reached the Kansas City Court of Appeals on a retrial after a remand by this court. *McGrew v. Railway Co.*, 118 Mo. App. 379, 94 S. W. 719.

But these litigants finally had the ear of this court in banc. *McGrew v. Railway*, 230 Mo. 496, 132 S. W. 1076. In that decision an eminent lawyer was called to assist this court as special judge. His performance of that duty is an example of learning, logic, and thorough investigation. The conclusions there announced covered every point of attack then made and now made as to the statutes or constitutional provisions which gave rise to the present case. The discussion is clear and convincing to a demonstration and leaves nothing further to be said on the subject, unless we shall paraphrase or republish his language. If we did the former, we should hazard the loss of the syllogistic force and clarity of the original; if we did the latter, we should only swell our reports by publishing for a second time what is already

contained in them. That decision contains rulings in a connected and complete form and seriatim upon every question which is presented on the present appeal. With the decision in that case we are content.

We fully concur in its doctrines, and, for the reasons there given, the present judgment is affirmed. All concur, except GRAVES, J., not sitting.

#### PHOENIX BRICK & CONSTRUCTION CO. v. GENTRY COUNTY. (No. 16380.)

(Supreme Court of Missouri, Division No. 2  
March 24, 1914. Motion to Transfer to Court  
in Banc Overruled April 3, 1914.)

#### 1. APPEAL AND ERROR (§ 854\*)—REVIEW—AFFIRMANCE.

A decree for defendant, in a suit in equity, where many defenses were pleaded, which contained a general finding of the issues in defendant's favor, will be affirmed, where any one of the defenses raised warranted it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 293\*)—STREET IMPROVEMENTS—NOTICE.

Under Rev. St. 1909, § 9411, providing that, when the board of aldermen shall deem it necessary to improve any street for which a special tax must be levied, the board shall declare, by resolution published for two weeks, that such work or improvement is necessary, a resolution is insufficient which merely states that it is necessary to pave a street, and does not specify the kind of paving or refer to plans or specifications containing the required information, for, unless the resolution contains such information, property owners cannot know how to exercise their right of protest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

Roy, C., dissenting.

Appeal from Circuit Court, Gentry County; G. W. Wannamaker, Judge.

Action by the Phoenix Brick & Construction Company against Gentry County. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff seeks to recover from the defendant county the sum of \$5,728.94, the amount of a special tax bill for excavating, paving, and curbing a portion of the public street surrounding the courthouse square in the city of Albany, Gentry county, Mo. Albany is a city of the fourth class.

Defendant filed answer in the nature of a cross-bill. The answer, after setting forth general denial, sets up an affirmative defense praying that the court decree said tax bill to be void, and that the same be canceled. The allegations in the answer, in support of the prayer for affirmative relief, are substantially as follows:

(1) That sections 9427, 9428, and 9429 (providing that cities of the fourth class may issue tax bill against the county for certain street improvement made on abutting county

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



property) are unconstitutional, as being in conflict with section 28 of article 4 of Constitution of Missouri in that the title to said act is insufficient and misleading.

(2) The preliminary resolution passed by the board of aldermen of said city declaring the work necessary was insufficient and void because it did not describe the work to be done or the material to be used.

(3) No valid estimate of the work to be done was ever made or filed by the city engineer of said city as required by law.

(4) The preliminary resolution passed by the board of aldermen failed to describe the grading to be done in said improvement, and said board never found or declared that the revenue of said city was insufficient to pay for said grading, the expense of which was included in the total sum of said tax bill.

(5) The cost of paving the squares formed by the street crossing was not apportioned and assessed as provided by section 9583 of the Revised Statutes of Missouri 1909.

(6) No sufficient legal or valid notice of the requirements of said work was ever served upon defendant as required by section 9429, Revised Statutes of Missouri 1909.

(7) Plaintiff failed to do said work in accordance with the terms of the contract and specifications, alleging in detail said failure.

The reply was in substance a general denial, and also alleged that the defendant was estopped to contest the validity of said tax bills, and that the grading charged for in the tax bill was for "subgrading" instead of "grading."

By stipulation of the parties the case was treated as a suit in equity, and all the issues were tried before the court without a jury. The court found the issues for the defendant and entered the following decree: "Now on this day, this cause coming on again to be heard, and the court having taken the same under advisement, now again comes the parties by their attorneys, and all and singular the matters are submitted to the court on the pleadings and proofs, and the court, after hearing all the evidence and being fully advised in the premises, doth find the issues for the defendant upon its cross-bill, and that it is entitled to the relief prayed for therein. It is therefore by the court ordered, adjudged, and decreed that the plaintiff's petition be dismissed; that it take nothing by its said writ; that the tax bill described in said petition be, and the same is, canceled and for naught held; and that the defendant go hence without day and recover of the plaintiff its costs in this behalf expended, taxed at ——— dollars, and that it have execution therefor."

Plaintiff filed motion for new trial, which was by the court overruled, and thereupon plaintiff perfected an appeal to this court.

Such facts as shall become necessary to an understanding of the issues will be set forth in connection with the discussion of the legal questions in the opinion.

Charles F. Strop and Eugene Silverman, both of St. Joseph, for appellant. J. W. Peery and W. F. Dalbey, both of Albany, Mo., for respondent.

WILLIAMS, C. (after stating the facts as above). [1] It will be noted that the decree of the trial court contains a general finding of the issues in favor of defendant, and it is impossible, therefore, to determine the exact ground or grounds upon which the trial court based its decree. However, as to this, it is sufficient to say that the decree of the trial court should be upheld if any one of the many defenses raised should be found upon investigation to justify the judgment.

[2] One of the defenses raised by the answer is that the preliminary resolution required by section 9411, Revised Statutes 1909, was insufficient and void in that it failed to describe the work proposed to be done or the materials to be used, and made no reference to any other paper or record containing such description.

The resolution thus challenged is as follows: "Resolved that the board of aldermen of the city of Albany, Missouri, deems it necessary to pave, gutter and curb the following parts of streets in said city to wit: Clay street in front of and adjoining block two and from the west side of Polk street to the east side of Smith street; Polk street in front of and adjoining block six, and from the north side of Clay street to the south side of Wood street; Smith street in front of and adjoining block five and from the north side of Clay street to the south side of Wood street; Wood street in front of and adjoining block nine and from the west side of Polk street to the east side of Smith street. And it is further ordered that a copy of this resolution be published in the Albany Ledger and the Albany Capital, for two consecutive weeks."

Section 9411, Revised Statutes of Missouri 1909, provides: "When the board of aldermen shall deem it necessary to pave, macadamize, gutter, curb, \* \* \* or otherwise improve any street, avenue, alley, \* \* \* within the limits of the city, for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided," etc.

It will be noticed that the resolution above provided for is a matter of much importance, Until such a resolution is passed, published,

and a majority of certain interested property owners to be affected fail, within a given time, to protest against the same, the board of aldermen has no power to cause the improvement to be made. The evident purpose of such a resolution and its publication is to give notice to the specified interested property holders that they may exercise their right of protest, if they so desire. And to give them notice of what? Notice that the board of aldermen thinks it necessary that an indefinite something should be done? Clearly not. Such an interpretation would to a large extent nullify one of the vital provisions of the statute, viz., the right of certain interested property owners to protest. The right of protest would be of little use if the person having the right to protest had to first make a guess as to the kind and character of the work and material to be used. The above statute provides that the board of aldermen "shall by resolution declare such work or improvement necessary to be done." What work or improvement? Certainly that work or improvement which is in fact finally done. And it is difficult to conceive how the work or improvements which are in fact finally done could be declared necessary to be done unless the resolution names or describes the work or improvement which is in final contemplation. And, since the statute provides for the right of protest, it is clearly within the intent of the statute that the resolution should name or describe the work and material with sufficient definiteness as to enable the person given the right of protest to determine with reasonable accuracy what effect the proposed improvement will have upon the public need and his private interest. Such information should therefore be either imparted by the resolution itself, or the resolution should make reference to other papers, such as plans or specifications, which contain the required information.

The point here involved has been many times passed upon by the different Courts of Appeal of this state. In the case of *City of Kirksville ex rel. v. Coleman*, 103 Mo. App. 215, 77 S. W. 120, the Kansas City Court of Appeals, speaking through Ellison, J., very ably and correctly discusses the proposition in the following language: "One of the principal objects and purposes of such resolution is that, by its publication, the property owners affected may be advised of what is contemplated, so that they have an opportunity to arrest the proceedings by a majority protest against it. Manifestly, when the improvement is such that it may be done in various ways or be composed of one of many kinds of material, substantially affecting the quality or cost of the work, the council should state in such resolution in what manner it is proposed to improve the street. In the resolution now under consideration, it was declared that 'it is deemed by said council necessary to improve Brown avenue from Jefferson street south to Michigan street by

grading, paving, guttering, curbing, and terracing the said avenue.' There is in this no mention, directly or indirectly, of the kind of paving. That street pavement consists of a variety of material of widely different cost, as well as quality, is a fact of such general knowledge that the courts will take judicial notice of it. And so, too, that various opinions are entertained as to the value or expediency of the different kinds. This is evidenced by sharp contests which are frequently waged by property owners asserting their choice of material, either as to what is best quality or what can best be afforded. If a city council is to be permitted to acquire the power to improve a street by use of the very general word 'pave,' then they have a wide range within which to move, and the action they finally take may be against the will and wish of the property holders which the law says shall govern. The owners of abutting property may very much desire that the street be paved with certain material, and they may be unalterably opposed to other kinds. In such case, under a resolution couched in the general language of this one, they would be compelled to protest against any pavement, or else give the council a *carte blanche* to use any material, at any price, it might choose. The property owner ought not to be put to such dilemma. The resolution should inform the citizen substantially of the kind and character of improvement, to the end that he may exercise his election of withholding the power, as contemplated by the statute."

The Kirksville Case has been consistently followed by the Kansas City Court of Appeals in the following cases: *Barber Asphalt Paving Co. v. O'Brien*, 128 Mo. App. 267, 107 S. W. 25; *Coulter v. Phoenix Brick & Construction Co.*, 131 Mo. App. 230, 110 S. W. 655 (involving the validity of a tax bill of the same series as the one in the case at bar)—and by the Springfield Court of Appeals in the following cases: *City of Poplar Bluff v. Bacon*, 144 Mo. App. 476, 129 S. W. 466; *Webb City ex rel. v. Aylor*, 163 Mo. App. 155, 147 S. W. 214; *Custer v. Springfield*, 167 Mo. App. 354, 151 S. W. 759; *Schulte v. Currey*, 173 Mo. App. 578, 158 S. W. 888.

We are aware that the St. Louis Court of Appeals, in the recent case of *Delmar Inv. Co. et al. v. Lewis et al.*, 162 S. W. 675 (not yet officially reported), reached a conclusion contrary to the conclusion herein reached, and in conflict with the foregoing decisions of the Kansas City and Springfield Courts of Appeal. In the case of *Delmar Inv. Co. v. Lewis*, supra, the St. Louis Court of Appeals expresses the opinion that the opinion of this court in the case of *Gist v. Rackliffe-Gibson Construction Co.*, 224 Mo. 369, 123 S. W. 921, has left in doubt the correctness of the decision of the Kansas City Court of Appeals in the case of *City of Kirksville ex rel. v. Coleman*, supra. We are of the opinion that the *Gist* Case in no way conflicts with the

case of *Kirksville v. Coleman*, supra. It is apparent, from a reading of the two cases, that the respective charter provisions on the points discussed were so different as that the discussion of the one would furnish no guide or authority for the discussion of the other. That this is true is clearly shown by the statement by Lamm, J., the writer of the opinion, in the following language: "The charter scheme held in judgment in *Kirksville v. Coleman*, 103 Mo. App. 215 [77 S. W. 120], differed in essentials from the one under consideration. We are asked to overrule that case or to disapprove its reasoning. We shall do neither because to do so would be obliter."

After a careful consideration of the subject and the briefs of learned counsel for both parties, we have come to the conclusion that the preliminary resolution was fatally defective, and that the tax bill, by reason thereof, is void. Since the conclusion above reached furnishes sufficient ground upon which to uphold the judgment of the circuit court, it becomes unnecessary to discuss other defenses which may or may not have justified, in whole or in part, the decree entered by the trial court. The judgment is affirmed.

ROY, C., dissents.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

#### WINGFIELD v. WABASH R. CO.

(Supreme Court of Missouri. April 2, 1914.)

##### 1. TRIAL (§ 255\*)—REQUESTS TO CHARGE—NECESSITY.

Parties at trial are not bound to ask for instructions; nor, in the absence of requests, is the court bound to charge on the theory of the respective parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

##### 2. RELEASE (§ 59\*)—VACATION—GROUNDS—INJUNCTION.

Where, in an action for injuries, plaintiff sought to set aside a release on the ground that he had been induced by defendant's physician to execute the release on the latter's false statement that plaintiff's arm, the bones of which had been broken, had united at the time of the physician's examination, an instruction that, if the jury found that the physician falsely assured plaintiff, without qualification, that his arm would be as good and strong as ever within six months, then the release did not bar plaintiff's right to recover was erroneous.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 115; Dec. Dig. § 59.\*]

Woodson and Walker, JJ., dissenting in part.

In Banc. Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Robert Wingfield, revived after his death in the name of Annie Wingfield, his administratrix, against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. L. Minnis, of St. Louis, and Seabee, Conrad & Wendorff, of Kansas City, for appel-

lant. Guthrie, Gamble & Street, of Kansas City, for respondent.

GRAVES, J. The facts of this case were well stated by BOND, J., then commissioner, when this case was pending in Division No. 1. To that statement we shall add but one thing (i. e., the full text of plaintiff's reply), which we think important in the discussion of a question raised. The statement of BOND, J., is as follows:

"Plaintiff sues for injuries sustained by him on June 29, 1906, while working for the defendant upon a water tank at or near Keytesville, Mo., which he alleges, through the negligence of defendant, collapsed, gave way, and fell, causing him severe and permanent injuries. The answer was a general denial, plea of contributory negligence, assumption of risk and of release and satisfaction for the sum of \$650 paid to plaintiff by defendant. The reply contained a denial of matters not therein admitted, and an averment that the instrument of writing executed by plaintiff on the 24th of December, 1906, purporting to release and satisfy all his claims against the defendant for the injuries sustained, was induced by fraud and wrongful conduct on the part of the defendant, in that the defendant procured the plaintiff to rely upon the statement of a physician selected by it to examine his injuries; that said physician made an untruthful statement to plaintiff as to the extent of his injuries, upon which plaintiff relied solely in accepting such compromise and executing said release; that plaintiff, prior to the commencement of this suit, tendered to defendant a return of the \$650, which was refused, and hereby continues his tender thereof. For plaintiff there was evidence tending to show that he was a member of a gang of 12 or 13 men working under the direction of a foreman, A. C. Blake, known as the bridge gang, and employed by defendant in putting up water tanks; and in the prosecution of this work they had been for about a week engaged in the construction of a temporary tank on the banks of the Chariton river, about 28 miles from Moberly, which was intended to furnish water for a water train belonging to the defendant and used for supplying water at Moberly, Mo., during the continuance of a prevailing drouth. This foreman described specifically the method of constructing such tanks and the general dimensions of the one then being built, and the particular duties of the men employed by him in the construction work; the tank in question was intended to hold 16 feet of water; plaintiff was one of the workmen employed by him and assisted in the building of that tank; it was partly braced at the time it collapsed, which took place directly after they had eaten their dinner; these braces were nailed but had not been bolted as they should have been according to the usual and proper method of construction; that the plaintiff was acquaint-

ed with these facts and knew as much about the condition of the tank as he did.

"There was testimony that plaintiff was on top of the tank and engaged in pulling up dirt to stop a leak at the time of the injury; that it shook and rocked before falling, and this was commented upon by some of the workmen and deterred some of them from going upon it; that the plaintiff was a bridge carpenter. On his own behalf plaintiff testified: That he was injured on the 29th day of June while engaged in his work on top of the tank about 35 or 40 feet from the ground. That when it gave way he was unconscious for about a minute while the water was running over him. That he was caught after the fall between an iron band and a joist on top, 3x8 inches. That the iron band was a tank hook a half inch thick and 5 inches wide. That one of the staves was also on him, which was 4 inches wide and 3 inches thick and 16 feet long. That he found his arm broken and the bone exposed through the skin and his undershirt. That he was taken to Keytesville, about a mile and a half distant, where the doctor gave him a hypodermic injection, after which he was put in a caboose, and the conductor poured hot water on his arm until they got to Moberly, where he was taken to a hospital and then put in the operating room. That, after coming out from that, he found his arm was not treated with splints or casts but was kept lying on a pillow and remained in that condition a week or longer. After two weeks they put a plaster cast upon it. The physician who treated him was Dr. Clapp. That after removing the cast they put tin splints on it, subsequently replaced them with wooden splints, in which condition it was kept until he was examined in St. Louis, September 21, 1906. A physician who examined plaintiff three or four weeks previous to the trial testified that he found his arm was broken and disunited; that the plaintiff showed him pieces of bone which had worked out; that the separate bones were held together by exudated matter. This physician gave his opinion that, in order to remedy this, the fracture must be opened, the ends of the bone would have to be cut off and wired together, for in their present condition they were overlapping each other, and that this operation would shorten the arm three or four inches. He further stated that assuming plaintiff's testimony as to the nature and history of his injury to be true, on the 21st of September, 1906, it would not have warranted a skilled professional man in then stating to the plaintiff that there was a reasonable certainty of a complete recovery of the injuries to his arm. The testimony of this physician was corroborated by three others. There was further testimony for the plaintiff that he was approached by a representative of defendant to make a settlement of his claim and was offered \$200, which he refused, telling him that he did not know of the condition his arm was

going to be in; that he was then asked if he would go to St. Louis, if transportation was furnished him, and see Dr. McCandless, which he agreed to do, and about a week thereafter made a trip to St. Louis and met that claim agent, who told him which street car to take in order to reach Dr. McCandless, whom the agent said was one of the best physicians in St. Louis, and whatever he told him could be depended upon. The plaintiff replied he knew nothing about the said doctor and would have to take the agent's word for that, but would go out and see him: that he found Dr. McCandless at his residence; that he was accompanied on his trip out there by Dr. Ragsdale, a student at the Moberly hospital, whom he had asked to have accompany him as he was weak and did not want to go around by himself; that Dr. Ragsdale said to Dr. McCandless, 'The plaintiff wants you to examine him;' that Dr. McCandless proceeded to do this for 30 or 35 minutes; that plaintiff then stated to Dr. McCandless that he wanted to know how his arm was going to be, whether it was going to get well or not, that he had to work for a living, and was contemplating a settlement, and would like to have him to be honest in his opinion as to whether his arm was going to get well or not. He said the doctor replied, 'Young man, I will guarantee you will have a good arm inside of six months;' that the doctor further told him that there was a perfect union of his arm and advised when he got back to the hospital to take his arm out of the sling and let it hang down, stating that its paralyzed condition was on account of the arm being drawn up; that 'after your arm hangs down at the side the circulation will be restored;' that he then asked Dr. McCandless whether he was positive the arm would get well, and the doctor replied, 'Inside of six months that arm will be perfectly well;' that the doctor agreed to telephone his diagnosis to Mr. Austin, the claim agent who had induced plaintiff to call upon him; that the plaintiff went back to see Mr. Austin, who told him that he had gotten a telephone from Dr. McCandless, and that whatever Dr. McCandless told him he could depend upon. Thereupon they began to talk about the settlement and reached an agreement as to the amount, and plaintiff signed a release in the superintendent's office after he got back to Moberly, because he believed Dr. McCandless had told him the truth. Plaintiff, at the time of the trial, testified he had hardly any use of his arm. He could not put his hand on anything and push up; that there was a little life in his little finger, and that the rest of his fingers are dead and the thumb is stiff; that he can lift his hand up and down but cannot put his arm on anything with any weight and push down on it; that in one direction he can raise his arm from his body. The visit of the plaintiff to Dr. McCandless was about the 21st of September, 1906. The agreement of release and satisfaction was

signed three days thereafter. That he remained in the hospital from the 26th of September until the 3d of October, carrying his arm in a sling at that time. Plaintiff stated further that he had been knocked down in three fights since the injury, but did not fall upon his injured arm; that he was now keeping a boarding house and drank more than formerly, in order to deaden the pain in his arm.

"The defendant introduced its assistant's claim agent, Mr. Austin, who testified that in August, 1906, he discussed the settlement with plaintiff and made him an offer of \$200, which the plaintiff declined to consider, saying that he preferred to wait a while and see how his arm would progress; that later he furnished plaintiff transportation to St. Louis; plaintiff met him there and talked over the matter of settlement and wanted \$1,000 or \$1,200. The witness suggested that plaintiff go to see Dr. McCandless; that McCandless made a written or telephone report to him of his examination, and later he and the plaintiff took up the matter of settlement, and, after concessions, reached an agreement of \$650. The defendant then introduced the doctor who gave plaintiff the first treatment after his injury and also at the hospital, who stated from the examination he made of the plaintiff's arm, about the early part of September, 1906, by feeling over the seat of the fracture, he thought that a good result had been obtained and that there would be a useful arm. Dr. McCandless testified that he was called upon on the 21st of September, 1906, by plaintiff in company with a physician from Moberly; that the splints were taken from plaintiff's arm, and he examined it and found that the iper bone of the arm had been broken and that there was callous at the seat of the fracture, and it seemed to him there was a satisfactory union. He made a verbal report of his examination to Mr. Austin that he thought the results promised good from the observations which he made. He states further that in all cases where there was much involvement he would reserve his opinion until the splints were removed and the arm put in use; that his opinion was that plaintiff would have a 'useful arm,' and that he said to the young doctor, who accompanied him, 'Doctor, I think this will give good results;' that this remark was made in the presence of the plaintiff, but he did not tell plaintiff his arm would entirely recover or be as good as ever, nor that he would guarantee it to be well within six months; that no medical man ought to make such statements because they would 'be irregular, unusual, and unknowable.' His testimony was corroborated by that of Mr. Ragsdale, who accompanied the plaintiff to his office.

"The jury returned a verdict for \$12,690, from which defendant appealed, and assigns for error the refusal of the court to sustain

its demurrer to the evidence, the insufficiency of the proof of fraud in the execution of the release, the giving of instruction numbered 1 on the part of the plaintiff, the overruling of the objections to the hypothetical questions put to the witness, and that the verdict is excessive.

"Since the case has been pending here, the plaintiff died, and it is now revived in the name of his administratrix."

The full text of the plaintiff's reply is as follows:

"For reply to the answer of the defendant plaintiff says:

"(1) That he denies the truth of each and every averment, allegation, and statement in said answer contained not hereinafter expressly admitted.

"(2) On or about the 24th day of September, 1906, plaintiff, in consideration of the sum of \$650 paid to him by the defendant, executed a document purporting to be an agreement, in writing, between plaintiff and defendant, by which plaintiff purported to settle, adjust, compromise, and satisfy the claim herein sued on, for the sum of \$650; but plaintiff avers: That he was induced to execute such document by the fraudulent and wrongful conduct of the defendant in this: That the defendant procured the plaintiff to rely, as he did rely, upon the statement of a physician selected by the defendant to examine the injuries of the plaintiff; that from such examination he could and did know and assured the plaintiff *that the bone of the plaintiff's left arm where broken was perfectly reuniting*, and that, as far as such injury to the plaintiff's left arm was concerned, said left arm would be as good and strong as ever within a period of time not exceeding six months from the 21st day of September, 1906. That defendant assured plaintiff that such statement of such physician could be fully relied upon. That plaintiff did fully and wholly rely upon such statement in accepting said sum of \$650 and executing such document, and would not have executed the same except for such statement and plaintiff's reliance thereon. That, although unknown to the plaintiff at the time, the condition of plaintiff's arm was such as not to justify even an operation of a skilled professional man, much less an unqualified statement as aforesaid, and the said physician employed and relied upon by the defendant was not justified in good faith in making such statement, and same was not true, or of the defendant in adopting and repeating the same; prior to the commencement of this suit plaintiff duly tendered to the defendant a return of the sum of \$650, which was refused by the defendant, and which plaintiff is ready and willing to pay into court for the use of defendant, or to be credited upon such judgment as may be rendered herein in favor of the plaintiff.

"Wherefore plaintiff prays that defendant

take nothing by this action, and that plaintiff recover judgment as prayed for in his petition."

The italics are ours. This sufficiently outlines the case.

[1] I. This is another one of those cases where counsel for plaintiff seems to have tread with fear and trembling, lest they get reversible error in the record. To begin with, they chose to plead negligence generally, rather than specifically, but of this we see no room for complaint or criticism. They no doubt proceeded upon the idea that the doctrine *res ipsa loquitur* applied, in this kind of case, and counsel for defendant let it go at that. The matter is of interest in connection with the further progress of the case. The only allegation of negligence is: "Plaintiff further says that heretofore, and on, to wit, June 29, 1906, he was in the employ of the defendant, working upon a water tank, at or near the city of Keytesville, Mo., when, through the negligence of the defendant, said water tank collapsed, gave way, or fell, thereby causing great and serious injury to the plaintiff as follows."

When the plaintiff came to asking instructions, he requested but two: (1) An instruction on the measure of damages, and (2) one upon the validity of the release, which, being of importance, we quote as follows: "If you find and believe from the evidence that prior to the execution of the papers of release and settlement between the plaintiff and defendant for the injuries complained of, as introduced in evidence by the defendant, the defendant caused the plaintiff to be examined by a doctor selected by it, and assured the plaintiff that such doctor was competent and reliable, and that said doctor could be fully relied upon, and if you further find that such doctor assured the plaintiff in substance and without qualification that plaintiff's left arm would be as good and strong as ever within a period of time not exceeding six months, and if you further find that the conditions existing at the time of such examination were such that such doctor was not, if a competent doctor, justified as a reasonably prudent doctor in giving in good faith such assurance (if given), and such doctor did not believe that such statement (if made) was true, and if you further find that such assurance (if given) was not a true statement, and that plaintiff's left arm did not become as strong as ever in not exceeding six months from the time of such examination, and if you further find that a reasonably prudent person, situated as you find the plaintiff was situated at the time of such examination, was reasonably justified in relying upon such assurance (if any) as you may find was given by such examining doctor, and if you further find that the plaintiff, in executing such papers of release and settlement, relied upon such assurance of such doctor (if given) and would not have executed such papers except therefor, then,

in arriving at your verdict, you need not take into consideration the execution of such papers of release and settlement except to the extent of crediting the amount of \$600 on your verdict, if your verdict should be for the plaintiff." The defendant stood upon a demurrer to the evidence, and the court of its own motion gave the usual formal instruction; about nine jurors being sufficient to render a verdict.

Nowhere does the plaintiff by a requested instruction outline his theory of the case, and the trial court let them proceed (and rightfully so) without any clearly defined statement of the law upon the applicable facts as to defendant's primary liability. We say the trial court did so rightfully, because such courts are not bound to write instructions in civil cases. *Powell v. Railway Co.*, 164 S. W. 628 (just handed down). If counsel (fearing error in requested instructions) chose to submit their case without declarations of law upon the facts proven, they have the right so to do, but sometimes they may even face trouble in this direction. *Eversole v. Railway Co.*, 249 Mo. loc. cit. 529, 155 S. W. 419; *Powell v. Railway Co.*, supra (just handed down). This case went to the jury without instruction outlining what facts or circumstances in evidence would constitute negligence upon the part of the defendant, or contributory negligence, or assumption of risk upon the part of plaintiff, all of which were pleaded. These matters would not be of such moment had no instructions been asked, but counsel for plaintiff did ask two, as above stated, one of which is seriously questioned here. That one we have set out above. It is always the better practice for counsel to have some definite theory of their client's right to recover, and put that theory in concise legal form in the nature of an instruction upon the facts proven. Reverting to this instruction: It was said in the opinion in division, to which I then agreed: "But the instruction purported to cover the entire case and direct a finding. It should therefore have embraced the converse of that issue raised by the evidence for defendant; i. e., whether or not the disunited condition of the plaintiff's arm at the date of the trial resulted from his mishaps or fights after the time of his examination by the surgeon." We held the instruction bad for that reason. In other words, we attempted to announce the wholesome doctrine that where the plaintiff's instruction clearly deals with the whole case, and directs a verdict for the plaintiff upon a given state of facts, such an instruction cannot exclude the theory of the defense, and be held a good instruction, unless the theory of the defense, as evinced by the evidence, is outlined in other instructions, which when taken with that of the plaintiff can be said to properly give the whole law of the case. Our Brother LAMM, in an opinion, discarded, because we concluded that we had no juris-

fiction of the case, has so clearly written the law upon this phase of the matter that I shall not let the fragrance of his flower be lost, but shall preserve it here. He said:

"It is argued by plaintiffs' learned counsel that, taken as a whole body of law, the instructions, when read together, were well enough, and that this view of it sustains instruction No. 1. We will recur to this doctrine when we come to consider instruction No. 2 for plaintiffs. In dealing with the subject-matter of instruction No. 1, it is sufficient to say that no instruction on either side cures the grievous error of its mandatory form. Nor did defendants follow the error in their instructions and thereby cure it. That instruction, on its face, deals with the whole case, and, as it ordered a verdict for plaintiff if the jury found the facts therein hypothesized, a pretermisison of an essential element in recovery, to wit, a balancing of special benefits and special damages, was a fatal vice and one not cured by any other in the series given.

"In an early case in an opinion written by a jurist, Judge Scott, whose just fame is not only an ornament to jurisprudence but is fondly preserved as a sacred tradition of the Missouri bar, it was ruled (*Clark v. Hammerle*, 27 Mo. loc. cit. 70-71): 'In the trial of causes neither party is bound to ask instructions. If they are not asked, the giving them or not is at the discretion of the court. If instructions are asked on the whole case, or of any particular matter arising out of it, which the court refuses, it is not bound afterwards to give instructions of its own as substitutes for those refused. If erroneous instructions are asked and refused, it is entirely at the option of the judge whether he will afterwards give any or not. A party, therefore, who asks an instruction on the whole case must not frame it so as to exclude from the consideration of the jury the points raised by the evidence of his adversary. If a suit is on a bond for the payment of money, and the defendant gives evidence tending to show that he has paid it, it would not be proper for the court, at the instance of plaintiff, to instruct the jury that, if they believed that the defendant executed the bond, they will find for the plaintiff. Such instruction would be erroneous, as it would exclude from the jury all consideration of the question of payment. It is no answer to this to say that the defendant might have asked instructions. He was not bound to do so, and it was at the peril of the plaintiff to ask instructions disposing of the whole case which excluded from the jury the consideration of the evidence of the defendant's tending to show that he had no right to recover.'

"The doctrine of that case has been affirmed over and over again. Cases may be found that seemingly announce a contrary doctrine; but on suitable analysis, and when the facts of the particular case are consider-

ed with discrimination, it will be found that the doctrine of *Clark v. Hammerle* is brought down as live and good doctrine to this very day. It runs, however, hand in glove with another so qualifying it as to make it a usable rule in working out the practical administration of justice in concrete cases, viz., that the mere pretermisison in plaintiffs' instructions of an element in defendants' case (a part and parcel of the defense interposed) may not work reversible error if that very element is plainly and effectually put to the jury in other instructions on either side in such form as not to cause confusing contradiction between instructions, but rather to make more specific, in, say, defendants' instructions, a matter that was dealt with in general form in plaintiffs'.

"The student in case law, so curious in that behalf as to seek to trace not only the evolution of that doctrine but its application in concrete cases, may consult with profit *Mead v. Brotherton*, 30 Mo. 201; *Sawyer v. Railway Co.*, 37 Mo. loc. cit. 263 [90 Am. Dec. 382]; *Fitzgerald v. Hayward*, 50 Mo. loc. cit. 523; *Owens v. Railway Co.*, 95 Mo. loc. cit. 181 [8 S. W. 350, 6 Am. St. Rep. 39]. (The *Owens Case* overruled *Sullivan v. Railway Co.*, 88 Mo. 169, on the point, and made the dissenting opinion of Black, J., in the *Sullivan Case* a controlling pronouncement of the law.) But it will be observed that neither in the principal opinion in the *Owens Case* nor in the dissenting opinion in the *Sullivan Case* was the doctrine of the *Clark-Hammerle Case* exploded. To the contrary, it was left to stand and run with the qualification that, if the whole body of law delivered to the jury put the case in correct form, then all essentials to recovery, or to the defense, need not appear in one instruction. *Gordon v. Burris*, 153 Mo. loc. cit. 232 [54 S. W. 546]; *Gibler v. Railroad Ass'n*, 203 Mo. loc. cit. 222, [101 S. W. 37, 11 Ann. Cas. 1194], and cases cited; *Tinkle v. Railroad*, 212 Mo. 471 [110 S. W. 1086]; *Wojtylak v. Coal Co.*, 188 Mo. loc. cit. 283 [87 S. W. 506], post and ante; *Flaherty v. Transit Co.*, 207 Mo. loc. cit. 334 [106 S. W. 15]; *Orcutt v. Bldg Co.*, 214 Mo. loc. cit. 51 [112 S. W. 532]; *Austin v. Transit Co.*, 115 Mo. App. loc. cit. 152 [91 S. W. 450]; *Toncrey v. Railroad*, 129 Mo. App. loc. cit. 600 [107 S. W. 1091]; *Bolles v. Railroad*, 134 Mo. App. loc. cit. 704 [115 S. W. 459]; *Rudd v. Insurance Co.*, 120 Mo. App. loc. cit. 16 et seq. [96 S. W. 237]; *Stewart v. Andes*, 110 Mo. App. loc. cit. 247 [84 S. W. 1134]; *Stauffer v. Railroad*, 243 Mo. loc. cit. 332, 333 [147 S. W. 1032]. Other cases will be found cited in defendants' briefs.

"Plaintiffs' instruction No. 1 does not prosper on the theory just discussed."

But is that doctrine applicable here? We have purposely set out this instruction. It does not purport to direct a verdict for the plaintiff upon the whole case. It only directs that, if the jury find certain facts, then they will not consider the release as a defense, and

winds up with the words: "Except to the extent of crediting the amount of \$890 on your verdict, *if your verdict should be for the plaintiff.*"

Note the language italicized above. This language does not direct a verdict for plaintiff. Nor does this instruction, taken as a whole, undertake to detail a state of facts, and then tell the jury that, if they find such facts, they should find for the plaintiff. The most that can be said of the instruction in this regard is that it outlines a state of facts, and then tells the jury, if they find such facts, they will disregard the release in arriving at their verdict, except as to the credit mentioned. The question of liability or no liability for negligence is not mentioned. The matter of contributory negligence or assumption of risk is not mentioned. As to the law upon the facts shown as to all these matters, the jury were left to grope in the dark—a practice to be condemned—but we have not been reversing for such practice. We do not believe that the instruction falls within the class of one attempting to cover the whole case, and directing a verdict upon hypothecated facts. But the instruction is bad for reasons to be assigned in proper paragraph, when the case is a little more fully developed.

[2] ¶. It is urged that there was no sufficient evidence upon which to submit the question of the invalidity of the release to the jury. This question was fully discussed by BOND, J., when the case was in division. His views were carefully worded, and met my approval then, and I have no reason to change at this time. He draws the distinction between the statement of an existing fact, and the mere expression of an opinion as to what will take place in the future, as actionable fraud in matters of contract. His language is:

"Leaving out of view the conflict of this evidence, since that has nothing to do with its submission to the jury, the point to be decided is whether plaintiff's version of it had any tendency to show that he was fraudulently induced to sign the release, and therefore entitled to have a jury pass on that issue. R. S. 1909, § 1812; *Berry v. Railroad*, 223 Mo. 358 [122 S. W. 1043].

"In order to sustain a defense in an action at law attacking the validity of a contract on the ground that its execution was induced by fraud, it is necessary to prove: (1) That the statements were false; (2) that they were known to be false when made, or (what is the same thing) that they were made as of his own knowledge by the utterer, when in fact he had neither any knowledge of the subject nor any reasonable grounds to believe them to be true; (3) that the defendant had a right to and did rely upon the truth of such misrepresentations when he executed the contract. *Hamlin v. Abell*, 120 Mo. 188 [25 S. W. 516]; *Edwards v. Noel*, 88 Mo. App. loc. cit. 439; *Dulaney v. Rogers*, 64 Mo. 201. These are also the essential elements of an action for deceit or fraud. Cyc. vol. 20, p. 12. But,

whether used as grounds for suit or as a defense, the false averments must relate to matters of fact past or present and not matters of judgment, opinion, estimate, or future expectations. This is the settled rule where the parties are dealing at arms length. *Brown v. Lead Co.*, 194 Mo. loc. cit. 700 [92 S. W. 699]. But, when that is not the case, it is held in many states that justice requires some expansion of the rule, especially in the relations of professional or other men possessed of special learning, knowledge, and skill, with other persons not having the same advantages. The reason given is that the superior qualification of the one is an invitation of trust and confidence to the other which the law will not permit to be fraudulently used to his loss and damage. A few illustrations may serve to illustrate the application of this principle in other jurisdictions. A case arose in Texas. Suit was for personal injuries, and the defense was release. A reply that the release was fraudulently obtained. The evidence tended to show that the plaintiff executed it upon the representation of a doctor to the effect that the bones of plaintiff's arm had 'knitted and united together,' and that as soon as the swelling had passed her arm would be as good as ever. The Texas court added: 'The facts in evidence warrant the conclusion that Stewart (the doctor) made the representations and statements to the appellant for the purpose of inducing him to execute the release; \* \* \* that the representations and statements so made by Stewart were false in that the bones at the time of the trial were not united, and that her arm was practically destroyed in its usefulness.' The court added: 'We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart were a mere expression of opinion. It was more than opinion; it was the statement of fact. The effect of his statement was that the appellee was a sound man; that the bone of the arm had united together; and that it ought to be all right. It is true that these statements may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge.' (The italics are ours.) The court held that the cause was rightfully submitted to the jury. *Houston, etc., R. R. Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651. See, also, *Pattison v. Railway Co.*, 55 Wash. 625 [104 Pac. 825]; *Railway Co. v. Hambricht*, 87 Ark. 614 [113 S. W. 803]; *Railway v. Richards*, 23 Okl. 256 [102 Pac. 92, 23 L. R. A. (N. S.) 1032]; *Hedin v. Minneapolis, etc., Institute*, 62 Minn. loc. cit. [146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628], affirmed in *Nelson v. Railway*, 111 Minn. 193 [126 N. W. 902, 20 Ann. Cas. 748]; *Viallet v. Railway Co.*, 30 Utah, loc. cit. 267 [84 Pac. 496, 5 L. R. A. (N. S.) 663]; *Lumley v. Wabash*, 76 Fed. loc. cit. 70 [22 C.



C. A. 60]; *Dominicis v. Casualty Co.* [132 App. Div. 558] 116 N. Y. Supp. 975 (Sup. Ct. 1909). See *arguendo* *Carroll v. United Ry. Co.*, 157 Mo. App. loc. cit. 268 [137 S. W. 303]. In all of the cases it was held that the judgment of the physician as to the extent of the injuries at the time of his examination and his statement of the existing condition of the patient is not in any sense the expression of an opinion but the assertion of a matter of fact, and that, if untrue and fraudulently made, would afford a basis for setting aside a release made upon faith in its verity. Some of them hold that the opinion of the physician as to the future recovery of the party examined within a specified time becomes actionable from the fact of his presumed competency and knowledge and trust reposed. And that, if the plaintiff, in sole reliance on that opinion, makes a settlement, for an unfair amount, it may be set aside upon a showing that the medical statement inducing the settlement was untrue in fact and fraudulently made because not bottomed on a knowledge which the physician, by virtue of his profession, should have had when he gave the opinion.

"This extension of the rule need not be now affirmed by us. For in the case at bar the plaintiff testified that the physician told him the bones of his arm were united at the time of the examination. Other testimony adduced on his behalf tended to show that was not the fact. This representation made by the physician was not the expression of an opinion but the assertion of an existing fact, and therefore clearly within the general rule making such assertions, when fraudulently made, a proper ground for annulling a release executed upon the faith in them. The opinion of the doctor to that extent, at least, presented an issuable fact which the plaintiff was entitled to have the jury pass upon in the case at bar. The case of *McFarland v. Railway Co.*, 125 Mo. 253 [28 S. W. 590], and *Homuth v. Street Ry.*, 129 Mo. 629 [31 S. W. 903], do not in any way contravene this conclusion. In the first of these citations, the court calls attention to the fact that the release executed by the plaintiff actually described the full extent of her injuries. Under these circumstances the court held that she could not have been deceived in executing the release; and that, having made it with full knowledge of its provisions and received payment in accordance with its terms, she could not afterwards maintain an action for further injuries. In the second case the statement relied upon by the plaintiff as having induced the execution of the release was the representation to her, previous to the settlement, made by the physician for the defendant, that he thought she would be well in 14 days, accompanied by the statement, 'Here is your physician; ask him his opinion.' The court held that there was nothing in the circumstances which warranted the presumption that a statement so made

by the company's surgeon was not in the utmost good faith and contained an honest expression of his opinion, and hence did not constitute an actionable fraud. These were not representations of existing facts. It is apparent, therefore, that neither of those cases contravene the rule applicable to the direct, unequivocal, and positive statement (as testified by plaintiff) of the surgeon in the case at bar that the separated bones of his arm had united at the time of the examination made. Our conclusion is that the truth or falsity of that statement and the scienter of the maker and the reliance of the plaintiff upon it in executing the release offered in evidence presented an issue which should have been submitted to the jury by proper instruction."

It will be noticed that, whilst our Brother BOND says that some courts have extended the rule to opinions as to future recovery of the patient, he was careful not to give the assent of this court to that doctrine. In view of what we have previously held, we could not well assent to this new rule. *McFarland v. Mo. Pac. Ry. Co.*, 125 Mo. loc. cit. 278, 28 S. W. 590; *Homuth v. Street Ry. Co.*, 129 Mo. 629, 31 S. W. 903.

In so far as the doctor undertook to state existing facts, as he did, if he said the bones were then united, the truth or falsity of such statements are for consideration. A physician, skilled in determining existing bodily conditions, should be held to be making statements of fact, rather than giving a mere opinion, when he undertakes to state a then existing condition of the patient. So in this case, if the company's physician stated to deceased that the bones of his arm had then united, and such stated fact was not true, and the deceased, in executing the release, believed such statement of fact, and acted thereon, then, if the statement was false, plaintiff should not be bound by the release. But the trouble with plaintiff's instruction in this case is that it does not present that question for the consideration of the jury. The instruction predicates the plaintiff's right to set aside the release upon the opinion as to the date of the future recovery of the deceased, and not upon the ground that the doctor had stated that the bones were then united, when in truth and fact they were not. (We use the term "deceased," because the original plaintiff is dead now, and the suit is proceeding in the name of his administratrix.) The wording of the instruction upon this question is, "And you further find that such doctor assured the plaintiff in substance and without qualification that plaintiff's left arm would be as good and strong as ever within a period of time not exceeding six months," and that such statement was false, then the release should be set aside. The whole instruction is based upon the opinion expressed as to the future recovery of the plaintiff's arm, and not to any false statement of a then existing fact. Not only

this the situation of the instruction, but it is the theory of the reply, which we have set out fully to the end that its purport might be seen. It is true that in such reply the plaintiff avers that the doctor said "that the bone of the plaintiff's left arm, where broken, was perfectly reuniting," but the instruction does not cover this idea. It should also be noted that the allegation is that the bone "was perfectly uniting," whilst the proof is that the doctor said that it had "*perfectly united*." This last is somewhat by the way-side. The point is that the instruction allowed an invalidation of the release for an alleged false opinion as to the time in which the arm would, in the future, become well, and not for a false statement of a then existing fact. So that grant it to be true that when the doctor told deceased that the bones of his arm had then united, and in so doing stated a fact, which, if false, would nullify the release, yet no such theory was presented to the jury, and that case has never been passed upon by the jury. The release could not be set aside for the mere expression of the opinion covered by the instruction. In the *McFarland Case*, supra, the language used by the physician was, "Plaintiff would be up and around in ten days or two weeks;" of this we then said: "As to the last, it amounts to no more than an expression of opinion as to the probable duration of plaintiff's injuries." Upon the theory that the instruction predicates plaintiff's right to avoid the release upon the finding of a mere false or mistaken opinion, rather than upon a false statement of a then existing fact, the instruction was error, for which the case will at least have to be reversed.

III. Defendant urges that its demurrer to the evidence should have been sustained, and therefore that the case should be reversed outright. This is pressed upon the theory of the defendant's answer rather than upon the theory of absence of negligence upon the part of defendant. We are not advised by the petition what acts of negligence are chargeable to defendant, but there is evidence that the tank, so far as the base or foundation is concerned, was not constructed in the usual way, nor had it been bolted up in the usual way. In fact, there is evidence of a negligent construction of the tank, and further that there was negligence in filling the tank with water in its then unfinished condition. There may be other matters, but these suffice to show that the plaintiff could draw an instruction upon the negligence of defendant.

We take it, however, that defendant's real contention is that the plaintiff's own conduct precludes him from recovery. There is nothing in the assumption of the risk as pleaded. The deceased did not assume the risk of the defendant's negligent acts. There is much evidence adduced, by a cross-examination of the plaintiff's witnesses, which goes to the question of contributory negligence. The evi-

dence, from this source, shows that the tank was being filled with water by a pump in the forenoon of the day of the accident; that the water was leaking and making the ground at the base of the tank wet and inclined to slide or slip; that just before noon the tank was quivering and waving to the extent of two inches or more; that deceased knew all these things; that at the dinner meal the dangerous condition of the tank was discussed by the workmen, but it is not clear whether deceased heard this discussion; that, knowing these facts, the deceased, with other workmen, obeyed the directions of their foreman and went back to work upon the tank, the deceased being up near the top thereof; that shortly after their return to work the tank fell and injured deceased. This evidence might justify the presentation of these acts of the deceased to the jury upon a proper instruction, but the evidence does not show such imminent peril as to justify the court in declaring, as a matter of law, that the act of deceased in so going back to work upon the tank would preclude a recovery by plaintiff. At most it was a question for the jury upon proper instructions. In this case, however, both sides seem averse to instructions. Upon the question of defendant's negligence, we believe the plaintiff was entitled to go to the jury, and this contention of the defendant is not allowed. As the case must be reversed for the giving of instruction No. 1 for the plaintiff, we need not discuss the excessiveness of verdict here urged. If the plaintiff upon a retrial gets a verdict, it may be more moderate next time.

Judgment reversed, and cause remanded.

LAMM, C. J., concurs. BOND, J., concurs for the reasons assigned in the quoted portion of his opinion. BROWN, J., concurs in result. WALKER, J., concurs in result and in the opinion except paragraph 1. WOODSON, J., concurs in result in separate opinion. FARIS, J., not sitting.

WOODSON, J. (dissenting). When this case was in Division No. 1, I wrote a dissenting opinion upon two propositions: First, regarding the scope of the instruction; and, second, regarding the opinion of the medical expert testimony. I acknowledge I was partially wrong upon the former, but adhere to my views expressed as to the latter.

In division my learned Associate, Judge BOND, who wrote the divisional opinion, correctly applied to this case the familiar rule of practice that when the plaintiff, in submitting his case to the jury, by the instructions which omitted therefrom one of the ingredient elements necessary for a recovery, and thereby induced the court to give the same, should suffer the penalty of his error by having the judgment of the circuit court in his favor reversed and the cause remanded; but in doing so, he stated the rule too

broadly as my learned Associate, Judge GRAVES, has done in this case, in banc, in this: That where the plaintiff undertakes to cover his entire case by instructions, and omits therefrom the theory of the defense imposed, then he commits the same error that he would have done, and did actually commit, in this case, by omitting from his instructions a necessary element in his own case. My meaning is this: In this case, after the plaintiff sustained the injuries complained of, entered into an accord and satisfaction of his cause of action with the defendant. The defendant paid him a certain sum of money in consideration therefor, and the plaintiff accepted the same, and in writing receipted for the same and acknowledged full and complete satisfaction for all damages he claimed he was entitled to on account of said injuries. In all such cases, prior to the enactment of section 1812, R. S. 1909, the plaintiff could not sue and recover upon a cause of action so settled, because the law required him to go into a court of equity and have the accord and satisfaction set aside for some just ground; but after the passage of that statute, and in pursuance to its provisions, such a settlement may be attacked for fraud or other equitable grounds in the same action. But in each instance the burden of proof rests upon the plaintiff to establish the fraud, etc., before the law will permit him to recover damages for the injuries received.

In the case at bar, Judge BOND so held, and properly ruled, that the plaintiff's instructions were erroneous because they omitted the element of fraud mentioned; and, there being no express alder in that regard in defendant's instructions, the judgment should be reversed and the cause remanded, and it was accordingly so done. I dissenting upon the two grounds previously mentioned, first, because I erroneously assumed that the burden of proving the fraudulent release was upon the defendant and not upon the plaintiff, where it properly belonged; and I was therefore of the opinion in that case that it was not necessary for the plaintiff's instructions to submit the question of fraud to the jury, but that it should have been submitted by the defendant's instructions. That was where I erred. The fraud being a part of plaintiff's case and not of defendant's, it became the duty of the former, and not that of the latter, to instruct upon that issue.

Having thus disposed of my own error, and stating these preliminary matters, I will now pay my respects to the errors, as I conceive them, of my Associates, Judge BOND in division and Judge GRAVES in banc, regarding this rule of evidence.

I maintain upon both principles and authority that under our system of jurisprudence all that is required by the law of this state to entitle the plaintiff to recover in an action at law is: (1) To state in his petition the facts which are necessary to constitute his cause of action; (2) to prove those facts

by a preponderance of the evidence introduced; (3) and to submit those facts, and those alone, to the jury, under fair and proper instructions. If under those conditions the jury should find for the plaintiff, I insist he is entitled to a recovery. I also maintain upon both principle and authority that, before the defendant can defeat the plaintiff's right to a recovery in the case supposed, he must: (1) Plead a legal defense to the cause of action stated in the petition; (2) if it is a general denial, to counteract the evidence of the prima facie case made by plaintiff by competent evidence; (3) if an affirmation plea of new matter is filed, then he must establish the truthfulness of the facts of the new matter by a preponderance of the evidence; and (4) in order to intelligently present the defense so made to the jury, he should submit those facts to the jury by proper instructions.

In the former case, if the jury should find for the plaintiff, then in my opinion this nor any other court should interfere with the verdict of the jury or the judgment of the trial court; and in the latter case, should the jury find for the defendant, then this court should not disturb the verdict of the jury of the judgment of the circuit court.

By the foregoing observations I do not mean to contend that in civil cases the court, in the absence of requests by the plaintiff or defendant, is required to give instructions to the jury, nor that either the plaintiff or defendant are legally required to ask them; but what I do mean to state is this: That if the plaintiff does see fit to ask instructions embracing all the elements of his own case, as stated in his petition, and of which there is evidence tending to prove, then his instructions need not go further and cover the defendant's theory of the case. In other words, the defendant cannot stand idly by and thereby impose upon the court or the plaintiff the duty of instructing the jury upon his theory of the case, when perhaps neither of which are perfectly familiar with it.

The law is, and the practice in this state has uniformly been, to give instructions for the plaintiff, which present only his case to the jury, and to give instructions for the defendant which present only his defense to the case made by the plaintiff.

The only ruling of this court, in my opinion, to the contrary where the point was made, that I have seen or have been able to find, is found in the case of *Sullivan v. Railway Co.*, 88 Mo. 169. There it was held, as the opinion here holds, that in an action for injuries resulting from the negligence of the defendant, and in which the issue of plaintiff's contributory negligence was made, an instruction was erroneous which hypothecates the facts as to defendant's negligence and authorizes a verdict for plaintiff therein without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of the plaintiff. (The word "hypothecates" is used

because the court used it in that case.) That opinion was by a divided court; Black and Norton, JJ., dissenting.

The writer had the honor of presenting the same question again to this court in the case of *Owens v. Railway Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. It was there insisted that the ruling in the *Sullivan* Case was erroneous under the rules of pleading and practice in force in this state, which do not require the plaintiff, as in some of the states, to charge in the petition or prove by the evidence that he was free from contributory negligence, but imposes the duty upon the defendant to plead and prove contributory negligence. In other words, that the instructions for the plaintiff need be no broader than his petition and proof, and that, if the defendant wished to rely upon contributory negligence or other facts as a defense, he must plead and prove them and ask the court, if he deems proper, to submit them to the jury by the instructions given on his behalf; but he cannot impose that duty upon the plaintiff.

The court in the *Owens* Case accepted this view of the law, and in express terms overruled the *Sullivan* Case, and in doing so used this language: "The instructions are to be taken as a whole, are so taken by men of common understanding, and can be understood in no other way. There is no necessity for qualifying each by an express reference to the others. They thus qualify themselves, when in the form these instructions are. The contrary ruling in *Sullivan v. Railroad*, 88 Mo. 182, is not to be followed."

The plaintiff's instructions do not in mandatory language tell the jury to find for him, nor do those of the defendant tell them to find for the defendant, but do tell them that if they find the facts to be as stated in the petition to be true as plaintiff's evidence tends to show, then they will find for him; but, upon the other hand, that, if they find the facts to be as contended for by defendant, then they will find for him. Clearly there is no conflict between the two, for the reason that, if the jury find for the one, they must necessarily find against the other, as this court has many times so held.

The same question was presented again in the case of *Melly v. Railroad Co.*, 215 Mo. 567, on page 587, 114 S. W. 1013, 1019, where this court said: "Appellant assails the correctness of instruction numbered 1, given by the court in behalf of the respondent, for the reason assigned that, while it purports to cover the whole case, it omits one of the defenses pleaded in the answer, namely, assumption of risk. We have been cited to no authority sustaining the position assumed by counsel for appellant, and we have been unable to find any case in this state lending color to that contention, excepting the case \* \* \* by a divided court (Norton and Black, JJ., dissenting), it was held that an

instruction which embraced all the facts which were necessary to be found by the jury, before the plaintiff would be entitled to recover, must also tell the jury that, before a recovery could be had, the jury must also find that the plaintiff was not guilty of contributory negligence. But no case has been found in this state or elsewhere, going to the full extent contended for by learned counsel for appellant; nor is the doctrine announced in the *Sullivan* Case any longer the law of this state. That case has been overruled many times in express terms by this court, among which are the following: *Owens v. Railroad*, 95 Mo. 169 [8 S. W. 350, 6 Am. St. Rep. 39]; *Dougherty v. Railroad*, 97 Mo. loc. cit. 661 [8 S. W. 900, 11 S. W. 251]; *Burlington Bank v. Hatch*, 98 Mo. loc. cit. 379 [11 S. W. 739]; *Reilly v. Railroad*, 94 Mo. 600 [7 S. W. 407]; *State ex rel. v. Hope*, 102 Mo. loc. cit. 426 [14 S. W. 985]; *Burdoin v. Trenton*, 116 Mo. loc. cit. 372 [22 S. W. 728]; *Hughes v. Railroad*, 127 Mo. loc. cit. 452 [30 S. W. 127]; *Meadows v. Life Ins. Co.*, 129 Mo. loc. cit. 97 [31 S. W. 578, 50 Am. St. Rep. 427]; *Anderson v. Railroad*, 161 Mo. loc. cit. 427 [61 S. W. 874]."

And in *Lange v. Mo. Pac. Ry. Co.*, 208 Mo. 458, loc. cit. 478, 106 S. W. 660, 666, this court said: "The third objection to this instruction is that it ignores the question of contributory negligence. While that is true, yet that question was presented to the jury in instruction numbered 3 given for respondent, which properly submitted that issue to the jury. *Schmitz v. Railroad*, 119 Mo. 256, loc. cit. 269, 276 [24 S. W. 472, 23 L. R. A. 250]; *Court in Banc*; *Baker v. Railroad*, 147 Mo. loc. cit. 168 [48 S. W. 838]; *Blackwell v. Hill*, 76 Mo. App. 53; *Lange v. Railroad*, 115 Mo. App. 589 [91 S. W. 989]."

The same rule is announced in *Anderson v. Union Terminal Ry. Co.*, 161 Mo. 413, loc. cit. 428, 61 S. W. 874; *Meadows v. Life Ins. Co.*, 129 Mo. 67, loc. cit. 97, 31 S. W. 578, 50 Am. St. Rep. 427; *Hughes v. Railway Co.*, 127 Mo. 447, loc. cit. 452, 30 S. W. 127.

In *State ex rel. v. Hope*, 102 Mo. 410, loc. cit. 426, 14 S. W. 985, 989, this court in discussing this question, said: "The point of the only objection urged against plaintiff's instructions is that they authorize a verdict for plaintiff upon his theory of the facts in the case, without embracing in the same instructions other facts constituting defendants' theory of the case. If, however, the legal propositions they contain are correct (and this is not disputed), and defendants' theory was properly presented to the jury in their own instructions, this mode of instruction would not furnish cause for reversal. *Owen v. Railroad*, 95 Mo. 169 [8 S. W. 350, 6 Am. St. Rep. 39]; *Burlington First Nat. Bank v. Hatch*, 98 Mo. 376 [11 S. W. 739]; *Dougherty v. Railroad*, 97 Mo. 647 [8 S. W. 900, 11 S. W. 251]."

And in *Dougherty v. Railroad Co.*, 97 Mo. 647, loc. cit. 661, 8 S. W. 900, 904, this court

said: "The fifth given for plaintiff is complained of for the reason that it ignores the contributory negligence of plaintiff, and authorizes and directs a verdict for plaintiff, without regard thereto. A similar omission in an instruction of this sort was held fatal error in the case of *Sullivan v. Railroad*, 88 Mo. 169, but the doctrine of that case has recently been overruled in the late case of *Owens v. Railroad*, 95 Mo. 169 [8 S. W. 350, 6 Am. St. Rep. 39]; and upon the authority of the *Owens Case* just cited, and under the views there adopted by a majority of my associates, the omission of the defense of contributory negligence from the instruction under review is not to be regarded as fatal error, requiring a reversal of the judgment in the cause." The same rule is announced in *Burlington Nat. Bank v. Hatch*, 98 Mo. loc. cit. 378, 379, 11 S. W. 739.

The case of *Owens v. Railway Co.*, supra, has been cited and followed by the Courts of Appeals in more than 50 cases, saying nothing about other cases cited, by those courts announcing the same rule.

It seems to me that the law as thus announced by this court and the Courts of Appeals should be followed and forever put this question at rest; if not, then they should be overruled in terms so they will no longer mislead the bench and bar, and act as pitfalls into which the profession and litigants must and will stumble and fall.

This court was led into an erroneous ruling in the case of *Sullivan v. Railway Co.*, supra, by following the decisions of courts where the law of their states requires the plaintiff to allege and prove that he was free from contributory negligence, which, under such a law, it was perfectly proper for such courts to hold that the instruction given for the plaintiff should call the attention of the jury to the question of contributory negligence for the reason that it was a part of the plaintiff's case, but not so in this state, where contributory negligence is purely a matter of defense, and must be pleaded and proven by the defendant to be available.

II. The second ground for my dissent in this case is that the majority opinion holds that the opinion of Dr. McCandless, given to the plaintiff, regarding the condition of his arm, was not the statement of an opinion merely, but "was the statement of a fact." Our learned Associate cites some very respectable authority which seems to support him in that statement; nevertheless I dissent from it, because the expression of an opinion, by a doctor regarding the condition of a person, is not the statement of a fact, but is, in the very nature of the case, nothing more or less than the opinion of the doctor who gives it, and the opinions of all courts in Christendom to the contrary will not change the fact that an opinion is an opinion, and not a fact. I have often heard that, for all practicable purpose, a court could decide that black is white; but this is

the first time in my life where I have seen, in black and white, that principle decided by a court.

However, I, for one, intend to cling to the old idea that an opinion is but the judgment or belief of the party who gives expression to it; and in my judgment the character of the opinion is not metamorphosed in a fact because perchance it is expressed by an expert upon the subject in question. The knowledge and wisdom of the person giving the opinion, if honest, adds weight to, but does not change the character of, the expression. No doctor on earth can state as a fact what will be the result of a certain injury received, not even of a pin scratch. Ordinarily a doctor, or any one else, for that matter, would tell you that such an injury would be trivial and would soon heal, but how often have we seen and heard of injuries no more serious in character prove fatal, even under the care and treatment of the most learned and skilled physicians of the land. That is common knowledge and every one knows it; and there is not a man or woman, with ordinary intelligence, who does not know that, when he or she consults a physician, he will only express an opinion as to his or her condition, and all the assurances the physician may offer that he knows what he is talking about will not deceive him or her in the least in that regard, and, if pressed too far, it is more than likely such assurances will cause them to consider him a quack and, instead of trusting him, will lose all confidence in his opinion and respect for his word. In other words, such matters are not embraced within the field or scope of human knowledge, but rest in opinion only, the same as the opinion of a lawyer. No man knows the law.

With these preliminary observations, let us consider the plaintiff. He testified that he went to Dr. McCandless and stated to him that he had sustained an injury through the negligence of the defendant, and that he was thinking of settling with the company for the damages received in consequence thereof, and told him that he wanted his honest opinion as to his condition, in order to fix the amount of the damages. In response thereto, he further testified that Dr. McCandless said, "Young man, I will guarantee you will have a good arm inside of six months;" and that the doctor further told him that there was a perfect union of the bone of the arm, which, of course, was but an opinion, as he could not see that fracture or its condition. This language of the doctor must be construed in the light of the facts and circumstances that existed at the time he gave expression to it. The plaintiff did not ask the doctor to guarantee that he would have a good arm in six months or within any other period of time; consequently he was not expecting a guarantee, but asked him for *his honest opinion* as to his condition, and that was what he expected

and what he received. The plaintiff never relied upon the guaranty, but upon the opinion. The expression of the doctor that he would guarantee that plaintiff's arm would be as good as ever in six months was made by him for the purpose of giving force and character to his opinion, and not in the sense that he was insuring the plaintiff's arm in that regard, and the latter knew that the doctor used the word "guarantee" in that sense. While the use of that word by the doctor might and probably did have weight with the plaintiff, nevertheless he understood and knew that the doctor was expressing only his opinion as to his condition; and upon that opinion he settled with the company.

In effect it is contended in this suit that the doctor's opinion was in fact a guaranty that the fractured arm had perfectly united and would be completely well within six months, and that the defendant is bound by that guaranty. This contention is untenable for two reasons: First, because, as before stated, neither the doctor nor the plaintiff understood that the opinion was to operate as a guaranty; and, second, because, if the plaintiff so understood it to be such, still he would not be entitled to a recovery for the reason that there is no evidence in this record which tends to show that the doctor had authority to make a contract of guaranty for the defendant, and having no such authority, if he make such a guaranty, then he would be personally liable thereon, but who would ever think of suing him on such a pretended contract of guaranty? He and every one else would say it was his opinion. In short, the plaintiff asked the doctor for an honest opinion as to his condition, and the doctor, so far as this record shows, gave him an *honest opinion*, and now since he was mistaken in that opinion, if he was, the plaintiff now seeks to set aside the settlement and hold the defendant liable for the original injury.

If the petition had charged and the plaintiff had proven by the evidence that the opinion of Dr. McCandless was false and was knowingly and fraudulently made for the purpose of injuring the plaintiff, and that it did so, quite a different question would be presented; but there is not a word of evidence in this case that tends to show that Dr. McCandless falsely, knowingly, or fraudulently gave his opinion as to the condition of the plaintiff. Under this state of facts, this case falls clearly within the rule of law announced by this court in the cases of *McFarland v. Railway Co.*, 125 Mo. 253, 28 S. W. 590, and *Homuth v. Street Ry. Co.*, 129 Mo. 629, 31 S. W. 903. That being true, the court should have sustained a demurrer to the evidence. Without there was other evidence to carry the case to the jury upon that point, I express no opinion.

For the foregoing reasons I dissent from the majority opinion; but believe that the judgment of the circuit court should be reversed, and the cause remanded for a new trial in conformity to the views herein expressed.

WALKER, J., concurs in paragraph 1.

JEUDE et al. v. SIMS et al. (No. 16014.)  
(Supreme Court of Missouri. May 4, 1914.)

1. JUDGMENT (§ 140\*)—DEFAULT JUDGMENT—SETTING ASIDE—STATUTORY PROVISIONS.

Rev. St. 1909, § 2101, providing that a final judgment entered against a defendant not summoned, and not appearing, may be set aside within a specified period on defendant filing a petition for review showing a good cause for relief, does not apply where defendant appeared and filed an answer to the original petition, though he subsequently failed to appear and take part in the subsequent proceedings, resulting in an adverse judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 252; Dec. Dig. § 140.\*]

2. JUDGMENT (§ 153\*)—VACATING JUDGMENT—GROUNDS—IRREGULARITY—MOTION.

A motion under Rev. St. 1909, § 2121, declaring that judgments shall not be set aside for irregularity on motion, unless the motion is made within three years after the term at which the judgment was rendered, must be based on an irregularity patent on the record, and not depending on proof outside the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300-304; Dec. Dig. § 153.\*]

3. JUDGMENT (§ 299\*)—SETTING ASIDE—JURISDICTION OF COURT.

The court, except as authorized by statute, has no authority to disturb its judgment after the lapse of the term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.\*]

4. JUDGMENT (§ 334\*)—DEFAULT JUDGMENT—VACATION—CORAM NOBIS.

A writ of error coram nobis to vacate a default judgment is granted only to correct an error of fact pertinent to the issues in the case, and not mere extraneous matters.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

5. JUDGMENT (§ 334\*)—DEFAULT JUDGMENT—VACATION—CORAM NOBIS.

A motion to set aside a default judgment, on the ground that plaintiff fraudulently misled counsel for defendant as to the time of the trial of the case, is not an application for a writ of error coram nobis, for the trial of the issue of fraud is the trial of an issue outside of any involved in the case in which the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

6. JUDGMENT (§ 334\*)—DEFAULT JUDGMENT—VACATION—CORAM NOBIS.

An application for a writ of error coram nobis to set aside a default judgment, based on a fact known to the party applying and to the court prior to the rendition of the judgment, is properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 638-646; Dec. Dig. § 334.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. JUDGMENT (§ 403\*)—VACATION—EQUITABLE RELIEF—INDEPENDENT ACTION.**

The equitable remedy to set aside a judgment for fraud can only be invoked by an independent equitable action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. § 403.\*]

**8. APPEAL AND ERROR (§ 876\*) — REVIEW — VACATION OF JUDGMENT.**

A plaintiff who treats an application by defendant to vacate a default judgment as a motion, and who challenges the sufficiency thereof by objection to evidence, on the ground that the motion shows on its face that it will not lie, and that the facts proposed to be adjudicated cannot be reached by motion, is not thereby precluded from questioning the sufficiency of the motion on appeal from a judgment setting aside the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3549-3559; Dec. Dig. § 876.\*]

**9. APPEAL AND ERROR (§ 544\*) — QUESTIONS REVIEWABLE—RECORD PROPER.**

Where the record proper shows the rendition of a valid judgment at a term of court and the setting aside thereof at a subsequent term when the court had lost jurisdiction over the judgment, the action of the court in setting aside the judgment was reviewable on the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

**10. APPEAL AND ERROR (§ 544\*)—QUESTIONS REVIEWABLE—RECORD PROPER.**

A motion in the nature of an application for a writ of error coram nobis to set aside a default judgment is in the nature of a petition, and is a part of the record proper, and need not be preserved by bill of exceptions to require the court on appeal to review the setting aside of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

Lamm, C. J., dissenting.

In Banc. Appeal from Circuit Court, Ste. Genevieve County; Chas. A. Killian, Judge.

Action by Susan Jeude and others against Thomas B. Sims and others. From a judgment setting aside a judgment for plaintiffs, they appeal. Reversed.

Jere S. Gossom, of Caruthersville, W. O. Anderson, of St. Louis, and Pope & Lohman, of Jefferson City, for appellants. Ely & Kelso, of Cape Girardeau, and John A. Hope, of St. Louis, for respondents.

**WALKER, J.** This cause was certified here by the St. Louis Court of Appeals, because title to real estate was involved. To get at the real issues, a short statement of the facts will suffice:

This is an action to quiet title under old section 650, R. S. 1899. Petition was filed September 12, 1905, in the circuit court of Pemiscot county. Defendants appeared and filed answer at the regular November term of that court. At the request and costs of Thomas B. Sims, it was continued over to the February term

of said court. At the February term said Sims took a change of venue to the Ste. Genevieve county circuit court, and the cause was duly docketed for trial at the April term, 1906, of said last-named court. At said April term said Sims, through his attorney, Judge George H. Williams, applied for and obtained a continuance of the cause until the 23d day of July, 1906, and was taxed with the costs of such continuance. On said 23d day of July the said Sims again appeared through his attorneys, Whittleage & Pratt, and filed his application for a continuance to the next regular term of the court, which was by the court refused, and thereupon the said Sims, through his said counsel, refused to appear further in the case. The judgment record of the court on July 23, 1906, being a part of the April, 1906, term of the court, thus speaks: "Now come the plaintiffs by their attorneys, and all the defendants, having appeared and answered plaintiffs' petition in said cause, say nothing further in bar of plaintiffs' action. Thereupon plaintiffs, by their attorneys, waive a jury and submit this cause to the court upon the pleadings and the evidence and proof adduced in said cause, and the court, having heard and considered the same, doth find that the plaintiffs are the owners in fee of the land described in the petition as follows, to wit: The northeast quarter of section twenty-eight (28), in township nineteen (19), north of range twelve (12) east, lying, being, and situate in Pemiscot county, Missouri, and that the plaintiff Susan Jeude is the owner and entitled to a dower interest in said land as the widow of Casper Jeude, deceased, and that each of the other plaintiffs own an undivided one-fifth interest in fee in and to said land, subject, however, to the said dower interest of Susan Jeude, and that the defendants, nor either of them, have any right, title, or interest, or estate in and to said above-described land. It is therefore ordered and adjudged and decreed by the court that the absolute, legal, and equitable title to said land is in the plaintiffs, Susan Jeude, Walter G. Jeude, Fredreca M. Jeude, Emma L. Jeude, Herbert L. Jeude, and Charles C. Jeude, and that the defendants, and those claiming under them, are hereby precluded and forever barred from setting up any right, title, interest, or estate in or to the above-described land. It is further considered, ordered, and adjudged by the court that plaintiffs have and recover of and from the defendants, Thomas B. Sims, Laura B. Tistadt, Clara M. Barcroft, Mary F. Liles, and Bettie Green, their costs in this suit expended and laid out, and that they, the above-mentioned plaintiffs, have execution therefor."

The application for continuance, mentioned supra, becomes a material matter, because of the facts therein recited: "And now comes

the above-named Thomas B. Sims, by T. B. Whittleage and Joseph Pratt, his attorneys, and moves the court to continue this cause to the 24th day of July, 1906, for the reason stated in the following affidavit: "T. B. Whittleage, being duly sworn, says that one George H. Williams, of St. Louis, is the principal attorney for the defendants in this cause, and that himself and Joseph C. Pratt were employed by the said Mr. Williams at the last term of this court to assist in the trial of the said cause, and that they knew nothing of the merits of the case, and are not prepared and cannot safely go to trial at this term of the court on account of the absence of the said George H. Williams, the attorney of the defendants as above stated; that himself and Mr. Pratt fully expected the said Mr. Williams to be in attendance for the trial at this term of court, and fully expected him to arrive at the 10:30 train from St. Louis, and upon his failure to arrive upon said train he called up by telephone the St. Louis office of Stewart, Elliott & Williams, the law firm of the said George H. Williams, of St. Louis, and was informed by the person in charge of the office that Mr. Williams was absent from the city, and further stated that a copy of a letter was on the files of their office written by Mr. Williams to Ely & Kelso, a firm of lawyers at Kennett, Missouri, which stated that he (Mr. Williams) had seen Mrs. and Miss Jeude, two of the plaintiffs in the above-entitled cause, and made an agreement with them that this case was to be continued by consent to the next regular term of this court; that the said letter was dated on June 18, 1906, and that said Ely & Kelso were in said letter directed to inform Mr. Gossom, the attorney for the plaintiffs in this cause, of the said agreement for continuance; that the letter files also contained a letter from the said Ely & Kelso, dated June 23d, acknowledging the receipt of said letter, and stating that they would inform Mr. Gossom of the agreement to continue, and that the said George H. Williams, in good faith, and relying on the said agreement with the above-named plaintiffs, and for that reason alone, did not come down for the trial of this cause at this time. The affiant further says that he was informed that Mr. Williams could be here in time for the trial of said cause by to-morrow morning, if the court would continue it until that time. Affiant further says that neither he himself or Mr. Pratt have any of the title deeds necessary to be introduced in this cause in order to properly defend the said action; that all such title deeds are in the possession of the said Mr. Williams and Thomas B. Sims, the defendant, and affiant further states that he is informed and believes that the said Thomas B. Sims is now sick and unable to be in attendance for trial at this term of court, and that the defendant cannot safely go to

trial without the presence and the testimony of the said Thomas B. Sims; that the said George H. Williams and the said defendant Thomas B. Sims are not absent by the consent or connivance or procurement of this affiant, and this affiant has good reason to believe and does believe that the said George H. Williams will be on hand and ready for trial of this cause to-morrow morning at 10:30 o'clock a. m., if the said cause is continued to that time, and that great injustice will be done to the defendant in this cause if such continuance is not granted; that the affiant in this case hereby in open court offers and tenders all reasonable expenses to the plaintiffs, witnesses, counsel, and costs of court that may accrue by reason of the continuance of this cause until to-morrow morning at 10:30 a. m.; and the affiant further states that there are no other causes now pending and ready for trial before this court, that no injustice will be done to any parties by reason of said delay, but that great injustice will be done by the denial of this application, and that this application for a continuance in this cause is not made for the purpose of vexation or delay, but that substantial justice may be done, and that the defendant has a good and meritorious defense in this cause." We have omitted the caption and the verification.

After the April term, 1906, the term at which the foregoing judgment was rendered, nothing further was done in the case until the April term, 1907, at which time the following motion was filed in the original cause:

"Now comes defendant T. B. Sims and moves the court to set aside the judgment rendered herein against this defendant on the 23d day of July, 1906, for the reason that said judgment is irregular, prematurely rendered, and wholly unwarranted for the following reasons, to wit:

"First. Because said judgment was obtained by plaintiffs in the absence of defendant; said defendant being absent at the instance of the plaintiffs, and upon an agreement made and entered into by and between plaintiffs and defendants that said cause would not be taken up for trial, but should be continued.

"Second. Said defendant would have been present at the trial in person and by counsel had it not been for the undue advantage taken by plaintiffs in securing an agreement to continue the case. Defendant had made every arrangement to be present at the trial of said cause when plaintiffs entered into an agreement that said cause would be continued, and that the parties would not go to Ste. Genevieve to court.

"Third. That, in violation of said agreement to continue said cause made with the plaintiffs, and notwithstanding the fact that this defendant did not go to said trial solely because of said agreement, yet these plaintiffs, taking advantage of said agreement to continue said cause and the absence of the



defendant because of said agreement, did attend the said court, and asked that judgment be entered against this defendant.

"Fourth. Defendant says by reason of said agreement that said judgment is, not only irregular, but fraudulently obtained against this defendant.

"Fifth. That, if said judgment is permitted to stand, it would deprive this defendant of his property without due process of law.

"Sixth. That the property described in said petition, to wit, all of the northeast quarter of section twenty-eight (28), township nineteen (19) north, range twelve (12) east, in Pemiscot county, Missouri, is the absolute property of this defendant. All of which would fully appear from a trial of this cause upon the merits."

We have again, for brevity, omitted caption and verification. Suffice it to say that this motion was filed in the original proceeding, and entitled just as was the petition. Plaintiffs joined issue by answer, the terms of which are not very material in the view we have taken of this case. When the motion came on for hearing, the plaintiff objected in the following language:

"George H. Williams, being duly sworn, testified on the part of the defendant, as follows:

"Examined by Mr. Kelso.

"Judge Gossom: I now desire to object to the introduction of any testimony whatever under this motion, for the reason that the motion shows upon its face that it will not lie in a proceeding of this kind after the term of court had expired, the term of court at which judgment was rendered had expired, and for the further reason that the motion shows that the facts and questions proposed to be adjudicated in this case cannot be reached by a motion of this kind, and it is not a matter discretionary with this court.

"By the Court: Let the motion be overruled, or the objection be overruled.

"Judge Gossom: We except."

After a hearing upon this motion, the court sustained the same and set aside the original judgment of July 23, 1906, and, from that judgment so sustaining said motion, and setting aside the original judgment, the plaintiffs have appealed. Around these facts center all the contentions here.

[1] I. There are but three possible views in which to consider the document upon which the judgment appealed from in this case is based; i. e., (1) that it is a motion under our statutory provisions, (2) that it is a motion in the nature of an application for a writ of error coram nobis, and (3) that it arises to the dignity of a bill in equity to set aside a judgment for fraud. Of these in their order:

For some years we have had what is now section 2101, R. S. 1909, on the books. This section reads: "When such interlocutory judgment shall be made and final judgment

entered thereon against any defendant who shall not have been summoned as required by this chapter, or who shall not have appeared to the suit, or has been made a party as the representative of one who shall have been summoned or appeared, such final judgment may be set aside, if the defendant shall, within the time hereinafter limited, appear, and by petition for review, show good cause for setting aside such judgment." The time limit for a review of the case under this statute is fixed at three years from the rendition of the final judgment. Section 2103, R. S. 1909.

This section 2101 has no application to the case at bar, because the defendants in the instant case not only appeared to the original petition, but they filed an answer thereto. From the plain wording of this statute, it cannot be said that it applies to the case at bar. The parties do not fall within the class intended to be benefited by this section of our statutory law. When they appeared and filed answer to the petition, they took themselves from under the protecting wings of this legislative act—if they were ever in position to claim its benefits. Thereafter they were obliged to conduct themselves as the ordinary litigant, even throughout the weary length of the case. They could not throw up their hands at the first adverse ruling, and by deserting the case gain advantage for themselves. The document filed by them at the April term, 1907, of the court cannot be considered as a motion under the statute quoted supra.

[2] Sections 2119 and 2120, R. S. 1909, are our statute of jeofails, and definitely prescribe upon what irregularities a judgment shall not be set aside. We then have these statutes followed by section 2121, R. S. 1909, which reads: "Judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within three years after the term at which such judgment was rendered." Section 2121, R. S. 1909, was section 795 of R. S. 1899.

In *State ex rel. v. Riley*, 219 Mo. loc. cit. 681, 118 S. W. 651, we had occasion to consider the scope and the character of a motion under this section of the statute. We there said: "A motion contemplated by this statute must be one based upon an irregularity which is patent on the record, and not one depending upon proof dehors the record. *Phillips v. Evans*, 64 Mo. loc. cit. 22; *Latshaw v. McNees*, 50 Mo. loc. cit. 384; *Powell v. Gott*, 13 Mo. loc. cit. 461 [53 Am. Dec. 153]." In the *Phillips Case*, supra, this court said: "Although a judgment may for irregularity be set aside at any time within three years (*Wagn. Stat. p. 1062, § 26*), yet such irregularity must be one patent of record, and cannot be shown by matter dehors the record." The other cases cited are to a like effect. The instrument filed in this case is not one covered by this statute. The errors or wrongs complained of therein were

not patent of record, but were dependent upon proof dehors the record.

[3] In all cases, except those provided for by these statutes, a court has no authority to disturb its judgment after the lapse of the term. This has been so universally ruled that citations would be or become superfluous. The defendants, therefore, are in no position to lay hold of either of these two statutes, and the original judgment was wrongfully set aside after the lapse of the term, unless such action can be upheld upon one of the other two theories remaining to be discussed.

[4, 5] II. Is the document filed by the defendants a motion in the nature of an application to the court for the common-law writ of error coram nobis? Does it go to questions for which such a motion is permitted under the practice in this state? When the instrument upon which the judgment vacating the original judgment is examined, both these questions must be answered in the negative. At common law writs of error coram nobis were writs granted by the court rendering the judgment for the purpose of correcting some error of fact. 2 Tidd's Practice, p. 1136. The fact must be such a fact which, had it been known at the time of the rendition of the judgment, such judgment would not have been entered. It must be a fact directly connected with the case in which the judgment was entered, and a fact wrongly considered in the entry of the judgment, which is sought to be corrected by the writ of error coram nobis. To illustrate, the court enters a judgment against a dead person after service, on the theory that he is still alive, or against a minor, thinking such minor was an adult. In other words, the erroneous fact must be one which entered into the very make-up of the judgment sought to be overruled and set aside by the writ, and the real fact sought to be established upon the hearing of the writ must be one which would have prevented the entry of the judgment had it been known to the court. *State v. Stanley*, 225 Mo. loc. cit. 534, 125 S. W. 477; *State ex rel. v. Riley*, supra. In the *Stanley Case*, supra, this court said: "But again, this writ is only allowed to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." The motion in this case simply sets up that the plaintiffs fraudulently misled counsel for the defendants as to the time of the trial of the cause. Whilst such conduct, if shown upon a trial by bill in equity to set aside the judgment for fraud, would perhaps be good, yet we fail to find any case wherein such fact is a ground for the common-law writ of error coram nobis. In our practice a motion is considered as an application for such a writ. The writ, being heard in the same court which issues it, is

usually never issued at all; but the matter is determined upon a hearing of the matters raised in the application (in this state in the motion) as if a formal writ had been issued. 5 Ency. of Plead. & Prac. 38.

The trial of the issue of fraud used in preventing the party from being present and making a defense is the trial of an issue outside of any issue involved in the case in which the judgment is rendered. It is not an issue in that case, and in my mind not an issue out of which an error of fact can arise, which would authorize a writ of error coram nobis. The error of fact to be corrected by the writ of error coram nobis must be errors of fact pertinent to the issues in the case, and not mere extraneous matters.

We are therefore of the opinion that this motion cannot be considered as a motion in the nature of a writ of error coram nobis.

[6] III. But, even if we grant the proposition that the fraudulent misleading of a party as to the time of the trial is a pertinent issue entering into and culminating in the judgment sought to be set aside, and that this motion should be considered as an application for a writ of error coram nobis, yet the judgment on such application is erroneous under the facts in the case. In the record before us we have the affidavit for continuance. This affidavit sets out the facts of an agreement to continue. It sets out the very things charged in this motion or application. It is therefore apparent from the face of the record before us that the fact of this alleged agreement was not only known to counsel for defendants, but that it was brought to the attention of the court before the rendition of the judgment in the case—the judgment attacked by the motion and vacated by the court nisi.

It is the universal rule that, if a fact be known prior to the entry of judgment, or by reasonable diligence it might have been known prior to the entry of the judgment, such fact cannot be relied upon under the common-law writ of error coram nobis to set aside such judgment. The cases upon this point will be found collated in *Reed v. Bright*, 232 Mo. loc. cit. 410 et seq., 134 S. W. 653, and in *State v. Stanley*, 225 Mo. loc. cit. 532 et seq., 125 S. W. 475. The general rule is stated in 5 Ency. of Plead. & Prac. p. 29, in this language: "The writ will not lie where the party complaining knew the fact complained of at the time of or before trial, or by the exercise of reasonable diligence might have known it, or is otherwise guilty of personal negligence in the matter, or when proper advantage could have been taken of the alleged error at the trial."

The fact complained of in the case at bar was, not only a fact known to counsel for defendants prior to entry of judgment, or the trial of the case, but one actually called to the attention of the trial court by them in the motion for continuance. It was therefore

a matter within the knowledge of the parties (for the knowledge of one's attorneys is his knowledge), and within the knowledge of the court which entered the judgment. So that, even if we consider the motion as and for the writ or error coram nobis, the judgment appealed from in the case before us is wrong upon the showing made.

[7] IV. Counsel for respondents do not seriously contend in their brief that this proceeding is one in equity to set aside a judgment for fraud in the procurement thereof. Stated differently, they do not contend that the instrument here under consideration is a bill in equity to set aside a judgment for fraud. It is clear that it is not such instrument. To have invoked equity would have meant the bringing of an independent action, and this does not purport to be an independent equitable action. As it is not a bill in equity upon its very face, it is useless to discuss the question whether or not it states facts sufficient to constitute a good bill in equity.

[8] V. But counsel for respondent urge that the plaintiffs filed an answer to the instrument filed by defendants, and that for this reason they should be precluded from questioning its sufficiency now. Plaintiffs treated this instrument as a motion, and they challenged the sufficiency thereof by objection to the introduction of any evidence under the same. This objection we have set out in the statement of facts, and it is such as to protect all rights of the plaintiffs. Defendants proceeded nisi as if it were a motion in the nature of a writ of error coram nobis, and by that token they must be judged here.

[9, 10] VI. Lastly, it is contended that this motion to set aside the judgment is not preserved in the bill of exceptions, and for that reason the judgment thereon is not for review here. This contention will not avail the defendants. First, if this document is neither a bill in equity nor an application for a writ of error coram nobis, but is a simple motion to set aside a judgment, it matters not whether it is here at all. The record proper is here. This record shows a judgment in due form at the April term, 1906, and then it shows that the court set aside that judgment at a subsequent term, i. e., at the April term, 1907, upon a motion filed at such subsequent term. The judgment under review here denominates it a motion. Note the language of that judgment: "Now on this day come the parties in the above-entitled cause by their respective attorneys herein, and the motion to set aside judgment in the above-entitled cause was by the court taken up, and, after duly considering the same and hearing testimony regarding same, and argument of counsel, the court sustains the same. It is therefore ordered and adjudged by the court that said judgment heretofore rendered in the above-entitled cause be set aside and vacated. It is further ordered and adjudged that defendant have and recover of plaintiffs his

costs on this behalf expended and have execution therefor." So, taking the record proper, we have a valid judgment entered at the April term, 1906, and such judgment set aside at a subsequent term of the court, a time when the court had lost all jurisdiction over the judgment. And, secondly, if we consider the instrument filed as a motion in the nature of an application for a writ of error coram nobis, then such document is in the nature of a pleading (5 Ency. of Plead. & Prac. p. 33) or petition, and is a part of the record proper, and does not have to be preserved by bill of exceptions. All the books and the cases treat a motion of this kind as a petition, and as the foundation for the relief sought, and, being of that character, it should be treated as record proper.

From what has been said, it follows that the judgment vacating the former judgment should be reversed, to the end that the original judgment may stand in full force and effect. It may be that defendants have a remedy, a matter we do not decide; but this judgment is wrong and should be reversed.

It is so ordered.

All concur except LAMM, C. J., who dissents in an opinion filed, and FARIS, J., who does not sit.

LAMM, C. J. (dissenting). Plaintiffs sued Sims and others in the Pemiscot circuit court to determine title to certain land under former section 650 (now R. S. 1909, § 2535, as amended). Sims answered separately, claiming the land. Other defendants answered jointly, claiming the land *as against the world*, and after that valiant challenge they straightway and once for all disappear from subsequent proceedings. Presently Sims (whom we will call defendant) took a change of venue to Ste. Genevieve. After a continuance by him it was once more continued by him to July 23, 1906, which we conclude is a day certain at an adjourned term, specially set, we take it, for the trial. When reached for trial on that day, Sims, through counsel, filed an application asking for a continuance until the next day. That application was overruled. Thereupon Sims' local attorneys stood mute, taking no further part. Defendant was not present in person. Thereat the cause was heard on one side, and judgment entered for plaintiffs, finding and decreeing they were the owners of the land as against all the defendants; one of plaintiffs, Susan Jeude, being adjudged a dowress, the rest owners of the fee, and the several defendants were forever barred from claiming any right, title, etc. The judgment has, *inter alia*, the following narration: "Now come the plaintiffs by their attorneys, and all the defendants, having appeared and answered plaintiffs' petition in said cause, say nothing further in bar of plaintiffs' action." Presently, on the same day, the court adjourned to court in course, with nothing further done at that term. So at the October term, 1906.

But to the April term, 1907, defendant filed a motion to vacate the judgment. We assume plaintiffs were served with a notice and copy of the motion. At any rate, they personally appeared to the April term, 1907, and filed a pleading called "an answer" to the motion. Thereupon on full appearances and full hearing the issues on the motion were tried. Taking time to consider, the court at a subsequent term entered a judgment and order vacating the judgment of July 23, 1906. In due time plaintiffs made an attempt to have the vacating judgment and order set aside by a motion for new trial. Failing in that, they saved an exception and on apt steps came up by appeal. The appeal was lodged in the St. Louis Court of Appeals and transferred here because title to real estate is involved.

There is a main question, viz.: On the facts had the court jurisdiction to enter its vacating judgment and order on a motion filed to a subsequent term? When that question is reached, we will set forth sufficient of the record to intelligently dispose of it. There are some subsidiary points to be ruled to clear the way for the main controversy. Of them severally.

I. It is argued for respondent there is no call in the bill of exceptions for the motion to vacate, nor is it preserved in such bill; hence it is not regularly here on appeal. This agreeably to the precept: That which does not appear where it should appear is the same as if it did not exist. Let us look to that.

The motion is in the record, but is in the abstract of the record proper, not in the abstract of the bill, and no call is made for it therein.

The point is without substance, because: Whilst the general rule is that a bill of exceptions is the proper receptacle for ordinary motions (Shohoney v. Railroad, 231 Mo. loc. cit. 152, 132 S. W. 1059, Ann. Cas. 1912A, 1143), there are exceptions to the rule as well established as the rule itself. One of them is that a demurrer, stood on, or a motion filling the office of one, preserves itself, without an exception, and without a bill. Shohoney Case, supra. Another exception is that motions which, when served, have the office of due process of law, or are in the nature of original and independent proceedings, though grafted on the main stem of the original suit, are in effect pleadings, become part of the record proper, and come up without a bill. Wilson v. Railroad, 108 Mo. loc. cit. 602 et seq., 18 S. W. 286, 32 Am. St. Rep. 624, and cases cited; Ryan v. Gowney, 125 Mo. loc. cit. 480, 28 S. W. 189, 755; City of Tarkio v. Clark, 186 Mo. loc. cit. 293, 85 S. W. 329.

Here the motion to vacate authorized a judgment setting aside the former judgment and the recovery of costs. The vacating judgment entered was to that effect. The proceeding, then, being to all intents and purposes an independent proceeding in which the

motion was the petition, it falls within the noted exception to the general rule.

Accordingly the point should be disallowed to respondent.

II. It is next argued by respondent that no appeal lies from the vacating judgment or order. We think that an unsound position also, because: An appeal is a creature of statute only. Now, by R. S. 1909, § 2038, an appeal is allowed "from any final judgment in the case, or from any special order after final judgment in the cause."

As said heretofore, in a sense, this is a new suit. From that standpoint, broadly speaking, the vacating judgment was a "final judgment," and an appeal lies by virtue of the statute. But, if the proceeding to vacate be held not a new suit, yet the statute still allows an appeal because, on such view, the vacating judgment or order may be allowed (without violence to reason or language) to fall into the class of "any special order after final judgment in the cause." So that, for our present purposes, we may reserve the question whether the vacating judgment or order, on one hand, is a "final judgment," or, on the other, is a "special order after final judgment," since it is one or the other, and an appeal lies either way. And so we have held. State ex rel. v. Riley, 219 Mo. loc. cit. 695 et seq., 118 S. W. 647. So, in Shuck v. Lawton, 249 Mo. 168, 155 S. W. 20, error was brought on such a vacating judgment, and we took cognizance of the case. Doubtless other cases could be found by time and diligence in which we have entertained jurisdiction of appeals from orders refusing to vacate. Craig v. Smith, 65 Mo. 536, is one of that kind. Burgess v. Hitt, 21 Mo. App. 313, evidences an instance of an appeal from a vacating judgment.

The practice being against respondent's contention, the point should be ruled against him; the maxims being: Common observance is not to be departed from; custom is second law; custom is the best expounder of the law. Donnell v. Wright, 199 Mo. loc. cit. 316, 97 S. W. 928.

III. Appellants seek to impugn the vacating judgment, among other ways, by a rule of court. Let us look to that. The attack on the judgment in the motion is based on an alleged violation of an agreement to continue whereby it is said defendant was tricked out of his defense. Now, that agreement was not in writing. Judge George Williams, who made the agreement on behalf of Sims, lived in St. Louis, as did the two plaintiffs who are said to have entered into the agreement. Sims' other attorneys had no part therein, nor did plaintiffs' attorneys. Sims had arranged with Ely & Kelso, of Kennett, to assist Judge Williams at the trial, as will more fully appear hereafter. There was also an arrangement with Pratt & Whitledge, who lived at the place of the trial, to assist as local counsel. Judge Williams was Sims' principal attorney, and had gener-

al charge of his business. He was recognized as the leader on defendant's side. There was a rule of the Ste. Genevieve circuit court, No. 22, reading: "No agreement, understanding, or stipulation of parties or their attorneys concerning any pending cause, or any matter of proceeding therein, will be recognized or enforced by the court, unless made in writing and filed in said cause, or made in open court."

It is not shown that Sims or Ely & Kelso or Judge Williams (all nonresidents of Ste. Genevieve) knew of the existence of this rule. Presumably they did not. At the hearing of the application the existence of an agreement to continue was disputed. The record indicates that the rule was, at least, one ground upon which the court overruled the application, coupled with the conceded fact that the alleged agreement did not conform to it, but rested alone in parol. In this view of the matter, it is argued for appellants that the above court rule not only impugns the vacating judgment, but made the original impregnable against attack.

But we are not willing to follow the lead of that suggestion. General rules of court, like general principles of law, are subject to exceptions when justice cries out for the exception. Court rules are mere ends to the attainment of justice, and are not to be twisted into instruments of injustice. Courts, about the exalted office of dispensing justice, are not to have their functions starved and atrophied by a mere phrase or rule, in an exceptional case calling for a suspension of the rule as a debt due to justice. Says Chief Justice Taney (*United States v. Breitling*, 61 U. S. [20 How.] loc. cit. 254, 15 L. Ed. 900): "And it is always the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." Speaking to a rule of court (*quatuor pedibus currit* with the one at bar) interposed in *McIntosh v. Crawford County*, 13 Kan. loc. cit. 176, the court said, through Brewer, J.: "Even with such a rule, it would not follow that a court was bound to tolerate so gross a breach of faith. [To wit, a violation of a verbal agreement to continue which tricked the other party into absence and out of his defense.] The rules are designed to prevent injustice, not to further and accomplish it. The question is, not whether the court would have erred after notice of such a parol agreement in compelling the plaintiff to go to trial, but whether a party, after making such an agreement, can be allowed in a court of justice to profit by breaking it." *Pickett v. Wallace*, 54 Cal. 147, is in point, and *Fritz v. Railroad*, 243 Mo. loc. cit. 68, 148 S. W. 74, *arguendo*.

On such reasons we conclude that, if the court gave full credence to the evidence on behalf of defendant (of which more presently), the rule, without more, interposed no impassable obstacle to relief. Appellants' case

cannot alone stand, therefore, on that narrow point. It was not reversible error to except the case from the court rule, as was done.

The point should be ruled against appellants.

IV. With the foregoing questions at rest, the main controversy confronts us. It (assuming facts already stated) searches other record facts, which follow:

It substantially appears that two of plaintiffs who seem to have acted for all (and there is no evidence tending to show their acts were repudiated by the others as unauthorized) appeared at the office of Judge Williams in St. Louis some days prior to the day of trial. They had not been able to hear from their own attorney. A negotiation for a compromise seems to have been pending, and, to that end, the plan of Mr. Sims was to presently send his son to Pemiscot to thoroughly investigate the value of the land, which he proposed to do. (Note: We do not mean to say that the facts we relate were not disputed in part. It is sufficient to state that on behalf of Sims the court heard testimony on the motion to vacate tending to prove them.) The two plaintiffs proposed a continuance pending the compromise negotiation. Judge Williams agreed to it. He offered to notify plaintiffs' attorneys of the agreement; but they took it upon themselves to do so, preferring that course. Mr. Sims at that time was in poor health, on that account was planning a trip north, and had postponed it to attend the trial. The evidence tends to show he had a meritorious defense; that he had paid the taxes on the land for a score of years, and claimed and had evidence of title.

Judge Williams had, as said, charge of Mr. Sims' business in Southeast Missouri, and we infer was about to go on the bench. Be that one way or the other, an arrangement had been made with Ely & Kelso to take charge of Sims' business in that region and relieve Judge Williams. The latter, however, was to remain chief counsel in the instant case and try it with the assistance of the former. To that end, he alone had made and had charge of the trial preparations. As said, a firm of local attorneys was also employed; but they had received no instructions, knew nothing of the merits, and were to assist in the actual trial, when it came on, under the supervision and direction of their associates. At once on the agreement to continue, Mr. Sims was notified by Judge Williams that the case would not be tried, and, on the strength of that information, he left for the North. He knew nothing of the trial or of the judgment until, say, six weeks afterwards. Judge Williams promptly notified Ely & Kelso that the case would not be tried, and that they need not appear. He also out of caution asked them to notify the attorneys on the other side. Through

some inadvertence this was not done; neither did plaintiffs notify their attorneys, as Judge Williams testified they were to do. Relying on the agreement, Judge Williams left the city of St. Louis with his family for California, Mo. He left in his St. Louis office all title papers and documents pertinent to the defense. On the day set plaintiffs and their attorneys appeared in court and demanded a trial. Thereupon the local attorneys for Sims, up to that time apparently in utter ignorance of the facts, got into hasty telephone communication with Judge Williams' office at St. Louis, and that office got into communication with Judge Williams at California. By these means information was conveyed to Sims' local attorneys of the agreement and the reason of the absence of Williams, Sims, and Ely & Kelso. The upshot was that it was ascertained that Judge Williams could reach the place of trial on the next day and bring with him Sims' documentary evidence, if the trial was to come off. Accordingly an application for a continuance was drawn instantaneously by the local attorneys asking for a continuance until the next day only. Through the haste and lack of information, it did not disclose that Sims had gone North and could not set forth all the facts; but it did the best possible and disclosed to the court that the local attorneys had none of the title deeds essential to the defense, and were in a state of unpreparedness. The application was in technical form, and was verified by affidavit. It was overruled, and, as said, the local attorneys took no further part. It should be said that, while agreeing that they visited Judge Williams' office, and that a continuance was talked of, as well as a compromise, plaintiffs denied making any agreement to continue. It will not be necessary to cumber the record with their testimony or of the corroborating testimony on either side, for, if the court gave credence to the evidence for Sims on the hearing on the motion to vacate, as it had the right to do, then the facts appealed strongly to the sound discretion of the court, provided it had any to exercise. The foregoing sufficiently outlines the substance of the controversy.

At the trial of the motion, plaintiffs insisted the court had no jurisdiction to grant relief, and jurisdiction is the master question here for determination. In determining that question of law, we should leave it to the trial court to weight the testimony, and we should not find fault with it for accepting defendant's theory of the facts.

(a) As an aid in determining that question some preliminary observations are useful:

(1) In the first place, the facts on defendant's side bring the cause within an ancient head of equity jurisdiction, to wit: Relief against a judgment obtained by fraud, in extrinsic and collateral matter, by which defendant was tricked out of making his meri-

torious defense. *Bresnehan v. Price*, 57 Mo. 422, and *Lee v. Harmon*, 84 Mo. App. 157, are typical examples of cases illustrating the jurisdiction of a court of equity to grant relief where facts exist like those at bar.

(2) In the next place, as will appear presently, the foregoing does not state the whole source or manner of the remedy, for a practice prevails in many courts permitting a cumulative remedy, to wit: Summary relief by way of motion. The sources of this power, whether statutory, common law, or custom with the rules defining it and its limits, are somewhat obscure. The rules are ill-defined, and he would be a bold judge who would now undertake the task of setting metes and bounds to it—one declined by so wise and learned a jurist as Mr. Justice Miller. *Bronson v. Schulten*, 104 U. S. loc. cit. 416 et seq., 28 L. Ed. 797. But that the practice exists and may be called into play to prevent a miscarriage of justice and grant quick relief by motion in the same cause, *in exceptional cases*, cannot be gainsaid. Speaking to the point, Mr. Justice Miller says, in the *Bronson-Schulten Case*, supra: "There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-fashioned writ of error coram nobis did. This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the states where a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do." (Note: I stress the last sentence in the above excerpt as pregnant and apposite. Missouri is in the class of states justifying the practice, and doubtless it harks back to the reason indicated. It is of great significance, also, to mark the fact that no word of condemnation of the practice can be found in any case in our appellate courts, though many opportunities have arisen for criticism if such was called for because of any inherent vice in relief by motion after the term in exceptional cases crying out for it.)

A standard treatise sums up the matter in this way (1 Black on Judgments [2d Ed.] § 308): "The method of procuring the vacation of judgments which is by far the most commonly used, at the present day, is the proceeding by application to the court which rendered the judgment, in the form of a motion, with notice to the adverse party. This practice, being simple, speedy, and effective, is

well calculated to promote the interests of justice with the least cost and trouble to suitors."

Indeed, it is not clear what inherent vice exists or what harm to jurisprudence can arise in summary relief by motion. When the parties are served with notice and appear (as here), there can be no question about *due process of law*, or "a day in court." So, when the judgment is vacated in that way, the original cause stands for trial on its merits, and cases might be put where the plaintiff, in that regard, would be left in a more advantageous position than he would occupy in a case where (as defendant), by a bill in equity and the decree of a chancellor, the merits might be involved, and be adjudicated against him in abrogating his judgment.

In the above regard the relief by motion is akin to that granted by a motion for a new trial; i. e., it touches the discretion of the very court whose confidence or process has been abused. "Such relief," says Scott, J., in *Stout v. Lewis*, 11 Mo. loc. cit. 439, "operates merely as a delay at most, and that delay may as well be borne in the court below as in coming to this court for redress."

A familiar instance of relief by motion arises under the Attorney's Lien Act. By that act a right was given, but no remedy. But a practice grew up, finding countenance in the common law, for relief, not only by suit, but by motion, and an adjudication on such motion of an attorney's rights thereunder after satisfaction of a judgment. *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Curtis v. Railroad*, 118 Mo. App. 341, 94 S. W. 762; *Walt v. Railroad*, 204 Mo. 491, 103 S. W. 60.

(3) In the next place, it must not be lost sight of that a judgment imports absolute verity, and is the highest form of obligation. It is protected by the maxim: It is to the interest of the state that litigation come to an end. During a term the court holds its judgments in its breast; but after term, as a general rule, they may not be set aside, except for some fraud or trickery scandalizing the administration of justice, and arising (not out of the negligence of a party, nor out of perjury at the trial, but), as said heretofore, extrinsically and collaterally whereby the court itself has become an instrument of injustice. *Howard v. Scott*, 225 Mo. loc. cit. 711 et seq., 125 S. W. 1158. Relief by motion, if such right exists in this state, must be strictly confined within the general bounds of that settled doctrine, except where a certain form of relief in a certain class of cases is expressly granted by statute by a "petition for review," *infra*.

(4) In the next place, there is a statutory scheme for vacating final judgments by a "petition for review." R. S. 1909, §§ 2101 to 2108, inclusive. But, there being service by summons in the instant case, it does not fall within the purview of those sections.

(5) In the next place, there is a statute

under which relief has been granted in many cases (R. S. 1909, § 2121) reading: "Judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within three years after the term at which such judgment was rendered."

It would appear that such section, in words, does not *grant* a power, but puts a *limitation* on a power assumed to exist. However, the rule has been to allow it as a source of judicial power, and it has been uniformly applied in that way. It will be observed it uses the word "irregularity." Accordingly, on that word as a hinge all the cases brought under the section turn. What is an "irregularity" in a legal sense? Tidd defines it (1 Tidd, Prac. [3d Am. Ed.] p. 512) thus: "An *irregularity* may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner." Bliss, J., shortens the definition by accepting that part of Tidd's before the semicolon. *Downing v. Still*, 43 Mo. loc. cit. 317. We have ruled over and over again that the irregularity reached by motion under that section must be one patent on the record, and not resting in proof dehors the record. *Shuck v. Lawton*, 249 Mo. 168, 155 S. W. 20; *State ex rel. v. Riley*, 219 Mo. loc. cit. 681, 118 S. W. 647, and cases cited. The irregularity in the mind of the lawmaker is distinguished by the courts from mere "error." *Ex parte Toney*, 11 Mo. 661; *State ex rel. v. Tate*, 109 Mo. loc. cit. 270, 271, 18 S. W. 1088, 82 Am. St. Rep. 664. To illustrate: Rendering a judgment on service by publication based on an allegation of non-residence in the petition when none such exists would be an irregularity patent of record. *Shuck v. Lawton*, *supra*. We construe *Chambers v. Carthel*, 35 Mo. 374, to rule that, if a judgment be taken exceeding the amount prayed in the petition, that would be an irregularity under the statute. Taking judgment after an order of reference would be an irregularity. *Stacker v. Court*, 25 Mo. 401. A judgment which the record shows was taken prematurely is such irregularity. *Branstetter v. Rives*, 34 Mo. 318. A judgment on a revivor of an action without the entry of appearance or service of a *scire facias* is such irregularity. *Harkness v. Austin*, 36 Mo. 47. Such examples might be added to indefinitely to illustrate the application of the statute; but the foregoing suffice. Evidently there was no irregularity of that class in the case at bar, and respondent's case cannot prosper on that statute.

This brings us to a motion called a motion in the nature of a writ of error coram nobis, sometimes called, when issued by a reviewing court to a trial court, a writ of error coram vobis. Bl. L. Dict. tit. "Coram."

(b) It will be observed that a writ of error

coram nobis as well as a writ of error coram vobis at common law were actual writs, and, speaking with reference to a growth in the law, it is apparent that the very existence of a motion in the *nature* of such writs, whereby a simple and speedy remedy is attained, imports a growth in the law, for I do not find that a motion in the nature of the writ of error coram nobis or coram vobis was known at the old common law. And why should not the law grow? Did not the common law *grow*? Did not equity *grow*? Courts are not lawmakers; but the large fact remains that the body of the law relating to rules of procedure, rules of interpretation, rules of construction, rules of evidence, and many other working theories of the law are the exclusive work of courts. Are they the worse off for that? The very common law itself is a mere "system of unwritten law, not evidenced by statutes, but by tradition and the opinions and judgments of the sages of the law." Per Scott, J., in *Riddick v. Walsh*, 15 Mo. loc. cit. 536. There is nothing, then, revolutionary or singular, let alone reprehensible, in the proposition that courts have worked out, as a sensible instrumentality in administering justice, a motion in the nature of a writ of error coram nobis, entirely without aid of the lawmaker, or that they have recourse to the common law for the bases or prototypes for modern motions. In broad construction the object of that motion is, after the term, to bring before the court some fact dehors the record which, if the court had known it, would not have rendered the judgment. Usually such fact is coverture, or insanity, or infancy absent a guardian ad litem, or the appearance of an attorney without authority, or the rendition of a judgment after death of a party without a revivor, or the sentencing of a defendant under age to the penitentiary, or the sentencing of a slave to the penitentiary for larceny. Examples of the various offices filled by this motion have been collected in *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672 (q. v.). And though we were of a different opinion on argument, yet our conclusion has come to be on full consideration that the motion, timely filed, is flexible enough to adjust itself to the equitable feature of setting aside a judgment after the term, where the rights of third parties have not intervened, obtained by means of a violation of an agreement to continue, tricking the defendant into absence and out of his defense, unless the remedy is lost by neglect or laches. We think that conclusion is within reasoned precedents. Thus:

In *Siewerd v. Farnen*, 71 Md. loc. cit. 630, 18 Atl. 968, the right to strike out a judgment obtained by "fraud, surprise, or irregularity," on motion after the term, was taken for granted, witness the phrase, "It can hardly be necessary to say that courts, in the exercise of a quasi equitable jurisdiction, will," etc.

In *McIntosh v. Crawford County*, 13 Kan.

171, under precisely the facts in judgment here, the remedy was allowed on motion after the judgment term.

But our own cases serve in giving countenance to that view. Thus:

In *Spalding v. Meler*, 40 Mo. 176, relief was granted after the term, on motion, by setting aside a judgment entered after an agreement to continue, which continuance, by inadvertence, had not been entered by the clerk.

In *Downing v. Still*, 43 Mo. 309, 319, a careful judge whose juristic fame has, of right, grown gently but steadily, Bliss, J., speaking for this court on a motion of the character in judgment, said: "The question of fraud is also raised by the motion. The charge is made that all the proceedings after the suggestion of the death of Thatcher—to wit: The appearance of Still, the entry of judgment, the issuing of the execution, the sale, and the return—were without the knowledge of the plaintiff or his attorney, and were a conspiracy to defraud him of his security. The charge is sustained by affidavits, except as to the conspiracy. The proceedings complained of were without the knowledge of those interested in seeing that they were regular. This matter should have been considered below. The objection that it can only be inquired into upon petition in the nature of a bill in equity is not well taken. Though fraud and mistake are often grounds for relief, yet the proper proceeding in a matter of this kind is by motion."

The foregoing pronouncement was put, and soundly put, on the great authority of Chancellor Kent (*Delaney v. Brownell*, 4 Johns. [N. Y.] 136, and *Denton v. Noyes*, 6 Johns. [N. Y.] 296 [5 Am. Dec. 237]), and other cases cited by Judge Bliss.

In *Estes v. Nell*, 163 Mo. 387, 63 S. W. 724, Gantt, J., uses the doctrine of the Tennessee courts in deciding his case, stating it in this way: "The motion or petition, it has been ruled, must show that the movent or petitioner was prevented from making the defense by surprise, accident, mistake, or fraud of the adversary without fault on his part."

In Tennessee the use of the writ of error coram nobis to get relief in the emergency we are dealing with is a favorite practice. *Tucker v. James*, 12 Heisk. 333; *Dunnivant v. Miller*, 1 Baxt. 227; *Crawford v. Williams*, 1 Swan, 341; *Crouch v. Mullinix*, 1 Heisk. 478.

Returning to our own state:

In *State ex rel. v. Riley*, 219 Mo. loc. cit. 682 et seq., 118 S. W. 652, the following excerpt from 5 Ency. Pl. & Prac. 26, 27, was quoted approvingly as descriptive of the scope and office of the writ of error coram nobis: "The office of the writ of error coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein, or infancy, where the party was not properly represent-



ed by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of the trial, or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

In *Fisher v. Fisher*, 114 Mo. App. 627, 90 S. W. 413, a soundly reasoned case, it was unanimously ruled by the learned judges of the Kansas City Court of Appeals that a motion in the nature of a writ of coram nobis, filed after the term, could reach a fraud of the very character involved in the case at bar.

Finally, the St. Louis Court of Appeals in *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672, followed the doctrine of the Kansas City Court of Appeals in pronouncing judgment on the same character of a motion, based on the same ground involved here and filed after judgment term. The latter case has received the visé of this court as an acceptable exposition of the law. *Shuck v. Lawton*, 249 Mo. 168, 155 S. W. 20.

True, it has been ruled that the writ (and hence the motion in the nature of the writ) cannot be used merely to review and revise the opinions of the court nor correct mere errors of law. *State v. Stanley*, 225 Mo. 533, 125 S. W. 475. Nor can the motion be based on facts which are inconsistent with, or contradictory of, the record. *Reed v. Bright*, 232 Mo. 399, 134 S. W. 653. So all the authorities hold that there must be a showing of diligence. We are of opinion there was such showing made below, and that the case falls within the guarded doctrine of the *Reed-Bright* and *Stanley* Cases, and the array of others heretofore cited.

Each case of this sort must necessarily be decided on its own facts. Here the trial court faced the fact that he had been misled in the hurry of an instant into deciding a case on a hearing of only one side, when the other side had a defense they could not make and were not present to make because of their trust in a broken agreement to continue. This situation brought the court within Seneca's criticism: "Qui statuit aliquid, parte inaudita altera æquum licet statuerit, haud regnus fuerit"—which a scholar tells me means in English: "He who decides a case without hearing the other side, though he decides justly, cannot be considered just." We are of opinion that the court set both itself and justice right by opening the judgment.

This opinion was written as a principal opinion; but it was seed that fell by the wayside or on stony ground, and—but no matter. Still entertaining the same views after

reargument in banc, I file the same opinion as a dissent. Maybe the "stone which the builders rejected," etc. Quién sabe?

SNYDER v. TOLER. (No. 11,086.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

1. PLEADING (§ 369\*)—PETITION—INCONSISTENT CAUSES OF ACTION—ELECTION.

A petition, alleging in one count the invalidity of a will admitted to probate, and seeking in another count to recover under a trust created by the will, contains inconsistent allegations, and plaintiff is properly required to elect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

2. WILLS (§ 487\*)—CONSTRUCTION—EVIDENCE—ADMISSIBILITY.

In a suit to construe a will, declarations of testator as to the meaning of the will are inadmissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.\*]

3. WILLS (§ 439\*)—CONSTRUCTION—INTENTION.

The court in construing a will must ascertain the intention of the testator and give effect thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

4. WILLS (§ 488\*)—CONSTRUCTION—EVIDENCE—ADMISSIBILITY.

Even where a will is ambiguous, parol evidence must be limited to the condition of testator's feelings towards the persons affected by the will, so as to thereby place the court in the possession of the facts as testator viewed them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.\*]

5. WILLS (§ 675\*)—CONSTRUCTION—PRECATORY TRUSTS.

A will, which gives to testator's wife all his property "knowing she will deal properly with" his grandchild and his son, does not create a precatory trust in favor of the grandchild or son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.\*]

6. WILLS (§ 675\*)—CONSTRUCTION—PRECATORY TRUSTS.

Where a testamentary gift is absolute, it will not be lessened by mere words of recommendation, unless the will clearly shows that testator had in mind the creation of a trust, and not a mere appeal to the discretion of the beneficiary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.\*]

Appeal from Circuit Court, Cooper County; J. G. Slate, Judge.

Action by Gertrude Snyder against Uriah T. Toler. From a judgment for defendant, plaintiff appeals. Affirmed.

John Cosgrove, of Boonville, for appellant. W. V. Draffen, of Boonville, and C. D. Corum, of St. Louis, for respondent.

JOHNSON, J. This suit was begun in the circuit court of Cooper county March 20, 1913. The petition was in two counts. In the first plaintiff alleged the invalidity of the

last will of her grandfather William E. Toler (which had been duly probated), and prayed "that said pretended paper, writing, or will be declared void and of no effect." In the second, she claimed under the will on the theory that it created a precatory trust in her favor. A motion to elect was filed by defendant on the ground "that said counts are inconsistent with each other and the proof of one would disprove the other." This motion was sustained, and plaintiff elected to stand upon the second count. Defendant then answered traversing the allegations of that count. The cause was tried without a jury, and the court rendered judgment for defendant. Plaintiff appealed.

William E. Toler died in Cooper county June 18, 1911, possessed of a farm of 100 acres of the alleged value of \$10,000. He was survived by his wife, Ann C. Toler, and his son Uriah, the defendant. Plaintiff was the daughter of another son (Columbus), who died before the death of his father. Columbus and Uriah were children of a former marriage. There were no children of the last marriage.

On May 5, 1911, Toler executed the following will: "I, William E. Toler, do make this my last will and testament: I give to my beloved wife, Ann C. Toler, all my property, real, personal and mixed, absolutely, knowing she will deal properly with my grandchild, Gertrude Snyder and my son, Uriah Toler." After the death of the testator, his widow was appointed administratrix of the estate with the will annexed. The personal estate being insufficient to pay the debts, the land was sold under order of the probate court and was purchased by defendant for \$8,500. This sale was invalid on account of the insufficiency of the notice, but the widow executed and delivered to defendant a quitclaim deed and gave him possession of the farm. Defendant claims title under that deed. He paid the widow \$2,500 on the purchase price, and out of that money she paid all of the debts of the estate, gave \$1,550 to plaintiff, and kept the remainder of about \$400 for her own use. She died shortly before the commencement of this action. It appears that the land was of the reasonable value of \$8,500, and the real bone of contention is the proceeds of its sale to defendant, which, after deducting the sums expended by the widow in paying debts and for her own use, amounted to \$7,550, of which she gave defendant \$6,000 and plaintiff \$1,550. Plaintiff contends that by the terms of the will she was entitled to receive one-half of the proceeds, to be put on an equal footing with her uncle, since she was the only child of his deceased brother, and it was the obvious intention of her grandfather to create a trust for the equal benefit of her uncle and herself. The position of defendant is that the will clearly evinced an intention to vest the fee-simple title to the land

in the widow, and that the words, "knowing she will deal properly with my grandchild, Gertrude Snyder and my son, Uriah Toler," cannot be construed as having created a precatory trust, but gave the widow full power to exercise her own discretion in the disposition of the estate.

There is evidence, introduced by plaintiff, tending to show that the relationship between her father and grandfather always had been of the closest and most affectionate nature; that her father had worked with and for his father and had aided in the accumulation of the money invested in the farm; that her uncle had not been so self-sacrificing, but had lived a more selfish life; and that she had always been treated affectionately by her grandfather.

The evidence, as a whole, shows, we think, that the old man loved both sons and his granddaughter, and that his wife shared his feelings, and there is no suggestion in the evidence of any change in her feelings after her husband's death. She bore plaintiff no ill will, and, if it may be said that she discriminated against plaintiff in the distribution of the estate, the error was one of judgment rather than of a purpose to show partiality.

The will was made during the last illness of the testator. The lawyer who drew it testified (without objection) that the testator, in giving directions for the preparation of the document, said: "I want to give my wife everything I have. I would divide it up if there was enough; but, if I should divide it up, there would not be enough for anybody, and if a man divides his property into different pieces, why the amount I have would not be much for anybody, and I am giving it to my wife." The lawyer told him that it would be necessary to mention his son and granddaughter in the will, and he inquired, "Is it necessary to give them a dollar?" Being answered in the negative and assured that it would be sufficient if they were mentioned, he said, "Well, just put in there that I give it to my wife. I want her to have it, and I know that she will deal properly with them."

[1] Counsel for plaintiff insist that the court erred in sustaining the motion to elect. Overlooking other considerations, we hold the motion was properly sustained on its merits. It is true the causes alleged in the two counts purported to relate to the same transaction, but they were so inconsistent and repugnant they could not stand together in the same action. The test in such instances is whether or not proof of one cause necessarily would disprove the other. If it would, the petition is bad, and the plaintiff should not be suffered to go on with the case unless he abandons one or the other of such mutually destructive causes. *Soap Works v. Sayers*, 51 Mo. App. 310; *Mirrielees v. Railway*, 163 Mo. loc. cit. 492, 63 S. W. 718; *Drolshagen v. Railway*, 186 Mo. loc. cit. 262, 85 S. W. 344.

In one breath plaintiff averred there was no will, and in the next that the will created a trust in her favor. She could not prove either assertion without disproving the other. It would be hard to imagine a more striking example of inconsistent positions. The election of plaintiff to stand on the second count, i. e., on the will, reduced the practical issues of the case to the proposition of whether or not the will created a precatory trust. If it did, plaintiff is entitled to recover; if it did not, she has no case. The judgment was fully responsive to this issue and, we may observe in passing, covered the entire subject-matter before the court for adjudication.

[2] Counsel for plaintiff argue that the court erred in excluding evidence of statements made by the widow relating to the meaning she understood the testator gave to the words "deal properly with my granddaughter, Gertrude Snyder and my son, Uriah Toler." The evidence was properly excluded. This is an action not to invalidate but to construe a will. In such cases oral declarations of the testator relating to the meaning of the instrument are not admissible. As is said in *Webb v. Hayden*, 166 Mo. loc. cit. 46, 65 S. W. 761: "A testator's meaning is to be found in his will alone; from the will itself we must learn the testator's intent. But if the language employed is of doubtful meaning or susceptible of either of two constructions, evidence as to the condition of the testator's feeling toward the persons affected by the will is competent, if it tends to put the court in possession of the facts as the testator viewed them and helps to explain the doubtful passages. *Hurst v. Van De Veld*, 158 Mo. 239 [58 S. W. 1056]; *Murphy v. Carlin*, 113 Mo. 112 [20 S. W. 786, 35 Am. St. Rep. 699]."

[3] In the construction of wills the prime object is to ascertain and enforce the true intent and meaning of the testator. *Snorgrass v. Thomas*, 166 Mo. App. loc. cit. 609, 150 S. W. 108, and cases cited; and, when the language of the will is of doubtful meaning, "the true intent and meaning of the testator can be best ascertained by the courts and those concerned in the execution of wills by putting themselves, so far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made." *Murphy v. Carlin*, supra.

[4] If it may be said that the present will is of doubtful meaning, we think the explanatory evidence should be restricted to the portrayal of the environment of the testator and his feelings towards the persons affected, and should not include declarations he may have made concerning his interpretation of words employed in the will at his direction. Such declarations would be violative of the rule that "a testator's meaning is to be found in his will alone." A formal will

would be of little practical value if it could be contradicted, varied, or explained by proof of such declarations of the testator.

[5, 6] Passing to the subject of the interpretation of the will, the important question is whether it bespeaks an intent to impose an imperative obligation upon the devisee to regard herself as a trustee of a trust created for the equal benefit of the son and granddaughter of the testator, or an intent that the devisee should become the absolute owner of the estate with only a moral and not a legal obligation resting upon her to deal properly with the son and granddaughter.

In support of her position that a trust was created, we are cited by plaintiff to the cases of *Schmucker's Estate v. Reel*, 61 Mo. 592, and *Noe v. Kern*, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544. In the first case the will contained a bequest to R. "to apply in charity, according to his best discretion, and I appoint said R. executor of this, my will, \* \* \* and whereas I hope, that R. will consent to act as my executor, and desire to save him all trouble and annoyance in that regard, and have every confidence, good faith and discretion, and have explained to him to what charities I desire him to appropriate the monies herein bequeathed to him, it is my will that my said executor be held to no accountability whatever for the nonperformance of the trust herein confided to him; he will use his best discretion in the matter, and the receipt of the acting Archbishop of St. Louis of the Roman Catholic Church in Missouri or Kansas, shall be a full discharge to him pro tanto for any monies applied by him to charities according to my request." The court said: "There is no mistaking the purport of this language. It all goes to show that the executor took bequests clothed with a trust to carry out certain objects or purposes not defined or expressed in the will." Strictly speaking, the trust in that case did not arise by implication from the use of precatory words. The purpose of creating a trust was clearly expressed and an unequivocal command was laid upon the legatee to devote the legacy to charity, and not to any other use, and the discretion allowed him was not a discretion to divert the legacy to any other use. In the opinion the court say of that species of implied trusts known to equity as precatory: "Courts of equity have frequently discussed the question as to the force of words or expressions of recommendation in wills in regard to the use to which the testators might desire the persons to whom they had given legacies to put the same. The prevailing doctrine is that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish, or expectation will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both

the subject-matter and the object of the trust. *Reeves v. Baker*, 18 Beav. 372; *Macnab v. Whitbrad*, 17 Beav. 299; *Jarm. Wills*, 336; 2 Redf. *Wills* (2d Ed.) 410."

In *Noe v. Kern*, supra, the following bequest was in issue: "I give, devise, and bequeath unto my husband, \* \* \* all of my real and personal estate absolutely, the real estate being mostly situate in the city of Norfolk, \* \* \* state of Virginia. I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate." This language was held to create a precatory trust in favor of the children, not on the ground that the words themselves were *prima facie* sufficient to convert a devise or bequest into a trust, but that the words, read in the light of evidence portraying the environment of the testatrix and her feelings towards the persons mentioned in the will, were strong and convincing evidence of an intent that the precatory language she employed should be understood as voicing a command to do the thing she expressed the hope would be done. The court seemed to recognize the injustice that might result from giving words of recommendation, request, entreaty, wish, or expectation addressed to a legatee or devisee, the fixed, technical meaning of creating a trust, and gave approval to the doctrine that "every case must depend upon the construction of the particular will under consideration. The point really to be determined in all these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion." *Perry on Trusts* (3d Ed.) § 114.

The whole doctrine of precatory trusts has been criticised as being purely artificial, as involving the solecism of reading an imperative command into words of mere recommendation accompanying an absolute devise or bequest. It was well said in *Sale v. Moore*, 1 Simons, 534, "that the first case that construed words of recommendation into a command made a will for the testator; for every one knows the distinction between them." *Van Duyne v. Van Duyne*, 14 N. J. Eq. loc. cit. 401. The tendency of modern decisions, both in England and America, is to avoid such artificial canons of construction and to have regard only to the intention of the testator as gathered from the whole will in determining whether or not such expressions shall create a trust. *Corby v. Corby*, 85 Mo. loc. cit. 393. "Judges have for some time past shown a decided leaning against the doctrine of precatory trusts and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds; many of the earlier decisions cer-

tainly would not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although, perhaps, with some caution and reserve, and they all exhibit the modern tendency to limit rather than enlarge its scope." *Pomeroy's Eq. Juris.* (3d Ed.) §§ 1014, 1015.

While, as we have shown, the doctrine is recognized in this state, the modern view that it should serve only as an aid to the ascertainment of the real intention of the testator also obtains. A clear and terse statement of the doctrine is to be found in the following quotation from *Corby v. Corby*, supra: "A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust, and especially no such trust will be implied when it clearly appears \* \* \* that the testator intended to give the devisee full discretion in the use of the property." Where a devise or bequest is absolute, it should not be cut down or lessened by mere words of recommendation unless the will, as a whole, clearly shows the testator had in mind the creation of a trust, and not a mere appeal to the discretion of the legatee. See *In re McVeigh's Estate*, 164 S. W. 673, where the subject of precatory trusts is extensively and logically discussed by Allen, J.

The most concise and perhaps the most luminous construction of precatory words in the reported cases is found in *Fox v. Fox*, 27 Beavan, 301, where the bequest was to the wife of the testator "to and for her own use and benefit absolutely having full confidence in her sufficient and judicious provision for my dear children." The laconic opinion of the Master of the Rolls was as follows: "I am clear that no precatory trust arises in this case; it is not, however, necessary to go through the authorities, which are not all perfectly reconcilable, but they all establish that the subject-matter must be certain, and the objects to take must be clearly defined. Here the testator intends to give his property absolutely to his wife, and he intended, at the same time, to give her a clear intimation of his wishes, but as to which she was to be considered under a moral, and not under any legal, obligation."

In the present case we cannot regard the words of recommendation in any other light than as an intimation of the wishes of the testator and not as a command. He intended to give his wife the absolute right to use, enjoy, and dispose of the property without restriction or limitation. His son and granddaughter were adults, in no manner dependent upon him, as were the children in the case of *Noe v. Kern*, supra, and there is nothing in the record to suggest that he intended

to make his wife a mere trustee for their benefit. We conclude that the trial judge took a proper view of the case.

The judgment is affirmed. All concur.

**LAGARCE v. MISSOURI PAC. RY. CO.**  
(No. 13,572.)

(St. Louis Court of Appeals. Missouri.  
April 7, 1914. Rehearing Denied  
April 24, 1914.)

**1. RAILROADS (§ 348\*)—CROSSING ACCIDENT—JURY QUESTION.**

In an action for the wrongful death of one run down at a railroad crossing, the courts will declare him to have been guilty of contributory negligence only in those cases where the testimony is very clear and practically uncontradicted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. § 348.\*]

**2. RAILROADS (§ 350\*)—CROSSING ACCIDENT—ACTIONS—JURY QUESTION.**

In an action for the wrongful death of plaintiff's husband, run down at defendant's crossing, the question of his contributory negligence held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.\*]

**3. TRIAL (§ 191\*)—RAILROADS—CROSSING ACCIDENT—INSTRUCTIONS.**

A traveler on a highway which crossed defendant's tracks had a view of about 700 to 900 feet at a point about 40 feet from the tracks, and from that point the approaching train which struck him was not visible. The ordinances of the city wherein the accident occurred required the bell to be continuously rung and forbade the operation of trains at a greater speed than 20 miles an hour. There was testimony showing that the bell of the train which struck deceased was not rung, and it appeared that if the speed prescribed by ordinance had not been exceeded the traveler would have passed over the crossing before the train could have reached him. Held, that the refusal of an instruction that if the traveler's death was the result of unavoidable accident, due to his inadvertent act in driving on the track immediately in front of a moving train, verdict should be for defendant, was proper, because it omitted all references to defendant's violation of the ordinances and treated the collision as the result of unavoidable accident due to the traveler's inadvertent act, though plaintiff claimed that it was the result of his intentional act, induced by defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. § 191.\*]

**4. RAILROADS (§ 327\*)—CROSSING ACCIDENT—DUTY OF TRAVELER.**

A traveler about to cross railroad tracks is bound to stop, look, and listen only when he can neither see nor hear, and where, from a point 40 feet from the crossing, he saw that there was no train within between 700 and 900 feet, he is not bound to stop before proceeding on the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043–1056; Dec. Dig. § 327.\*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by Mary Lagarce against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The authorities cited by appellant on the proposition of the contributory negligence of plaintiff's intestate are as follows: *Farris v. Railroad*, 167 Mo. App. 398, 151 S. W. 979; *Kelsay v. Railroad*, 129 Mo. 365, 30 S. W. 339; *Dyrcz v. Railroad*, 238 Mo. 83, 141 S. W. 861; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925; *Laun v. Railroad*, 216 Mo. 563, 116 S. W. 553; *Stotler v. Railroad*, 204 Mo. 619, 103 S. W. 1, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710; *Green v. Railroad*, 192 Mo. 131, 90 S. W. 805; *Schmidt v. Railroad*, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196; *Sanguinette v. Railroad*, 196 Mo. 466, 95 S. W. 386; *Hook v. Railroad*, 162 Mo. 569, 63 S. W. 360; *Lien v. Railroad*, 79 Mo. App. 475; *Jones v. Barnard*, 63 Mo. App. 501; *Drake v. Railroad*, 51 Mo. App. 562; *Hayden v. Railroad*, 124 Mo. 566, 28 S. W. 74; *Ries v. Railroad*, 179 Mo. 1, 77 S. W. 734; *Lane v. Railroad*, 132 Mo. 4, 33 S. W. 645, 1128; *Huggart v. Railroad*, 134 Mo. 673, 36 S. W. 220; *Stepp v. Railroad*, 85 Mo. 229; *Butts v. Railroad*, 98 Mo. 272, 11 S. W. 754; *Haffey v. Railroad*, 154 Mo. App. 493, 135 S. W. 987; *Sims v. Railroad*, 116 Mo. App. 572, 92 S. W. 909; *Gumm v. Railroad*, 141 Mo. App. 313, 125 S. W. 796; *Railroad v. Houston*, 95 U. S. 702, 24 L. Ed. 542.

James F. Green, of St. Louis, for appellant. A. R. & Howard Taylor, of St. Louis, for respondent.

**Statement.**

**REYNOLDS, P. J.** This is an action brought by the wife to recover damages for the death of her husband occasioned, as it is alleged by the negligence of defendant, the negligence charged being excessive speed—over twenty miles an hour—and also failure of the employes of defendant to cause the bell on the engine to be constantly sounded while the engine and train were running in the city of St. Louis, both in violation of the ordinance of the city.

The answer, after a general denial, avers that the injuries to and death of plaintiff's husband were the result of his own negligence and carelessness, which directly contributed to cause his death, in this: That he drove on defendant's track, on which his team was struck, so close to cars standing on the adjoining track or tracks that his approach to the track could not be discovered by the person in charge of defendant's engine which struck the team the decedent was driving, without ascertaining before he drove on the track, as it was his duty to have done, whether a train was approaching thereto, and by not stopping his team before he drove on the track to ascertain that fact, and in failing to observe and heed the signals given by the train and the noise and smoke made thereby, and stop his team until the train had passed, and in failing to heed the warnings of persons on or

near the crossing, given him of the approach of the train, and failing to avoid the train after he had discovered the danger of being struck thereby, and in otherwise failing to exercise such care as an ordinarily prudent person would have done under similar circumstances.

The reply was a general denial.

The locus in quo was at the crossing of a private roadway over the tracks of appellant, this private roadway, which we will call the dirt road, running north and south and leading from the works of the Missouri Fire Brick & Clay Company north to Manchester avenue. While not a dedicated street of the city, it was in constant use by the public, particularly by the employés of the Missouri Fire Brick & Clay Company, for whom plaintiff's husband, owning his own team, was engaged in hauling, and was in the habit of using this road to reach the Brick Company's works from Manchester avenue. This dirt road crosses four of defendant's tracks. These four tracks, two spur tracks or sidings, and two main tracks, are south of Manchester avenue and run parallel to each other and to Manchester avenue and run east and west. The spur tracks are immediately south of Manchester avenue. The next track south of these spurs or sidings is the main track, called the westbound track; next south of that is the other main track, called the eastbound track; south of that and of the right-of-way is the property of the Brick Company. Lagarce was struck and killed at the crossing of the dirt road over the westbound track. Thirteen feet, two and one-half inches from the center of the eastbound track, which is the most southern track, and to the north, is the center of the westbound track. Fourteen feet, one and one-half inches north from the center of this is the center of the south spur track or siding, and twelve feet, two and one-half inches north of the center of this is the center of the north spur track. Ten feet and ten inches north of the center of this latter is the south line of Manchester avenue, along which are the double tracks of the United Railways Company. The westbound main track of defendant is thirty-nine feet and six inches south of the south line of Manchester avenue, at the point where the dirt road leaves that avenue and runs south. We gather these figures from the testimony, aided by the plat which was in evidence and is before us. Referring to these measurements and to the testimony, the distance between the north rail of the westbound track of defendant and the south rail of the spur track next north of that is nine feet one and one-half inches clear between these two tracks. There were box cars standing on the spur tracks, on which of them is not very clear; apparently west of the crossing of the dirt road. It was in evidence that these box cars extend from two to two and one-half feet beyond the rail. Hence there was a space of about six feet, seven and one-half

inches clear along the side of this car between it and the north rail of the westbound track. The length of the horses of decedent and the distance back to the wagon where he sat while driving was eight feet, so that when the line of vision alongside of these cars was open for decedent to see a car coming from the east, his horses would be about one foot north of the track, one and a half feet, say counsel for respondent. Knox avenue was one hundred and sixty-five feet west of this dirt road, and Sulphur avenue nine hundred feet east of it. It may be added that the train, the engine of which struck Lagarce, was the Kirkwood Accommodation coming from the east going west and, as stated, on the westbound track, the track immediately north of the eastbound track. The train consisted of an engine and tender, combination coach and one or more passenger coaches. Its crew was made up of an engineer, fireman, brakeman and conductor. Just as the horses of Lagarce had gotten well on to the westbound track, the engine struck them, killed Lagarce, killed one of the horses instantly and fatally injured the other, and was not brought to a stop until it had run several hundred feet west of the place of the accident. It further appears that just before this westbound train came along and passed this crossing, an eastbound train had gone over this same crossing along the eastbound track, the two trains having met at about Sulphur avenue.

Going into the evidence in detail, the summary of it made by the learned counsel for appellant is very concise and with few changes we follow that summary.

Miss Jennie Katherine Lang testified that she saw John Lagarce killed by a westbound passenger train on the Missouri Pacific tracks on April 9, 1906; that when the accident occurred she was standing on a platform on the south side of the street car tracks at Knox avenue, waiting for a street car; that when she saw Lagarce he was driving his wagon on Manchester avenue, going east; that as he turned across Manchester avenue into this dirt road, he stopped for awhile, stopped to listen, as witness supposed, for a few minutes, and looked east and west, turning his head in those directions, and then started over the track; that his horses were moving at a walk, going about two or three miles an hour; that the train that struck Lagarce was running about fifty miles an hour; never heard any signals given by the train; did not remember seeing or hearing any train approaching from the east at the time Lagarce stopped and looked; that after Lagarce had stopped at the entrance to the driveway he did not stop again but drove along continuously until he was struck. On cross-examination, Miss Lang, indicating on the plat the place where she was standing, as north of defendant's tracks, and west of the dirt road crossing, repeated that when she first saw Lagarce he was driving east on Manchester avenue; that he stopped north

of the first railroad track, which would be north of the north spur track, and then drove on but halted "a little bit" before he got to the main track, that is, the westbound track upon which he was struck; that some cars were standing on the first two spur tracks. Asked if there was not a train, which she saw when she was first down there at the platform, going east, she answered that she could not remember that train at all; did not remember that train going east at all; remembered the one going west, which was the one she saw after it had struck Lagarce. Witness further testified that she had been standing on this platform about ten or fifteen minutes before the accident, waiting for a street car; had no recollection, while she stood there, of hearing the noise of either one of these trains. That, said the witness, was "all a blank" to her. Asked if, after the collision occurred between the train and Lagarce, she recalled looking over to the point of collision and seeing both of the trains, one going east and one going west, she answered that she did not remember anything of any train except the one that struck Lagarce. Asked what there was on these two tracks, the northernmost tracks, or the spur tracks, between where she was and this driveway, she said that there were no cars there; that there was a sort of culvert or trestle and she repeated that she had never noticed the noise of either of the trains, either the one coming from the east or the one going west, until the westbound one struck Lagarce; had not heard this westbound train at all until it passed where she was standing at Knox avenue; then she heard the train coming from the east, the one which struck Lagarce, and she watched that, but she repeated, under close cross-questioning, that she had no remembrance whatever of seeing or hearing any eastbound train, the one going toward St. Louis; may have heard it at the time but could not recall it; did not remember hearing any bell or whistle; if the train going west whistled or rang a bell, she did not hear it nor had she heard a whistle or bell from a train going east; had no recollection of how far the train was from Lagarce when he drove his team on to the track; all she remembered of that train was seeing it strike him, and had not seen that train approach at all. Asked if what had attracted her attention to the fact of Lagarce going on the crossing was the fact of the collision, she answered that she was watching Lagarce; that he had attracted her attention in some way going along and she just followed the wagon, that is, just watched the wagon and was paying no attention to the fact that there were trains on the track until just about the time the train struck him, when she saw a little puff of smoke and then did not hear anything else; saw that just as the train hit him; before that had heard no noise of a train at all and had heard no whistle nor bell nor any-

thing. She repeated, "They didn't blow any whistle or anything; all that attracted me was the smoke;" had never seen either of the trains, although one of them had passed within twenty feet of her, until the train struck Lagarce.

Another witness for plaintiff, Hazel Ruppelt, testified that she was on Knox avenue at the time Lagarce was killed; saw him drive his team east on Manchester avenue; when he got to the driveway or dirt road and turned in, he slowed up and came to almost a standstill and looked in both directions. She saw the engine of the westbound train strike Lagarce and throw him and one of the horses in the air; that after the train struck Lagarce it ran about the length of a city block before it stopped; that after Lagarce had turned into the roadway and looked in both directions, he drove right straight along until he was struck. On cross-examination this witness testified that she had stopped between the street car tracks and the railroad tracks on Knox avenue to see if a train was coming; that she did not see or hear either the train going east or the one going west; that after Lagarce had "slacked up" and started to drive on again, he continued to drive straight ahead until he was struck; she was looking in the direction in which he was driving but did not see the train coming until it struck the horses. This witness was ten years old at the time of the accident.

George Thomas, a witness for plaintiff, testified that, at the time of the accident, he was superintendent of the Missouri Fire Brick Company; that the roadway over which Lagarce was driving was the only inlet to the factory of the Brick Company at that time from Manchester avenue, and all the hauling in and out of the factory was done over that roadway; that when he first saw the train that struck Lagarce, it was within several feet of the horses; that he had not heard the bell of the engine ringing before the accident but heard the whistle blow just as the engine struck the horses. On cross-examination he testified that he was in the office of the Brick Company at the time of the accident and was walking toward the door when the whistle attracted his attention; was not looking for a train; that so many trains passed the office during the day he paid no attention to them; that the train which struck Lagarce was within several feet of the horses at the time he heard the whistle and looked out; that at the time he saw the train, the engineer could not have avoided striking the horses as the train was going too fast; that when the horses saw the train they shied but he did not know what position they were in at the time they were struck.

Dennis O'Connell, another witness for plaintiff and in the employ of the Missouri Fire Brick Company as laborer, testified that he was standing on the south side of the railroad tracks when Lagarce was struck;

he saw Lagarce coming east on Manchester avenue; that he turned into the street car tracks at Knox avenue, then drove slowly along to the east until he got to the crossing of this dirt road; that when he turned in at the crossing he stopped and looked east and west; that as he came down this dirt road Lagarce was driving about two miles an hour; that the train that struck Lagarce was running about forty miles an hour. Witness did not hear the engine bell or the whistle before the train struck Lagarce's wagon; that after it struck Lagarce it ran on for about four and a half blocks; that looking from the roadway crossing eastward, the direction from which this train was coming, a man on a wagon could have seen a train approaching for six or seven hundred feet; that there were four cars standing on one of the spur tracks near the scene of the accident. On cross-examination he stated that he was just west of the Fire Brick Company's office at the time of the accident; that the eastbound train came in ten minutes after the train which struck Lagarce had passed; that Lagarce did not stop for this eastbound train but stopped and looked across and there was no train coming at all; that Lagarce had stopped before he crossed any of the railroad tracks; that he did not hear a Mr. Tracy anybody halloo at Lagarce and did not hear the noise of either the east or westbound train.

Another witness for plaintiff, Dave Morgan, testified that he saw Lagarce driving a wagon on Manchester avenue before he had turned into this roadway or dirt road; that his face was turned toward the east but from where witness was he could not tell where Lagarce was looking; that at the place where he saw Lagarce, a man sitting on a wagon and looking east could have seen an approaching engine for six or seven hundred feet; that he did not hear or see a train coming until he heard the crash when Lagarce was struck; that the train which struck Lagarce was running forty or fifty miles an hour. On cross-examination this witness stated that he was two hundred and thirty or three hundred feet away from the place where the accident occurred; that the morning was bright and clear; that he had not seen the train which passed just before the accident, and that all he saw was the train after it struck Lagarce when it had passed witness.

Plaintiff also introduced in evidence the sections of the ordinance pleaded. Referring to pages 794 and 795, McQuillin's Annotated Municipal Code of St. Louis (Ed. 1900) sec. 1748, article 5, of chapter 23, relating to public carriers, provides, in substance, for the erection of gates over improved streets and alleys where they cross railroad tracks. Section 1752 makes it unlawful, within the limits of the city, for any one who shall have failed to erect gates when notified, to run an engine or train of cars propelled by steam

power at a rate of speed exceeding six miles per hour, over, along or across any cross or intersecting improved street, avenue or road, which is now or may hereafter be used for wagon travel. But after having erected gates, "it shall be lawful for any \* \* \* corporation to run its engines, car or train of cars at a rate of speed not exceeding twenty miles per hour." Section 1753 provides that any and all cars, cars or locomotive propelled by steam power, when moving within the limits of the city, shall keep the bell of the engine "constantly sounded within said limits." As before stated, it was for a violation of these two provisions of the ordinance, that is, exceeding the twenty-mile speed limit and failing, when moving, to constantly sound the bell, upon which this action is based.

That was plaintiff's evidence, save as to the age and earning capacity of Lagarce and that he was husband of plaintiff. There was also testimony as to the position of the tracks, etc.

At the close of this evidence defendant asked the court to give an instruction in the nature of a demurrer to the evidence which being refused, it proceeded with the introduction of its evidence.

A witness, John W. Tracy, testified that he was on the sidewalk on Manchester avenue and going in an eastwardly direction along that avenue. He noticed Lagarce coming down the street right in front of him, coming from the neighborhood of Tamm avenue, and drive on in front of witness about four blocks before he turned into the roadway leading to the Brick Company's plant. When Lagarce got to the place where he turned into this roadway, witness was to his left and noticed the eastbound train and at the same time saw the smoke of the westbound train across the top of the cars; that he halloored at Lagarce, who turned to look at him just about the time the train struck his team; that at that time he (witness) was north of Lagarce and to his west. He testified that when he halloored at Lagarce the latter's horses were approaching the westbound track; that at that time the eastbound train had passed; when witness noticed the westbound train and halloored, Lagarce's horses were about on the track, that is on the westbound track; that after he noticed the westbound train and Lagarce continued to drive, there was no way to avoid the accident; when witness first noticed this westbound train it was not over a car and a half from the crossing. On cross-examination this witness testified that the only place Lagarce could have seen the approaching train before going on the track was at the junction of the roadway and Manchester avenue; that he could not have seen a train after he passed down behind the cars on the spur track; that at the time witness halloored at Lagarce, the latter swung himself around; that the westbound train was then running



from thirty to thirty-five miles an hour; that when the collision occurred, one of the horses was knocked on the eastbound crossing, the other carried on the cowcatcher of the engine, and the engine ran about five blocks before it came to a stop. On redirect examination this witness testified that when he had first noticed the eastbound train it was coming over Knox avenue, the last coach was coming over Knox avenue; that it ran on by the crossing and Lagarce continued to drive on down to the westbound track.

A. S. Butterworth, a civil engineer, testified to the correctness of the diagram in evidence, and also testified that he had personally gone to the scene of the accident and made some observations by looking from a point on Manchester avenue near the crossing; that a person just turning into the private crossing from Manchester avenue and looking east over the tops of the cars could see for nine hundred feet; that he (witness) had walked at an ordinary gait from the street car tracks on Manchester avenue to the main westbound track of defendant and that it had taken him about fifteen seconds to do so.

The deposition of a witness, Walker, was read. He testified that he had been crossing watchman for defendant at Knox avenue; had been acting as such for about a year and a half prior to the accident; that trains run over Knox avenue generally at a medium rate of speed and that the train which struck Lagarce was running from twenty to thirty miles an hour; trains were coming each way; that the one going east passed first and that Lagarce crossed right in front of the westbound train. Quoting his testimony, he said: "He (Lagarce) couldn't see it and the engineer couldn't see it. The engineer is no blame; he couldn't see him. Just the same as you are walking out of that door and walk right in the hole." He further testified that the westbound train whistled for Sulphur avenue, which was about three hundred yards east of the crossing where Lagarce was killed. The whistle was not sounded after that but the bell was ringing; that after striking Lagarce the train ran on for about a quarter of a mile.

The engineer of the train which struck Lagarce, the Kirkwood Accommodation, testified that he whistled both at Sulphur avenue and Knox avenue, gave four whistles, two long and two short; whistled at Sulphur avenue at the usual place east of the crossing; that the fireman rang the bell for the crossing; that he met the eastbound train about at Sulphur avenue; that the eastbound train was whistling for Sulphur avenue about the same time his train was doing so. When he got within fifty feet of this dirt crossing of the Fire Brick Company he saw the heads of two grey horses come between the cars; sounded the whistle with one hand and applied the air brakes with the other; that the horses were coming from the north on to the

track and appeared between the cars; that he probably had struck the horses before he ceased whistling.

The fireman of this train testified that when he first saw the team the horses were half way on the track; that he rang the bell until the train passed Sulphur avenue and was in the act of getting down to put in a fire when the engineer started to blow the whistle and pull the brakes; that the engineer grabbed the whistle and jerked it and applied the emergency brakes. On cross-examination this witness stated that the train ran on for about four hundred feet before it was stopped.

The conductor of the train testified that he heard the engineer whistle for Sulphur and Knox avenues and immediately after the whistle was sounded for Knox avenue heard two or three short blasts which was the danger signal; that he jumped up and looked out and the train had passed over the Brick Company's crossing. On cross-examination he testified that the train was not going over thirty miles an hour; that its speed was reduced as it approached Knox avenue.

The brakeman of the train testified that he was sitting in the combination car at the time the accident occurred; heard the engine whistle for Knox avenue and Sulphur avenue, then heard one long blast of the whistle; felt the application of the brakes and then hastened to flag another train which was following his train and paid no attention to Lagarce; that the Kirkwood Accommodation trains run very close, sometimes twenty minutes apart; that this train was equipped with automatic air brakes operated by the engineer.

Evidence as to measurements, the plat, etc., which we have before summarized, was also introduced.

This is all the testimony in the case. At its conclusion, defendant again interposed a demurrer which the court overruled. The court gave a number of instructions at the instance of plaintiff and also at the instance of defendant. The jury returned a verdict in favor of plaintiff for \$5,000. Defendant, filing a motion for new trial and excepting to the action of the court in overruling it, and judgment following the verdict, has duly perfected its appeal to this court.

#### Opinion.

We have set out the evidence with some prolixity, but as briefly as possible to give appellant all the benefit of it which counsel claims.

The points relied upon for a reversal of this judgment are three.

[1, 2] Taking them in their order, the first point made is, that a clear case of contributory negligence on the part of plaintiff's husband was established by the evidence and the court should have so declared. A multitude of authorities supposed to support this

proposition are cited by the learned counsel for appellant, which will appear in the report of the case. Each and all of them announce propositions and apply principles that have been threshed out over and over and it will serve no useful purpose to attempt to review them. The principles well settled, the point lies in the application of them to the facts. No two cases are exactly alike on the facts. They are useful and of authority only in the application of the principles to those facts. One rule running through all of them is that it is only when the testimony is very clear and practically uncontradicted, that the court, in a given case, will declare, as a matter of law, that the contributory negligence of the plaintiff bars recovery. In the case at bar it would have been error for the trial court to so declare and it is impossible for us, with that testimony before us, even as presented by the learned and very fair counsel for appellant, to hold, as a matter of law, that contributory negligence on the part of plaintiff's husband was established by the evidence. Under this evidence, following it as summarized by the learned counsel for appellant himself, it was for the jury, properly instructed as it was, to pass upon the issue of contributory negligence as a fact. That issue has been found contrary to the contention of counsel for appellant and we cannot disturb the verdict on that ground, supported as that verdict is by substantial and competent evidence.

[3] The second point is that the court erred in refusing to give defendant's instruction numbered 9. That instruction is as follows: "The jury are further instructed that, if you find from the evidence that the death of plaintiff's husband was the result of unavoidable accident due to the inadvertent act of John Lagarce in driving his team on the defendant's track immediately in front of a moving train, then your verdict must be for defendant railway company."

Among other authorities cited by learned counsel for appellant in support of this instruction is *Zels v. St. Louis Brewing Association* (not "*Zels v. Railroad*," as twice erroneously printed by counsel), 205 Mo. 638, 104 S. W. 99. That authority, as we understand it, is against counsel's position. The instruction there before the court and passed on by it is as follows (205 Mo. loc. cit. 645, 104 S. W. 101): "2. If you find and believe from the evidence in the cause, that plaintiff's injury was the result of accident in the sense of misadventure, then your verdict must also be for the defendant." The court held in the *Zels* Case, supra, that this instruction under the facts and issues in that case was erroneous. While the court referred approvingly to the instruction given in *Henry v. Grand Avenue Ry. Co.*, 113 Mo. 525, 21 S. W. 214, it distinguishes the *Henry* Case from the *Zels* Case on the facts. The instruction in the *Henry* Case, supra, 113 Mo. loc. cit. 534, 21 S. W. 215, was as follows: "If the jury

believe from the evidence that the injuries sustained by the plaintiff were merely the result of accident, then your verdict will be for defendant." The saving word in this latter instruction is held to have been "merely." The *Henry* Case further turned on the defense, which was that plaintiff there had accidentally tripped on a crowbar, and that defendant was in no way responsible for that. In commenting on the instruction given in the *Zels* Case, it is said (205 Mo. loc. cit. 650, 104 S. W. 102): "After the respondent (plaintiff there) had made out his prima facie case, by showing the defective condition of the box and his injury thereby, then the burden was on the appellant to prove to the jury that it had performed all the duties it owed the respondent, by properly selecting, inspecting and repairing the boxes. This it attempted to do by the evidence, but nowhere was the jury required to find it had performed that duty before they could find for the appellant. It ignored all the evidence introduced by appellant, and told the jury that if the injury was the result of an accident, then they would find for it."

The ninth instruction, as asked and given here, left out all the elements of defense, that is to say, failure to comply with the requirements of the ordinance as to speed and ringing the bell. This instruction is furthermore erroneous in that it told the jury that if they found from the evidence that the death of plaintiff's husband "was the result of unavoidable accident due to the inadvertent act of John Lagarce in driving his team on the defendant's track immediately in front of a moving train, then your verdict must be for the defendant railway company." This puts all of the negligence on Lagarce and leaves out of consideration any possible negligence on the part of defendant. It was erroneous in referring to the act of Lagarce as an act of inadvertence. It was not inadvertence at all. He drove on to the track of purpose and in assumed safety. In a sense, the killing, the happening, was an accident, for it was not done of purpose, but in law it was not, if the facts are as here found. Where, as here, the evidence tended to show that Lagarce was travelling very slowly, about two or three miles an hour, as he approached the danger point—and all crossings of streets over railroad tracks are danger points—had stopped inside of thirty-nine feet from the crossing, had looked and listened—could see a clear track for from seven to nine hundred feet to the east, neither saw nor heard the on-coming peril—and in that failure he was not alone, for others standing in the locality neither saw nor heard it—and was caught and killed by a train running at an unlawful speed, without observance of the requirements of the ordinance, there was no accident about it. The result was to have been anticipated—provided he was on the

track. Lagarce, with no peril in sight for at least seven hundred feet, had a right to assume that no train, travelling over that distance at not exceeding the lawful speed of twenty miles an hour could possibly have touched him before he could have crossed in safety. So there is no accident, meaning that which could neither be anticipated nor avoided. The instruction was properly refused.

[4] The third point is that the court erred in refusing to give defendant's instruction numbered 3, as asked and in modifying that instruction. We set out that instruction as given, putting in italics the words inserted and running a line through those stricken out by the court:

"The jury are further instructed that, if you find from the evidence that plaintiff's husband, John Lagarce, was prevented from seeing the approach of a train coming from the east on account of the presence of cars which were standing on the northern tracks, or from any other cause, then it was the duty of said John Lagarce to ~~stop his team~~ look before going on the tracks and to listen for an approaching train; and, if you find that he could, under such circumstances, have discovered the train by ~~stopping and~~ looking or listening for it, and that he drove upon the track without ~~stopping looking~~ or listening, then in that event plaintiff is not entitled to recover."

The evidence in the case practically without dispute, showed that the deceased, when he turned his team into the road and was within less than forty feet of the crossing, did stop and look for an approaching train from either the east or west, turning his head. It is to be assumed from this act, that he listened, for there is evidence that his hearing was normal. At forty feet he could have seen an approaching train from the east, if it had been within seven hundred feet, appellant's civil engineer says nine. There was no train then in sight, according to testimony in the case, coming from the east or as near as seven hundred feet. He then had to drive only forty-three feet for his wagon to clear the track. That his team moved at the rate of from two to three miles an hour, is undisputed. Mathematically considered, and accepting the figures of counsel for respondent, if he was going only two miles an hour, the train, at the rate that he had a right to presume it would not exceed, namely, the ordinance speed of twenty miles an hour, would have been at least three hundred and twenty-three feet east of the crossing when he was safely across. When he stopped his team at a place inside of forty feet from this crossing and looked and lis-

tened for an approaching train and neither saw nor heard one at that time, and he had a view for about seven hundred feet up the track to the east, he had a right to presume that he could cross in safety. He had a right to act, to move on. Under the facts in evidence in this case, we cannot hold the law to be that he was bound to stop again before attempting to cross. This instruction as asked tended to direct the jury that the stop which Lagarce beyond question did make, was not sufficient and that would have been error. The general rule only requires that one look and listen when approaching a danger point. There are exceptional cases in which, in addition to looking and listening, one is required to stop. But that has been held to apply when one is so situated that he could neither see nor hear. No such case is presented by the testimony in this case, even with the cars on the spur tracks obstructing the view for a time. Considering all the evidence in the case, the decedent used all the care which the law and human prudence demanded before attempting to cross the tracks. It must be remembered that this tragedy was one of seconds—was measured by the rapidly running second hand, not by the slower recorder of minutes. Defendant's skilled witness, a civil engineer, Mr. Butterworth, testified that walking at an ordinary gait it had taken him fifteen seconds to walk from the immediate vicinity of the street car tracks on Manchester avenue to the main track of the defendant's road. Lagarce was driving from two to three miles an hour, the latter nearly the ordinary gait of a man walking. Mr. Butterworth further said that looking over the tops of cars, a person turning from Manchester avenue into the dirt road could see east up the track nine hundred feet. Lagarce was about there when he stopped and looked and listened and saw nor heard any train. There was nothing to warn him that he then was within the danger zone. Others standing on Manchester avenue, further east than Lagarce, neither saw nor heard the approaching train.

We think the court committed no error in altering the instruction in the manner which it did and that the instruction as altered submitted the case to the jury in as favorable a light and as favorable a view of the law as the appellant was entitled to ask.

We see no reversible error to the manifest prejudice of the defendant in the case and are of the opinion that the judgment of the circuit court should be and it accordingly is affirmed.

NORTONI and ALLEN, JJ., concur.

**GRAY v. DOUBIKIN. (No. 11,091.)**

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**EXECUTORS AND ADMINISTRATORS (§ 65\*)—ASSETS—DUTY TO INVENTORY—PROCEEDINGS—JUDGMENT.**

Rev. St. 1909, § 74, provides that proceedings may be instituted against administrators to discover assets, and, on finding against the administrator, the court shall compel him to inventory the property as that of the estate, etc. *Held* that, where one of several heirs instituted proceedings against an administrator to compel him to inventory ten shares of bank stock as a part of decedent's estate, but which the administrator claimed as his own pursuant to a gift causa mortis, the court had no power, on a verdict in favor of complainant, to order that five shares be delivered to complainant, and that the administrator retain the other five; the only judgment authorized being one directing the administrator to inventory the shares and distribute them in due course of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 314; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Miller County; J. G. Slate, Judge.

Action by Lizzie Gray against J. Walter Doubikin. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. S. Stillwell, of Tuscumbia, and W. S. Pope, of Jefferson City, for appellant. Sid C. Roach, of Lim Creek, and Barney Reed, of Ulman, for respondent.

ELLISON, P. J. Defendant is administrator of his deceased father's estate, and plaintiff is defendant's sister and one of several heirs of deceased estate. The deceased owned ten shares of stock in the Farmers' & Traders' Bank of Iberia, for which he held two certificates for five shares each. He was sorely afflicted, and had determined to go to St. Louis for the purpose of having an operation performed by surgeons. He thought probably he would die before his return, and assigned to defendant the two certificates of stock, and, perhaps the next day, went to St. Louis, where he died within two or three days after his arrival.

Defendant claims the certificates were a gift causa mortis, and that upon his father's death he became the owner. The complainant claims that the certificates were merely assigned to defendant to "look after" while deceased was absent in St. Louis, and, if he died while there, to be divided among the heirs with other personalty.

Defendant, as administrator, did not inventory the certificates as a part of the estate, and this proceeding was begun in the probate court of Miller county under the statute (section 74, R. S. 1909), to compel him to inventory the certificates and cause them to be appraised as property of the estate. After a trial in the circuit court, on appeal from the probate court by the defendant administrator, the following verdict was returned,

and the following judgment entered thereon: "Now comes the jury and returns into open court the following verdict, to wit: 'We, the jury, find the issues for the complainant that complainant have judgment for five shares of the bank stock described in the suit; and that the defendant is the owner of five shares of the stock and that the defendant pay the cost of this suit. E. A. Becker, Foreman.' Whereupon it is considered, ordered, and adjudged by the court that the complainant herein have five shares of the bank stock described in this suit, and that defendant have five shares of said stock, and that the costs of this suit be taxed to defendant, and that execution issue therefor."

The verdict was not justified by the evidence, and the judgment is not justified by the law. Under the interrogatories, the answers thereto by defendant, considered with the other evidence, the verdict should have found in favor of defendant for both certificates, or against him on both, according as the jury, after hearing the evidence, may have disbelieved or believed such evidence when considered in connection with his answers to the interrogatories. The judgment gave one of the certificates to the complainant, who was only one of several heirs entitled to the estate. There was no authority for this. Under the statute (section 74, R. S. 1909), if the finding is against the administrator, the judgment should be that he is not entitled to the property claimed by him; that it was the property of the estate, and should direct him to inventory it and to cause it to be appraised and held and accounted for by him as administrator.

The judgment is reversed, and the cause remanded. All concur.

**WILLIS v. CITY OF BROWNING.**

(No. 11,046.)

(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

**1. TRIAL (§§ 139, 140\*)—QUESTION FOR JURY—CREDIBILITY OF WITNESS.**

The questions of credibility of witnesses and the weight of their evidence are for the jury, unless the evidence is so inherently unreasonable that reasonable minds could not differ as to it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332-335, 338-341, 365; Dec. Dig. §§ 139, 140.\*]

**2. MUNICIPAL CORPORATIONS (§ 819\*)—INJURIES ON STREETS—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence in an action against a city for injuries claimed to have been caused by stepping through a rotten crossing board *held* to sustain a finding that plaintiff was injured as claimed, and not by stepping into a hole on her own premises.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.\*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Annie Willis against the City of Browning. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 161 Mo. App. 461, 143 S. W. 516.

E. B. Fields, of Browning, and Dan R. Hughes, of Macon, for appellant. D. M. Wilson and J. W. Clapp, both of Milan, Paul Prosser, of La Plata, and Guthrie & Franklin, of Macon, for respondent.

JOHNSON, J. This is a negligence suit begun in Linn county and on change of venue removed to Livingston, where a trial ended in a verdict and judgment for plaintiff for \$5,000. On appeal we reversed the judgment, and remanded the cause for error of the court in allowing plaintiff to make a demonstration before the jury to convince them of the need she still had for crutches. 161 Mo. App. 461, 143 S. W. 516. We held the evidence of plaintiff supported her pleaded cause and afforded no room for an inference of contributory negligence in law. After the cause was sent back to the circuit court, a second change of venue was granted to Macon county. An amended petition was filed, in which, in addition to the charge that the crossing board on which plaintiff stepped was rotten and broke under her weight, it was alleged "or plaintiff stepped in a hole in said crossing, which said hole had negligently been permitted to remain in said crossing for a long period of time." The answer was a general denial. The second trial resulted in a verdict and judgment for plaintiff for \$1,200, and, after its motions for a new trial and in arrest were overruled, defendant again appealed.

We find no substantial difference in the evidence introduced at the two trials. The proof of plaintiff is to the effect that a board crossing maintained by defendant over one of its public streets had been suffered to fall into such condition of decay that it became unsafe, and that, while she was attempting to cross the street, one of the boards broke under her weight, and her foot went through to the bottom of a drain under the crossing. The evidence of defendant tends to show that she was not injured in such manner, but accidentally stepped into a post hole in her own back yard, and, further, that she has magnified her physical injuries to swell her apocryphal claim for damages. Counsel for defendant repeat the argument they made on the former appeal that the verdict was so clearly against the weight of the evidence that we should regard it as the product of passion and prejudice, but we must reject this argument as we did before. There is no inherent weakness in the version of the injury given by plaintiff and her witnesses. She states her foot broke through a certain board, and other witnesses who looked at the place testified to the presence of a freshly made hole at that place. A greater number

of apparently disinterested witnesses introduced by defendant testified that there was no new hole in the crossing at or near that place, and that the boards were found to be in the same condition after the injury as they were before. The question for our consideration is not that of the weight of the evidence, but whether the evidence of the plaintiff is too weak to raise a debatable issue of fact in the minds of reasonable men.

[1] The issues of the credibility of witnesses and of the weight to be given their testimony always are for the jury to determine, except in instances where their testimony is so inherently weak and unreasonable that reasonable minds could not entertain different opinions about it. Though a greater number of witnesses say the crossing was eight boards wide, instead of four, as stated by plaintiff and her witnesses, and that the board through which she states her foot penetrated showed no signs of such mishap, we are in no position to declare that her evidence must be false.

[2] The duty of deciding such controversies is vested by law in the triers of fact and, since they have decided them in favor of plaintiff, we are without the power, and, we may add, the inclination, to interfere.

The conflict between the parties over the fact of whether the crossing consisted of four boards or eight, coupled with the new allegation in the petition as amended, furnished the ground for objections urged to the rulings on the instructions, which we regard as too technical for extended discussion. The clear-cut issue in the case is whether plaintiff was injured by stepping on a defective spot in the crossing, or by stepping into a hole on her own premises. If she is telling the truth, she is entitled to recover, since the defect appears to have been one which could not have existed except through negligence of the city. The instructions fairly presented the only real issue of fact in the case, and there is no room for the thought that the jury did not understand that issue and address themselves to its solution.

The point of an excessive verdict is not well taken.

The judgment is affirmed. All concur.

STATE ex rel. LYNCH v. TAYLOR, Judge. (No. 14370.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

1. PROHIBITION (§ 26\*)—MOTION FOR PEREMPTORY WRIT—RETURN.

Where a motion is made for a peremptory writ of prohibition notwithstanding the return, the averments of the return must be taken as true.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 75; Dec. Dig. § 26.\*]

## 2. PROHIBITION (§ 5\*)—CONTROL OF INFERIOR COURTS.

The court on application for prohibition cannot compel an inferior court to refrain from taking any particular action in a controversy before it, for the inferior court may act in any way, even erroneously, provided it has jurisdiction to act at all.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. § 5.\*]

## 3. APPEAL AND ERROR (§ 934\*)—MOTIONS—PRESUMPTIONS.

Where the court acts or proposes to act on a motion at a subsequent term, it will be presumed by an appellate court, in the absence of anything to the contrary, that the motion has been continued from term to term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

## 4. EVIDENCE (§ 41\*)—JUDICIAL NOTICE—TERMS OF COURTS OF STATE.

Appellate courts take judicial notice of the several terms of the courts of the state, and assume that if the court was in session at a later day of the term it was in session on intermediate dates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 56-60; Dec. Dig. § 41.\*]

## 5. NEW TRIAL (§§ 116, 165\*)—MOTIONS TO SET ASIDE ORDER SUSTAINING OR OVERRULING—TIME TO FILE.

A motion for new trial must be filed within four days after the trial, but motions to set aside an order granting or denying the motion may be filed at any time within the term at which the ruling was made.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238, 238½, 240, 241, 334, 335; Dec. Dig. §§ 116, 165.\*]

## 6. JUSTICES OF THE PEACE (§ 189\*)—APPEAL—AFFIRMANCE—MOTIONS TO SET ASIDE—TIME TO MAKE.

A motion to set aside the order of the circuit court affirming on appeal a justice's judgment may be filed at any time during the term and may be carried over to a subsequent term, and, until acted on, the cause is within the jurisdiction of the circuit court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 727-733; Dec. Dig. § 189.\*]

## 7. JUSTICES OF THE PEACE (§ 189\*)—APPEAL—AFFIRMANCE—MOTIONS TO SET ASIDE—TIME TO MAKE.

Where a motion to set aside an affirmance by the circuit court of a judgment of a justice's court was overruled at a subsequent term to which the motion was continued, the refile of a motion at that term to set aside the judgment of affirmance was within the jurisdiction of the circuit court and it could act thereon.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 727-733; Dec. Dig. § 189.\*]

## 8. PROHIBITION (§ 18\*)—RESTRAINING INFERIOR COURTS.

The office of prohibition is to prevent a court from assuming jurisdiction where it has none, and an application for the writ is not premature when made before the inferior court has acted.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 67; Dec. Dig. § 18.\*]

Prohibition by the State, on the relation of Harry P. Lynch, against Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis. Preliminary rule vacated, and

respondent discharged, and peremptory writ denied.

Taylor R. Young, of St. Louis, for relator.

REYNOLDS, P. J. On application of Harry P. Lynch, an alternative writ of prohibition issued out of this court, addressed to the Honorable Wilson A. Taylor, one of the judges of the circuit court of the city of St. Louis, presiding in division No. 7 thereof, commanding him, pending the determination of the cause in our court on the application for prohibition, that he proceed no further with and take no further steps in the case then pending in his court in which one J. R. Harkins, doing business under the style and firm name of J. R. Harkins Agency Company, is plaintiff and the above named Harry P. Lynch is defendant, being cause No. 85469, pending in division No. 7 of that court, as it is said, and that he should show cause, if any he has, why he should not be absolutely prohibited from further proceeding in that cause.

It is set out in the alternative writ issued out of our court that it appears that Judge Taylor had permitted to be filed, or refiled, a motion to set aside a certain judgment rendered by him in that cause at the December, 1913, term of the court, this or a substitute motion having been refiled, subsequent to the term at which that judgment was rendered, and that Judge Taylor now has the latter motion under submission for determination and proposes to pass upon it. Attached to the alternative writ and made a part thereof is the petition upon which the writ was issued. From this it appears that in a certain action by the above named J. R. Harkins, doing business under the style and firm name of J. R. Harkins Agency Company, instituted by him against Harry P. Lynch before a justice of the peace of the city of St. Louis, judgment went against plaintiff on his demand and in favor of defendant, relator here, on his counterclaim. From that plaintiff appealed to the circuit court, giving the required bond. Thereafter and on the 16th of December, and at the December, 1913, term of the circuit court, the cause on appeal from the justice having been assigned to division No. 7, was docketed for trial on the 16th of December, 1913. On that day, the cause being called for trial, plaintiff failed to appear and prosecute his appeal, whereupon the circuit court entered up judgment affirming that of the justice. Thereafter on the 12th of January, 1914, and during the December term of the court at which the judgment of the justice had been affirmed, plaintiff in the cause filed his motion to set aside the affirmance of the judgment of the justice. This motion went over to the February, 1914, term.

On the 6th of March, 1914, and during the February term, defendant filed affidavits in opposition to the motion to set aside the af-

firmance of the judgment of the justice. Plaintiff filed no affidavits in support of his motion and thereafter on the 16th of March, and during the February, 1914, term of the court, plaintiff's motion was overruled.

Ten days thereafter, to-wit, on the 26th of March, but during the same February term of the court, plaintiff in the cause was granted three days within which to refile a motion to set aside the judgment of affirmance of the justice. In the meantime execution had issued on the judgment.

Afterwards, and on the 27th of March, still during the February, 1914, term of the court, plaintiff, under the leave as above, filed this, a second motion, verified by him, to set aside the affirmance of the judgment of the justice. Along with this motion plaintiff filed his affidavit to the effect that he has a just and lawful claim against H. P. Lynch for the sum of \$238.75 on an account, of which a copy, containing 290 items, it is affirmed is attached, and that he owed defendant nothing. Upon the filing of this motion, the court recalled the execution. This motion was not acted upon at the February term of court and went over to the April term.

It is averred in the petition for the writ that when this last motion to set aside the order affirming the judgment of the justice came up, evidently in the April term, the Honorable Circuit Judge had stated in open court "that he would sustain said motion so filed by plaintiff, J. R. Harkins, on the 27th of March, 1914 (if he could)."

On being served with the alternative writ, the Honorable Wilson A. Taylor made his return, in which he specifically denied the allegation last above set out, averring that "at no time did he say that he would sustain said motion so filed by plaintiff, J. R. Harkins, on the 27th of March, 1914 (if he could), but that what respondent did say was 'that as there had never been any adjudication of plaintiff's right on the merits, the motion to set aside the default ought to be sustained provided the respondent was justified in sustaining said motion under the law.'" The respondent further suggests in his return "that the application made by relator for a writ of prohibition herein was prematurely made, in that the respondent at no time stated, or otherwise indicated to relator that he would sustain said motion so filed by plaintiff, J. R. Harkins on the 27th day of March, 1914, and that respondent does not now know what action will be taken by himself as the presiding judge of division No. 7 of the circuit court, in the event that he is permitted to further hear and pass upon said motion." The return is verified by the circuit judge.

[1] It was conceded at the hearing of argument on the case that the return sets up a true version of what the respondent had said. Whether conceded or not, as there is no denial of the return but practically a mo-

tion for a peremptory writ, notwithstanding the return, the averments of the return are to be taken as true.

[2] Some criticism is made as to the first motion being vague and the second being on new and other grounds. That, we think, is a matter for the consideration of the trial court. He gave leave to file a new motion; if the motion filed was not within the leave granted, it was, and yet is, a matter for his own judicial determination. He has not yet acted on it. We cannot say what his action will be. It would be beyond our province, in this proceeding, to direct him as to what action he should take. He has a right to act on it, even to act wrongly, if it is within his judicial power to act on the motion at all.

There is but one question necessary for our determination; that is, has the circuit court jurisdiction over the cause by reason of the pendency of the motion of the plaintiff in the cause to set aside the judgment affirming the judgment of the justice? The other question, whether on the action by the court on that motion, sustaining or overruling it, either party can appeal, is not necessarily here involved and we decline to consider it.

[3] We have in setting out the facts, said that we assume that the original motion to vacate the judgment of affirmance, filed at the term at which that judgment was rendered, had been continued from term to term and is now pending in the present, the April term of the court, if that term is still open. This, on the authority of *Harkness v. Jarvis*, 182 Mo. 231, 81 S. W. 446, and *Meyer v. Meyer*, 158 Mo. App. 299, loc. cit. 305, 138 S. W. 70. That is the effect even of the decisions cited by counsel for relator, namely, *Phillipi v. McLean*, 5 Mo. App. 587, and *Stocke v. Albert*, 8 Mo. App. 578, in each case this court holding that the fact that the trial court had passed upon motions at a term subsequent to that at which they were filed, raised the presumption that the cause had been carried over to that term by proper continuances.

[4] We also remark, in passing, that appellate courts take judicial notice of the beginning of the several terms of the trial courts. If from the record it appears that the court was in session of that term at a later day, the appellate court may assume that it was in session on intermediate dates. *Ray County Savings Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18; *Walker v. Fritz*, 166 Mo. App. 317, loc. cit. 319, 148 S. W. 991.

We make both of the above remarks because it is not recited in the petition for the writ in so many words, that the motions had been continued from term to term; we assume, from the fact that the court acted, or proposes to act, on them at subsequent terms, that they were properly continued, nothing to the contrary appearing.

Counsel for relator refer us to the Phillipi and Stocke Cases, *supra*, saying of them, that they "are the only decisions in this state or elsewhere that (he has) been able to find that actually decide (where the point was raised) that the proposed action of the trial court in this case is beyond its jurisdiction." Neither of these cases are reported in full but are to be found in the appendixes of the volumes referred to. Turning to the opinions on file we find in *Phillipi v. McLean*, *supra*, the judgment was rendered on the 13th of March, that being in the February term of the circuit court of the city of St. Louis. On March 16th motions for new trial and in arrest were filed by defendant. They were not passed upon until the April term, at which term they were overruled. At the same April term and three days after the above action, defendant filed, as our court said, "what is called a motion for rehearing of the motion for a new trial." This latter "so-called" motion for rehearing was sustained at a subsequent term and a new trial granted. On this new trial judgment was rendered and a motion for a new trial being filed, was overruled and an appeal taken at a subsequent term to that at which the judgment was rendered. It was complained in our court that the appeal thus taken was taken too late, as the judgment term had passed. "But," says our court, "the record shows that, in both instances, the motions for a new trial were by the court passed upon at a subsequent term to that at which the judgments were rendered, thus showing that the court had continued and held under advisement the motions for new trial. This being so, there is nothing in the point, as the defendant below could not take his appeal until the motion for new trial was disposed of. The motion for rehearing of the motion for new trial could not continue the case, as no such motion is recognized in proper practice; and the respondent's point would be well taken, if, after the motion for new trial had been overruled at one term, an attempt had been made to continue the case to the next term, by reason of the pendency of a so-called motion for rehearing of the motion for new trial."

In *Stocke v. Albert*, *supra*, it was likewise contended by plaintiff, who was the respondent, that the appeal had been taken too late. Said our court: "It appears that what is called 'a motion for rehearing of the motion for a new trial,' was filed and while this was pending, the order of the court below overruling the motion for new trial was set aside and the motion for new trial reinstated on the docket and the case continued. The so-called motion for rehearing was indeed a sham motion—as such a motion is, thus applied, a motion for a rehearing of a motion for a rehearing—and might have been stricken from the files. Such a motion cannot take a case over from term to term. But here the court, doubtless for good reasons, set aside

the order overruling the motion for new trial, and the appeal was taken at the term at which the motion for new trial was finally overruled." We do not think that the consideration of either of these cases lends support to the contention of the learned counsel for relator in the case before us, in fact, as before said, we think they are against him. He was doubtless misled by the very insufficient digest of this particular point in the appendix.

[6] Nor are we here dealing with a "sham motion." As will be seen in the cases hereafter referred to, motions to vacate orders on motions, substituted motions of like character, are recognized as valid motions. This does not apply to motions for new trial, which must be filed within four days after the trial and cannot, after that time, be amended, *Mt. Vernon Bank v. Porter*, 148 Mo. 176, loc. cit. 183, 49 S. W. 982, although motions to set aside the order sustaining or overruling them may be filed, if filed at the term at which action was had on the motion. See cases following.

[6, 7] It will be observed that the first motion to set aside the order affirming the judgment of the justice is not, technically, a motion for a new trial. Unlike a motion for a new trial, it may be filed at any time during the term at which the judgment was rendered and when filed, whether then argued and submitted may be carried over to a subsequent term and then acted upon, and that until it is acted upon the cause is within the jurisdiction—in the breast—of the court. *Harkness v. Jarvis*, *supra*. Overlooking this very vital fact, the learned counsel for the relator has fallen into his error. While that counsel admits that the motion suspended the judgment and carried that suspension over to the term at which the motion was disposed of, he claims that the motion being disposed of, the judgment *eo instante* became of effect and dated back to the date of the term of its original rendition, that is the December, 1913, term, and was not thereafter subject to any attack. It is true that when the motion for a new trial has been overruled the judgment or decree takes effect as of the date of its entry or rendition. It dates from then, as a lien, or for casting interest and perhaps for other purposes but not for all purposes. Thus section 2040, R. S. 1909, provides: "No such appeal shall be allowed unless: First, it be made during the term at which the judgment or decision appealed from was rendered." But a new trial or other motion attacking that judgment and continued to subsequent terms, carries the cause over and the appeal cannot properly be taken until these motions are disposed of. Even then the amount of bond, if one is required, is fixed, the bill of exceptions signed and filed—unless time for doing the latter is extended—not at the term at which the judgment was rendered but at



the term when the cause is finally disposed of. It has been held that even an order granting an appeal may be set aside during the term at which it was rendered. All of which means that carrying over the motions does more than merely suspend the judgment. It holds the cause itself within the jurisdiction of the court. As long as that is the fact it is within the power of the court to make any lawful orders in the cause which it sees proper. It could, at the same term at which it had overruled the motion to set aside the judgment affirming that of the justice, on motion made at that term to vacate this, have continued the cause to a subsequent term. When it did that the cause could not be said to have been finally disposed of; was not out of the jurisdiction of the court, until it had acted on the motion, up to that time pending and under advisement. That is what was done here; the court, continuing the motion, continued the cause and retained jurisdiction thereof. Power to do so is apparently incontestable under the decisions of our courts. That is the rule to be deduced from *Harkness v. Jarvis*, supra, and *Bank v. Hutton*, supra. Until the court has disposed of this motion, the cause cannot be said to be "finally determined." If the argument that when the motion for a new trial, or to vacate a judgment, is overruled, the judgment before entered, eo instante takes effect as of the date of that judgment, then the appeal is not taken "during the term at which the judgment or decision appealed from was rendered." Beyond doubt plaintiff, when his motion was overruled, could, at that term have taken an appeal, filed his exceptions. Why? Because the cause was still within the jurisdiction of the court.

In *Chandler v. Gloyd*, 217 Mo. 394, 116 S. W. 1073, passing not only upon the effect of a motion for new trial, but also on the effect of a motion to vacate an order granting a new trial, the court, as we think, recognized the principle upon which the rule rests as to all motions, when it said (217 Mo. loc. cit. 403, 116 S. W. 1074): "And until a final hearing and disposition of the motion," (that is, the motion to vacate the order sustaining the motion for a new trial) "the whole matter would unquestionably rest in the breast of the court, and it would be competent for it, in its discretion, for good cause to sustain the motion and award a new trial. Until this result is reached, it cannot be said that the cause is finally determined." Citing a number of cases, the court continues in *Chandler v. Gloyd* (217 Mo. loc. cit. 404, 116 S. W. 1075): "The reasoning upon which those cases must stand is that the filing of the motion for new trial at the term at which the judgment was rendered and its continuance to a subsequent term by the court kept the matters of exception in the breast of the court, and when the court final-

ly disposed of the motion for new trial, the party whose motion for new trial was overruled could then file his bill of exceptions and preserve the same, although taken at a prior term, and could then appeal from the action of the court for the reason that until the motion for new trial was determined, the judgment was not a final one from which an appeal could be taken. \* \* \* It must also be accepted as settled law that during the term at which any order of judgment of the court is entered, the court has the power to set the same aside either upon the motion of a party thereto, or upon its own motion. But the contention of the defendants is that while this may be true as to a motion for new trial, it is not so as to the plaintiff's motions to set aside the order granting a new trial although entered at a term of the court at which the court clearly had the right to set aside its order granting a new trial. And that when the court continued the motion to set aside the order granting the new trial it did not affect the duty of the plaintiff to take his appeal from the order granting the new trial." The court disposed of this contention adversely, holding: "The ground upon which a motion for new trial may be continued to a subsequent term, is, that the court has retained its jurisdiction of the cause and has not lost it by the continuance. But if the court can retain its jurisdiction by continuing it and can legally pass upon it at a subsequent term, then it also had jurisdiction of the cause until the adjournment of that term, and it may also during that term set aside its order sustaining it, or continue that motion until the next term. While courts of last resort have held otherwise, we are unable to appreciate the distinction thus drawn. The reason given that a party may thus delay the final disposition of the cause, can be obviated by the court, by disposing of it at the term, but if the court is of the opinion that it deserves careful consideration and sufficient time does not remain at that term, we cannot see how the jurisdiction of the cause is lost, and this, after all, is the question presented." It is to be noted that learned counsel for relator here urges this very same argument of delay.

In *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422, our Supreme Court even appears to go to the length of holding that a motion for a new trial filed, or even a suggestion made, by a stranger to the record, which was in the nature of an attack upon a judgment rendered, was of such a character as to retain the cause within the jurisdiction of the court, Judge Graves, who wrote the opinion, saying that even without that motion, the cause being continued to another term, the court of its own motion could set aside any order which it had made during the term to which the cause had been carried by the continuance.

That is the case here. These authorities are so conclusive of the question here involved, and they but repeat a rule recognized and announced in a multitude of cases, that we think it unnecessary to go into that question any further.

[8] It is set out in the return that this proceeding is premature. We do not think so. The office of the writ of prohibition is to halt a court in the improper assumption of jurisdiction. 23 Am. & Eng. Ency. of Law (2d Ed.) subd. 2, p. 195. That is here sought, it being claimed that the respondent is assuming jurisdiction where none exists. It is not necessary to wait until action has taken place. The very object is, to stop action.

The preliminary rule heretofore issued is vacated, the respondent discharged from that rule, and a peremptory writ of prohibition is denied.

NORTONI and ALLEN, JJ., concur.

**LINTZENICH v. SANGUINET et al.**  
(No. 13627.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**APPEAL AND ERROR (§ 692\*)—RECORD—EVIDENCE—INSTRUMENTS—BILL OF EXCEPTIONS.**

Alleged error in excluding a mechanic's lien statement, when offered in evidence on the ground that the statement was insufficient on its face, could not be reviewed, where the instrument was not preserved in the bill of exceptions, and there was no call in the bill therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Jacob E. Lintzenich, doing business as the St. Louis Slate & Tile Roofing Company, to enforce a mechanic's lien on property belonging to the Dover Place Realty & Investment Company under a contract with Alfred A. Sanguinet and another, doing business as the Acme Building Company, contractors, before a justice. Judgment for defendants, and the owner appealed to the circuit court. Judgment for the owner, and plaintiff appeals. Affirmed.

P. A. Griswold, of St. Louis, for appellant. George W. Lubke, Jr., of St. Louis, for respondent.

ALLEN, J. This is an action to enforce a mechanic's lien. Plaintiff entered into a contract with the defendants Sanguinet and Webb to do the slate roofing upon certain dwellings in the city of St. Louis, which these defendants, as original contractors, were erecting for the respondent, Dover Place Realty & Investment Company, the owner thereof. Plaintiff, having performed his contract, and not having been paid in full

therefor, filed a mechanic's lien against the said buildings and premises for the amount claimed to be due him. Thereafter he instituted this action before a justice of the peace, where he obtained a judgment against the contractors and sustaining the lien. From this judgment, the respondent owner appealed to the circuit court. At the trial of the cause in the latter court, plaintiff offered in evidence his lien statement, but it was excluded by the court upon objections interposed by the respondent, and judgment was rendered for the latter.

Plaintiff duly excepted to the action of the court in excluding the lien paper, but we are unable to review the matter, for the reason that plaintiff has not preserved in his bill of exceptions the instrument in question, which he offered in evidence, and which was excluded. Neither is there any call for the same in the bill of exceptions. The lien paper is no part of the record in the case, and could be made so only by being incorporated into the bill of exceptions. This not having been done, there is absolutely nothing in the record before us to enable us to pass upon the propriety of the court's ruling in excluding the paper. One objection to its introduction was that it was insufficient upon its face to sustain any lien. Whether it is or not we cannot determine, since it is not before us, and hence we can do nothing but affirm the judgment.

Were it a failure to incorporate into the printed abstract of the record the contents of an instrument set out in the bill of exceptions, or there called for, we could allow the record to be corrected in order to dispose of the case on the merits; but such is not the situation. It is conceded that the lien paper was not, in fact, incorporated into the original bill of exceptions filed, nor there called for, and that the bill of exceptions contained in the abstract before us is an exact copy of the original bill.

It follows that the judgment must be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

**ELWOOD v. HEINZ-YOUNG CONST. CO.**  
(No. 13746.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**1. JUSTICES OF THE PEACE (§ 91\*)—STATEMENT—SUFFICIENCY.**

A statement is sufficient if it fairly apprises defendant of the nature of the claim against him and is sufficiently definite to bar another action on the same demand.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

**2. JUSTICES OF THE PEACE (§ 91\*)—STATEMENT—SUFFICIENCY.**

A statement filed with a justice of the peace recited, "Started to work for H. Construction Company, M. Ave. at the rate of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sixty dollars per month," following which was a list of amounts allowed as credits for payments upon specified dates amounting to an aggregate sum, and then follows a heading, "Total amount due 1911," following which are set out amounts claimed to have been earned during certain months, with a further item for "repairs of bars" and the balance claimed to be due, and the paper was signed by plaintiff's name. *Held*, that the statement sufficiently informed defendant that plaintiff's claim was for a balance claimed for services due and was sufficient.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

Appeal from St. Louis Circuit Court; Wm. B. Homer, Judge.

Action by Joseph Elwood against the Heinz-Young Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Evan A. Smith, of St. Louis, for appellant. Geo. W. Wellman, of St. Louis, for respondent.

ALLEN, J. This is an action begun before a justice of the peace, where plaintiff had judgment. Upon defendant's appeal to the circuit court, and a trial de novo there, plaintiff again prevailed, and the case is here upon defendant's appeal.

The only point involved relates to the sufficiency of the statement, or account, filed before the justice of the peace. This instrument, as it appears before us in the record, begins: "Started to work for Heinz-Young Construction Company, Montana and Missouri avenues at the rate of sixty dollars per month." Then follows a list of amounts for which plaintiff gives credit as having been paid him upon various specified dates in the year 1911, amounting in all to \$225. Then follows a heading, "Total amount due 1911," following which are set out the various amounts claimed to have been earned during designated months of that year; the total thereof being \$298. A further item of 50 cents occurs for "repair of bars"; making the balance, claimed to be due, \$73.50. The paper is signed "Joseph Elwood."

There is some contention that plaintiff's name was not signed to the instrument until after the trial before the justice of the peace, but from the record before us, in which but little of the evidence is preserved, we cannot say that such was the case. Hence we shall take the statement as we find it, without further comment as to the point thus sought to be made.

[1, 2] The instrument is not in the usual form of an account, and is quite informally drawn; but nevertheless it does show upon its face that plaintiff is claiming a balance due for work and labor performed for the defendant, during a certain stated period of time, at \$60 per month; and purports to give credit for all payments made plaintiff on account thereof, specifying the dates and

amounts of such payments. It seems perfectly clear that it is sufficient to support the judgment. It is thoroughly settled that the test of the sufficiency of such a statement is merely that it must fairly apprise the defendant of the nature of the claim against him, and be sufficiently definite and specific to operate as a bar to another action upon the same demand. See *Rundleman v. Boiler Works Co.*, 161 S. W. 609, and cases cited. We think beyond doubt that the instrument here in question clearly advises the defendant of the nature of the claim, i. e., that it is a balance claimed to be due for services rendered; and that, inasmuch as it definitely sets forth the period during which such services are alleged to have been performed, and purports to give credit for all payments made, it is sufficiently specific and definite to bar another action upon the same demand. The judgment is affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

# CONNELLY v. ILLINOIS CENT. R. CO. (No. 14189.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

## 1. CARRIERS (§ 134\*)—ACTIONS FOR LOSS OR INJURY TO GOODS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for injury to goods, evidence *held* to sustain a finding that the goods were damaged while in the possession and under the control of the defendant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.\*]

## 2. EVIDENCE (§ 539½\*)—OPINION EVIDENCE.

In an action against a railroad for damages to furniture shipped, the court properly permitted experienced railroad men to testify that in their opinion the furniture could have been braced by the railroad, and the loss would not have occurred.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

## 3. APPEAL AND ERROR (§§ 242, 261\*)—PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—NECESSITY OF RULING AND EXCEPTION.

An assignment of error as to argument of counsel cannot be considered, in the absence of any ruling of the court or exceptions saved to the action or nonaction of the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1417-1425, 1500; Dec. Dig. §§ 242, 261.\*]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Action by Frank L. Connelly against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Watts, Gentry & Lee, of St. Louis, for appellant. H. A. Loevy, of St. Louis, for respondent.

REYNOLDS, P. J. This is the fourth appearance of this case in our court on appeal. Its history and the various incidents connected with it will be found reported, first, under the caption Connelly, Respondent, v. Illinois Central Railroad Co., Appellant, Southern Railway Company and Mobile & Ohio Railroad Company, Defendants, 120 Mo. App. 652, 97 S. W. 618, the judgment then rendered against the Illinois Central Railroad Company being reversed and the cause remanded. Its second appearance is under the title Connelly, Appellant, v. Illinois Central Railroad Company, Respondent, 133 Mo. App. 310, 113 S. W. 233. The plaintiff having appealed from a judgment against it and in favor of the railroad company, that judgment was reversed and the cause again remanded. Its third appearance is under the title of Connelly, Respondent, v. Illinois Central Railroad Company et al., Defendants, Southern Railway Company, Appellant, and it will be found in 169 Mo. App. 272, 153 S. W. 79, coming before us on an appeal by the Southern Railway Company from a judgment against it and in favor of the plaintiff. That judgment was reversed and the cause again remanded. On its return to the circuit court it was tried against the Illinois Central Railroad Company alone and resulted in a verdict against it, judgment being entered up in favor of the other two defendants, who had before then been discharged from the case. It is from this last judgment against it that the Illinois Central Railroad Company has brought the present appeal.

The case in its several trials proceeded upon the theory that each of the carriers was liable only for loss occurring on its own line and while the goods were in the possession of that line, and was founded on the liability of each as carriers at common law. See Connelly v. Illinois Central Railroad Company, 133 Mo. App. 310, loc. cit. 313, 113 S. W. 233. In the case now before us the other two companies having disappeared from the case, right of recovery is sought against the Illinois Central alone. That right must turn upon the question as to whether the damage to the goods, and as to the fact of damage there is no controversy whatever, occurred while the goods were in charge of the Illinois Central Railroad Company, in transit over its line from Jackson to Winona, Mississippi, or before delivery by it to the Southern Railway Company, the intermediate carrier between the Illinois Central, the initial carrier, and the Mobile & Ohio Railroad Company, the final carrier, at Winona.

The law applicable to the case is so clearly stated in 133 Mo. App. loc. cit. 316, 113 S. W. 235, supra, that we do not consider it necessary to enlarge on it to any extent. Referring to the opinion in that case, we there said: "To our minds the weight of evidence shows the damage was done after the fur-

niture was received by the Southern Company and while in its custody, as the jury found." Following this, however, we said: "But the witnesses who testified to those facts were introduced by respondent (appellant here) and appellant (respondent here) was not bound by their testimony. Neither was the jury bound to believe them if their manner on the stand discredited them, or if the evidence as a whole would support another inference."

[1] At the trial of the case at bar the testimony was practically as set out in 133 Mo. App. 310, 113 S. W. 233, supra, and we refer to that for the facts. At the present trial plaintiff introduced further evidence tending to show that while the car was in the possession of this defendant, it had been opened and entered by a couple of the employes of defendant, for the purpose of removing from the car certain articles which had been loaded in that car by mistake, and that to do this they had pulled down part of the furniture and goods of plaintiff under and among which these articles had been loaded. The testimony did not show how this had been done, or that the goods of plaintiff had been properly replaced after being disturbed. There was also evidence to the effect that no rails or braces or bars of any kind had been in place to hold the goods of plaintiff, and there was opinion evidence that the presence of bars or braces would have prevented the shifting of the load, which occupied but one-half of the car. In the presence of this evidence we cannot hold, as a matter of law, that the court should have instructed the jury that plaintiff could not recover against this defendant. Even if we may think that the weight of the testimony is in favor of appellant, that was for the determination of the trial court and we are concluded by his finding as to that. So we hold that there was no error in refusing demurrers to the evidence, or in giving the instructions asked by plaintiff, which proceeded on the theory that there was evidence, which, if believed by the jury, entitled plaintiff to recover. We hold that there was evidence in the case from which the jury was warranted in inferring that the damage to the goods had occurred while they were in the possession and under the control of the appellant company. This is the only criticism aimed at those instructions.

[2] It is strenuously argued that the court erred in admitting what is called "opinion evidence," that is the testimony above referred to of two or more witnesses, to the effect that means could have been taken to have braced this furniture in the car and that if that had been done it could not have been in the position in which it was found, scattered over the floor, broken and damaged. It is true that this was opinion evidence, but it was given by experienced railroad men, the result of their own observation, and we

see no error in permitting it to go to the jury for what it was worth. Our court commented on this same line of testimony in *Connelly v. Illinois Central Railroad Co.*, 133 Mo. App., supra, loc. cit. 317, 113 S. W. 233, as some evidence from which the jury might determine whether the furniture had been so loaded as to bear transportation.

[3] Error is assigned to the remarks of counsel for respondent in his closing address to the jury. It is true that that counsel was interrupted by counsel for appellant and his statements challenged, but we find no mention in the record of any rulings of the court, or of any exceptions saved, either to the action or non-action of the court.

Upon consideration of the case we find no reversible error in the record or proceedings. The verdict was for \$500 and there is no claim that it is excessive. In point of fact it is very much within the testimony as to the amount of damage sustained by plaintiff in the loss of his goods. We see no legal ground upon which we can reverse or disturb the judgment in this case. That judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

SKINNER & KENNEDY STATIONERY CO.  
v. LAMMERT FURNITURE CO.  
(No. 13,445.)

(St. Louis Court of Appeals. Missouri. April 7, 1914. Rehearing Denied May 21, 1914.)

1. SALES (§ 301\*)—REMEDIES OF SELLER—LIEN—STATUTORY PROVISIONS.

Rev. St. 1909, § 2191, providing that personal property shall be subject to execution on a judgment against the buyer for the purchase price, and shall not be exempt except in the hands of an innocent purchaser for value, merely removes such property from the operation of the exemption law, and does not create a lien in favor of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 857, 868; Dec. Dig. § 301.\*]

2. SALES (§ 316\*)—"CONDITIONAL SALE"—STATUTORY PROVISIONS.

Rev. St. 1909, § 2887, providing that no sale of goods and chattels, where possession is delivered, shall be subject to condition as against creditors or subsequent good-faith purchasers of the buyer, unless such condition be evidenced by writing, executed, acknowledged, and recorded, has no application to the avoidance of a cash sale for nonpayment, such a sale not being a "conditional sale" within the statute.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 890-895; Dec. Dig. § 316.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

3. APPEAL AND ERROR (§ 1008\*)—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS.

The finding of facts by the trial court on conflicting evidence, was conclusive upon appeal, though no request appeared to have been made therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

4. SALES (§ 202\*)—REMEDIES OF SELLER—RECOVERY OF GOODS—RIGHT TO RECLAIM.

Where a sale of personal property is for cash, the title does not pass if the purchase money is not paid in accordance with the terms of the contract, and in such case the seller may reclaim his property, provided he has not waived cash payment, or been guilty of laches or conduct estopping him from so doing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. § 202.\*]

5. ESTOPPEL (§ 75\*)—REMEDIES OF SELLER—RECOVERY OF GOODS—WAIVER OF RIGHT.

The conduct of the seller of goods for cash, in permitting the buyer to remain in possession for a considerable time before reclaiming them for nonpayment, though it might have worked an estoppel as against an innocent purchaser for value, did not estop it as against a mortgagee, who knew when the mortgage was executed that the seller had not been paid and claimed the property.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192-195; Dec. Dig. § 75.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Replevin by the Skinner & Kennedy Stationery Company against the Lammert Furniture Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George F. Beck, of St. Louis, for appellant.  
Henry M. Walsh, of St. Louis, for respondent.

ALLEN, J. This is an action in replevin to recover the possession of certain articles of office furniture. Plaintiff's claim to the latter arises by virtue of a chattel mortgage thereon executed by the White Portland Cement & Clay Company, hereinafter referred to as the Cement Company, to secure the payment of certain notes. The cause was tried before the court without a jury, resulting in a judgment for defendant, from which the plaintiff has appealed.

On or about July 18, 1910, the defendant, Lammert Furniture Company, sold and delivered the furniture in question to the Cement Company, in the city of St. Louis, which latter company appears to have been in process of organization, and to have been without funds. The goods were purchased from the defendant by one Dodge, acting for the Cement Company. Defendant's evidence went to show that the sale thereof was for cash on delivery; that directly after the delivery of the goods to the Cement Company's offices, defendant's collector called at the latter place to collect the bill, and thus made repeated efforts to collect the same until a short time prior to the levy upon the goods by plaintiff, but could not find Dodge, being told that he was out of the city. On behalf of plaintiff there was some evidence tending to show that defendant had sold the goods on credit. Shortly after said sale of the furniture by defendant, plaintiff sold to the Cement Company certain office supplies. It appears that before making such sale plaintiff's "credit

man" communicated by telephone with defendant's credit man respecting the financial standing of the Cement Company, and that plaintiff extended credit to that company on the strength of what was said by defendant's credit man as to the statements made to the latter by Dodge respecting the parties who were said to be connected with it. On or about October 19, 1910, neither the furniture nor the office supplies having been paid for, plaintiff secured a judgment against the Cement Company, before a justice of the peace, for the amount of its account, and, on or about October 27, 1910, caused execution to be levied on the aforesaid furniture then in that company's offices. After the constable had taken possession of the furniture, defendant filed a third party claim, claiming to be the owner thereof; and thereafter plaintiff executed and delivered to the constable an indemnifying bond in the sum of \$500. While matters stood thus, the Cement Company, on November 10, 1910, paid plaintiff \$150 on account of said judgment, and executed and delivered to plaintiff its two notes for \$60.75 each, payable 30 and 60 days, respectively, after date, secured by a chattel mortgage upon the furniture in question, which mortgage was duly recorded on November 11, 1910. Thereupon plaintiff released its levy and caused the furniture to be returned to the offices of the Cement Company. Thereafter, and before the institution of this action, defendant took possession of the furniture and removed the same to its store or warehouse, under some instrument, it seems, not appearing in the record, whereby it is said that the Cement Company "quitclaimed" its right, title, and interest therein. After both of the above-mentioned notes had become due and payable, plaintiff instituted this suit to recover the property.

The court made a finding of facts, though the record does not show that a request therefor was made, finding, among other things which need not be here repeated, that the sale of the furniture by the defendant to the Cement Company was, in fact, a sale for cash, and that the property was to be paid for on delivery, that defendant had made repeated efforts to collect the purchase price thereof, but had not been paid for the same, and that prior to the execution of the mortgage to plaintiff, the latter had been notified, and had knowledge of the fact, that the defendant had not been paid for the furniture, and that it claimed title thereto. The court thereupon found that the plaintiff was not entitled to the possession of the property in question, and found the issues in favor of the defendant.

Learned counsel for appellant urges that, though plaintiff had knowledge of the fact that the purchase price of the property had not been paid, nevertheless plaintiff's mortgage will prevail over the defendant's claim to the property, citing *Van Frank v. Walther*, 84 Mo. App. 472; *Kane v. Manley*, 63 Mo.

App. 43; *Finke & Nasse v. Pike*, 50 Mo. App. 564. But we think that these cases are not decisive of the question in hand. An examination of them will reveal that they apply to a situation where the vendor has extended credit to the vendee, and then seeks to obtain priority over other creditors by asserting his claim for the purchase price.

[1] In this connection it is urged by appellant that section 2191, Revised Statutes 1909, has been construed to be a statute of exemption only, and not one creating a lien in favor of a vendor of personal property. This statute provides that "personal property shall in all cases be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money." It is true that this statute does not create a lien in favor of the vendor, where the purchase price of personal property has not been paid, but merely excepts such property from the operation of the exemption law. See *Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940; *Barton v. Sittlington*, 128 Mo. 165, 30 S. W. 514. But we are not here concerned with this statute, for defendant's claim to the property is not predicated thereupon, but proceeds upon the theory that the title to the property never passed to the Cement Company.

[2] It is also urged by appellant that under section 2887, Rev. Stat. 1909, whatever condition was imposed by defendant's contract of sale of the property to the Cement Company was void as to creditors. This statute provides that "no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee and recorded as now provided in cases of mortgages of personal property." This statute has been frequently construed by our courts, and the fullest effect has been given to it as a rule of public policy. However, we think it has no application whatsoever to the case in hand. This is for the reason that the original sale of the goods by the defendant was not a conditional sale at all within the meaning of this statute.

[3] The trial court, in its finding of facts, specifically found that the property was sold by the defendant to the Cement Company for cash on delivery. Such finding is conclusive upon us, even though no request appears to have been made therefor. See *Lesan Advertising Co. v. Castleman*, 145 Mo. App. 573, 148 S. W. 433; *Barton Lumber Co. v. Gibson*, 161 S. W. 357. Likewise the trial court found, and which is undoubtedly beyond dispute, that the plaintiff had full knowledge of the defendant's claim to the property at

the time of taking the mortgage in question.

In *Johnson-Brinkmann Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615, our Supreme Court, in a case of this nature, said: "As between vendor and purchaser, where the sale of the chattels is a cash sale, the delivery of the thing sold and the payment of the purchase money are concurrent acts, and the former may reclaim his property if the purchase money be not paid according to the terms of the sale, either in the hands of the vendee or of a purchaser with or without notice of the terms of the sale, and that the purchase money has not been paid, provided the vendor has not waived the cash payment and has been guilty of no laches or such conduct as would estop him from so doing. *Decan v. Shipper*, 35 Pa. 239 [78 Am. Dec. 334]; *Leven v. Smith*, 1 Denio, 571. A cash sale and a sale upon subsequent condition are entirely different. In the first, the payment of the purchase money and delivery of the property are concurrent acts, one and the same transaction, while the latter is a sale and delivery of the thing sold on condition subsequent, subject to be defeated by failure of the purchaser to comply with the terms of the contract of purchase. The former may be avoided by the vendor upon failure by the vendee to pay the purchase money, while the property is in his hands or in the hands of any other purchaser unless the payment of the purchase price has been waived. While section 5178, Revised Statutes 1889 (section 2887, Rev. Stat. 1909), invalidates conditional sales, as to the creditors of the vendor and subsequent purchasers in good faith when the goods are delivered to the vendee, except where the condition is evidenced by writing executed, acknowledged, and recorded as in the case of chattel mortgages, section 5180 (section 2889, Rev. Stat. 1909), same statute, was manifestly intended to invalidate numerous devices which had sprung up for the evasion of the statute, such as the practice of leasing, renting, or hiring the property when the real transaction was a sale on the plan of the vendee receiving possession and paying the purchase money in installments. This statute has no application to the case in hand, where the terms of the sale are cash on delivery. In such case there is nothing to record, so as to notify subsequent creditors and purchasers, as there may be in conditional sales."

[4, 5] It cannot be doubted that the rule prevailing in this state is that, where the sale is for cash the title does not pass, if the purchase money be not paid in accordance with the terms of the sale. See, also, *Strother v. Lumber Co.*, 200 Mo. 647, 98 S. W. 34; *Wright v. Trust Co.*, 144 Mo. App. 640, 129 S. W. 407; *Sharp v. Hawkins*, 129 Mo. App. loc. cit. 85, 86, 107 S. W. 1087. And it appears that in such case the vendor may reclaim his

property, provided he has not in some manner waived the cash payment, or has been guilty of laches or such conduct as would estop him from so doing. It thus appears that in the instant case the defendant had the right to reclaim its property, unless its conduct, in permitting the same to remain in the possession of the vendee for a considerable period of time, should be held to operate as an estoppel, so as to prevent the defendant from asserting its claim thereto. But it appears that should the defendant be held to be guilty of laches in the premises, such as would have operated to prevent assertion of title by it as against an innocent purchaser for value, nevertheless defendant is not so estopped as to the plaintiff, for the reason that the latter took its mortgage with full knowledge of defendant's claim.

In *Johnson-Brinkmann Co. v. Central Bank*, supra, 116 Mo. loc. cit. 573, 22 S. W. 816, 38 Am. St. Rep. 615, the court further said: "The evidence shows very conclusively that there was no intention on the part of plaintiff to waive the cash payment for the wheat, but it was guilty of laches in suffering it to be shipped from Kansas City, and in delivering its bill of lading to the Imboden Commission Company, and it would in consequence thereof be estopped from claiming the wheat or the proceeds arising from the sale thereof in the hands of an innocent holder without notice. The sale of the wheat being a cash sale, if the defendant knew that the purchase money therefor had not been paid by Imboden Commission Company, or that Imboden Commission Company was not the owner of the wheat at the time it, defendant, received the draft in payment therefor, \* \* \* it is not an innocent purchaser, and must account to plaintiff for the amount of the purchase money according to the contract price."

This appears to be not only persuasive, but controlling, authority in the case at hand. It seems that defendant's delay in the premises was due to the failure of its collector to find Dodge, who had made the purchase. And though it may be that defendant would be estopped as against others by reason of having delayed so long in asserting its claim to the property, plaintiff cannot avail itself of this, for the reason that it fully appears that plaintiff knew that defendant had not been paid for the property, and was fully advised of defendant's claim thereto at the time of the execution of the chattel mortgage.

Other questions raised are not controlling, and need not be discussed.

We are of the opinion that the learned trial judge was correct in finding the issues in favor of the defendant. The judgment should therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

**S. VIVIANO & BROS. v. COLUMBIA CAN CO. (No. 13596.)**

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**1. JUSTICES OF THE PEACE (§ 91\*)—STATEMENT OF CAUSE OF ACTION—SUFFICIENCY.**

A statement of a cause of action in justice's court, which alleges that plaintiff, on a designated date, was lawfully entitled to immediate possession of lithographic impressions or designs used in making labels for a business carried on by him, that the lithographic plates had gone into the possession of defendant, who converted them to his own use and refused to surrender them, though plaintiff had many times demanded them, and that the plates were of a specified value, stated a cause of action.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

**2. REPLEVIN (§ 72\*)—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a finding that defendant wrongfully detained lithographic plates manufactured by him for plaintiff authorizing a recovery by plaintiff of the plates.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 292-295; Dec. Dig. § 72.\*]

**3. REPLEVIN (§ 106\*)—RELIEF—RECOVERY OF VALUE.**

One who wrongfully converted personality of another cannot complain of a judgment for the value of the property instead of a judgment for its return.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 416-423; Dec. Dig. § 106.\*]

**4. APPEAL AND ERROR (§ 197\*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.**

Where advantage was not taken in the trial court of a variance between the pleadings and the proof, the defeated party cannot on appeal complain thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 197; \* *Pleading*, Cent. Dig. §§ 1438-1441.]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by S. Viviano & Brothers against the Columbia Can Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank A. MacManus, of St. Louis, for appellant. R. T. Stillwell, of St. Louis, for respondent.

**ALLEN, J.** This is an action originally instituted before a justice of the peace. Plaintiffs prevailed before the justice, and the defendant appealed to the circuit court, where, upon a trial de novo before the court without a jury, plaintiffs again had judgment, and the case is here upon defendant's appeal.

Plaintiffs' statement of their cause of action alleged "that on the 30th day of November, 1911, they were lawfully entitled to the immediate possession of six lithographic impressions, plates, or designs used in making labels for the business carried on by him, which said lithographic plates or designs were then of the value of \$25 each, or \$150 for the six, aforesaid; that said lithographic

plates had heretofore gone into the possession of defendant, who then converted them to its own use and refused, and still refuses, to surrender them to the plaintiffs, although plaintiffs have many times demanded said plates from defendant." It was then averred that by reason of defendant's refusal to deliver "said plates" to plaintiffs the latter suffered certain damage and loss in their business; but, since there was no recovery on this score, this phase of the case need not be further noticed.

Plaintiffs are engaged in selling certain food products, and prior to the time when this controversy arose with defendant the latter had for some years been making for plaintiffs certain cans, of tin, to contain olive oil and other substances. It appears that defendant first made certain lithographic designs for plaintiffs to be utilized for printing labels upon plaintiffs' cans, for which plaintiffs paid the defendant. The evidence is not altogether clear as to the precise process used; but it does appear that the various designs to be thus printed or placed upon plaintiffs' cans were traced or engraved upon lithographing stones, from which impressions were made directly upon the tin of the cans. These stones were retained by defendant at its place of business, and were used in making cans for plaintiffs, upon orders given by the latter from time to time, at prices agreed upon between the parties. Some time in 1910, plaintiffs, desiring to contract elsewhere for the manufacture of their cans, demanded that defendant deliver to them these designs, or impressions thereof, which defendant refused to do.

Just what was the original agreement between the parties is a matter in dispute, since it appears to have been entirely oral; and the testimony in respect thereto is by no means clear. Plaintiffs' testimony is to the effect that they bought and paid for the lithographic designs, or engravings, for which they were charged at the rate of \$25 each, and that it was understood that these were to become plaintiffs' property; that plaintiffs did not know that the designs were to be placed upon stones; but that, however they were made, they were to belong to plaintiffs. Defendant's position appears to be that the agreement made with plaintiffs did not contemplate that the latter would have any property rights in the lithographic stones upon which the designs in question were placed, but that such stones belonged to the defendant; that defendant was not guilty of conversion in refusing to deliver the stones themselves; and that defendant could only be required to deliver to plaintiffs "impressions" taken from the stones, upon being paid for the labor of making such impressions. And there is testimony in the record to the effect that according to the custom in this business such stones remain the prop-



erty of the lithographing company and that they are planed off and utilized for other purposes.

Certain letters written by the defendant to plaintiffs appear to throw much light upon the situation. On November 28, 1910, defendant wrote plaintiffs a letter inclosing a statement for \$277.82 for certain cans manufactured and delivered to plaintiffs, in which letter defendant stated that plaintiffs' representative had requested defendant to deliver to him the "lithographic impressions." And defendant therein stated that it could not so deliver such impressions until the inclosed statement had been paid.

It appears that the statement referred to in the letter above was paid by plaintiffs; the latter, however, deducting therefrom \$2.15 as being a discount to which they claimed to be entitled. And on March 28, 1911, defendant again wrote plaintiffs in answer to a letter of plaintiffs of the day previous. In this letter defendant offers to deliver the "lithographic impressions" provided plaintiffs pay the \$2.15 above referred to and also the sum of \$50 claimed by defendant for making certain changes which had been made in the designs at different times.

On March 30, 1911, defendant again wrote plaintiffs stating that it had refused to deliver the "transfer impressions" of plaintiffs' "lithographic can designs" to an employé of plaintiffs who had called at defendant's offices therefor, assigning as reason for such refusal that plaintiffs owed defendants the \$2.15 above mentioned, the \$50 for changing the designs, and likewise a further charge of \$30 "covering the labor cost on pulling lithographic transfer impressions." And defendant stated that it would deliver to plaintiffs the "impressions" on receipt of such sums.

It appears from the evidence that the lithographic impressions referred to in defendant's letters were impressions taken, "or pulled," as defendant calls it, from the lithographing stones, upon special paper, and which could be then utilized in placing such designs upon new lithographing stones; and that by the use of such impressions about two-thirds of the cost of preparing such new stones was saved. And it appears that plaintiffs in the meantime had caused lithographing stones to be prepared by another company at a cost of \$150.

The learned trial judge was evidently of the opinion that, though plaintiffs had paid \$150 for the making of the original designs, nevertheless they were not entitled to recover the value of the stones themselves, but the value of the lithographic impressions taken therefrom; for the court entered judgment for plaintiffs for \$106, being two-thirds of the original cash price of these designs, as well as of the new designs procured by plaintiffs, with interest at 6 per cent. from the date of the institution of the suit, the judgment having been rendered just one

year after the institution of the action before the justice of the peace.

[1] There are various grounds for reversal urged, but a careful scrutiny of the entire record has convinced us that they are without merit. It is urgently insisted that plaintiffs' statement wholly fails to state a cause of action, but we are not so persuaded. We think it quite clear that the statement is sufficient as a basis of an action before a justice of the peace.

Aside from a demurrer to the evidence interposed by it, defendant offered five declarations of law. Two of them were given and three refused. As to the latter, it is sufficient to say that we think it clear that the court committed no error in refusing them. The court found the issues for plaintiffs, evidently accepting their version of the original contract between the parties; and this is fully warranted by the evidence contained in the record.

[2] It is insisted that plaintiff is suing for the conversion of certain impressions, not of the lithographic stones themselves; that the impressions referred to were in fact not in esse at the time plaintiffs claim that they were converted; and that in fact defendant had in its possession no specific property, to the possession of which plaintiff was entitled at the time of the alleged conversion. This appears, however, to overlook the fact that plaintiffs claim to own the lithographic designs themselves by virtue of the original agreement between the parties, and for which plaintiffs had fully paid. It is true that these designs were upon certain lithographing stones, but plaintiffs claim to have known nothing as to the process to be employed in making them, and that the agreement contemplated that they were to become plaintiffs' property when made. Defendant's letters above referred to appear to concede that plaintiffs were entitled to the lithographic designs in the form at least of impressions; and plaintiffs have recovered only the value of such impression. By these letters defendant first offered to comply with plaintiffs' request to deliver the impressions, if plaintiffs paid a certain bill, which was paid; a small discount being deducted. Later defendant took the position that it was entitled to \$50 for certain minor changes made at various times theretofore. As to this, it quite clearly appears that the defendant was not entitled to make such charge, for it seems that none was contemplated for making these minor changes during a period covering several years, as the court below evidently found. Likewise the matter of the small discount which defendant claimed to be due it may be considered as out of the case, for it appears that this sum was tendered to defendant by plaintiffs. Finally, defendant demanded the further sum of \$30 for "pulling" the impressions. These claims do not appear to have been made in good faith. In the first letter, no mention is made whatso-

ever of any charge for changes in the designs made at times long prior thereto; and in neither of the first two letters is there any mention that there would be any cost attached to delivering to plaintiffs the impressions, but, on the contrary, plaintiffs' right to the same without any such charge is conceded.

[3] We think that the case made by plaintiffs was such as to justify a finding that the defendant had bound itself to turn over these designs to plaintiffs, either by delivery of the stones themselves, or by delivering impressions taken therefrom, without further charge therefor. Plaintiffs have recovered only the value of such impressions, and of this we think defendant cannot complain.

[4] The form of the action is not material in view of the state of the record before us; for, if there was any variance between the pleadings and the proof, proper advantage was not taken thereof below, and the appellant cannot now complain on this score. See *Rundelman v. Boiler Works Co.*, 161 S. W. 609, and cases cited.

Other questions raised are not material and need not be noticed.

The judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

#### CHILTON v. HARRIS. (No. 11084.)

(Kansas City Court of Appeals. Missouri. May 4, 1914.)

#### EXECUTION (§ 275\*)—VOID SALE—RELIEF OF PURCHASER.

The rule of caveat emptor, applicable to execution sales provided no fraud is practiced, does not apply where the sale is void because of the death of the execution creditor, and a purchaser, acting under the mistaken belief of law that a sale is valid, may be relieved from his purchase by application to the court rendering the judgment and issuing the execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. § 275.\*]

Error to Circuit Court, Cooper County; G. A. Wurdeman, Special Judge.

Action by Edward W. Chilton against William A. Harris. There was a judgment for defendant, and plaintiff brings error. Affirmed.

John Cosgrove, of Boonville, for plaintiff in error. W. G. & G. T. Pendleton, of Boonville, for defendant in error.

ELLISON, P. J. This is an action on a judgment against defendant, W. A. Harris, rendered in favor of George E. Harris in the circuit court of Cooper county on the 29th of October, 1903, for \$1,739.29 and for the costs, taxed at \$29.70. George E. Harris assigned the judgment to this plaintiff. The trial court rendered judgment against defendant, W. A. Harris, and he appealed to this court.

It appears from defendant's answer, sustained by the evidence, that George E. Harris, as plaintiff in the original judgment, assigned it to this plaintiff to secure a lawyer's fee due from him, and that he afterwards died; that long after his death, to wit, on the 4th of March, 1913, the attorney for this plaintiff, the assignee, and of the heirs of George E. Harris, the assignor, and of the lawyer to whom the fee was due, ordered execution on the judgment, and such writ was issued and delivered to the sheriff, who levied it upon lands of the defendant. These lands were regularly sold by the sheriff for the purpose of satisfying the judgment, the attorney who ordered the execution purchased all but one acre of the land for his clients for the sum of \$1,975, and that acre was purchased by a daughter and one of the heirs of the deceased, George E. Harris, for \$150. The attorney ordering the execution knew that George E. Harris was dead, but seems not to have realized until after the sale that no title to the lands could be conveyed by the sheriff on an execution in favor of and in the name of a dead man, when, in the name of his clients (this plaintiff as assignee and the daughter), and at the return term of the execution, he filed a joint motion to recall and quash the execution for the reason that it "was void and conveyed no title" to them. The circuit court, after hearing the motion, sustained it, and ordered the sheriff to refund the \$150 bid and paid by the daughter, and found that the attorney purchasing for his clients had not paid any money, as they owned the judgment. The parties agreed that the execution was void. Afterwards the present action was instituted on the judgment, as stated in the beginning, and on the facts shown defendant insists that the amount of the bids at the execution sale should be credited on the judgment, and that judgment be rendered against him for the balance only. Plaintiff's position is that, since he got no title at the sheriff's sale on account of the execution being void, he should be allowed to escape his purchase, and not credit his bid on the judgment, while defendant insists that, as no fraud or unfairness is pretended, and as plaintiff knew all the facts, and as his mistake was only one of law, he must abide by his purchase and credit his bid on the judgment.

[1] It is commonly understood by the bar that the rule caveat emptor applies to sheriffs' sales. *Rorer on Judicial Sales*, §§ 174, 476, 528, 603; *Kleber, Void Jud. & Ex. Sales* § 457; *Stewart v. Devries*, 81 Md. 525, 32 Atl. 285; *Johnson v. Laybourn*, 56 Minn. 332, 57 N. W. 933; *Borders v. Hodges*, 154 Ill. 498, 39 N. E. 597. The questions presented under this general rule are interesting but unsettled. Diversity in mode of considering them has led to different conclusions. Some courts have pronounced the purchaser

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a mere "volunteer" in bidding and paying his money, and consequently holding that he must pay his bid, or, if paid, that he cannot recover it back. *Horne v. Nugent*, 74 Miss. 102, 108, 20 South. 159. It has been said that under the rule of caveat emptor, and as a necessary result of it, "the money produced at a sheriff's sale is to be regarded, not as the money of the purchaser, but as that of the defendant in the *fi. fa.*" *Lowe v. Rawlins*, 83 Ga. 320, 10 S. E. 204, 6 L. R. A. 73. Again it is held that if a bidder at a sheriff's sale gets no title and makes it known before the sale is confirmed, he will be released. *Williams v. Glenn*, 87 Ky. 87, 89, 7 S. W. 610, 12 Am. St. Rep. 461. Then we have in this state the well-known case of *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, 77 Am. Dec. 557, wherein it is held that a purchaser at an administration sale of land incumbered by a mortgage, whose bid has been used to pay the mortgage debt, will be subrogated to the rights of the mortgagee. And it has been held that the heirs will not be permitted to set aside an administration sale of real estate where the purchase money went to discharge debts of the estate, without refunding the purchase money. *Throckmorton v. Pence*, 121 Mo. 50, 57, 25 S. W. 843; *Davis v. Gaines*, 104 U. S. 386, 26 L. Ed. 757. So in *McLean v. Martin*, 45 Mo. 393, where the sheriff by mistake misdescribed land as belonging to the execution creditor, and so sold it to a purchaser, who also supposed it was the debtor's; and the debtor, joining in the mistake, supposing his land had been sold, surrendered possession to the purchaser, who entered and made improvements, it was held, in an opinion by *Wagner, J.*, that the doctrine of caveat emptor did not apply to such a case. But these cases have not been allowed to affect the full application of the rule in this state. Thus in *Cashlon v. Faina*, 47 Mo. 133, it was held, the opinion also by Judge *Wagner*, that at a partition sale by the sheriff there was no warranty, and a purchaser must pay a note for his bid though he got no title. And in *Schwartz v. Dryden*, 25 Mo. 572 (the opinion being by the judge who wrote *Valle's Heirs v. Fleming's Heirs*, supra), it was held that there could be no abatement of the price though there was no title to a part of the land sold. The same was held in *Stephens v. Ellis*, 65 Mo. 456, and *Shannon v. Mastin*, 135 Mo. App. 50, 114 S. W. 1127.

In *Talley v. Schlatitz*, 180 Mo. 231, 239, 79 S. W. 162, 164, it is said that in a sale by the sheriff the owner of the land intends nothing, and that the law through its officer, the sheriff, "acts in hostility to him," and that "the rule of caveat emptor applies to all execution sales." The same is decided in *Clarke v. Cooper*, 148 Mo. App. 230, 128 S. W. 840, and *McNamee v. Cole*, 134 Mo. App. 266, 274, 114 S. W. 46. Manifestly these cases announce a rule that a purchaser at execution sale in this state is in the position of

him who receives a quitclaim deed; he gets what he may, and must pay the price. And this is the prevailing rule. *Peterborough Bank v. Pierce*, 54 Neb. 712, 719, 75 N. W. 20; *McCartney v. King*, 25 Ala. 681; *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119, 3 L. R. A. 440, 10 Am. St. Rep. 40; *Leuders v. Thomas*, 35 Fla. 518, 17 South. 633, 48 Am. St. Rep. 255; *Smith v. Painter*, 5 Serg. & R. (Pa.) 223, 9 Am. Dec. 844. In the last of these cases it was said: "The sale by sheriff excludes all warranty. The purchaser takes all risk. He buys on his own knowledge and judgment. Caveat emptor applies, in all its force, to him. If this were not the law, an execution, which is the end of the law, would only be the commencement of a new controversy; the creditor kept at bay during a series of suits, before he could reap the fruits of his judgment and execution. A party may sell his claim to lands, whatever they may be; and, if there is no covenant other than an express stipulation that he sells only his own interest, unless he has been guilty of some misrepresentation as to the intent, or some fraudulent concealment, he may recover the purchase money. Lands at sheriff's sale are frequently sold greatly below their value, because the usual understanding is that the purchaser takes his chance of the title." The foregoing rule presupposes that no fraud is practiced; and in some jurisdictions mistake of fact, especially if it be mutual, will relieve the purchaser. But if that rule be conceded to exist in this state, it would not apply to this case, since here the fact which made the execution void (the death of the plaintiff) was known to the purchaser; the mistake he made in supposing the execution to be valid was one of law, and a mistake of law by a purchaser at an execution sale will not relieve him. *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Arnold v. Donaldson*, 46 Ohio St. 73, 81, 18 N. E. 540. "Even courts of equity will not relieve, in an independent action, from a mistake of law, where it is not accompanied with special circumstances—such as misrepresentation, undue influence, or misplaced confidence. \* \* \* And courts of law are less indulgent than courts of equity in such case. 'It is well settled,' says *Greenleaf*, after speaking of the recovery of money paid under mistake of facts, 'that money paid under a mistake or ignorance of law of our own country, but with a knowledge of the facts, or the means of such knowledge, cannot be recovered back.'" *Boggs v. Hargrove*, 16 Cal. 559, 566, 76 Am. Dec. 561, 565. This is illustrated in this state. Thus in *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251, it was held that a father, paying damages caused by his infant son setting out a fire, under a mistaken belief that he was legally liable, in the absence of fraud, could not recover the money back. In *Couch v. Kansas C'*

127 Mo. 436, 30 S. W. 117, the plaintiff paid taxes on property in extended city limits, under the mistake that the extension was valid, and it was held he could not recover them back. See, also, *Campbell v. Clark*, 44 Mo. App. 249, where the question is discussed by the St. Louis Court of Appeals.

But it has been held that the rule caveat emptor will not apply where the judgment or execution is *void*, and consequently no power of sale exists. *McGee v. Wallis*, 57 Miss. 638, 646, 34 Am. Rep. 484; *Howard v. North*, 5 Tex. 290, 315, 51 Am. Dec. 769; *Dufour v. Camfranc*, 11 Mart. O. S. (La.) 607, 13 Am. Dec. 360; *Bailey v. White*, 13 Tex. 114; *Burns v. Ledbetter*, 54 Tex. 374, 382; *Id.*, 56 Tex. 282, 284; *Dutcher v. Hobby*, 86 Ga. 198, 12 S. E. 356, 10 L. R. A. 472, 22 Am. St. Rep. 444. In *Bailey v. White*, just cited, the court said that: "Where a sale has been made on an invalid execution, issued on a valid judgment, and the money paid" has been applied "to the satisfaction of the judgment, and there has been no fraud, the purchaser will not be compelled to restore the property purchased, until reimbursed the amount paid by him." That case was affirmed in 54 Tex. 374, *supra*, where the purchaser was not a party to the suit. But in 56 Tex. loc. cit. 285, *supra*, it is held that if such party should have himself purchased, either by himself or through his attorney, and thereby apparently satisfied the judgment without any gain to himself or loss to the defendant, "he could on motion have had the satisfaction set aside, or have maintained an action on the judgment as unsatisfied."

The question was discussed by Mr. Justice Field, then Chief Justice of the Supreme Court of California, in *Boggs v. Hargrove*, 16 Cal. 559, loc. cit. 564, 76 Am. Dec. 561, where the conclusion is reached that the rule of caveat emptor does not apply to *void* sales. We have already shown that it was held in that case that a purchaser at an invalid execution sale, knowing the facts, could not be aided, either in law or equity, in an *independent* action. But the conclusion was reached (16 Cal. 565, 566, 76 Am. Dec. 561) that he was entitled to relief in the suit in which the sale was made, provided there is a timely application and no prejudice to the rights of others exists.

So, therefore, while recognizing that the rule of caveat emptor is in full force in this state and the rule that our courts will not grant relief for mistake of law, yet we think the foregoing considerations justify us in holding that the former does not apply where the sale is *void*, and the latter does not apply where such is the character of the sale and relief from the purchase is sought in the action out of which the sale grew. In so holding we are not disturbing that array of authority which likens a sale caveat emptor to a conveyance by quitclaim deed. For while the vendee in a quitclaim deed must beware and will receive no reimbursement if he gets

nothing, yet he is entitled to a *valid* quitclaim, and if for any reason it is a *void* instrument, he may go upon his vendor on that account.

We are aware of the embarrassments that may, at times, flow from this view. There are instances when the question whether a judgment, or an execution, is *void* is difficult to determine; the plaintiff in the writ may think it *valid*, the defendant may think it *void*, and a speculative purchaser may be doubtful and willing to take the risk by bidding the amount of the debt. In *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, 77 Am. Dec. 557, *supra*, where, as has been stated above, the purchase money of the bidder at an invalid administration sale went to discharge a mortgage, and it was held the owner could not maintain an action for the land, thus freed of the mortgage, without refunding the purchase money, yet, even in that character of case, Judge Scott dissented, stating that such view "may work changes in our system which no one can foresee." And in *Burns v. Ledbetter*, 56 Tex. 282, *supra*, the decision that a purchaser at an invalid execution sale, whose bid had been applied to discharge the judgment, was entitled to have it refunded was acquiesced in by Stayton, J., on the ground of stare decisis. He said: "Were the question an open one in this court, I am of the opinion that it would be a better rule to deny relief to a mere volunteer, who purchases at an execution or judicial sale under the facts presented in this and similar causes."

In *Frost v. Atwood*, 73 Mich. 67, 73, 41 N. W. 96, 98, 16 Am. St. Rep. 560, the right of a volunteer purchaser to reimbursement is repudiated altogether. The court said that: "Every one is bound to satisfy himself of the authority under which a judicial sale is made, and buys at his peril. It would be a contradiction in terms to hold a sale *void* for want of authority to make it, and yet *valid* enough to create a lien for the purchase money. Where individuals sell their own lands and receive pay for them, there can be no want of authority, and the question is only one of title. But a sale made by quitclaim deed, without covenants, and without fraud or misrepresentation, does not entitle the purchaser to reclaim his money. This bill is an attempt, not only to give to a *void* probate sale the effect of a warranty deed, but to go further and bind the land itself, which was sold without right, for its repayment."

There is no doubt that some courts, without expressly stating it, have allowed to execution sales the force of a warranty, when none was given, or could have been given, by the officer, except on his personal responsibility, and thus, it seems to us, have unwittingly put the bidder in as good position as if he had purchased from an individual with warranty. We have no disposition to criticise that line of cases in this state, holding that the purchase money at invalid

judicial sales which went to discharge a lien on the lands of an estate should be refunded by the heir as a condition to his right to recover such lands, as in *Valle's Heirs v. Fleming's Heirs* and *Throckmorton v. Pence*, supra, or where there has been an innocent mutual mistake of fact, as in *McClellan v. Martin*, supra. Our holding here is that, while the rule of caveat emptor at execution sales is in force in this state, it does not apply to cases where the writ is void; in such instances the purchaser, whether he be the plaintiff in the writ or his attorney, or a third party, may go into court in that case and be relieved of his purchase. We have already seen that the purchaser in the case at bar did seek and obtain relief in the court which had rendered the judgment and issued the execution. If this case presented an instance in which defendant was claiming the sale to be void, and yet insisting that the price bid should be credited on the judgment, he perhaps, would not be allowed such inconsistent position. *Kleber, Void Judicial & Ex. Sales*, §§ 393, 374, 475; *Rorer, Judicial Sales*, § 190. But that character of case is not presented by the record, and hence we pass it by. We have not discussed *Bailey v. Buchanan*, 126 Mo. App. 190, 102 S. W. 36, cited by plaintiff, since we consider it not applicable on the facts.

The judgment is affirmed. All concur.

McDONALD v. CENTRAL ILLINOIS  
CONST. CO. (No. 13602.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

1. PLEADING (§ 93\*)—INJURIES TO SERVANT—DEFENSES—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK—ELECTION.

In an action for injuries to a servant, pleas of contributory negligence and assumed risk were not inconsistent with a general denial, and hence it was error to compel defendant to elect between the general denial and such special pleas.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.\*]

2. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PLEADING—ASSUMED RISK.

In an action for injuries to a servant, assumed risk is an affirmative defense that must be specially pleaded, and is not covered by a general denial.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

3. PLEADING (§ 426\*)—DEFENSES—ELECTION—WAIVER.

Where defendant in an action for injuries to a servant pleaded a general denial, contributory negligence, and assumed risk, and was erroneously required to elect as between the general denial and such special pleas, its election to rely on the general denial, and its going to trial did not constitute a waiver of its exception to the court's action in compelling it to elect.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1425-1427; Dec. Dig. § 426.\*]

4. APPEAL AND ERROR (§ 500\*)—RULINGS BEFORE TRIAL—PRESERVATION.

Where defendant, in an action for injuries to a servant, was required before trial to elect as between a general denial and affirmative pleas of contributory negligence and assumed risk, its exception to such ruling was properly saved by a term bill carried over into the final bill of exceptions, and in the motion for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2296; Dec. Dig. § 500.\*]

5. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—ISSUES AND PROOF.

Where, in an action for injuries by the caving in of a ditch while attempting to shore up one of the sides, there was no averment that plaintiff lacked knowledge of the danger, or that he was inexperienced and ignorant of the work he was ordered to do, evidence that plaintiff was unaware of the danger by reason of his inexperience, ignorance, or unfamiliarity with the particular line of work, etc., was inadmissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

6. CONTINUANCE (§ 31\*)—INJURIES TO SERVANT—ACTION—PLEADING—VARIANCE—ADMISSION OF EVIDENCE.

Where, in an action for injuries to a servant by the caving in of a trench in which he was employed, the petition charged as negligence that defendant's foreman ordered plaintiff to dig in the trench, which was unsafe because defendant had negligently failed to shore it, and there was no allegation that plaintiff was inexperienced or that defendant was negligent in sending plaintiff, an inexperienced man into the ditch to shore it up, the admission of evidence that at the moment of the accident plaintiff was engaged in shoring up the ditch, that he was inexperienced, and that defendant was negligent in ordering him to perform such work, constituted a variance for which defendant, on proper application, was entitled to a continuance for surprise.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 96-98; Dec. Dig. § 31.\*]

7. TRIAL (§ 202\*)—INSTRUCTIONS—DUTY TO GIVE.

While the trial court in a civil case is not bound to give instructions in the absence of requests to do so, it should nevertheless in the exercise of its sound discretion charge the jury on the law of the case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 474, 477, 482; Dec. Dig. § 202.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Robert B. McDonald against the Central Illinois Construction Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Roscoe F. Anderson, of St. Louis, for appellant. Earl M. Pirkey, of St. Louis, for respondent.

REYNOLDS, P. J. The petition in this case, seeking damages for injuries to plaintiff, alleged to have been sustained on the 8th of March, 1910, in consequence of the sliding of a bank of a trench in which plaintiff at the time was working in an attempt to shore up the side, avers that for a lon-

space of time next prior thereto, the excavation or place where plaintiff was digging was dangerous and not a reasonably safe place for him to be in while doing the work of his employment, because the sides or walls of the excavation were not shored or propped in any way, and there was nothing to prevent the dirt, stones, etc., composing the soil at and near the excavation, and part of which composed the sides or walls of the excavation, from moving into the excavation, and there was palpable danger of the soil, etc., moving into the excavation unless prevented by shoring or braces or other effective means. "That defendant knew, or by the exercise of ordinary care would have known of the aforesaid dangerous and unsafe condition of said excavation, soil and place where, as aforesaid, plaintiff was digging, and of the danger to plaintiff therefrom while in said excavation, in time, by the exercise of ordinary care, to have remedied said condition and averted the injuries hereinafter mentioned, to plaintiff, yet it negligently failed to do so, but negligently maintained said excavation, the sides thereof, and said soil in the aforesaid dangerous and unsafe condition at and for a long time next prior to the time plaintiff was injured on March 8, 1910, hereinafter mentioned, and negligently sent him into said excavation to work, all without protection or notice of any kind to him, and negligently failed to furnish him a reasonably safe place in which to do the work of his said employment under defendant." Averring that on the date above mentioned, by reason of the negligence of the defendant above mentioned, and while plaintiff was in the excavation at work digging in the discharge of the duty of his employment under the defendant, part of the dirt, stones and objects composing the soil at and near the excavation, because of the dangerous and unsafe condition of the excavation, soil, and place where plaintiff was digging, moved into the excavation upon and against plaintiff, thereby injuring him, describing his injuries, to his damage, etc.

The answer to this, after a general denial, avers, first, that the injuries alleged to have been sustained by plaintiff were the direct result of such danger as is ordinarily incident to the employment in which plaintiff was engaged at the time of his injury and that the risk of the injury was assumed by plaintiff by engaging in the employment; second, that the injuries received by plaintiff were the direct result of his own negligence in negligently, voluntarily and unnecessarily entering the excavation, when he might have adopted a safer method of doing his work and shoring up the excavation without entering the same, and that plaintiff was further negligent in that he had voluntarily entered the excavation after being warned by defendant to remain out of it.

Plaintiff filed a motion to require defendant to elect whether it would stand on its

general denial or on the remaining defenses pleaded. The court sustained this motion and required defendant to elect. Saving its exception to this action of the court, defendant elected to stand on the general denial. The cause accordingly went to trial on the petition and general denial.

During the progress of the trial and over the objection and exception of defendant, plaintiff was allowed to testify that he had been told by the foreman to go into the trench and shore up one side of it, and that he did not understand that work. Asked by his counsel if he knew anything about shoring, plaintiff answered that he did not. These two answers, evidently made while defendant was interposing its objections, were duly objected to by defendant, on the ground that they were immaterial and incompetent for the reason that there is no such issue as the ignorance and inexperience of plaintiff presented by the petition; no allegation that plaintiff was ignorant of the work; hence incompetent testimony under the issues in the case. Exception was duly saved to the admission of this testimony. Plaintiff was afterwards asked by his counsel if he had had any experience in excavating dirt. This was duly objected to for the reasons above stated and the objection being overruled and defendant duly excepting, plaintiff was permitted to answer that he had not then had any experience at all in that kind of work.

At the close of the testimony for plaintiff, defendant interposed a demurrer which was overruled, defendant saving exception. Defendant thereupon filed an affidavit that it had been misled and had not had an opportunity to properly prepare a defense to the new issue raised by variance between the petition and the new issue raised by the admission of evidence, the variance claimed being this: "That the proof brought out by the plaintiff \* \* \* has varied from the allegations of the petition to such an extent that defendant has been misled to its prejudice in this, to wit: Plaintiff's petition charges as its ground of negligence on the part of defendant that defendant's foreman ordered plaintiff to dig in a trench which was unsafe because of the fact that defendant had failed to shore same, and because of such failure to shore defendant was negligent; however the proof shows that at the very moment of the accident the plaintiff was engaged in the work of shoring up said ditch and that the defendant was negligent in ordering an inexperienced man to the work of shoring up." Wherefore defendant moved for a continuance of the cause. This was overruled, defendant excepting. Defendant thereupon introduced a witness and rested. The jury returned a verdict for plaintiff, judgment following. Filing its motion for new trial and excepting to the action of the court in overruling that motion, defendant has duly appealed.

I am of the opinion, on careful consideration of the case and of the authorities, that the judgment in this cause will have to be reversed for two reasons.

[1] First, I think the court committed error in compelling counsel for defendant to elect as between a general denial and the pleas of assumption of risk and contributory negligence, for that is what those stricken out are, and to rely upon one defense alone. A plea of contributory negligence, an affirmative defense, has never been held to be inconsistent with a general denial, although it has been held it is not always necessary to plead it. So it is held by our Supreme Court in *Benjamin v. Metropolitan Street Ry. Co.*, 245 Mo. 508, loc. cit. 614, 151 S. W. 91, the court saying, "If, however, the plaintiff, in his effort to make out his own case, shows that he was guilty of negligence that contributed to his injuries, he cannot recover, even if there was no plea of contributory negligence." We cited and quoted this in *Williams v. United States Incandescent Lamp Co.*, 173 Mo. App. 87, loc. cit. 97, 157 S. W. 130. See, also, *Taylor v. Met. St. Ry. Co.* (Sup.) 165 S. W. 327, a recent decision by the Supreme Court not yet officially reported.

[2] Assumption of risk is most distinctly an affirmative defense which must be pleaded and has never been held to be covered by a general denial nor to be inconsistent with a general denial. It is a defense not arising out of the pleadings by any implication but to be pleaded, and if not pleaded not available. In fact I know of no case in which assumption of risk has been allowed to be shown in evidence, unless pleaded.

[3] But it is said that by electing to stand on the general denial and going to trial defendant lost the benefit of his exception to the action of the court in compelling it to elect. *White v. St. Louis & Meramec River R. R. Co.*, 202 Mo. 539, 101 S. W. 14, is the latest case on this proposition. I do not think that decision meets this case. That was a case where a motion to require plaintiff to elect was overruled and defendant pleaded over. The defendant here did not plead over. In effect, the court struck out one of its several defenses and compelled it to stand on a single defense. It was compelled to elect between entirely consistent defenses. Its action in abandoning one or more of its defenses, and standing on a single defense was involuntary. The *White Case* was one in which the defendant pleaded over. There it is said (202 Mo. loc. cit. 561, 101 S. W. 21): "When, then, defendant, as here, refused to stand on its motion to elect, filed answer, went to trial and took the chances of winning or losing on an issue of fact, it abandoned its motion to elect; for a motion to elect is of no more dignity and potency than a motion to make more specific and certain, than a demurrer, or a motion to strike out because of departure, or because of redundant, irrelevant or frivolous matter: and, therefore, I take it, if a de-

fendant is held (as he is) to have waived his demurrer or his motion to strike out or his motion to make an allegation more specific by joining issue on the facts by answer, then, as like reason makes like law, he must, by the same token, be held to have waived his motion to elect by answering over except where the allegations are so contradictory as to be self destructive and, therefore, no cause of action is stated." So says Judge Lamm, speaking for Division No. 1 of our Supreme Court. But in none of the cases to which he refers as examples illustrating the rule do I find a case which meets the situation here presented; that is to say, a case in which the motion to elect was filed by plaintiff and against the defenses set up in the answer. All of them are cases in which it was filed against the petition, and the motion being overruled, defendant pleaded over. It seems to me, from consideration of the sections of the statute to which Judge Lamm refers, namely, what are now sections 1800 and 1804, Revised Statutes 1909, that they do not cover the point here involved. Section 1800 provides that the defendant may demur for certain reasons stated. Section 1804 provides that when any of the matters enumerated in section 1800 do not appear upon the face of the petition, the objection may be taken by answer and that if no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, etc. Turning to other sections, section 1809 provides that the plaintiff may demur to one or more defenses in the answer, and where the answer contains new matter, plaintiff shall reply, and to this reply the defendant may demur within three days; while section 1811 provides that the reply shall be governed by the rules prescribed in relation to answers "and demurrers to the answer or reply shall be governed by those prescribed in relation to *demurrers* to petitions, where they apply; and when a replication is filed, the cause shall be deemed at issue." (*Italics mine.*) Section 1806, in so many words, allows the answer to contain: "First, a general or specific denial of each material allegation of the petition controverted by the defendant, \* \* \*. Second, a statement of any new matter constituting a defense or counterclaim," etc.

I find nothing in these provisions which look to any waiver upon the part of the defendant where a motion to elect between different but consistent defenses has been filed and, when under the compulsion of the order of the court he has been compelled to elect, that by thereupon going to trial he has waived the error, if any, in the action of the court in compelling him to elect. To repeat: Defendant filed no motion; did not plead over. If we may resort to analogy, it would seem that defendant, by a compulsory election between defenses, is very much in the situation of a plaintiff who has brought an action

against two or more defendants. In the progress of the trial, and under a ruling of the court, he is forced to a non-suit as to one of the defendants. The case goes to the jury as to the remaining defendant. It has never been held that by proceeding against that defendant alone, plaintiff was debarred from having the action of the court reviewed which forced a non-suit as to the other, exception having been duly saved. My conclusion is that the action of the court in forcing defendant to elect between its several defenses was reversible error, is not waived by defendant going to trial on its remaining defense, and is open to review here, defendant having saved the point by a term bill of exceptions, duly carrying that into the final bill, and again preserving it in its motion for a new trial.

It is proper to say that this ruling as to election between the several defenses was made by a judge other than the one who tried the cause.

(Since writing and handing down the foregoing, we find that our Supreme Court has very recently had before it one of the questions here involved, namely, whether striking out defenses set up in the answer and forcing the defendant to trial on the answer as it stood with these defenses eliminated, debarred the defendant from challenging that action on appeal. Our Supreme Court holds, as we have here held, that it did not. *McGrew v. Missouri Pac. Ry. Co.*, not yet officially reported, but see 166 S. W. 1033.)

[5] Second. We have set out all the material parts of the petition in this case which contain the assignments of negligence. It will be noted that there is no averment whatever either of lack of knowledge of the danger on the part of plaintiff, nor any averment that he was an inexperienced man and ignorant of the work in which he was ordered to engage. A careful reading of the authorities in which the question of accidents from caving in of banks or falling of material upon a laborer have been under consideration, shows that practically all of them dwell upon the fact that the matter of knowledge and experience of the laborer in the particular work in which he was engaged is a very essential matter to be considered in determining the liability of the employer. Without taking up all of them, it is sufficient to refer to a very few typical cases. Thus in *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320, 111 S. W. 919, the fact is dwelt upon and reiterated that the appellant in that case was experienced in the work in which he was engaged and knew one of the effects of removing sacks from a row would be the displacement of overlying sacks and danger to him from the falling of those sacks.

In *Henson v. Armour Packing Co.*, 113 Mo. App. 618, 88 S. W. 166, as a reason why plaintiff could not recover, the Kansas City Court of Appeals dwells very strongly upon the fact that he was a man of full mental and physical vigor, with an experience of about

fourteen years as a carpenter and had originally assisted in putting in the shoring to secure the wall or bank which he was called upon to put braces against and to make safe. "In other words," said the court (113 Mo. App. loc. cit. 621, 88 S. W. 167), "he knew it was unsafe without the braces," and the court said that as a carpenter of experience plaintiff must have known this as well or perhaps better than any other person. "In such state of case the master is not liable for the injury which came upon him."

In *Trigg v. Ozark Land & Lumber Co.*, 187 Mo. 227, loc. cit. 237, 86 S. W. 222, it is said: "In the brief for respondent the learned counsel make a strong argument based on the theory that the plaintiff was a green hand, that it was negligence to put him to do that work which required skill and experience. That argument is almost a confession that it was a lack of careful operation that caused the accident. We do not care to discuss the evidence on that point, however, because that question is not in this case. The defendant is not in court to answer that charge of negligence. There is nothing in the petition on which to base such a charge nor was the case tried on that theory in the circuit court. If authorities are desired to sustain the proposition that plaintiff cannot allege one act of negligence in his petition and recover on proof of another totally different act, they will be found by reference to the brief of appellant's counsel." This is conclusive in this case on this point. A careful consideration of plaintiff's petition fails to show that there is any allegation whatever that the accident was the result of plaintiff going into a place of danger by order of his superior, he unaware of the danger by reason of his inexperience, ignorance or unfamiliarity with this particular line of work—a green hand, in short—put to do an unknown and hazardous piece of work, the danger and its hazardous nature unknown to him by reason of his lack of previous experience or knowledge in that line of work. That is the only theory upon which the admission of this evidence of plaintiff's inexperience and lack of knowledge can be founded. There is no such averment in the petition. The error of admitting this line of evidence is more apparent when we remember that the defendant's plea of assumption of risk, which might have availed to meet this, was stricken out.

[6] It was improper for the court to allow this line of testimony, in the first place, and, secondly, having allowed it, it constituted a material variance, entitling defendant to a continuance. Defendant took the proper steps, making the necessary affidavit of being surprised and misled and asking a continuance.

[7] The only instruction asked by plaintiff was on the measure of damages. While the point of a failure to ask instructions on the law is not before us, it is not amiss to call attention to the cautionary word—danger signal it may be called—thrown out by our Su-



preme Court on this in the recent case of *Powell v. Union Pac. R. Co.* (Sup.) 164 S. W. 628, loc. cit. 639. See also *Eversole v. Wabash R. R. Co.*, 249 Mo. 523, loc. cit. 529, 532, 155 S. W. 419. The soundness of the view expressed by our Supreme Court in these two opinions, if we may be allowed to make any addition to what is there so well said, is obvious, when we remember the oath administered to the jurors, which is in substance, "You solemnly swear that you will try the issues in this case according to the law as given you by the court and on the evidence before you."

Without going into the case any further and for these reasons, I am of the opinion that the judgment of the circuit court must be reversed and the cause remanded, and it is so ordered.

NORTONI and ALLEN, JJ., concur.

# STONE v. ST. LOUIS UNION TRUST CO. (No. 13582.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

## 1. BANKS AND BANKING (§ 315\*)—TRUST COMPANIES—DEPOSITS—ACTIONS—COMMON COUNTS.

A petition alleging that defendant was a trust company authorized to receive money upon general deposits, subject to check, on which it was bound to pay interest, that it advertised to the public that it would allow interest on deposits, that, in reliance on such advertisements, plaintiff, as receiver, began and continued making deposits in an open current account, and that, by reason thereof, defendant promised and agreed to pay plaintiff a reasonable rate of interest, etc., states a cause of action upon an implied contract, and seeks recovery on the theory of a quantum valebat.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1219-1221; Dec. Dig. § 315.\*]

## 2. BANKS AND BANKING (§ 315\*)—TRUST COMPANIES—ACCOUNTS.

Where a receiver deposited in an open checking account receivership funds with defendant trust company, which was surety on his bond, defendant cannot escape liability for payment of interest imposed by Rev. St. 1909, § 1124, because the account, without the knowledge of the receiver, was kept in the surety ledger in which so-called indemnity deposits were kept; it not appearing that the receiver in any way consented that the deposit should be considered as indemnity for the surety's liability on his bond.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1219-1221; Dec. Dig. § 315.\*]

## 3. RECEIVERS (§ 101\*)—RECEIVERSHIP DEPOSITS.

Receivership funds held by a receiver appointed to liquidate the assets of a bank are part of the trust estate subject to the court's orders; and hence a trust company with whom the receiver deposited them cannot claim that the deposit was an indemnity against its possible liability on the receiver's bond, and defeat payment of interest on the deposit in accordance with Rev. St. 1909, § 1124.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 180; Dec. Dig. § 101.\*]

## 4. RECEIVERS (§§ 95, 101\*)—POWER OF RECEIVERS—CONTRACTS.

Until qualified, a receiver cannot bind the estate, and even thereafter he cannot do so without an order of court or its approval; hence a contract between a receiver and his surety, whereby he agreed to deposit the receivership funds with the surety and to waive payment of interest, would be void.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 178-179, 189; Dec. Dig. §§ 95, 101.\*]

## 5. RECEIVERS (§ 101\*)—CONTRACT—SURETY.

Where before qualification a receiver agreed with the defendant trust company that, in consideration of its becoming his surety, he should pay 15 per cent. of any compensation he might be allowed, and should keep on deposit with defendant all moneys which could be so deposited, but stipulated that he should not be required to do anything not to the advantage of the trust, the contract did not waive the receiver's right to collect interest upon funds deposited with the trust company in accordance with the law requiring trust companies to pay interest on deposits.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 189; Dec. Dig. § 101.\*]

## 6. BANKS AND BANKING (§ 315\*)—TRUST COMPANIES.

As Rev. St. 1909, § 1124, requires trust companies to allow interest upon general deposits, a trust company cannot contract to receive current deposits, subject to check, without allowing interest thereon.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1219-1221; Dec. Dig. § 315.\*]

## 7. ACCOUNT STATED (§ 6\*)—POWERS OF RECEIVERS.

A trust company with whom receivership funds were deposited struck balances of the account at intervals, delivering the passbook to the receiver, who did not object to its failure to allow interest as required by law. Held, that, as a receiver is a mere representative of the court, whose powers are limited to those plainly granted, notice of which must be taken by those with whom he deals, his failure to object to the balances struck will not, where the court was not apprised of the matter, render them accounts stated; hence the estate is not estopped from claiming interest at the close of the account, and limitations against claims of interest did not begin to run at the time of the striking of the balances.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 30-39; Dec. Dig. § 6.\*]

## 8. LIMITATION OF ACTIONS (§ 66\*)—ACCOUNTS.

Where a deposit is an indefinite one, limitations do not begin to run until demand.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 353-375; Dec. Dig. § 66.\*]

## 9. RECEIVERS (§ 98\*)—POWERS OF RECEIVERS.

A receiver holds funds in his hands subject to the orders of the court, having supervision over the receivership, and all persons dealing with him are chargeable with knowledge thereof.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 182; Dec. Dig. § 98.\*]

## 10. STIPULATIONS (§ 18\*)—EFFECT.

In an action by a receiver against a trust company with whom he deposited receivership funds, a stipulation that the receiver, if entitled to any interest, should be entitled to a given amount estops the trust company from contending that its practice of allowing 2 per

cent. interest compounded monthly was in violation of Rev. St. 1909, § 7185.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

Appeal from St. Louis Circuit Court; Hugo Grimm, Judge.

Action by William J. Stone, receiver of the Mullanphy Savings Bank, against the St. Louis Union Trust Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 150 Mo. App. 331, 130 S. W. 825.

Stewart, Bryan & Williams, of St. Louis, for appellant. Manton Davis, of St. Louis, for respondent.

ALLEN, J. This is an action by plaintiff, as receiver of the Mullanphy Savings Bank, to recover interest claimed to be due from defendant trust company upon funds kept on deposit with the latter by plaintiff, as such receiver, during a period of years. This is the second appearance of the case in this court; the opinion on the former appeal being reported in 150 Mo. App. 331, 130 S. W. 825. The suit was instituted in the circuit court of the city of St. Louis on September 15, 1906. The first trial resulted in a judgment for plaintiff. On appeal to this court the judgment was reversed, and the cause remanded. Upon the second trial plaintiff again prevailed, and the cause is again here upon defendant's appeal.

On or about March 1, 1897, William J. Stone, now Senator Stone of this state, was appointed receiver of the defunct Mullanphy Savings Bank by the circuit court of the city of St. Louis. On said last-mentioned date he duly qualified as such receiver, giving a bond in the sum of \$1,000,000 for the faithful performance of his duties in such capacity, which bond was executed by him as principal, and by the defendant, then the St. Louis Trust Company, as surety. Upon the back of a copy of the bond was written the following agreement entered into between Senator Stone and the defendant before the former had qualified as such receiver, viz.: "The St. Louis Trust Company having executed my bond, of which the within is a duplicate original copy, it is hereby agreed that the premium of said suretyship shall be fifteen per centum (15%) of whatever compensation I may be allowed as such receiver. And I further agree to keep on deposit with said St. Louis Trust Company all moneys and other property of which I have been appointed receiver, which can be so kept on deposit with it; and to transact through it all business pertaining to said receivership that can properly be so transacted through it, *provided that nothing herein shall require or obligate me to do anything not to the advantage of the trust or inconsistent therewith.* [Signed] William J. Stone."

Plaintiff at once began depositing with defendant the funds coming into his hands as

receiver, and continued to make such deposits from time to time, and kept on deposit with defendant such funds as were thus in his hands during the period here in question. The account which plaintiff thus maintained with defendant was in its nature what is termed a current or checking account; and plaintiff from time to time drew checks upon the fund, in accordance with the orders of the court which appointed him, and in the performance of his duties as receiver, in the course of the administration of the trust estate. The amount of funds thus kept on deposit by plaintiff therefore varied greatly from time to time; the amount thereof decreasing as plaintiff liquidated the affairs of the institution of which he was receiver.

The record shows that upon many different dates between said March 1, 1897, and September 15, 1906, the date of the institution of this suit, plaintiff's bank book was delivered to the defendant to be balanced, and was so balanced and returned to plaintiff, together with his canceled checks, and that on these occasions the bank book so returned to plaintiff showed no interest allowed or credited to plaintiff's account. It appears that nothing was ever said between plaintiff and any of the officers or agents of defendant trust company respecting the allowance of interest upon plaintiff's account until April, 1906, when plaintiff, who was preparing to make a final settlement as receiver, demanded a statement of the interest to be allowed. Upon learning that the defendant declined to allow any interest upon the deposits which had been kept with it, plaintiff applied to the circuit court having jurisdiction over the receivership for instructions in the premises, and was directed by the court to institute this action.

I. The original petition proceeded upon the theory that the defendant had contracted to pay interest at the rate of 2 per cent. on plaintiff's current account, in accordance with the rules of the defendant trust company. It alleged, among other things, that, in reliance upon certain newspaper advertisements and published declarations of defendant, plaintiff, as receiver, began and continued to make deposits with defendant, and counted upon an actual contract entered into between the parties, as by offer and acceptance, whereby defendant agreed to pay 2 per cent. interest upon such deposits, compounded at certain periods. Upon the former appeal it was held that there was no evidence from which the court could find that a contract had been actually entered into, as pleaded. The judgment was therefore reversed, and the cause remanded, with leave to plaintiff to amend his petition if so advised.

[1] Plaintiff thereafter amended his petition in certain particulars; and one point now urged upon us by appellant pertains to the nature of the amended petition. It is urged that the latter still counts upon an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

actual contract, either express or to be inferred from the acts and conduct of the parties, as distinguished from one implied by law. See *Stone v. Trust Co.*, 150 Mo. App. loc. cit. 343 et seq., 130 S. W. 825.

The amended petition alleges that the defendant is a corporation organized under the statutes of Missouri relating to trust companies, "and by virtue of said laws was authorized and empowered to receive money upon general deposits payable upon demand on check or sight draft, on which said general deposits interest was to be paid by said corporation; \* \* \* and has no other or further powers;" "that defendant corporation advertised and held out to the public that it would allow interest on deposits;" and "that, in reliance on defendant's said advertisements, the plaintiff, acting as such receiver, began, and has ever since continued, his said deposit and account; \* \* \* and that said account has at all times since its beginning been a mutual open and current account, with reciprocal demands between the defendant corporation and the plaintiff acting as such receiver, and by reason thereof defendant promised and agreed to pay plaintiff a reasonable rate of interest on his said deposit and account; that 2 per cent. per annum computed once in six months was a reasonable rate of interest from the time plaintiff began his said deposit and account until on or about the 1st day of November, 1901; and that 2 per cent. per annum, computed monthly, was a reasonable rate of interest from the 1st day of November, 1901, until the beginning of this action."

An examination of this amended petition discloses that plaintiff therein counts upon a contract implied by law, whereby the defendant became obligated to pay plaintiff a reasonable rate of interest. It is true that plaintiff still alleges that, in reliance upon certain advertisements, he began making the deposits, but this does not necessarily mean that plaintiff is counting upon a contract arising from an actual offer and acceptance whereby the minds of the parties met with respect to all of the essential terms of the contract. On the contrary, the allegations of the amended petition can be construed only to mean that plaintiff made and kept his deposits with the defendant in the expectation of receiving interest thereon at some rate, because the law required defendant, as a trust company, to pay some interest on deposits, and because of the fact that defendant had held itself out as allowing interest upon deposits generally, whereby defendant became bound to pay plaintiff a reasonable rate of interest, as upon a promise to that effect which the law will imply.

The amended petition now appears to seek a recovery upon the theory of a quantum valebat, in accordance with the suggestion of this court on the former appeal.

[2, 3] II. Defendant is a trust company or-

ganized and existing under and by virtue of chapter 12, art. 3, Revised Statutes 1909. In construing section 1124 of this article, defining the powers and purposes of such corporation, our Supreme Court has held that trust companies in this state have not the power to receive money on general deposit, and pay it out on demand, without allowing some interest thereon. See *State ex inf. v. Lincoln Trust Co. et al.*, 144 Mo. 562, 46 S. W. 593.

But appellant seeks to justify its refusal to allow interest on plaintiff's account with it upon the ground that the account in question is to be regarded as an "indemnity account," upon which defendant was not required by law to pay interest. Touching this question an officer of defendant testified, in substance, that "indemnity deposits" are cash funds, deposited as a guarantee as against loss on bonds upon which the trust company was surety. And it appears that this account was kept in what was known as the "surety ledger," in which so-called indemnity deposits were kept. It may be said, however, for one thing, that the evidence fails to reveal that plaintiff had any knowledge whatsoever of defendant's bookkeeping, or how or where plaintiff's account was kept by defendant. And, not having assented thereto, or even been informed thereof, plaintiff could not be bound thereby. Furthermore, in view of the fact that our law forbids the acceptance by defendant of ordinary checking accounts, such as was this, without the allowance of some interest thereon, it is difficult, indeed, to see how plaintiff's right to interest can be affected by the manner in which the defendant kept the account upon its own books. Were it a case where a deposit had been made with defendant to insure it against loss or liability by reason of becoming surety upon plaintiff's bond, we should have a different case to deal with. Such a deposit would necessarily not be made upon a general checking account, but the defendant would be entitled to hold the same until it had ascertained that it would be subject to no liability in the premises.

But, under such circumstances as here appear in evidence, it is quite clear that the defendant cannot claim that the trust funds deposited with it could in any manner be regarded as being in its hands for the purpose of indemnifying it against loss or liability by reason of being surety upon the bond which it signed. The funds so deposited were those of the trust estate, were subject to the court's orders in the premises, and the receiver could not have deposited them with the defendant trust company for the purpose of indemnifying the latter as against liability arising upon the receiver's bond. Any liability so arising, as for a failure to faithfully perform the duties of such office, would have been a personal liability of the principal in the bond, and not of the re-

ceiver as such; and to apply the trust funds to indemnify the surety against liability upon the bond would of itself necessarily render both the receiver and the defendant trust company liable upon the bond which both had signed. In other words, the defendant could not have indemnified itself out of the very trust funds which it and the receiver were under obligation to keep and hold subject to the orders of the court wherein the trust was being administered. There are further reasons why this contention is without merit, but we need not dwell thereupon, for manifestly the theory of an indemnity account has no place in the case.

[4, 5] III. It is also urged that the special contract entered into between Senator Stone and defendant precludes the idea of the payment of any interest upon the account in question; that the sole consideration for the depositing of the money and assets of the trust estate with the defendant was the execution by the latter of the receiver's bond as surety; and that as nothing is contained in this agreement providing for the payment of interest, the latter is excluded, in accordance with the maxim "*expressio unius est exclusio alterius*."

As to this, it may be said, in the first place, that the contract shows upon its face that it is not a contract between the receiver, as such, and the defendant, but a private agreement between Senator Stone and the trust company, not purporting to bind the trust estate. At the time of its execution the receiver had not qualified, and was wholly without power to bind the estate in the premises, even could he thereafter have done so without an order of court, or the latter's approval thereof, which we do not grant. Neither could he have made a binding agreement to waive interest upon the trust funds in consideration of defendant's becoming surety upon his bond. Manifestly the receiver could not at that time have entered into any contract binding the trust estate, and his powers thereafter were necessarily limited and subject at all times to the orders of the court having jurisdiction over the receivership.

But it is enough to say that this contract does not purport to deal with the terms upon which the deposits were to be made and kept with the defendant. It provides that the defendant shall be entitled to a certain percentage of the receiver's compensation; that the trust funds shall be kept on deposit with defendant; and that all business pertaining to the receivership shall be transacted through the latter that can be properly transacted through it. Then follows quite an important proviso, which, it appears, was added by Senator Stone in his own handwriting, and which we have italicized above, viz.: "Provided that nothing herein shall require or obligate me to do anything not to the advantage of the trust or inconsistent therewith."

Clearly it would not have been to the advantage of the trust estate to attempt to waive all interest on the fund kept on deposit by the receiver, in consideration of the defendant's becoming surety upon the receiver's bond. And it appears that this contract was purposely limited so as to make it clear that the requirement that the funds be deposited with defendant, and the business of the receivership be transacted through it, should not be effective if at any time or for any reason it should operate to the disadvantage of the trust estate or be inconsistent with the trust reposed in plaintiff.

We think it altogether clear that this contract cannot affect plaintiff's right to recover interest. Certainly Senator Stone was not competent to contract as receiver, and did not so contract.

[6] Neither was the defendant competent to make a contract to receive current deposits, subject to check, without allowing interest thereon; for it is clear that it had no such power under its charter, and the contract does not purport upon its face to make any such provision, nor stipulate the terms upon which the deposits are to be held by defendant. The question need not be pursued further.

[7-9] IV. It is earnestly insisted by appellant that an account stated arose between the parties at the various times when the receiver's bank book was balanced, which not only bars plaintiff from now assailing the same, but which served, at the various times mentioned, to start the statute of limitations running. Appellant says that the entry of debits and credits in a depositor's bank book, striking a balance, and delivering the book to the depositor with his canceled checks, constitutes the rendition of an account, and that the retention by the depositor of the book so balanced for an unreasonable time, without objection to the account as rendered, constitutes an account stated, citing *McKeen v. Bank*, 74 Mo. App. 281; *Kenneth Investment Co. v. Bank*, 96 Mo. App. 125, 70 S. W. 173; *Lieber v. Fourth National Bank*, 137 Mo. App. 158, loc. cit. 170, 117 S. W. 672. But we are firmly convinced that this rule can here have no application; that there could be here no account stated; and that hence there is nothing upon which to predicate the defense of the statute of limitations. As to this we quote and adopt the following from the memorandum opinion of the learned trial judge filed herein, to wit: "Since the receiver is a mere 'arm of the court,' is a representative of the court in carrying out its decrees and orders, and in the management of property temporarily administered by and in the custody of the court, his powers are strictly limited to those plainly granted by the court, cannot be broadened by implication, and must be taken notice of by parties with whom the receiver deals. Hence, if, by the act of opening the current account of his estate with defendant trust company, the

right to customary interest upon the current funds accrued to the estate of the defunct bank, the mere omission of defendant to credit accrued interest upon the bank book held by the receiver, upon occasions when balances were struck in such book, would not estop such estate from claiming this interest at the close of the account between them; at least not so long as the court having control of the account was not apprised of the question thus sought to be determined, and did not directly or by necessary inference, or by ratification, approve of such settlement. In the case at bar no report as to interest on deposits was ever vouchsafed to the court until the last receiver's report in question, and instantly an order followed to test out the receiver's right to the interest. \* \* \* There is nothing to show that any occasion for action on the part of the court ever arose until its receiver made the report, whereupon the court entered the order commanding this suit. What has been said regarding an account stated necessarily disposes of the question as to whether the claim for any portion of the interest is barred by limitation. Absent such stated account, the interest is simply inherent in, and incident to, the 'current account' between plaintiff and defendant. \* \* \* No limitation here arises as to interest until it would arise also upon the account itself, and, where the deposit is an indefinite one, the period of limitation takes its inception only from the date of a demand for the same."

It is well settled that a receiver is not authorized to exercise his discretion with respect to funds in his hands, but that he holds the latter subject at all times to the orders of the court having supervision over the receivership; that, in order to affect the funds in his hands, the receiver's acts must be authorized or ratified by the court; and that all persons dealing with the receiver are chargeable with knowledge thereof, and deal with him with notice of his limited authority and of the undoubted power of the court to modify or vacate altogether any agreement which he may make relative to the funds in his hands. See *Chicago Deposit Vault Co. v. McNulta*, 158 U. S. 554, 14 Sup. Ct. 915, 38 L. Ed. 819, and authorities cited.

The assets of the defendant bank were in custodia legis, and if by virtue of the deposits made by the receiver with defendant the right to interest thereon accrued, as an increment to the fund, the receiver was without authority to waive it by contract either express or implied; and his retention of the bank book, balanced by defendant and returned to him, could not operate to relieve the defendant of its obligation to pay the interest which had accrued prior thereto, upon the theory of an account stated between the parties, nor put in operation the statute of limitations with respect thereto.

V. In order to avoid an accounting to de-

termine the amount of interest due, if plaintiff was entitled to recover interest at all, a calculation of interest upon the account was made in accordance with the rules of defendant company relative to the allowance of interest upon current deposits; and it was stipulated between the parties that such calculation of interest was correct. It appears that, according to defendant's rules in force from March 1, 1897, to November 1, 1901, interest at 2 per cent. per annum was allowed upon current deposits of \$100 and over, and, unless withdrawn, was added to the principal every six months, and thereafter bore interest; and that from November 1, 1901, until the institution of this action 2 per cent. per annum was allowed on such deposits to be thus added to the principal monthly. The calculations of interest accompanying the stipulation above mentioned were made accordingly, and showed that the total interest thus calculated, which had accrued at the time of the institution of the suit, was \$3,574.72. The judgment entered by the lower court was for this sum, with 6 per cent. interest thereon from and after the institution of the suit, making a total of \$4,800.83.

[10] There is sufficient evidence to justify a finding that the interest computed as above was a reasonable rate of interest to allow on such deposits. We do not understand this to be controverted, and the stipulation would appear to concede it. It is contended by appellant, however, that to thus allow interest upon interest, by adding the interest to the principal oftener than once a year, is contrary to law, and that the stipulation in question does not include this matter. The point was expressly made below, and is urged upon us here, that to so compute the interest would be to violate section 7185, Rev. Stat. 1909, which provides as follows: "Parties may contract, in writing, for the payment of interest on interest; but the interest shall not be compounded oftener than once in a year."

We have recently had occasion to notice the effect of this statute in *Kessler v. Kuhnle*, 159 S. W. 768, where we held that the provision in semiannual interest notes to the effect that such notes should begin to bear interest upon their maturity was in violation of the statute forbidding the compounding of interest oftener than once a year, and that such agreement to so compound the interest was void, and only simple interest recoverable. But we think that the defendant is here estopped to challenge the amount of interest, if any, to be recovered, because of the above-mentioned stipulation which it entered into, and which, in our judgment, precludes any defense on this score. By this stipulation it was agreed that the various calculations of interest upon plaintiff's account, appearing upon certain attached sheets, and covering the entire period in question, were correct. Upon such sheets the interest computed from the beginning of plaintiff's

count to February 25, 1907, was shown to be \$3,646.27, while to August 31, 1906, the end of the month preceding that in which the suit was instituted, it amounted to \$3,574.72. And it was stipulated "that if interest is due and payable on said account from its beginning to February, 1907, that the proper amount thereof is the sum of thirty-six hundred forty-six dollars and twenty-seven cents (\$3,646.27)." The stipulation then provided that it should "not be held or construed to be an admission by the defendant that any interest whatsoever is due or payable, its sole purpose being to avoid an examination of accounts and a calculation of interest, if any interest shall be held and found by the court to be due by the defendant to the plaintiff."

While it is, of course, not conceded by the stipulation that any interest is due, we cannot but view the stipulation as an agreement fixing the amount thereof recoverable by plaintiff, in the event that plaintiff should be found entitled to recover at all. It expressly declares that the various interest calculations appearing upon the attached sheets are correct, and that, if interest is due and payable to February, 1907, then "the proper amount thereof" is \$3,646.27. And its declared purpose was to avoid an examination of accounts and any further or other computation of interest. Though the period for which plaintiff recovers does not extend to February, 1907, but to September 15, 1906, the date of the institution of the suit, the stipulation appears to concede that interest as thus computed and agreed upon was to be regarded as the proper basis of plaintiff's recovery, as of a reasonable rate of interest, if defendant was found to be liable for interest on the funds kept on deposit with it. The stipulation appears to have been entered into to set this very matter at rest, and to serve to fix the amount of plaintiff's recovery, in the event that plaintiff prevailed in the action. We therefore rule this point against appellant.

For the reasons expressed above, we are of the opinion that the judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

FEZLER v. GIBSON. (No. 13585.)  
(St. Louis Court of Appeals. Missouri. May 5, 1914.)

# 1. JUSTICES OF THE PEACE (§ 91\*)—ACTIONS—PLEADINGS—SUFFICIENCY.

A statement, filed in justice's court, which alleges that plaintiff was the owner of a parcel of real estate, that defendant entered thereon and committed a trespass by taking up and carrying away an ornamental hedge of a specified value, that the entry of defendant was without plaintiff's knowledge, and that defendant had "no interest or right to the hedge," states a cause of action for treble damages under Rev.

St. 1909, § 5448, authorizing such action where defendant has no "interest or right" in the land. [Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 81.\*]

## 2. TRIAL (§ 68\*)—ORDER OF PROOF—DISCRETION OF COURT.

Allowing plaintiff after he has closed his case to reopen the case and recall a witness for examination on matters not covered when he was first examined is within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-163; Dec. Dig. § 68.\*]

## 3. BOUNDARIES (§ 35\*)—EVIDENCE—ADMISSIBILITY.

A witness may base his testimony on measurements he has made on the ground and along a boundary between adjacent parcels of land, where the boundary was marked by crosses by surveyors so that it was open to any one seeing the marks to draw a line between them and testify to the boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.\*]

## 4. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

A finding embodied in the statement of facts found by the court is as binding on the court on appeal as is a general finding if supported by substantial testimony; no declarations of law being asked by either party nor given by the court, and neither party asking the court to make a finding of fact and state his conclusions of law thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

## 5. ACTION (§ 5\*)—CIVIL AND CRIMINAL LIABILITY.

That an act complained of may be punished criminally does not exclude the party injured from recovering damages for his own injury.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 25-27, 31-34, 86-89; Dec. Dig. § 5.\*]

## 6. TRESPASS (§ 60\*)—TRESPASS TO REAL ESTATE — TREBLE DAMAGES — STATUTES — "PLANTS."

The word "plants," under Rev. St. 1909, § 5448, authorizing the recovery of treble damages for digging up and carrying away roots, fruits, or "plants," covers any and all plants and includes an ornamental hedge.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 146; Dec. Dig. § 60.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by Tillie A. Fezler against R. B. Gibson. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. F. Smith, of St. Louis, for appellant. William S. Campbell, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, respondent here, commenced her action before a justice of the peace against the defendant Gibson and a Mrs. Moses, the petition or statement filed with the justice alleging that plaintiff, being the owner of a certain lot of ground situated in the city of St. Louis, the defendants afterwards entered upon the premises and committed a trespass thereon by digging

up and carrying away therefrom a large number of ornamental hedge plants of the reasonable value of \$150, as it is alleged; that the entry of defendants on the premises of plaintiff was without her knowledge or consent and that by the acts of trespass she had been damaged in the sum of \$150, and that at the time the hedge was so dug up and carried away, defendants had no interest or right to the hedge so dug up and carried away from the land of plaintiff. Treble damages are claimed. There was no written answer filed before the justice. Service not having been had on Mrs. Moses and she not appearing, the case was dismissed as to her and proceeded against Gibson alone. Plaintiff had judgment from which the defendant Gibson appealed to the circuit court. There, on a trial before the court, a jury having been waived, the court found for plaintiff, setting out that he found that on or about December 1st, 1909, plaintiff owned and was in possession of the real estate, describing it, and that the defendant Gibson afterwards entered upon it and committed a trespass thereon, either in person or through his agents, by cutting down, destroying and carrying away from the premises a large number of ornamental plants of the value of \$100, and that at that time defendant did not have any cause or reason to believe that the land on which he committed the trespass was his own, or that he had any interest therein, or that the hedge so cut down, destroyed and carried away by him, or by his direction, was his own, or that he had any interest therein; and that by reason thereof plaintiff was entitled to treble damages. Judgment followed accordingly for \$300. Filing a motion for new trial and in arrest of judgment, defendant Gibson duly perfected his appeal to this court.

His counsel make ten assignments of error. First, that the court erred in overruling the motion of defendant, made at the opening of the case, to elect and announce whether she would proceed with the cause as a common law action of trespass or as a trespass under the statute.

The second, third and fourth errors assigned are to the admission of certain evidence, among that, the testimony of a real estate agent as to the difference in value of the premises with and without the hedge, it being claimed that the witness was not qualified.

Fifth, that the court erred in allowing plaintiff to recall a witness after plaintiff had closed her case, and in allowing that witness to base his testimony on measurements he had made.

Sixth, error of the court in refusing a declaration of law asked by defendant at the close of plaintiff's case, to the effect that under the pleadings, issues, and evidence plaintiff could not recover.

Seventh, that the court had erred in refusing to require plaintiff, upon the submis-

sion of the case, to make her election as to whether she had submitted her case on the theory that she was proceeding under the statute for treble damages or for a common law trespass.

Eighth, that the findings of fact of the court were not supported or warranted by the evidence; that some of the facts found were apart from and outside of the issues in the case; that the finding on other evidence and facts was erroneous; that the conclusions of law applicable and appropriate to the controlling facts were erroneous; that it was erroneous to enter judgment against defendant and his surety on the appeal bond for \$300, being treble the damages erroneously found and assessed by the court; that the finding of facts did not embrace all the probative facts, or the requisite facts, necessary to a proper determination of the case and includes facts not relevant to the issues of the case nor material to its proper determination.

Ninth and tenth, to the error of the court in overruling the motions for new trial and in arrest.

Without going into an examination of these assignments of error in detail, or undertaking to review the authorities cited by the learned counsel for appellant in his very elaborate brief, it is sufficient to say that a very careful reading of all the proceedings in the case, as contained in the abstract prepared by that learned counsel, fails to satisfy us that there is any reversible error present.

[1] We confess to not quite appreciating the point made by the learned counsel for appellant that plaintiff should have been required to announce at the beginning of the case and at its conclusion upon what theory she expected to recover, whether as on a common law action or as one under the statute. It is very evident that the petition or statement which was filed with the justice counts upon a claim for damages for trespass to realty and is founded on section 5448, Revised Statutes 1909. The statute, section 5448 provides: "If any person shall cut down, injure or destroy or carry away \* \* \* any roots, fruits or plants, \* \* \* in which he has no interest or right, standing, lying or being on land not his own, \* \* \* the person so offending shall pay to the party injured treble the value of the thing so injured, broken, destroyed or carried away, with costs." The statement or petition charges that defendants had no interest in or right to the hedge so taken up and carried away by them from the land of the plaintiff, and in this it does not strictly follow the language of the statute, that is, it does not state that defendants had no interest in the land; but this was a statement filed before a justice of the peace, where the same nicety of pleading is not required as in the circuit court. No objection was made in the circuit court to the statement upon this ground and the case was tried on the question of ownership of

land upon which the hedge had been located. So that whatever defect there may have been in this statement, as far as this point is concerned, it was waived.

This covers the first and seventh assignments.

We see no error in the admission of the testimony complained of in the second, third and fourth assignments. We say this after a careful reading of all of it and examination of the rulings of the learned trial court in passing upon it.

[2, 3] The fifth assignment made by counsel for defendant, as to the court allowing a witness to be recalled for further examination by counsel for plaintiff after that witness had been excused, is not well taken. The record, or the abstract of it as furnished us by counsel himself, fails to show that the witness referred to was recalled after plaintiff had closed her case; it is true that he was recalled and examined on matters not covered when he was first on the stand, but the record does not show that plaintiff had then closed. Even if that was so, it was entirely in the discretion of the court to allow the case to be reopened, assuming that was done. Nor do we find any error in the action of the court in allowing this witness to base his testimony on measurements he had himself made on the ground and along the boundary between the two lots. That boundary had been marked by crosses by city surveyors and it was open to anyone seeing those marks, to draw a line between them and testify upon which side of the line the hedge which was destroyed by defendant Gibson had been in place.

It is impossible, reading over the testimony in the case, to sustain the point that the declaration of law asked by defendant at the close of plaintiff's case, to the effect that under the pleadings, issues and evidence plaintiff could not recover. Plaintiff had, up to that time, and by her testimony in chief, given substantial evidence in support of facts necessary to her recovery.

[4] No declarations of law were asked by either party nor given by the court, nor was the court asked by either party to make a finding of fact and his conclusions of law thereon under the statute. It is true that the court embodied in his finding a statement of facts found but while this was not a finding under the statute, it is binding upon us as would be a general finding, if supported by substantial testimony. It covers all of the facts in issue upon the establishment of which plaintiff was entitled to recover.

[5, 6] In his argument of the case, learned counsel for appellant cites us to the sections of the statute making it an offense punishable by indictment or information to cut down or destroy hedges, referring to sections 4600, 4794, and other sections of the criminal

code relating to miscellaneous offenses in which the term hedges is used, and he argues that on the rule of construction of statutes in pari materia, we are to look to those sections, in conjunction with section 5448; that as section 5448 does not contain the word "hedges," but merely the word "plants," that hedges are not included within section 5448; that if the legislature had desired to cover hedges by this section, it would have used that term in it. We are unable to agree to this. In the first place, the fact that the act complained of may be punished criminally, as by sections 4600 and the like, does not exclude a party injured from recovering damages for his own injury. In the next place, our construction of the word "plants," as used in section 5448, is that the term "plants" is used in its generic sense, and covers any and all plants. The hedge here in evidence was composed of plants, is made up of a number of them. The hedge itself, composed of plants springing from roots in the ground, is as completely covered by the word "plants," as was held by the Supreme Court in *Henry v. Lowe*, 73 Mo. 96, loc. cit. 99, coal was included and covered under the general name "mineral" in the same section. There it is said that "coal is a well known mineral of great value." It is just as well known that hedges are composed of a multitude of plants, as in the Osage orange hedge sometimes taking the size of trees. We have no question that the term "plants," as used in section 5448, covers and protects these hedges from the acts of the despoiler.

It follows that the motions for new trial and in arrest were properly overruled.

Finding no reversible error, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

**MCKENZIE v. UNITED RYS. CO. OF ST. LOUIS.** (No. 13,631.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

**DAMAGES (§ 100\*)—LOSS OF EARNING POWER—AGE AND CONDITION.**

It is proper, in an action for personal injuries which were permanent by a single woman or a widow, for the jury to consider both plaintiff's age and condition in life in ascertaining the extent of her loss; those considerations being important on the question of diminution of earning ability and her ability to attend to the ordinary duties of life.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 237-241; Dec. Dig. § 100.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Ada McKenzie against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Boyle & Priest, Paul U. Farley, R. E. Blodgett, and Elmer C. Adkins, all of St. Louis, for appellant. Julian Laughlin, of St. Louis, for respondent.

**NORTONI, J.** This is a suit for damages accrued to plaintiff on account of personal injuries received through defendant's negligence. Plaintiff recovered, and defendant prosecutes the appeal.

It appears plaintiff, a passenger on one of defendant's street cars, was injured through the premature starting of the car while she was in the act of alighting therefrom. Plaintiff's injuries are not only serious, but the evidence tends to prove they are permanent as well. Plaintiff is a single woman, that is, a widow, aged about 58 years at the time of receiving her injury.

The only argument advanced for a reversal of the judgment relates to the instruction on the measure of damages, given at the instance of plaintiff. The instruction complained of is as follows: "If you find for the plaintiff, you will, in assessing her damages, take into consideration her age and condition in life, the injury sustained by her, if any, the physical pain and mental anguish suffered and endured by her on account of said injury, if any, as you believe will result in the future from such injuries, such sums as plaintiff has paid or contracted to pay, if any, for necessary medical treatment and medicines on account of said injuries, not exceeding \$187 for such medical treatment, and the sum of \$83 for such medicines, if any, together with all the facts and circumstances in evidence in the case, and assess her damages at such sum as you believe will fairly compensate her for said injuries, not exceeding the sum of \$10,000." By this instruction the jury were authorized, as is to be observed, to take into consideration plaintiff's age and condition in life. It is argued that this is error, for it is said there is no evidence tending to show that plaintiff earned wages or suffered any pecuniary loss in her occupation. There is authority for the argument which condemns such words in an instruction on the measure of damages. In such cases, it is said that, though it is competent for the jury to consider the age of the injured person, her condition in life should not be reckoned with if it appears she is a married woman, unless some separate occupation is pursued by her which yields benefits separate and apart from that to which the husband is entitled because of the marital relation. The idea which seems to have influenced the judgment of the court in those cases is to the effect that "the condition in life" of a married woman, who is injured, is not to be considered on the measure of damages in her suit for a tort committed upon her, in that it calls into view her earning power, and this, as a general rule, inures to the benefit of her husband. See *Hinds v. City of Marshall*, 22 Mo. App. 208, where the

Kansas City Court of Appeals so reasons the matter. To this extent, too, the doctrine seems to have a tacit indorsement of the Supreme Court, as will appear by reference to the case of *Phelps v. City of Salisbury*, 161 Mo. 1, 16, 17, 61 S. W. 582. But this court, it appears, advanced a step beyond, and condemned like words in an instruction in the case of a feme sole, a widow, in which it is obvious that the fact of coverture and its concomitant incidents were without influence whatever, as will appear by reference to the case of *Skiles v. St. Louis, I. M. & S. R. Co.*, 130 Mo. App. 162, 108 S. W. 1082. An instruction on the measure of damages similar to the one under review in the case of a single woman, who sued for personal injuries, was approved by the Supreme Court in *Russell v. Inhabitants of Columbia*, 74 Mo. 480, 488, 495, 41 Am. Rep. 325, which directed that both her age and condition in life should be reckoned with on that subject-matter. It is manifest that the ruling in *Skiles v. Railroad*, supra, is not in accord with that of the Supreme Court in *Russell v. Columbia*, supra. Moreover, the early case of *Hinds v. City of Marshall*, 22 Mo. App. 208, which asserts and declares the doctrine above referred to in the case of a married woman, expressly distinguishes the facts then in judgment from *Russell v. Columbia*, supra, because the plaintiff in the latter case was a feme sole. In *Ward v. Steffen*, 88 Mo. App. 571, 576, this court rejected the identical argument advanced here against these words in the instruction on the measure of damages, saying: "There is no merit in the criticism of the direction concerning the measure of damages for permitting the jury to take into consideration plaintiff's condition in life as shown by the evidence." The Supreme Court, too, in the recent case of *Phelps v. City of Salisbury*, supra, considered the identical language here involved in an instruction on the measure of damages, and declared it entirely proper in that case, the suit being one of a male plaintiff, wherein, of course, the marital right of a husband to the earnings of the wife was in no wise involved. From what has been said, it is obvious that if the words complained of in the instruction here under consideration are objectionable in any case, the doctrine should be confined to those in which a married woman is plaintiff, and it appears the injury entails a loss upon the husband in virtue of his marital right to the services of the wife, and not to those cases where the loss falls upon the plaintiff, a single woman. In cases of the latter class, it is obviously competent for the jury to look to both her age and her condition in life in order to ascertain and determine the extent of the loss to her, with a view of compensating it. Here, plaintiff is a widow. Her injuries were painful and permanent, and the matter of her "condition in life" is important, because permanent injuries essentially diminish one's ability, not

only to earn a livelihood, but to attend to the ordinary duties and comforts of life as well. The case of *Skiles v. Railroad*, 130 Mo. App. 162, 169, 108 S. W. 1082, in so far as it treats with this question, should be disproved.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

BELL v. UNITED RYS. CO. OF ST. LOUIS.  
(No. 13616.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

1. TRIAL (§ 192\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where, in an action for personal injuries, the undisputed evidence showed that plaintiff was injured, and the only issue was as to the extent thereof, an instruction that, if the jury found for plaintiff, they could, in estimating his damages, consider the facts shown by the evidence, was not objectionable, though it assumed that plaintiff had received injuries.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

2. TRIAL (§ 192\*)—INSTRUCTIONS—ASSUMPTION OF UNDISPUTED FACTS.

The court, in its instructions, may assume the truth of a proposition established by the undisputed testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

3. DAMAGES (§ 153\*)—PERSONAL INJURIES—PETITION—EXTENT OF DAMAGES.

A petition in an action for personal injuries, which alleges that plaintiff has been put to great expense, "more than \$500, in procuring medical and surgical services, and in the loss of about one year's time from his business," does not limit the amount of loss to \$500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 422-425; Dec. Dig. § 153.\*]

4. APPEAL AND ERROR (§ 1170\*)—DETERMINATION—INSTRUCTIONS—PREJUDICIAL ERROR.

Where, in an action for personal injuries, there was evidence, to support a substantial recovery on every element of damage submitted in the instructions, including damages for loss of time and expenses incurred for medical treatment, the mere fact that the instruction on the measure of damages failed to prescribe a limit of recovery on each separate item of damage was not reversible error, and the error, if any, must, as required by Rev. St. 1909, § 2082, be disregarded on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4088, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

5. APPEAL AND ERROR (§ 216\*)—QUESTIONS IN LOWER COURT—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the instruction on the measure of damages in an action for personal injuries was correct in its general scope, and was not erroneous as authorizing a recovery on some element of damage not authorized, defendant must request limiting instructions, or he cannot complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 627.\*]

Appeal from St. Louis Circuit Court; Chas. Claflin Allen, Judge.

Action by John T. Bell against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest and S. P. McChesney, all of St. Louis, for appellant. Crews & Cantwell, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through the alleged negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff, a passenger on one of defendant's street cars, while alighting therefrom, was precipitated into the street and thus received his injuries. The evidence for plaintiff tends to prove that he had notified the conductor of his destination, and upon the car stopping there went to the rear platform to disembark. While in the act of alighting from the car, the conductor caused it to start forward with great force, so as to occasion the injuries complained of. On the part of defendant, the evidence tends to prove that plaintiff voluntarily stepped off of the moving car under circumstances which would cast no liability on defendant for his injury. The questions of defendant's negligence and that pertaining to the conduct of plaintiff were submitted to the jury under instructions in no wise complained of, as was also the fact with respect to the manner of plaintiff's receiving his injuries. It appears from the evidence that plaintiff's injuries were not only painful, but of a serious nature, and permanent in character as well.

The argument advanced here for a reversal of the judgment proceeds alone on plaintiff's instruction on the measure of damages. The instruction complained of is as follows: "If, under the evidence and the other instructions given in this case, the jury find for the plaintiff, they may, in estimating his damages, take into consideration all the facts and circumstances as detailed in evidence, his loss of time, his bodily and mental suffering, his expenses incurred in and about attempting to cure himself, the extent of his injuries, and whether they are permanent in their nature, and allow him therefor such sum as they believe from the evidence he has been damaged, as shown in the evidence, not exceeding \$15,000."

[1] It is urged that this instruction is prejudicial to defendant, in that it assumes an issuable fact in the case, that is, that plaintiff was injured, without requiring a finding by the jury with respect to that matter. The instruction directs that "if, under the evidence and the other instructions in this case, the jury find for the plaintiff, they may, in estimating his damages, take into consideration all the facts and circumstances as detailed in evidence, his loss of time, his bodily and mental suffering, his expenses incurred in and about attempting to cure himself, the

extent of his injuries," etc. It is said that the words "if any" should have been incorporated after the words "the extent of his injuries," and that by omitting such words "if any" the court assumed that plaintiff was injured, so as to direct the jury peremptorily thereabout, without requiring a finding of the fact. It may be said of this argument, touching the matter of assuming that plaintiff suffered injuries, that such fact was expressly submitted to the jury for a finding by the first instruction given, and it appears from the verdict the jury found the issue concerning it in favor of plaintiff. However, the case of *Fullerton v. Fordyce*, 121 Mo. 1, 12, 13, 14, 25 S. W. 587, 42 Am. St. Rep. 516, is relied upon to support the argument against this instruction for a reversal of the judgment. So, too, is that of *Warrington v. Bird*, 168 Mo. App. 385, 151 S. W. 754. But it is clear enough that the question here made is in no wise similar to the proposition determined in the authorities referred to. The case of *Fullerton v. Fordyce*, supra, is more nearly in point, and it will suffice to distinguish the instant case from that alone, for if the proposition advanced is controlled by the judgment of the Supreme Court in the latter case, it is certainly remote to the rule asserted in the other authorities relied upon. In *Fullerton v. Fordyce* there was evidence on the part of plaintiff tending to prove that he received injuries through the negligence of defendant. On the other hand, there was evidence on the part of defendant tending to prove that plaintiff had received no such injuries whatever. The physicians giving evidence for defendant in that case testified, to quote from the opinion, "that they could find no symptom of rupture, or injury to the spine, and gave it as their opinion that the sores on the hip were only skin deep, and were *caused intentionally by applications of some kind*." (The italics are our own.) It thus appears that there was a sharp issue in that case as to whether or not plaintiff had been injured at all by the fault of defendant, and the evidence was pro and con concerning it. In instructing the jury on the measure of damages, the court directed, among other things, as follows: "You will also take into consideration the present and prospective condition of his rupture, if you believe from the evidence that he was ruptured, and of the injuries to his hips and spine, resulting from the accident," etc. The court condemned this instruction because, while it submitted to the jury the condition of plaintiff's alleged rupture, if any, it assumed, without so submitting, that he had received "injuries to his hips and spine resulting from the accident." Touching that matter, the court said the instruction took the issue concerning the injury to his hips and spine entirely away from the jury, and that such was a vital issue in the case, upon which the evidence was conflicting and irreconcilable. Obviously, if the fact that plaintiff was injured at all in

the instant case were controverted at the trial, as it was in *Fullerton v. Fordyce*, supra, the instruction above set forth would fall within the condemnation of the Supreme Court above pointed out. But this case is to be distinguished from that one, in that here no one controverts the fact that plaintiff received injuries at the time and place in question, and from being precipitated into the street from the car. The only controversy touching the matter of plaintiff's injuries in the instant case relates to the extent of the injuries received by him, and not to the fact that he was injured. The record abounds with evidence that plaintiff received several injuries, one of which was more severe than the others, and, it is said, permanent in character. No witness for defendant disputes the fact that plaintiff was injured; but an expert physician, who had examined him a few days before the trial, testified to the effect that in his opinion one of the injuries complained of was not traumatic in character, but resulted rather from senility.

[2] The case was tried throughout as though there was no controversy over the fact that plaintiff received some injuries, and it therefore appears the instruction above set forth in no wise assumes a controverted fact in the case touching this matter. While it may be the instruction assumes, in that it omits to call for a finding, that plaintiff was injured, it clearly submits the extent of his injuries to the jury. This was entirely proper, for the fact of injury was not controverted, and the question in issue, and on which the expert testified in favor of defendant, related to the extent of plaintiff's injuries, and did not touch upon the matter, nor controvert the fact that he had received injuries in the manner charged. It is an established rule of decision, recognized, too, in the leading case relied upon by defendant here, that the court may, in its instructions to the jury, assume the truth of a proposition which is established by the undisputed testimony and appears not to be controverted. See *Fullerton v. Fordyce*, 121 Mo. 1, 13, 25 S. W. 587; *Warrington v. Bird*, 168 Mo. App. 385, 151 S. W. 754. This being true, the court in no wise erred in assuming the fact that plaintiff received injuries, for the evidence is not only abundant, but undisputed, to that effect, and so much seems to be conceded. The only point, as before said, about which there is a conflict in the evidence, is the extent of the injuries received, and this was submitted to the jury for its finding thereon. Moreover, it may be said of this instruction that it has been expressly approved in the form given by the Supreme Court in *Maxwell v. Hannibal*, etc., R. Co., 85 Mo. 95, 101. However, it was not challenged in that case for the reasons here involved.

[3] There is evidence tending to prove that plaintiff paid his physician \$75 and also purchased and used medicines while suffering

from his injuries. It is argued the instruction is too broad in permitting a recovery for expenses incurred in and about attempting to cure himself, in that such recovery would allow compensation for medicines as well, and that nothing appears in the evidence touching the subject of medicine. This is a manifest error of fact on the part of counsel, for the evidence reveals the contrary.

The petition avers that because of his injuries plaintiff "has been put to great expense, to wit, more than \$500, in procuring medical and surgical services, and in the loss of about one year's time from his business." It is argued the instruction should be condemned, because it does not limit the right of recovery to his loss of time, \* \* \* his expenses incurred in and about attempting to cure himself, to the sum of \$500. This argument proceeds on the theory that the petition so limits the right of recovery with respect of these items, but obviously such is not true. The averment is that plaintiff suffered damages in an amount "more than \$500," and in no wise prescribes such as the entire amount of loss suffered, for which he seeks compensation on account of those elements of damage.

[4] Furthermore, there is an abundance of evidence in the record to support a substantial recovery upon every element of damage submitted in the instructions. This being true, the mere fact that the instruction fails to prescribe a limit of recovery on each separate item of damage is not to be taken in and of itself as reversible error under the more recent decisions of the Supreme Court. Reversible error is bound to be error materially affecting the merits of the action—this, too, in the belief of the reviewing court. See section 2082, R. S. 1909. Under this statute reversible error excludes the consideration of any error or defect not affecting the substantial rights of the complaining party. The rule obtains alike in cases of this character, where the instruction omits to limit the recovery on some item or items of damage set forth to the amount stated on that particular item in the petition as in other cases. See *Shinn v. U. Rys. Co.*, 248 Mo. 173, 181, 182, 154 S. W. 103. We do not believe that the failure of the court to limit the amount of recovery to \$500 on account of plaintiff's loss of time and his expenses incurred in and about attempting to cure himself in any wise materially affected the merits of the action or impinged the substantial rights of defendant. In other words, we do not believe, on reviewing the evidence, that the general character of this instruction operated to inflate the verdict in any amount.

[5] Moreover, the instruction submits no element of damage to the jury which is not amply supported by the evidence, and it appears to be well enough in its general scope; that is to say, it is not erroneous as misdirection for incorporating an element of

damage not authorized to be considered on the evidence. The complaint against it now under consideration goes to the effect alone that a limitation of \$500 is not therein prescribed on the right to recover for loss of time and expenses incurred in and about attempting to effect a cure. By the concluding lines of the instruction, the recovery is limited so as not to exceed \$15,000; that is, the amount prayed for in the petition. It would seem that such is sufficient. We are to be guided by the last previous decision of the Supreme Court touching the matter of instructions on the measure of damages in suits for damages on account of personal injuries received through the negligence of another. According to these decisions, if it appears, as it does here, that the instruction is well enough in its general scope, and not erroneous in incorporating and authorizing a recovery on some element of damage not authorized, the defendant must be regarded as having waived its right to complain on appeal, if it omits to ask a limiting instruction at the time. See *King v. City of St. Louis*, 250 Mo. 501, 187 S. W. 498; *State ex rel. U. Rys. Co. v. Reynolds* (Sup.) 185 S. W. 729. See, also, *Nelson v. U. Rys. Co.*, 176 Mo. App. 423, 158 S. W. 446. Defendant requested no such instruction.

What has been said covers and disposes of other arguments advanced against the same instruction. Upon considering the evidence and the character of injuries as found by the jury, we do not regard the verdict as excessive.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### STOLTZE v. UNITED RYS. CO. OF ST. LOUIS. (No. 13638.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

#### 1. CARRIERS (§ 321\*)—PERSONAL INJURIES—INSTRUCTIONS—CONFORMITY TO PROOF.

In an action for personal injuries, where there was evidence that plaintiff was thrown off the car by its sudden start while in the act of boarding it, that the people on the platform were crowding toward her, and that she had been pushed off by other passengers because of a fight on the rear platform, an instruction submitting the question whether she was pushed off the car by other passengers was not without support in the evidence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

#### 2. CARRIERS (§ 321\*)—PERSONAL INJURIES—INSTRUCTIONS—APPLICATION TO ISSUE.

In such action the refusal of defendant's requested instruction that, if plaintiff fell from the car because pushed off by other passengers, she could not recover, which, however, was given with a modification to the effect that, if plaintiff fell solely because pushed off by other passengers, and not because of any negligence of defendant's servants, she could not recover,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was not error; since the requested instruction excluded plaintiff's right of recovery if the sudden starting of the car contributed to her fall and injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

### 3. CARRIERS (§ 305\*)—INJURY TO PASSENGER—CONCURRENT NEGLIGENCE.

A street railroad's negligence in suddenly starting a car, concurring with the crowding of other passengers as the proximate cause of plaintiff's injury, made it liable as a joint tortfeasor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136-1139, 1245, 1246; Dec. Dig. § 305.\*]

### 4. TRIAL (§ 295\*)—INSTRUCTION—CONSTRUCTION AS A WHOLE.

In a passenger's action for personal injury from being thrown from a car by a sudden start, or by being pushed off by other passengers, where her given instructions were to the effect that she must have been injured solely because of defendant's negligence in starting the car, or that, combined with the crowding of passengers on the rear platform, an instruction that, if she fell solely because pushed off by other passengers, and not because of any carelessness of those in charge of the car, she could not recover, read with the instructions given, was not erroneous, as allowing a recovery for such carelessness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Marie Stoltze against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest, Paul U. Farley, and Elmer C. Adkins, all of St. Louis, for appellant. Charles E. Morrow, of St. Louis, for respondent.

**NORTONI, J.** This is a suit for damages accrued to plaintiff on account of personal injuries received through the negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

It appears plaintiff was a passenger on defendant's street car at the time of her injury, which was occasioned through precipitating her from the step of the car into the public street. Plaintiff boarded defendant's car at the corner of Eleventh and Wash streets, in St. Louis, and she was preceded immediately by three men, who took their positions upon the rear platform of the car before her. There were a number of persons standing on the rear platform at the time, and, because of its crowded condition, plaintiff was impeded in entering upon it. Immediately upon boarding the car, the three men preceding plaintiff thereon became engaged in a fight while she was yet on the step of the car. It appears the conductor caused the car to start forward as plaintiff entered upon the step, and before she had reached a position of safety on the platform, and while the physical encounter among the

several men mentioned was in progress. Plaintiff was thrown into the street from the step of the car because of its premature starting, and received the injuries complained of. There is evidence tending to prove that she was thrown from the step of the car into the street because of a sudden jerk of the car in starting, and there is evidence, too, tending to prove that she was pushed into the street from her position on the step by other passengers on the platform of the car who were dodging about because of the fight. The conductor was in his place at the rear of the car, and the occurrence transpired under his very eye. The petition charges: First, that defendant was negligent, in that the conductor negligently caused the car to move violently forward before plaintiff had reached a position of safety thereon, and thus occasioned her injury by throwing her into the street; and, second, that the conductor negligently caused the car to start forward when he knew plaintiff was not in a position of safety thereon, and was likely to be crowded or pushed off of the same because of the turmoil and the pushing and shoving of the passengers then upon its rear platform. Because of this carelessness on the part of the conductor and the crowding, pushing, and shoving of the passengers on the rear platform at the time it was started, plaintiff avers she received her injury through being pushed from the step of the car into the street.

By instructions given for plaintiff, the court referred these several specifications of negligence to the jury as predicates of liability against defendant, if it so found the fact to be. Among other things, the court directed the jury that, if it found plaintiff was duly careful on her part, and that defendant's conductor started the car while she was yet on the step in the act of boarding it, and that, because of such starting, she came to her injury, through being pushed or shoved therefrom into the street by the pushing and crowding of the passengers, occasioned by the fight, then she was entitled to recover, though it appears the passengers on the rear platform of the car were negligent, too, and that the carelessness of such passengers contributed in part with that of defendant to her injury.

[1] Plaintiff's instruction touching this matter is in no wise criticized, except it is said the court erred in submitting the matter of plaintiff's being pushed off of the step of the car by other persons under the circumstances stated, for the reason there is no evidence tending to prove such to be the fact. It is true plaintiff testified that she was thrown off of the car by its sudden start while she was in the act of boarding it, but she says, too, that: "People were pressing toward me, and I could not get on. The platform was crowded, and the people were

crowding towards me." Moreover, several of defendant's witnesses testified pointedly that plaintiff told them she was pushed off of the car by other passengers because of the fight in progress on the rear platform. Indeed, it appears from the evidence introduced on the part of defendant that its theory of the case put forward in defense, in part at least, is that plaintiff was pushed off of the car by other passengers moving about on the rear platform, for which it was in no wise responsible, in that it is said the conductor did not prematurely start the car. It is manifest that there is an abundance of evidence in the record tending to prove that the pushing and shoving of the other passengers on the rear platform of the car because of the controversy and encounter there co-operated directly with the premature starting of the car to dislodge plaintiff from the step and occasion her injury.

[2, 3] At the instance of defendant, the court instructed the jury that, if plaintiff became frightened by reason of the fact that other passengers were fighting on the back platform of the car, and voluntarily jumped or stepped from the car because of that fact, then she is not entitled to recover, and the verdict should be for defendant. But it refused the following instruction requested by defendant in the form it was proffered: "The court instructs the jury that, if you find and believe from the evidence that the plaintiff fell from the car in question by reason of being pushed or jostled by other passengers thereon, then the plaintiff is not entitled to recover, and your verdict must be for the defendant."

Though the court refused this instruction as requested, it gave it in modified form as follows: "The court instructs the jury that, if you find and believe from the evidence that the plaintiff fell from the car in question, solely by reason of being pushed or jostled by other passengers thereon, and not by reason of any carelessness of the persons in charge of the car in question, then the plaintiff is not entitled to recover, and your verdict must be for the defendant."

It is argued the court erred in thus refusing defendant's instruction No. 6 and giving it in the modified form. Obviously there was no error in refusing this instruction as requested; for, while it authorized a verdict in favor of defendant, it reckoned with but a partial view of the evidence. There is evidence, as before said, tending to prove that plaintiff came to her injury through the concurrence of the negligent act of the conductor in prematurely starting the car while she was yet on its step, and the careless conduct of the passengers on the rear platform, who were surging and pushing against her because of the combat which then prevailed in their midst. This instruction, as requested, authorized a verdict for defendant if it appeared she fell from the car by reason of

being pushed off the step by other passengers thereon, without regard to the fact that she was entitled to recover for that provided it also appeared the carelessness of the conductor in prematurely starting the car contributed in part to her fall and injury. If these two matters concurred as the proximate cause of plaintiff's hurt, it is entirely clear she is entitled to recover against defendant, a joint *tort-feasor*, because of the part it contributed to her hurt, and it should not be acquitted of liability, as the instruction directs, unless the jury should also find it was not negligent, as charged, and the instruction carried no such requirement. See *Miller v. United Railways Co.*, 155 Mo. App. 528, 134 S. W. 1045.

[4] But it is said that, though such be true, the court erred in giving the instruction in its modified form, for it implies that plaintiff may recover for "any carelessness of the persons in charge of the car in question." The court modified the instruction by inserting the word "solely" in one place, and the words "and not by reason of any carelessness of the persons in charge of the car in question." It is true the words last quoted, when considered apart from the other instructions, seem to imply that defendant might be responsible for "any carelessness of the persons in charge of the car," when, as a rule, one may recover only on the specific acts of negligence alleged in the petition. If an instruction were given on the part of plaintiff authorizing a recovery in the instant case in such general terms, it would, no doubt, merit condemnation, but no such situation is before us. Plaintiff's instructions are well enough; and, indeed, they are in no wise criticized. They submit to the jury in plain and precise terms the specific acts of negligence relied upon in the petition for a recovery. These instructions require that, in order to vindicate plaintiff's cause, it must be found by the jury either: First, that she came to her injury solely because of the negligence of defendant's servants in charge of the car through prematurely starting it, and thus causing her injury; or because of the combined negligence of such servants in starting the car while she was yet on the step, and the carelessness of the passengers on the rear platform in pushing her therefrom into the street. The instructions must all be read together, and no one of them should be condemned as reversible error if it appears to be entirely clear as a guide to the jury, when read with the others given in the case. Thus viewed, it cannot be said that this instruction, as modified by the court, constitutes reversible error. By it the jury were told that, if it found plaintiff fell from the car solely by reason of being pushed by other passengers, and not by reason of any carelessness of the persons in charge of the car, then plaintiff could not recover, and the verdict should be for de-

fendant. Obviously the jury understood that the words "not by reason of any carelessness of the persons in charge of the car in question" related to the controverted fact in the case as to whether or not the conductor prematurely caused the car to start while plaintiff was in the act of boarding it and in a situation on the step exposed to danger from such cause.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

# JOHNSTON v. UNITED RYS. CO. OF CITY OF ST. LOUIS. (No. 13624.)

(St. Louis Court of Appeals. Missouri.  
May 5, 1914.)

## 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICTS ON CONFLICTING EVIDENCE.

A verdict upon conflicting evidence cannot be held against the weight of evidence by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

## 2. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—INJURIES TO THE PERSON.

A verdict of \$3,500 was not excessive, where a seamstress aged 45 was thrown down violently, her body bruised, scalp cut, and nervous system seriously affected, disabling her from following her occupation, and from the effects of which she still suffered; physicians testifying that her injuries were liable to be permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

## 3. TRIAL (§ 252\*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS—EVIDENCE.

An instruction permitting recovery if plaintiff was alighting in the presence and with the knowledge of the conductor was not erroneous because of lack of evidence to support it, where plaintiff testified that she saw the conductor looking in a way indicated by gesture; it being presumed in support of the instruction that she indicated her own direction, and the other evidence indicated that the car had stopped on the conductor's signal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.\*]

## 4. DAMAGES (§ 216\*)—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS.

An instruction that a married woman could recover for impairment of "ability to work or earn money on and for her separate account and use, independent of her husband, and of the performance of her household duties," did not allow compensation respecting household duties; the clear and natural meaning of the instruction being to exclude such compensation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Mary Johnston against the United Railways Company of the City of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest, T. E. Francis, and R. E. Blodgett, all of St. Louis, for appellant. John T. Murphy and Frank Coffman, both of St. Louis, for respondent.

REYNOLDS, P. J. This is an action for damages for injuries sustained by plaintiff, who, while the car upon which she was a passenger was stopped, was attempting to alight and, as it is alleged, without notice or warning to her and before she could alight in safety therefrom, the car was suddenly and negligently started by defendant's employes in charge thereof, in consequence of which plaintiff was thrown from the car with great force and violence and greatly and permanently injured. Plaintiff averring she is a married woman, and pleading the facts connected with her injury, and setting out damages which she had sustained, prayed judgment.

The answer was a general denial, accompanied by a plea of contributory negligence to which latter there was a reply.

The jury returned a verdict in favor of plaintiff in the amount of \$3,500; judgment followed and, interposing a motion for new trial and excepting to that being overruled, defendant has duly perfected its appeal.

It may be said of this case that it presents one of a class of accidents quite common and often before us prior to the installation by the United Railways Company of its present system of entrance and exit of passengers, a kind of accident not so likely to occur to passengers entering or leaving the cars, if the regulations under which street cars are now operated are observed.

[1] There is the usual conflict in testimony as in cases of this character. The plaintiff testified to the happening of the accident; that she was a passenger and had signalled the car to stop; that it came to a stop, and when she got up to get off and was standing on the back platform, one foot on the lower step, the conductor being at the other end of the car standing over a passenger, "with his face that way (indicating)," the car started with a sudden jerk and threw her off. Defendant's evidence tended to show that plaintiff attempted to alight while the car was in motion.

There are three assignments of error. First, that the instruction covering plaintiff's case is not supported by the evidence. Second, that the court erred in its instruction on the measure of damages. Third, that the verdict is excessive. Fourth, that the verdict is against the overwhelming weight of the evidence.

[2] Disposing of the two latter contentions, the weight of the evidence is not for our consideration. Nor can we hold the verdict excessive in the light of the evidence, particularly when it has the approval of the learned trial judge. The evidence, practi-

cally uncontradicted as to the injuries, is that plaintiff, a woman of about 45 years of age, a seamstress by occupation, had been thrown down violently, her body bruised, her scalp cut, her nervous system seriously affected, she disabled from following her occupation, and at the time of the trial still suffering from the effects of the accident, physicians testifying that at her age the effects of her injuries were liable to be permanent. With such evidence, we cannot say the verdict is excessive.

[3] The error as to the instruction complained of is in this clause: "And if you further find and believe from the evidence that while said car was so stopped to enable plaintiff to alight therefrom, and that while in the presence and sight of defendant's conductor in charge of said car," etc. It is claimed that there is no evidence whatever to support this; that is, that there is no evidence that plaintiff was alighting "in the presence and sight of defendant's conductor." That she was attempting to alight in the presence of the conductor, certainly is supported by her testimony, for she says that the conductor was on the car; that she saw him in the front part of it; that he was standing over a passenger "with his face that way (indicating)." It is impossible for us to understand the direction in which she says the conductor was looking by this testimony, the witness indicating it by a motion of her hand, as we take it. Whether she indicated by her gesture that the conductor had his face turned toward her or from her, we cannot say, but as the court heard it and saw the motion and instructed the jury as above, indulging the presumption that always attends the ruling of the trial court, we must assume that the indication made by the witness (plaintiff) was of such a character as to indicate that the conductor saw her as she was trying to alight. Confirmation is given to this view by the unchallenged and uncontradicted testimony of plaintiff, that after she had fallen from the car and the conductor came out to where she was lying, he, in answer to some question of a bystander as to how it happened, said: "It was the motorman's fault;" that he (the conductor) "rang the signal." The testimony of plaintiff was very distinct that she had rung the signal to stop and that after that she arose from her seat and started to the rear platform, the car had stopped, not at a usual stopping place, but between two streets. That was not likely to result, save on signal of the conductor. Taking all this evidence together, it is fair to assume that plaintiff was attempting to alight in the presence and with the knowledge of the conductor, and that is all that is meant by this part of the instruction. We see no error in it.

[4] The part of the instruction on the measure of damage complained of is to the

court telling the jury this: That the jury, if they found for plaintiff, in measuring her damage, may take into consideration and award her damages, "Second, for any injuries to her person which has or may impair her physical ability to work or earn money on and for her separate account and use, independent of her husband, and of the performance of her household duties, not exceeding nine dollars per week." Learned counsel for appellant claim that the words we have underscored allow compensation for performance of household duties. We think learned counsel have fallen into an error in so construing these words, "and of the performance of her household duties." The clear and natural meaning of this clause is that compensation for performance of household duties is excluded. Plaintiff, as we read this paragraph of the instruction, is confined to a recovery for her personal injuries and loss of her separate earnings: to her own pain and suffering and loss of her physical ability to earn money on and for her separate account. No evidence of the value of her services to her husband was offered.

These are the only errors assigned and we think them untenable.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

WITTENBERG v. FISHER. (No. 13597.)  
(St. Louis Court of Appeals. Missouri. May 5, 1914.)

1. SALES (§ 397\*)—ACTION—EVIDENCE.

In an action upon an account, evidence held sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1136; Dec. Dig. § 397.\*]

2. FRAUDS, STATUTE OF (§ 23\*)—DEBT OF ANOTHER.

That plaintiff or his bookkeeper erroneously charged a purchase made by defendant to another, is not conclusive that the debt was that of a third person, so as to require a note or memorandum, under the statute of frauds, in order to render defendant liable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

3. FRAUDS, STATUTE OF (§ 23\*)—DEBT OF ANOTHER—CREDIT.

Where credit is extended only to defendant, and there is no liability but his, his promise to pay for goods, though they be delivered to a third person, is original, and not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

4. APPEAL AND ERROR (§ 1011\*)—FINDING—EFFECT.

In an action tried to the court, a finding on conflicting evidence resolves the conflict in favor of the successful party, and must be so accepted on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



# 5. COSTS (§ 260\*)—VEXATIOUS APPEAL—DAMAGES.

Where defendant had many times admitted his indebtedness and implored plaintiff for extensions of time, and did not deny it until suit was instituted, 10 per cent. damages must be awarded, under Rev. St. 1809, § 2084, for vexatious appeal, upon affirmance, on defendant's appeal, of judgment for plaintiff.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by Charles H. Wittenberg against Harry R. Fisher. From a judgment for plaintiff, defendant appeals. Affirmed, with penalty for vexatious appeal.

Frank A. C. MacManus, of St. Louis, for appellant. Carl Otto, of St. Louis, for respondent.

NORTONI, J. This appeal is wholly without merit. Plaintiff sued defendant upon an account, and recovered judgment for the amount claimed. From this judgment defendant prosecutes the appeal. A jury was waived, and the trial had before the court.

There are no instructions in the record for review save one offered by defendant and refused, through which the court was requested to declare that plaintiff was not entitled to recover under the law and the evidence.

It appears plaintiff is in the wholesale liquor business, and defendant conducted a saloon at Grand avenue and Natural Bridge road, in the city of St. Louis. Plaintiff testifies positively that he sold the liquors and other items of account to defendant personally during that year, and they were delivered at his saloon above mentioned. Moreover, the record is replete with evidence to the effect that defendant time and again promised plaintiff to pay the account, but put him off from time to time because, it is said, he was in "hard luck." After the account had been running for several years, and no payment made thereon, plaintiff personally called at defendant's saloon with a view of collecting it. Upon defendant's asking a further extension thereon, plaintiff requested him to make a payment on the same in order to keep it alive so as to prevent the running of the statute of limitations. Thereupon defendant personally paid plaintiff \$3.90 in cash to be credited for the purpose stated. The credit was duly entered as of the date the payment was made, March 19, 1906, by cash, and thereafter, it is said, defendant promised to execute notes for the balance, payable at \$25 per month, but did not do so. Finally, the account was placed in the hands of plaintiff's attorney for collection, and plaintiff says defendant offered to confess judgment thereon, but afterwards refused to do it. Defendant admits that he never repudiated the account nor refused to pay it, but insisted from time to time that plaintiff should not "push him" thereon. Concerning the matter of confess-

ing judgment, the following question to and answer by defendant in his testimony appear: "Q. Didn't you say, 'I will confess judgment?' A. I might have said that; yes." Defendant admits, too, that on August 16, 1910, he wrote plaintiff a letter as follows, concerning the subject-matter involved here, for this was the only matter pending between them: "Harry R. Fisher, Café and Pool Room, Southeast Corner Grand & Natural Bridge Road, St. Louis, 9/16/10. Charles Wittenberg—Dear Sir: I have been in such a tight place that I have not been able to do anything for you yet. If you will just give me a little rope I will fix it up all right by the first of the year. You have been very lenient and I will show you how I appreciate it. I am tied hand and foot now and cannot make a move. Hoping you will see my position, I am, yours truly, Harry Fisher."

On the part of defendant, it is said he does not personally owe the account, in that it was charged on plaintiff's books to Fisher Bros., and that he wrote this letter to plaintiff on being urged to pay it, with a view of "stalling off a suit" thereon. The evidence for defendant tends to prove that Fisher Bros. owned a saloon in the same neighborhood, at Spring avenue and Natural Bridge road, and another one of plaintiff's brothers owned a saloon at Grand avenue and Natural Bridge road, but that defendant was not interested in either at that time, though he shortly thereafter succeeded to the ownership of the place at Grand avenue and Natural Bridge road. Because plaintiff's bookkeeper entered the items of the account in his books at the time the sale was made as charges against the account of Fisher Bros., it is insisted by defendant that he is not indebted therefor. But the evidence for plaintiff is to the effect that the items of the larger portion of the account involved here were purchased personally by plaintiff as and for himself and the others on his order, to be delivered at his place of business at Grand avenue and Natural Bridge road. Plaintiff testifies positively that he knew defendant, Harry Fisher, well, and that he did not know his brothers, and had no business relations with them whatever. The evidence seems to greatly preponderate in favor of the view that the goods sued for were sold directly to this defendant, and were delivered to him, and, indeed, his own evidence and course of conduct during the several years thereafter seem to afford ample corroboration touching the matter. That the goods were actually sold by plaintiff and delivered, and that they were of the value set forth in the account is not disputed, but defendant insists that, as the account was posted in plaintiff's books against Fisher Bros., no recovery may be had against him.

[1] It is argued in this connection that the case presents an attempt to hold defendant

for the debt or default of another, and that there is no sufficient note or memorandum in writing, as is essential under the statute of frauds to do so. It is said the account, as originally entered in plaintiff's books, was against Fisher Bros., and not against defendant, and therefore the indebtedness sued for is that of another. The account in suit here appears to be an account against defendant, Harry Fisher, alone, and the name of Fisher Bros. does not appear therein. But it is true that in some manner the original entries were posted in the name of Fisher Bros., and, upon discovering the error, the account was subsequently made out properly against defendant. However this may be, the evidence of plaintiff and others for him is abundant to the effect that the sales were made directly to defendant, and the goods delivered in accordance with his direction at the place of business, Grand avenue and Natural Bridge road, where he subsequently held out and appeared to be the proprietor. Indeed, plaintiff's evidence is positive and direct that he did not know any of defendant's brothers at the time, and that he sold the goods to defendant on an understanding that he owned and conducted the saloon where they were delivered. Obviously this constitutes substantial evidence in support of the judgment for plaintiff. By its finding and judgment, the trial court accepted this view of the sale to be true and rejected the evidence of defendant in point of credibility.

[2-4] Obviously the mere fact that either plaintiff or his bookkeeper erroneously charged the items against Fisher Bros. in his books is not conclusive to the effect that the debt sued for is one of another, so as to require a note or memorandum, under the statute of frauds, in order to obligate defendant to pay it. In cases of this character, the test question universally applied is: To whom was the credit given? If in the first instance the credit was given to another firm, say Fisher Bros., then, of course, the statute of frauds requires a note or memorandum in writing, evincing a special promise to answer for the debt before an action may be successfully maintained against a third party defendant. But in cases where plaintiff has dealt with defendant alone and extended the credit to him there is no duty or liability but that of defendant, and his promise to pay for the goods is manifestly original and valid. Therefore the statute of frauds is wholly beside the case, and does not obtain, for there is no collateral promise to answer for the debt, default, or miscarriage of another. See *Stokes v. Mills*, 171 Mo. App. 638, 154 S. W. 455. It is entirely clear that, if we accept the facts as found by the trial court, as we must, there is no question touching a collateral promise involved here; for it appears the sale was made directly to defendant, and the goods delivered to him upon his credit

alone. The mere fact of entering the items of the account under the firm name of Fisher Bros. was but a mistake, and is unimportant as an element in the case, after having been found to be such, as it manifestly was by the trial court.

[5] Moreover, though it is not in our province to give judgment on the facts of the case, it appears from the cross-examination of defendant that he never at any time repudiated this account until after suit was instituted thereon. He admits having implored plaintiff to grant him further time, not to crowd him, and admits, too, that on one occasion he offered to confess judgment before a justice, and admits writing the letter to plaintiff by which he said he sought to "stall off a lawsuit." The record throughout suggests a fixed policy of delay and evasion, and reveals a course of conduct that should not be tolerated beyond strict necessity in so doing. Furthermore, it appears to be clear that the appeal here is not only without merit, but is so obviously frivolous and for the mere purpose of delay that we would be derelict in our duty if we omitted to penalize it as vexatious. In such circumstances, the statute devolves this duty upon the court. See section 2084, R. S. 1909; *Phillips v. Phillips*, 107 Mo. 360, 17 S. W. 974.

The judgment should therefore be affirmed, with an assessment of 10 per cent. damages thereon for a vexatious appeal.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### ORDELHEIDE v. TRAUBE et al. (No. 13632.)

(St. Louis Court of Appeals. Missouri. May 5, 1914.)

#### 1. FRAUDS, STATUTE OF (§ 139\*)—LEASE—ASSIGNMENT—PERFORMANCE.

Where plaintiff had fully performed a contract to purchase a livery and undertaking business, including the remainder of an unexpired lease for more than a year, the statute of frauds was no defense to defendants' liability for failure to procure a valid transfer of the remainder of the lease.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 384-341; Dec. Dig. § 139.\*]

#### 2. CONTRACTS (§ 346\*)—BREACH—EVIDENCE.

Where plaintiff sued solely to recover damages occasioned through defendants' breach of contract to assign a certain lease and procure the lessor's assent to such assignment as part of a contract for the sale of a livery business to plaintiff, the admission of evidence that defendants at the time of the sale agreed not to embark in a like business in the same neighborhood, but within three months thereafter opened a rival establishment within a few blocks of their former location, was irrelevant as not within the issues.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.\*]

**3. EVIDENCE (§ 441\*)—WRITTEN CONTRACT—VARIANCE BY PAROL.**

Where a contract for the sale of a livery business and leasehold contained no stipulation binding defendants not to re-engage in the same business in the same neighborhood, evidence of a parol agreement to that effect was inadmissible as varying the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

**4. DAMAGES (§ 120\*)—BREACH OF CONTRACT.**

In an action for breach of a contract to procure the landlord's assent to an assignment of the lease by the lessee to plaintiff, plaintiff's measure of damages was the difference between the rent reserved and the rental value of the premises for the term, to be determined by reference to the reasonable and fair rental value of similar property.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Florence A. Ordeltelheide against Edward Traube and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Henry G. Trieseler, of St. Louis, for appellants. Taylor R. Young and McShane & Goodwin, all of St. Louis, for respondent.

**NORTONI, J.** This is a suit for damages accrued through the breach of a contract. Plaintiff recovered, and defendants prosecute the appeal.

Defendants are sued as copartners, but the fact of partnership is denied in the answer, duly verified, and an issue concerning it made.

It appears defendant Edward Traube purchased an undertaking business and livery stable combined in 1904, which was then known as, and conducted under the name of, Lafayette Park Livery & Undertaking Company, and located at 1609-1611 Lafayette avenue, St. Louis. Immediately upon purchasing this business, it is said by defendants that Edward Traube gave it to his son and codefendant, Albert Traube, who thereafter conducted the business under the name theretofore employed, that is, Lafayette Park Livery & Undertaking Company. Though the name appears to suggest a corporation, it is said no such corporation existed, and it appears the business was either owned by defendant Albert Traube personally, or by himself and his father, Edward Traube, as copartners. Plaintiff says that he purchased the livery and undertaking business, together with all of the equipment, from both defendants on August 13, 1910, for which he paid them \$3,600. On the other hand, defendants say that the business was owned exclusively by Albert Traube, from whom plaintiff purchased it, and to whom the purchase price of \$3,600 was paid. It is conceded that defendant Edward Traube was present at

the time and wrote a memorandum of the sale, which was given to plaintiff, but this memorandum appears to be signed by defendant Albert Traube only. The instrument referred to is of date August 13, 1910, and recites the fact that plaintiff purchased the complete rolling stock, horses, carriages, undertaking equipment, ambulances, belongings, etc., of the Lafayette Park Livery & Undertaking Company, located as above mentioned, at the price of \$3,600, including and covering, too, a lease on the property, "1609-1611 Lafayette avenue." This instrument, as before said, is signed by defendant Albert Traube alone, though it was written by his father, Edward Traube. Plaintiff came into possession of the business and articles purchased immediately, but the lease on the property occupied by the business, that is, 1609-1611 Lafayette avenue, was never effectively assigned to him. The controversy in the case relates to this matter, for the breach of contract relied upon is to the effect that defendants failed to consummate the assignment of the lease of the premises to plaintiff, in that the lessor refused to consent to such assignment. It appears the lease on the premises was in the name of defendant Edward Traube, and his son, Albert Traube, was not mentioned therein. The lease referred to is of date February 27, 1904, and stipulates a term of 10 years, ending on the 27th day of February, 1914, at an annual rental of \$1,020 a year, payable in monthly installments in advance, that is, \$85 per month. Adolph Lambrecht owned the lots and buildings, and as lessor executed the lease to Edward Traube for the rent reserved, as above indicated, for a term ending February 27, 1914. According to the evidence on the part of plaintiff, he purchased this lease from defendants in connection with the purchase of the livery and undertaking business, and they agreed to both assign it to him and obtain the consent of the lessor to such assignment, for by the express terms of the lease an assignment was forbidden unless consented to by the lessor. The consent of the lessor was never obtained to the assignment, but on the contrary, he refused to accede to it, and refused, too, to permit plaintiff to occupy the premises at the rental therein provided. Plaintiff took possession of the building at the time of the purchase, and continued therein thereafter, but was required to pay \$100 per month as rental instead of \$85, stipulated in the lease, and there is evidence tending to show such to be the reasonable value of the rents, while there is evidence on the part of defendant tending to prove the reasonable value was from \$80 to \$85 per month.

The breach of contract declared upon in the petition relates to the failure of defendants to assign the lease to plaintiff and obtain the consent of the lessor thereto, and it is averred that plaintiff has suffered damage

to the extent of \$15 per month because of it, in that he was compelled to pay rent at \$100 per month, instead of \$85 according to the lease. The defense seems to proceed on two lines: First, defendant Edward Traube insists that he made no contract whatever with plaintiff, in that his son, Albert, alone owned and conducted the business and entered into the contract with plaintiff concerning the sale. Defendant Albert Traube insists that, while he owned the business and sold it to plaintiff, he did not include in the sale the unexpired term of the lease, nor contract with reference to that subject-matter. Touching this matter, Albert Traube insists, as the lease stood in his father's name, he, of course, was not a party to it, and could not assign it if he would. Moreover, he says he did not agree to assign it, and that, though the written memorandum of the sale bearing his signature recites that it included the lease on the premises, this recital was written on the memorandum by his father, Edward Traube, without his knowledge and consent, after he had affixed his signature thereto.

The instructions given in the main seem to have fairly presented the issues to the jury, which returned a verdict against both defendants as though they were partners in the business and jointly sold it, including the lease, to plaintiff. There can be no doubt that the evidence amply sustains this view, though there is an abundance of evidence, too, sustaining the theory of defendants that Albert Traube alone owned and conducted the business in the buildings which had theretofore been leased by his father, Edward Traube, and that the latter was not a party to the contract of sale, that Albert Traube did not agree the lease should be assigned, and that his father, Edward Traube, merely added the words concerning it to the bill of sale without his knowledge, after it was signed, and without any consideration moving to him, Edward.

[1] It is argued, first, the court should have directed a verdict for both defendants because the written memorandum of the sale is insufficient, under the statute of frauds, to entitle plaintiff to recover as for a breach of the contract to assign the lease and obtain the consent of the lessor thereto. It is true the writing is meager with respect of this matter, but it is unnecessary to inquire touching its sufficiency, in view of the fact that plaintiff has fully performed on his part. The transaction in suit took place on August 13, 1910. The subject-matter involved the assignment of the unexpired term of a lease ending February 27, 1914. This being true, that is, the unexpired term being for a period of more than one year, no one can doubt the influence of the statute of frauds. But, be that as it may, it appears plaintiff fully performed the conditions of the contract on his part by paying over to defendant Albert Traube the stipulated price of \$3,600 and en-

tering into possession of the business, likewise the realty, described in the lease. In such circumstance, though the contract be not in writing, the statute of frauds is of no avail, for complete performance by one contracting party forecloses his adversary from interposing its provisions as a defense. See *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 936; *Hoyle v. Bush*, 14 Mo. App. 408; *Self v. Cordell*, 45 Mo. 345; *McConnell v. Brayner*, 63 Mo. 461; *Cape Girardeau, etc., R. Co. v. Wingerter*, 124 Mo. App. 426, 101 S. W. 1113; *Sloan v. Paramore*, 164 S. W. 662.

What has been said on this matter applies as well to the argument touching the sufficiency of the petition, for though the memorandum of writing set out therein is somewhat indefinite, it pleads full performance of the contract on the part of plaintiff as well.

[2, 3] The court permitted plaintiff to introduce evidence, over the objection and exception of defendants, to the effect that they agreed, at the time of the sale of the property to plaintiff, and for the same consideration, not to embark in like business in the same neighborhood, and that they violated this agreement by opening up an establishment within a few blocks of their former location about three months thereafter. Obviously this was error of a prejudicial character, for its tendency is to lead one to believe that defendants are reckless with respect to the matter of abiding agreements made by them. There was no issue whatever in the case touching this matter. The suit proceeds alone for damages occasioned through the breach of the contract to assign the lease and procure the assent of the lessor to such assignment. It is entirely clear that the evidence above referred to was not only irrelevant, but highly prejudicial. Moreover, this evidence was incompetent because it tended to vary by parol the written contract of sale, in which no such stipulation appears, by showing an additional term of the agreement contemporaneously entered into.

[4] The evidence is that because of defendants' failure to procure an assignment of the lease to plaintiff he was required to pay \$100 per month rent for the premises, which otherwise he should have enjoyed for the unexpired term of the lease at \$85 per month. There is an abundance of evidence, too, on the part of plaintiff that \$100 per month was the reasonable rental value of the premises referred to. On the other hand, the evidence for defendant tended to prove the reasonable rental value of the premises was from \$80 to \$85 per month only.

At the instance of plaintiff, the court instructed on the measure of damages as follows: "If you find a verdict in favor of the plaintiff, you will assess his damages in such a sum as you may believe from the evidence plaintiff has been compelled to pay, if any, for the use of said premises, to wit, 1600-1611

Lafayette avenue, in the City of St. Louis, Mo. in excess of \$85 per month, to date, and such additional amount as he would be compelled to pay in the future for the use of said premises, in excess of \$85 per month, if any, should plaintiff remain in possession thereof until February 27, 1914, but in no event should your verdict be in excess of the difference, if any, between the rental mentioned in the lease and the reasonable rental value of said premises between the dates of October 1, 1910, and February 27, 1914." The rule of damages in such cases proceeds according to the principle of compensation for the loss of the bargain. Therefore the true rule by which the damages are to be measured, it is said, is the difference between the rent, as provided for in the lease, and the rental value of the premises for the term. Such rental value is to be determined by reference to the reasonable and fair value of the rents of the property situated as it is. See *Hughes v. Hood*, 50 Mo. 350; *Hulest v. Marx*, 67 Mo. App. 418; *Jenkins v. Womach*, 143 Mo. App. 410, 128 S. W. 530; 3 *Sedgwick on Damages* (9th Ed.) § 984. The rule is not designed to compensate the value of the term to plaintiff, nor the additional rent he may have been compelled to pay but rather endeavors to make good the loss of his bargain by allowing a recovery for the difference between the rent reserved in the lease and the reasonable value of the unexpired term. See *Hulest v. Marx*, 67 Mo. App. 418. See, also, *Jenkins v. Womach*, 143 Mo. App. 410, 128 S. W. 530. Though the latter clause of the instruction on the measure of damages above copied purports to limit a recovery to the difference, if any, between the rental mentioned in the lease and the reasonable value of the rent of the premises, the body of the instruction proceeds as though plaintiff should be compensated for the amount of rent he was compelled to pay over and above \$85 per month, that is, the rent reserved in the lease. This portion of the instruction, when considered in connection with the verdict, which is for the precise sum of \$15 per month for the full period of the unexpired term, is not only inaccurate, but appears to be highly suggestive as well and in this it is somewhat misleading. The instruction seems to emphasize and put forward the matter of the additional rentals which plaintiff was "compelled to pay," and this feature of it is strikingly prominent, whereas the true rule of damages in such cases is minimized because of it, or at least indefinitely portrayed therein when the entire context is considered. This instruction should be redrafted on a retrial.

For the reasons above stated, the judgment is reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J. and ALLEN J., concur.

WALDEN v. AMERICAN BANKERS' ASSUR. CO. (No. 13606.)

(St. Louis Court of Appeals. Missouri. May 5, 1914. Rehearing Denied May 21, 1914.)

1. MASTER AND SERVANT (§ 73\*)—CONTRACT OF EMPLOYMENT—BREACH.

Where a contract employing plaintiff provided that he should devote his entire time to the employment and that the arrangement should continue while mutually satisfactory, with the understanding that either party might terminate it by giving to the other 30 days' notice by letter of a desire to do so, plaintiff having ceased to work for defendant on August 1, 1911, without having given or received any notice as provided in the contract, thereby voluntarily terminated the contract and was not entitled to recover salary thereunder for a subsequent period because of defendant's refusal to accept further services when tendered.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 90-102; Dec. Dig. § 73.\*]

2. MASTER AND SERVANT (§ 75\*)—CONTRACT OF EMPLOYMENT—BREACH.

One who sues on a contract for personal services must show that the services have been fully performed or their performance has been prevented by the act of God or the unwarranted act of his employer, since in case of the servant's abandonment of the contract there can be no apportionment thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 96; Dec. Dig. § 75.\*]

3. MASTER AND SERVANT (§ 59\*)—CONTRACT OF EMPLOYMENT—BREACH—TERMINATION OF SERVICE—GROUNDS.

Where plaintiff contracted to render personal service to defendant company so long as the arrangement was mutually satisfactory, both parties agreeing to give 30 days' notice of a desire to terminate the same, plaintiff's omission to render service under the contract without notice was not excused by the fact that a temporary receiver was appointed for defendant resulting from a controversy between defendant's officers so as to require defendant to accept plaintiff's tender of further services after the receiver had been discharged.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 59.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Lewis S. Walden against the American Bankers' Assurance Company. Judgment for plaintiff, and defendants appeal. Reversed.

Arthur N. Sager, of St. Louis, for appellants. Sturdevant & Sturdevant and Charles A. Powers, all of St. Louis, for respondent.

NORTONI, J. This is a suit on an express contract to recover a stipulated salary of \$50 per week for personal services. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant is an incorporated company, engaged in the business of insuring bank deposits, and it appears that plaintiff pursues the avocation of a solicitor of such insurance. On May 24, 1911, defendant employed plaintiff to represent it in the matter of soliciting applications for insurance. The con-

tract of employment is in writing and conditioned to the effect that plaintiff agreed to devote his "entire working time thereunder." It stipulated, too, his compensation at the rate of \$50 per week together with actual traveling expenses. By the concluding clause of the contract, it is provided the arrangement shall continue in effect while mutually satisfactory, with the understanding that either plaintiff or the company may terminate it by giving to the other party 30 days' notice by letter of a desire to do so. As before said, the petition sets out the terms of this written contract and avers "that plaintiff since the 24th day of May, 1911, did devote all his working time to the business of defendant, and to and including the 28th day of October, 1911," wherefore he sues for \$650. It appears from plaintiff's evidence, for he personally so testifies, that he entered upon the employment in May and pursued it constantly until the 1st day of August, 1911, when he discontinued the service. Plaintiff testifies that he was paid in full for all services rendered under the contract until August 1st of that year, and the suit here proceeds for his agreed compensation at \$50 per week from and after August 1st to and including October 28, 1911. Touching the matter of quitting the service on August 1st, the following questions directed to and answers by plaintiff appear: "Q. Well, what happened then? A. Well, I discontinued services at that time. Q. What do you mean by that? A. I mean by that, that I didn't solicit any further in Indiana for the company. Q. For how long? A. Well, I never did after that, after the 1st of August." Plaintiff further testifies that after having discontinued the performance—that is, serving defendant under his contract—on August 1st, he made a contract with the International Live Stock Insurance Company to sell stock for them. He pursued this for a time by soliciting applications for the stock of the International Live Stock Insurance Company of Indianapolis on an arrangement for commissions on sales, and on October 28, 1911, entered the employ of the American Surety Association of Peoria, Ill., soliciting stock subscriptions for them. At no time after August 1, 1911, did plaintiff perform any services for defendant here, and, according to his testimony, he voluntarily discontinued such employment under his contract with defendant on that date because he heard of a receivership proceeding in which defendant was involved. However, it appears that about August 14th defendant became free from the receivership proceedings, and thereupon plaintiff offered to go about the further performance of his contract and requested instructions concerning it. Defendant did not furnish the instructions, and plaintiff attended to the pursuit of his new employment with the International Live Stock Insurance Company.

[1] It is obvious plaintiff is not entitled to recover, and the court should have so de-

clared, for that it conclusively appears on his own statement that he voluntarily abandoned the contract of employment.

[2, 3] It is true the contract stipulates for 30 days' notice to be given by either party to the other, with a view of its discontinuance, and considerable stress is laid upon this requirement because no such notice was ever given by either party. But obviously this provision may not be invoked by plaintiff if it appears, as it does, that he abandoned the contract, for by so doing he is estopped with respect of that matter because of his breach of it in voluntarily quitting the service without notice to defendant. One may not avail himself of benefits accruing from his own wrong. The suit proceeds to recover, as before stated, on an express contract involving personal services. There can be no doubt that one who sues upon a contract for personal services must show that the services have been fully performed, or that their performance has been prevented by the act of God or the unwarranted act of his employer. In case of an abandonment of the contract by a servant or employé, there can be no apportionment of the contract. Such, it is said, has always been the rule at common law both as to menial services and services in the nature of a bailment *locatio operis faciendi*. *Gruetzner v. Aude Fur Co.*, 28 Mo. App. 263, 266; *Paul v. Minneapolis, etc., Co.*, 87 Mo. App. 647; *Stroeh v. McClintock*, 128 Mo. App. 368, 107 S. W. 416; *Earp v. Tyler*, 73 Mo. 617; *Banse v. Tate*, 62 Mo. App. 150. In the two cases last cited, it is said the only exception to the general rule above stated, which obtains in this state, is in cases relating to building contracts, as is illustrated in *Haysler v. Owen*, 61 Mo. 270. See, also, *Yeats v. Ballentine*, 56 Mo. 530. Here plaintiff says he, of his own volition, discontinued the employment and service of defendant upon hearing of the receivership proceedings on August 1st and procured employment with another company on a commission basis. It is true, upon learning that defendant had survived the receivership, plaintiff proffered his services to it on August 14th and requested instructions as to what to do. No instructions were ever issued to plaintiff, and he says he performed no service for defendant thereafter. In this suit plaintiff seeks to recover for the two weeks' time intervening between August 1st and August 14th, as well as for all of the time thereafter until and including October 28, 1911, and, indeed, by the finding and judgment appealed from, he is awarded the contract salary of \$50 per week for all of this time. It is not only clear that he may not be so compensated in the circumstances of the case, but it is equally clear that he may not recover in any amount, for manifestly he abandoned the contract of his own accord, in that he embarked upon another employment and made no proffer to serve defendant from August 1st to August 14th, whereas his con-

tract required that he should devote his entire time to the service of defendant.

Touching the receivership, nothing appears save that a controversy existed among the officers of defendant, and a receiver was appointed, who seems to have continued for but a short time and was discharged about August 14th. However, there is no suggestion that defendant was insolvent at the time, or that it became so thereafter. The mere fact of the receivership did not operate a rescission of the contract on the part of defendant so as to enable plaintiff to abandon its further performance, as he did on August 1st, and thereafter sue thereon as for a breach because defendant neglected to instruct him to commence work again after the receiver was discharged. See *Bird v. Austin*, 40 N. Y. Super. Ct. 109. See, also, *Smith on Receivership*, § 17, p. 51; *Cox v. Volkert*, 86 Mo. 505. Especially is this true in view of the fact it appears plaintiff entered the employ of another.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

DAVIS v. McCOLL et al. (No. 11006.)

(Kansas City Court of Appeals. Missouri. April 6, 1914. Rehearing Denied May 4, 1914.)

1. **BILLS AND NOTES (§§ 155, 160\*)—NEGOTIABILITY—ATTORNEY'S FEES AND COSTS—"SUM CERTAIN."**

Under Rev. St. 1909, § 9972, stating the requirements of a negotiable instrument, and section 9973 providing that the sum payable is a sum certain, within the preceding section, though payable with costs of collection, or an attorney's fee if payment shall not be made at maturity, notes were negotiable, though they provided for the payment of attorney's fees and expenses of collection, and that the time of payment might be extended without notice to indorsers.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 403, 407-410; Dec. Dig. §§ 155, 160.\*]

2. **BILLS AND NOTES (§§ 155, 160\*)—NEGOTIABILITY—ATTORNEY'S FEES AND COSTS.**

Notes which provided for the payment of attorney's fees and expenses of collection upon default in payment, and that the time of payment might be extended without notice to indorsers, etc., were nonnegotiable, under the common law.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 403, 407-410; Dec. Dig. §§ 155, 160.\*]

3. **BILLS AND NOTES (§ 117\*)—CONSTRUCTION AND OPERATION—LAW GOVERNING.**

Notes made and payable in Iowa were Iowa contracts.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 248-254; Dec. Dig. § 117.\*]

4. **BILLS AND NOTES (§ 523\*)—ACTIONS AGAINST INDORSE—SUFFICIENCY OF EVIDENCE.**

In an action against the indorser of a non-negotiable note, the introduction in evidence of the note, with proof of the indorser's signa-

ture, does not make out a case, and there must be proof of the actual agreement under which the indorsement was made, and that it was for a sufficient consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.\*]

5. **EVIDENCE (§ 35\*)—JUDICIAL NOTICE—LAWS OF OTHER STATES.**

The courts of Missouri will not take judicial notice that the Negotiable Instruments Act has been passed and is in force in Iowa.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.\*]

6. **CONTRACTS (§ 2\*)—ACTIONS—LAW GOVERNING.**

In an action on an Iowa contract, where there is neither proof nor grounds for presumption as to the law of Iowa, the law of Missouri will be applied.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.\*]

7. **EVIDENCE (§ 80\*)—PRESUMPTIONS—LAWS OF OTHER STATES.**

Where the common law was in force in a state prior to its admission into the Union by force of statutes of which the courts of Missouri can take judicial notice, it will be presumed, in the absence of proof to the contrary, that it is still in force.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.\*]

8. **EVIDENCE (§ 34\*)—JUDICIAL NOTICE—LAWS OF UNITED STATES.**

The courts of Missouri will take judicial notice of the acts of Congress of a public nature.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 34.\*]

9. **EVIDENCE (§ 28\*)—JUDICIAL NOTICE—TERRITORIAL LAWS.**

The courts of Missouri will take judicial notice of the territorial laws of Missouri.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 35, 36, 43; Dec. Dig. § 28.\*]

10. **EVIDENCE (§ 80\*)—COMMON LAW—PRESUMPTION—ADOPTION BY STATUTE.**

Under Act Cong. June 4, 1812, c. 95, § 14, 2 Stat. 747, providing that the people of Missouri territory, which then included Iowa, should be entitled to judicial proceedings according to the common law, Act Missouri Territorial Legislature Jan. 19, 1816 (1 Terr. Laws, p. 436) § 1, providing that the common law of England and certain statutes in aid thereof should be the rule of decision until altered or repealed by the Legislature, Act Cong. April 20, 1836, c. 54, 5 Stat. 10, putting in force in Wisconsin territory the system of laws in force under the ordinance of 1787 (Rev. St. [U. S.] p. 15 [U. S. Comp. St. 1901, p. 1x]) article 2 of which provided that the inhabitants of the territory should be entitled to judicial proceedings according to the course of the common law, and Act June 12, 1838, c. 96, § 12, 5 Stat. 239, providing that the existing law of Wisconsin territory should be extended over Iowa territory, the common law was in force in Iowa prior to its admission into the Union, and, in the absence of proof to the contrary, it will be presumed by the courts of Missouri to be still in force.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.\*]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by Frank H. Davis against A. J. McColl and others. From a judgment for

plaintiff, defendant appeals. Reversed and remanded.

Hughes & Whitsett, of Kansas City, for appellant. Lathrop, Morrow, Fox & Moore, of Kansas City, for respondent.

TRIMBLE, J. In this case plaintiff brought five suits in a justice court of Jackson county, Mo., upon five notes by merely filing with the justice the said notes without further statement of his cause of action. Summonses were issued and served upon the defendant in each of the suits, and on the return day judgment was rendered for plaintiff. Defendant appealed to the circuit court, where the five suits were by agreement consolidated into one. A jury was waived and the cause submitted to the court. Plaintiff offered in evidence the five notes and rested. Defendant demurred. The court overruled the demurrer and rendered judgment for plaintiff on the notes. Defendant appealed.

All of the notes are dated at Des Moines, Iowa, December 29, 1906, and are identical, except they respectively fell due on the 1st days of August and October, 1907, and April, May, and July, 1908. The following sets forth the other terms of all of the notes: "\$200.00. Des Moines, Ia., Dec. 29, 1906. On or before the 1 day of May, 1908, for value received I promise to pay to the order of A. J. McColl the sum of two hundred dollars, payable at Des Moines, Iowa, with interest at 8 per cent. per annum from date. Interest payable semiannually. Upon default of payment of this note the makers, indorsers, guarantors and sureties agree to pay all attorneys' fees and expenses of collection, and consent that any justice of the peace may have jurisdiction of this note to the amount of \$300.00 and — do hereby severally waive demand of payment, protest and notice of protest of this note, and consent that time of payment may be extended without notice. A failure to pay interest when due shall cause this note to become due. A. W. Dudley." On the back of each appeared the following: "A. J. McColl. Without recourse on me. J. S. Turrill." The name of A. J. McColl on the back of the notes was admitted to be his signature.

[1, 2] It will be observed that the notes provide for the payment of attorneys' fees and expenses of collection, and that the time of payment may be extended without notice. Under the statutory provisions of the Negotiable Instruments Law, this would not destroy their negotiability. Sections 9972, 9973, R. S. Mo. 1909. However, without these statutory provisions, the notes are not negotiable. *McCoy v. Green*, 83 Mo. 626, loc. cit. 633; *First National Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Samstag v. Conley*, 64 Mo. 476; *Creasy v. Gray*, 88 Mo. App. 454; *Culbertson v. Nelson*, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222, 57 Am. St. Rep. 266; *Woodbury v. Roberts*, 59 Iowa, 348, 13 N. W. 312,

44 Am. Rep. 685; *Chouteau v. Allen*, 70 Mo. 290; *Coffin v. Spencer*, 39 Fed. 262.

[3] And it will be further noticed that the notes were all made in Iowa, are payable in Iowa, and are therefore Iowa contracts. 39 Cyc. 898; *South Missouri Land Co. v. Rhodes*, 54 Mo. App. 129; *Central National Bank v. Cooper*, 85 Mo. App. 383; *Case Threshing Machine Co. v. Tomlin*, 174 Mo. App. 512, 161 S. W. 286, loc. cit. 289, and cases cited.

[4] If the note is nonnegotiable, the mere writing of his name by defendant McColl on the back thereof will not make him liable as an indorser. There must be proof of the actual agreement under which the indorsement was made, and that it was for a sufficient consideration. *Shaffstall v. McDaniel*, 152 Pa. 598, 25 Atl. 576; 4 Am. & Eng. Ency. of Law (2d Ed.) pp. 479-80; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Prevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558. There is a vast difference between the liability of an indorser on a negotiable and a nonnegotiable instrument. *Norton on Bills and Notes* (3d Ed.) § 9; 1 *Daniel on Negotiable Instruments* (6th Ed.) § 666. Consequently, the mere introduction in evidence of a nonnegotiable note, with proof of the signature of the payee on the back, will not make out a case against one as an indorser. There must be proof of the contract made at the time of the indorsement. This is said without passing on the question whether any one but the immediate indorsee could sue the indorser of a nonnegotiable instrument.

[5] There was no proof that Iowa has passed and has in force the statute known as the Negotiable Instruments Act, and the liability of defendant must be determined by the law of that state, if the same can be ascertained or presumed. We cannot take judicial knowledge of the existence of such statute in Iowa. In *Rashall v. Railroad*, 249 Mo. 509, loc. cit. 516, 155 S. W. 426, 427, it is said: "Our courts do not take judicial cognizance of the laws of sister states or foreign countries, when they are issuable facts in any controversy. In such cases formal proof must be made just as of any other fact, and it is immaterial that the court may be possessed of independent knowledge of the foreign laws."

[6, 7] But plaintiff contends that, as there is no proof of what the law in Iowa is, we are authorized to apply the law existent and in force in our own state. This may be true where there is neither proof nor ground for presumption as to what the law in the other state is. In such case, since the court has no proof of the law in force in the other state, and has nothing upon which to base a presumption as to what that law is, it will not say it is helpless and without law, but will apply the law of its own forum, whether that be the common law or a statute. But whenever the other state in question is one concerning which we are required to take judi-



cial knowledge of the fact that the common law was in force prior to its admission into the Union, then, in the absence of proof to the contrary, we must presume that the common law has continued in force and is still in existence there. If, however, the other state is one of which we can take judicial knowledge that the common law was never in force prior to its admission, we can, in the absence of proof as to its law, apply our own statutes and system of law. As said in *Hazelett v. Woodruff*, 150 Mo. loc. cit. 540, 51 S. W. 1048, 1049: "It is only in respect of those states which were never subject to the common law that, in the absence of proof as to the *lex loci contractus*, the court will apply the statute laws of the forum."

Consequently the question arises: To which class of states does Iowa belong? Is she a state in which the common law never prevailed before her admission into the Union, or is she one in which the common law was put in force, prior to her admission, by any statute or ordinance of which we are required to take judicial notice? Here it might be readily taken for granted that, inasmuch as Iowa was a part of the Louisiana Purchase and was therefore under civil or French law, she was never under the common law prior to her admission. But the fact that she was under French law while a part of the Louisiana Purchase is not material if the common law was, prior to her admission, put in force there by any statute of which we are required to have judicial knowledge. If it was, then we must take judicial notice that the common law was, by the passage of such ordinance or statute, put in force there at that time, and, having been once in force, that law is presumed to have remained in force until the contrary is shown. The case of *Flato v. Mulhall*, 72 Mo. 522, is not contrary to but supports this rule. The court in that case held that judicial notice could not be taken of the laws of Texas; that as no proof of the Texas laws was offered, and as there was no basis for a presumption that the common law was ever in force there, the court could not presume that it was. At page 525 of 72 Mo., the court say: "If the common law ever prevailed there, or now prevails there, it must be by virtue of some statutory provision of which we cannot take judicial notice. As no evidence was introduced, and no presumption can be indulged as to the *lex loci contractus*, the law of the forum must govern." (Italics ours).

So that if, as stated before, the common law was put in force in Iowa, prior to her admission, by any ordinance or statute of which we must take judicial notice, then that law is presumed to have remained in force until now, in the absence of any proof to the contrary.

An examination of the various laws and ordinances of Congress dealing with Iowa prior to her admission into the Union, and

of the territorial laws of Missouri when Iowa was a part of the territory of Missouri, will disclose that the common law was clearly established there by laws of which we are bound to take judicial knowledge.

[8, 9] These various acts of Congress, which are all of a public nature, and the territorial laws of Missouri, are all within our judicial notice without proof. 1 Greenleaf on Evid. § 490; 17 Am. & Eng. Ency. of Law (2d Ed.) 928; *Mobile, etc., Ry. v. Bromberg*, 141 Ala. 258, 37 South. loc. cit. 401; *Missouri, K. & T. Ry. v. Wise*, 101 Tex. 459, 109 S. W. 112; *Overton v. McCabe*, 35 Tex. Civ. App. 133, 79 S. W. 861; *Perry v. Morris*, 7 Ind. T. 146, 104 S. W. 571; *Greene v. Boaz*, 157 Ala. 68, 47 South. 255.

[10] After possession was taken of the Louisiana Purchase under the treaty with Napoleon and the act of Congress of October 31, 1803 (2 Stat. 245, c. 1), Congress, by an act approved March 26, 1804 (2 Stat. 283, c. 38), divided the purchase into two territories, and all north of the thirty-third degree of north latitude was called the district of Louisiana. This was changed to the territory of Louisiana by act of Congress approved March 3, 1805 (2 Stat. 381, c. 31). The act of Congress of June 4, 1812 (2 Stat. 743, c. 95), changed the name thereof to the territory of Missouri and made a number of provisions for its government. The territory of Missouri included what is now known as Iowa, and the fourteenth section of said act of Congress of June 4, 1812, provided that: "The people of the said territory shall always be entitled to proportionate representation in the General Assembly; to judicial proceedings according to the common law and the laws and usages in force in the said territory." While the territory comprising what is now Iowa was still a part of the Missouri territory, the Territorial Legislature of Missouri passed an act January 19, 1816 (1 Terr. Laws, p. 436), section 1 of which provided: "The common law of England, which is of a general nature, and all of the statutes of the British Parliament in aid of or to supply the defects of said common law, made prior to the fourth year of James I, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, or inconsistent with, the Constitution and laws of the United States, shall be the rule of decision of this territory until altered or repealed by the Legislature." Laws Mo. Territory (Dec. Sess. 1815) p. 32, § 1.

After Missouri became a state, that part of the territory of Missouri comprising what is now Iowa was by act of Congress made a part of the territory of Wisconsin. The act of Congress of April 20, 1836 (5 Stat. 10, c. 54), by which the territory of Wisconsin was created, put in force the same system of laws in force under the ordinance of 1787, approved July 13, 1787, governing the north-

territory, out of which Wisconsin was one of the five states carved. Article 2 of this ordinance of 1787 provided that: "The inhabitants of the said territory shall always be entitled to \* \* \* judicial proceedings according to the course of the common law."

The Supreme Court of Illinois, in *Penny v. Little*, 3 Scam. (Ill.) 801, held that this provision meant the common law as it was then understood and expounded by the courts in America. And the fourth year of the reign of King James I was the year fixed for the transplanting of the common law into America, because that was the period at which the first territorial government was established in America and with it the common law of England as it then existed. In *Crake v. Crake*, 18 Ind. 156, loc. cit. 158, it is said: "We know judicially that the common law was brought from England to this country by our ancestors, and was declared, \* \* \* for the government of the territory of the Northwest, \* \* \* to be a part of the fundamental law of that territory." See, also, *Coburn v. Harvey*, 18 Wis. 156; *Stout v. Keyes*, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; *Lorman v. Benson*, 8 Mich. 18, loc. cit. 21, 77 Am. Dec. 435; *Crane v. Reeder*, 21 Mich. 24, loc. cit. 61, 4 Am. Rep. 430.

Now on June 12, 1838 (5 Stat. 235, c. 96), Congress by an act of that date organized the territory of Iowa, and section 12 of said act provided that "the existing laws of the territory of Wisconsin shall be extended over said territory, \* \* \* subject \* \* \* to be altered," etc., by proper authority.

The Supreme Court of Iowa, in the case of *O'Ferrall v. Simplot*, 4 Iowa, 381, loc. cit. 399, held that "the ordinance of 1787 for the government of the northwest territory made it (the common law) the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa."

So that we see that not only was the common law established over what is now Iowa by the territorial statute of Missouri of January 19, 1816, but that the common law was established over the northwest territory by the ordinance of 1787; that, when Wisconsin was carved out of this northwest territory into the territory of Wisconsin, the same law was put in force there as was in force under the ordinance of 1787; and that, when what is now Iowa was put into the territory of Wisconsin, she not only carried the common law she had under the territorial legislative act of Missouri, but she became subject to the common law already in force in Wisconsin, and, when the territory of Iowa was carved out of Wisconsin, the same law existing in Wisconsin territory was by act of Congress extended over the territory of Iowa. And all of this was done by acts which we are bound to judicially notice. Hence the common law was established in Iowa long prior to its admission into the Union, and,

having been once established, we must presume that it has continued in force to the present time, in the absence of any proof to the contrary. It follows, therefore, that as the liability of defendant must be determined according to the law of the place of the contract, and as the notes in suit are, in the absence of any statute, not negotiable, the proof offered in support of plaintiff's case was not sufficient, and the demurrer should have been sustained.

The judgment is therefore reversed, and the cause remanded. All concur.

## MEADE v. MISSOURI, K. & T. RY. CO. (No. 13,630.)

(St. Louis Court of Appeals. Missouri.  
May 5, 1914.)

### 1. CARRIERS (§ 405\*)—CARRIAGE OF PASSENGERS—BAGGAGE—LIMITATION OF LIABILITY.

The plaintiff, in an action for loss of baggage checked on a railroad, by declaring upon the contract for the carriage of herself and baggage, affirmed its validity, and was bound by a limitation of liability in her ticket, which she claimed to have signed without knowing its contents and because of misrepresentation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544-1549; Dec. Dig. § 405.\*]

### 2. ACTION (§ 27\*)—CONTRACT OR TORT.

While a carrier could be sued for a loss of baggage either *ex delicto* or *ex contractu*, and the *ex delicto* form is favored, and the action will be so regarded, notwithstanding the use of such words as "agreed" by way of inducement, yet, where the essential elements of the contract, including the consideration, were set forth, and the loss averred as a breach of it and the carrier's duty, it was an action *ex contractu*.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Mary B. Meade against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

J. W. Jamison and Lee W. Hagerman, both of St. Louis, for appellant. R. M. Nichols, of St. Louis, for respondent.

NORTONI, J. [1] This is a suit for damages alleged to have accrued to plaintiff through the breach of a contract of carriage. Plaintiff recovered, and defendant prosecutes the appeal.

The controversy in the case relates to a limitation on the amount to be recovered under the contract in suit, and this is to be determined on a consideration of the form of the action employed. Defendant is a common carrier of passengers and baggage. On February 15, 1910, plaintiff purchased a ticket from defendant in St. Louis entitling her to passage for herself and baggage from St. Louis, Mo., to Brownsville, Tex., and return over defendant's railroad. It appears the

ticket was a "homeseekers' excursion ticket," but it entitled plaintiff to first-class passage. On this ticket she checked her baggage, among which was a suit case, which contained numerous articles of wearing apparel. The suit case and contents were evidently lost in transit, for it was never delivered to plaintiff, but there is no evidence tending to prove negligence on the part of defendant with respect of the matter. How or where the suit case was lost does not appear, and plaintiff made no effort to show that it occurred through the negligence of defendant.

Although the transaction is interstate in character, the tariffs and rates, if any on file with the Interstate Commerce Commission, are not in evidence, and no question is made on that subject-matter.

The ticket is not of the small card variety, but, rather, is an extended one in the form of a contract between the parties, and this contract is printed in plain type. Certain agreements and conditions are set forth therein, and it appears plaintiff subscribed to the same by signing her name thereto as the original purchaser. Among other things, it is agreed between the parties, and the contract printed on the ticket so recites, as follows: "4th. Baggage liability is limited to wearing apparel not to exceed one hundred dollars in value for a whole ticket and fifty dollars for a half ticket."

Defendant offered to pay plaintiff the sum of \$100 on account of the loss of her suit case containing the wearing apparel mentioned, but she declined to accept it, and instituted this suit instead for \$1,050.50. By its verdict the jury awarded plaintiff a recovery of \$379.75. The evidence tends to prove that such was the amount of the actual loss sustained. At the trial plaintiff introduced considerable evidence tending to prove that, though she signed the contract contained in the ticket at the time it was purchased, she was in no wise advised of its contents. Moreover, it is said the ticket agent assured her the ticket contained no limitations on defendant's liability, and that it entitled her to first-class passage in every respect. On this evidence plaintiff was permitted to recover the full measure of her loss, as though the limitation prescribed on defendant's liability in the fourth paragraph of the contract printed on the ticket over plaintiff's signature was without avail. Obviously this was error, in view of the fact that the suit proceeds as for a breach of the contract of carriage. Such being true, of course, plaintiff is bound by all of the terms of the contract for the breach of which she sues. By declaring upon the contract, plaintiff affirms its validity in every part. *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 199, 156 S. W. 830; *Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 260, 112 S. W. 249; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996. She may not sue upon

it to recover compensation for her loss, and at the same time repudiate the stipulation contained therein, by which she and defendant agreed upon the extent of such compensation in the contingency of a loss. In a suit on the contract, the terms of the contract must control, and this is true though the recovery is sought on a contract contained in a railroad ticket, duly signed by the purchaser, who sues upon it to compensate the loss of baggage. See *Boylan v. Hot Springs R. Co.*, 182 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.

[2] But, though such be true, it is argued on the part of plaintiff that the suit here proceeds *ex delicto* as for a breach of the obligation annexed by law to the calling of the carrier, and not upon the contract at all. In this view, it is urged that it is competent to look to the evidence tending to show the contract was unadvisedly entered into by plaintiff. To determine the form of the action, it is necessary to set forth and consider so much of the petition as is relevant to that matter.

The averments are as follows:

"Plaintiff avers that defendant agreed, for and in consideration of the sum of twenty-five dollars (\$25.00), then and there paid by plaintiff to the defendant, to well and truly carry the above-enumerated articles, which were contained in a receptacle commonly known as a suit case, and also to carry plaintiff therewith from St. Louis, Mo., to Brownsville, in the state of Texas, and at the last-mentioned place to deliver the personal property, goods, and chattels above described to plaintiff in as good condition as when received by defendant.

"Plaintiff avers that defendant, in violation of its said agreement, and in total disregard of its duty as a common carrier, as aforesaid, failed and neglected to deliver said property at its destination to plaintiff, and that all of the same has been wholly lost to plaintiff."

It appears from this that plaintiff sets forth a contract entered into on the part of defendant with her in consideration of the sum of \$25. It avers that for this consideration defendant *agreed* to transport plaintiff and her suit case to Brownsville, Tex., and deliver the property above described to plaintiff in as good condition as when received; moreover, that defendant, "in violation of this agreement, and in total disregard of its duty as a common carrier, failed and neglected to deliver said property at its destination." Obviously this reveals a purpose to declare upon the contract rather, than upon the common-law liability of the carrier; for, though the latter is referred to in the words "and in total disregard of its duty as a common carrier," the promise and the consideration therefor are clearly set forth, as well as a violation of the agreement alleged. No one can doubt that one may pursue a common

carrier for a loss such as that involved here either in an action *ex contractu* or in one *ex delicto* at the option of the pleader. However, though the pleader may elect for either contract or tort, he is bound by and must recover upon the theory of his pleading. See *Wernick v. St. Louis, etc., R. Co.*, 131 Mo. App. 37, 109 S. W. 1027. See 3 Ency. Pl. & Pr. 818, 819, 820; 3 *Hutchinson, Carriers* (3d Ed.) (M. & D.) § 1324. The form of action *ex delicto* is usually preferred, and the courts are prone to so regard a petition if such course is at all permissible. In this view the courts frequently treat a petition against the common carrier which sets forth by way of inducement that "it agreed" or "undertook," etc., followed by averments suggesting a tort, as one proceeding *ex delicto*. See 3 Ency. Pl. & Pr. 819, 820, 821, 822; *Canaday v. U. Rys. Co. of St. Louis*, 134 Mo. App. 282, 114 S. W. 88. Our own courts construe petitions in cases of this character as declaring *ex delicto* for a breach of the duty annexed by law to the calling of the carrier when the essential elements of a contract—that is, both the agreement and consideration—are not set forth therein and declared upon. See *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440; *Hell v. St. Louis, etc., R. Co.*, 16 Mo. App. 363. But when the plaintiff's petition, as in the instant case, sets forth the essential elements of a contract—that is, an agreement of the parties on a consideration stated—and then avers the breach of such agreement, the proceeding is accepted and treated as a suit on contract for a breach of the contractual obligation, rather than for a breach of the obligation annexed by law. See *Wernick v. St. Louis & S. F. R. Co.*, 131 Mo. App. 37, 42, 43, 109 S. W. 1027. Indeed, such seems to be the settled rule of decision on the subject. 3 Ency. Pl. & Pr. 822, thus states the law: "A mere averment of a promise, or the use of the words 'undertook' or 'agreed,' does not constitute a declaration on contract. It is necessary to allege not only a promise or undertaking, but also a consideration therefor."

Mr. Hutchinson, in his splendid work on *Carriers* (3d Ed.) § 1328, states the law on this question to the same effect precisely as follows: "Notwithstanding these essential differences between actions on the case and in assumpsit against the carrier, it seems to have been in former times a very perplexing question how the one form of action should be distinguished from the other. The declarations in the two kinds of actions, according to approved formulas, were so nearly alike that in many cases the astutest judges became perplexed in their efforts to find out to which class the declaration belonged. It seems, however, to be finally settled that, while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words 'agreed,'

'undertook,' or even the more significant word 'promised,' must be treated as no more than inducement to the duty imposed by the common law, yet, if there be an averment of a promise and a consideration, the declaration will be construed to be upon the contract, and not for the breach of duty. And consequently, when the word 'consideration' was left out, the action was held to be in tort."

It therefore appears that manifestly the pleader elected to pursue the defendant here as for a breach of its contract; for in the petition plaintiff sets forth the essential elements of the contract, that is to say, both the promise and the consideration therefor, that is, \$25, and that defendant violated its said agreement in failing to deliver the suit case to plaintiff at the point of destination. This being true, the mere fact that the petition recites conjunctively therein "and in total disregard of its duty as a common carrier" is unimportant in determining the form of the action, for the words so carefully chosen to portray a contract and set forth its breach prevail over the mere phrase so conjoined.

The suit proceeding on the contract, as it does, it appears the limitation of \$100 valuation for loss of baggage must be treated as valid, whatever the facts of the case may be, and a recovery beyond that may not be allowed.

The judgment should be reversed, and the cause remanded, with directions to enter judgment for the plaintiff for such amount. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

OSBORN v. WABASH R. CO. (No. 10810.)  
(Kansas City Court of Appeals. Missouri.  
May 4, 1914.)

1. TRIAL (§ 156\*)—DEMURRER TO EVIDENCE—CONSIDERATION OF EVIDENCE.

While, in passing on a demurrer to the evidence, plaintiff's evidence must be accepted as true and he must be given the benefit of every inference fairly deducible therefrom, yet where his evidence does not contradict defendant's and his case rests upon an inference scarcely more than conjecture, or the possibility that the fact might exist, then the court ought to look at the character of defendant's evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

2. RAILROADS (§ 327\*)—ACCIDENTS AT CROSSINGS—DUTY TO STOP, LOOK, AND LISTEN.

A railroad crossing, being a dangerous place, a person, before venturing upon same, must both look and listen, at a convenient distance from the crossing, and where the look will be effective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

3. RAILROADS (§ 330\*)—ACCIDENTS AT CROSSINGS—FAILURE TO GIVE SIGNALS.

While, under Rev. St. 1909, § 8140, requiring the giving of signals for a railroad crossing, evidence of an injury where such signals are not given makes a prima facie case, yet

the rule of contributory negligence is not abrogated.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

**4. RAILROADS (§ 330\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—RELIANCE ON PRECAUTIONS ON PART OF RAILROAD.**

It is only where a person is paying attention and can neither see nor hear anything indicating that a train is coming that he can presume, without negligence, that if one were coming, the signals would be given.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

**5. RAILROADS (§ 330\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY WHEN VIEW OR HEARING IS OBSTRUCTED.**

Plaintiff's intestate, a rural mail carrier, being in an inclosed cart with his ears partly muffled on a foggy day drove upon a railroad crossing in front of an approaching freight train and was killed. The statutory signals for the crossing were not given, but persons further away than deceased heard the noise of the train. *Held*, that he was guilty of contributory negligence precluding recovery, since the conditions only increased the care he was required to exercise.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

**6. EVIDENCE (§ 568\*)—WEIGHT AND SUFFICIENCY—OPINION EVIDENCE.**

Though a witness who has sufficient knowledge of the facts, and who is so situated as to be able to form an opinion, may give that opinion as to the distance an object could be seen, yet such evidence is of a weak character as compared to positive testimony on the subject.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.\*]

Appeal from Circuit Court, Gentry County; Wm. C. Ellison, Judge.

Action by Estella Osborn against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. L. Minnis, of St. Louis, J. W. Peery, of Albany, and N. S. Brown, of St. Louis, for appellant. D. D. Reeves and Kendall B. Randolph, both of St. Joseph, for respondent.

**TRIMBLE, J.** Shortly before 1 o'clock in the afternoon of January 20, 1911, plaintiff's husband, Ira B. Osborn, was struck and killed at a public crossing by one of defendant's freight trains. This suit is to recover damages for his death, upon the ground that it was caused by the negligent failure of those in charge of the train to give the statutory crossing signals. The answer, in addition to a general denial, pleaded contributory negligence. A trial was had resulting in a verdict for plaintiff in the sum of \$3,000. Defendant appealed, and the sole question presented is whether defendant's demurrer to the evidence should have been sustained. To state it more specifically, the controversy is over the element of contributory negligence charged to have been shown on the part of deceased, that is, upon the question whether the evidence discloses that, in going upon the track under the circumstances, he was, as a matter of law, lacking

in that care and caution which ordinarily prudent persons would ordinarily use in the same situation and circumstances. The case presents no phase of the humanitarian doctrine. It is based solely on the failure to give the statutory signals, and there is no doubt but that the evidence, upon all features, aside from contributory negligence, presented a case for the determination of the jury.

In order that this question of deceased's contributory negligence may be understood and properly disposed of, it is necessary to state with some particularity the surroundings at the scene of, and the circumstances attendant upon, the killing.

The crossing in question was on a public road running due east and west. The railroad runs from the southeast to the northwest, and the track is straight for some distance on each side of the crossing. The deceased was a rural mail carrier, and was familiar with the crossing. He was traveling east along the county road, driving two ponies hitched to a two-wheeled cart, which he used in delivering the mail. The seat was inclosed, but there was a window in front and one on each side of the box, through which he could easily see. The seat was low and, when seated in the vehicle, deceased's head was about on the same level it would have been had he been walking along the road. He was a young man, in good health, with full possession of his faculties of sight and hearing, and wore a cap with ear muffs which came down partially over his ears.

The crossing was three-quarters of a mile southeast of the station of Whitton. There was no station or station agent at this place, only a platform and siding. A regular east-bound passenger train usually passed Whitton at 12:30, but on the day in question it had orders not to pass Whitton before 12:50. And this 20 minutes was given to an extra west-bound freight train to run from McFall northwest to Whitton and get on the siding there in time to allow the passenger to pass. If at the hour of 12:50 the freight had not arrived, or the passenger train had not been flagged, the latter had a right to proceed. So that when deceased approached the crossing in question at 12:40, it was a little past the usual time for the passenger train to go southeast at that point, and it had not yet reached Whitton. The extra freight, however, was approaching the crossing, going northwest, and running at 35 miles an hour in order to reach Whitton and get in the clear before the passenger train's time limit of 12:50 was up. The pilot of the engine struck the team and cart on the crossing in such way that both of the horses were thrown on the east side of the track; one of them being killed and falling on the north side of the road, the other being knocked down. The wagon was smashed and scatter-

ed along the track, and deceased's body was carried on the pilot a short distance, perhaps 200 feet up the track, and then thrown to the east side thereof. His cap was found on the pilot with the ear flaps slightly down, and he was dead when reached.

Although the evidence is conflicting as to whether the train whistled for the crossing, yet, as there was substantial evidence tending to show that it did not, and the jury found for plaintiff, we must, for the purposes of the question now before us, assume that neither the bell was rung nor the whistle blown as it approached the crossing. The only audible warning of its approach, therefore, given by the train, was merely that which accompanies a heavily loaded freight train consisting of an engine with 23 cars and a caboose; the load being something over 1,100 tons. The track was slightly down-grade for a short distance next to the crossing, and then at the crossing it changed to upgrade.

The county road passed over the top of a hill about 700 feet west of the crossing, and then came on down the hillside to a slightly low place at the foot of the hill about 400 feet west of the crossing and thence continued east on a slight upgrade to the crossing. From the top of the hill, and from any point along the greater portion of the hillside, as one came down toward the crossing from the west, the railroad to the southeast could be distinctly seen for at least a half mile on a clear day. There is a conflict in the evidence as to whether the railroad could be seen from the low place in the road at the bottom of the hill; the defendant's evidence tending to show that even at that point, 400 feet from the crossing, and from thence to the crossing, the railroad to the southeast could be seen for a quarter of a mile or more. Plaintiff had evidence tending to show that the railroad could not be seen at this low place nor at certain points thereafter along the road. But, aside from this conflict, the evidence all shows that on a clear day, for at least 100 feet before the crossing was reached, the railroad could be seen without any difficulty for more than a quarter of a mile to the southeast.

The day in question was cloudy and misty, and a fog prevailed to a greater or less extent throughout the day. Sometimes it would lift or clear for awhile and then would settle again. The fog appeared to lie in different strata, some of which were denser than others, and the degree of obscurity was greater at some periods of the day and in some places than at other periods and in other places. The part the fog had, or may have played, in preventing deceased from seeing or hearing the train may be more correctly presented by a careful analysis of the evidence of the witnesses on this point.

P. M. Ward, witness for plaintiff, who lived three-quarters of a mile southeast of the crossing, and who was in his lot feeding his

cattle, heard the train coming when it was half a mile away, and saw it when it came around a bend a quarter of a mile away, and saw it was a freight train.

Wade Henderson, another witness for plaintiff, a young man, lived a quarter west and a little south of the crossing, about diagonally across a 40 acres southwest from the crossing. He and his father were in the house with the doors and windows closed. Their clock had stopped, and, knowing the usual time for the passenger train to go by, they desired to set it in accordance therewith. Both heard the freight train, and the father told the son to look out and see if it was the passenger. The son went to the door and saw the train on the trestle a little over a quarter of a mile away and recognized it as a freight train. The north end of this trestle was not quite a hundred yards from the crossing. So that both father and son, inside the house and with the doors and windows closed, heard the train, and the son saw it a quarter of a mile away on the trestle the north end of which was within 300 feet of the crossing where the collision took place. This witness said it was foggy, but that he had no difficulty in seeing it was a freight train and could hear the roar and rumble of the train very distinctly.

Mrs. Spires another witness for plaintiff, living about three-quarters of a mile south of the crossing and something like 35 yards from the railroad track, was in her house with the doors and windows closed, engaged in churning. She heard the train as it passed, and thought at first it was the passenger, but concluded it made too much noise for that, and looking out saw it was the freight.

Two other witnesses for plaintiff, Mrs. Finderburg and her husband, testified to hearing the train, the former while in her house about 40 yards from the railroad, and the other about half a mile therefrom, but, as they were two and four miles, respectively, from the crossing, their testimony would not throw light on the noise the train made at that point, or on the distance it could be seen there. So that of all of plaintiff's witnesses who testified, none swore to facts showing that the train could not be heard and its direction ascertained on account of the fog. And none of them testified to any facts showing the train could not have been seen for at least a quarter of a mile on account of the fog, unless it be the witness, Woodson Swope, whose testimony we will now consider. This witness was at Whitton, three-quarters of a mile northwest of the crossing, when the accident happened. He was expecting the passenger train from the northwest. But he heard the freight running as it approached Whitton when it was a quarter of a mile away, and knew from the sound and direction thereof that it was not the passenger. His testimony, therefore, showed no difficulty for the train to be heard on account of the fog. And as to the diff-

culty of its being *seen* on that account, he testified as follows: "Q. What kind of a day was it as to fog? A. Why, it was a very foggy day. Q. To what extent was the view obscured? A. Well, I don't suppose you could have seen anything very far. I don't suppose you could have seen a train over 50 yards, very much; I wouldn't judge that you could." In view of the fact that he was three-quarters of a mile distant from the crossing; that the fog was more dense at times than at others; that it came and went, and varied greatly, not only at times, but also at places, not far apart; and that the form of the answers discloses that he was not attempting to do anything more than to give expression to a mere opinion—can it be said that this evidence constitutes any substantial basis on which to determine how far the train could have been seen at the crossing, the moment of the accident? Especially when plaintiff's other witnesses show that when the train was on the trestle approaching the crossing not much over 100 yards from it, and a very few seconds before the accident, it could be both seen and heard for a quarter of a mile. Added to this is the evidence of the following witnesses who testified for defendant: W. A. Henderson, father of the young man who testified as above stated. He was in his house with the doors and windows closed slightly over a quarter southwest of the crossing. He and his son heard the train on the trestle, and his son looked out, saw it a quarter of a mile away, and, though there was some fog, yet he recognized it as a freight train, and so reported to his father. After eating his dinner, the father went to the barn and saw the passenger train standing at the crossing something over a quarter of a mile distant. However, the atmosphere was clearer at this moment.

George Low lived a half mile west of the crossing. He was cleaning the snow and ice off his porch, and heard the train coming when it was three-quarters of a mile away, and recognized from the noise it was making that it was a freight train. At this time it was a quarter, or a little over a quarter, of a mile distant from and had not reached the crossing.

Owsley Brown lived a half mile east and 10 or 12 rods north of the crossing. He was in his yard at the time of the collision and heard the train when it was a half mile south of the crossing and only a minute before deceased was killed. The train, at that moment, was three-quarters of a mile from the witness, and his attention was attracted to the noise and rumble of the train passing over the trestle.

Bert Lumry was on the railroad west of the crossing, and walked southeast down the railroad toward the crossing for about a quarter of a mile, and left it at a point half a quarter north of the crossing a moment

before the collision, going west to a well to water some stock. While on the railroad he looked ahead of him past the crossing, and both saw and heard the freight train coming toward him. The train at that time was three-quarters of a mile from him, and his vision was along the same line of that of any one who would be approaching the crossing at that time and looking for the train. He had left the railroad, however, and had started west to a well in the field when the train reached the crossing.

Alvin Whitton was in the store at Whitton, but was expecting to take the passenger train when it came by. He heard the train when he was in the store, and thought it was then about three-quarters of a mile down the track. This would put it right at the crossing, and may have been the stock alarm blown a moment before deceased was struck. But when he went outside he saw it fully half a quarter away, and recognized it as a freight train just slowing up. He stayed outside only about three minutes, long enough to see it was a freight and then went back inside.

[1] It is true the five foregoing witnesses testified for defendant, and while, in considering whether or not a case was made for the jury, plaintiff's evidence must be accepted as true, and it must be given the benefit of every inference which can be rightfully drawn therefrom, yet it must also be remembered that where plaintiff's evidence does not contradict that of defendant's and plaintiff's case rests upon an inference "scarcely more than conjecture or the possibility that the fact might exist, then the court ought to look at the character of the evidence on the other side." *Furber v. Bolt & Nut Co.*, 185 Mo. loc. cit. 311, 84 S. W. 890; *Link v. Hathway*, 143 Mo. App. loc. cit. 509, 127 S. W. 913.

No witness saw deceased approach the track, and no one testified as to what he did with reference to looking or listening. The engineer was on the right-hand side of his engine, and the boiler and cab shut off his view to the west of the crossing. The first he saw was the horses coming up over the pilot on the east side the instant of the collision. The fireman was shoveling coal at the time. The conductor and head brakeman were also in the cab, but the conductor was in the engineer's seat and had no better view than the engineer. The head brakeman was not called as a witness by either side. He was, at the time of the trial, in Colorado for lung trouble.

The foregoing is a fair statement and résumé of all the circumstances under which deceased was struck and killed. What is the law governing the situation applicable to the deceased and the defendant at that time?

[2] Deceased was approaching a railroad crossing in an inclosed two-wheeled cart at the rate of four miles an hour. For a distance of at least 100 feet before he reach-

ed the crossing he could, on a clear day, see down the track for a quarter of a mile or further. (The effect of the fog will be discussed later.) As a railroad crossing is a dangerous place, the law imperatively required deceased to look carefully in both directions, at a convenient distance from the crossing, and where the look will be effective, before venturing upon it, if, by looking, a train could be seen. And the duty to look is a continuing one until the crossing is reached. *Kelsay v. Mo. Pac. Ry. Co.*, 129 Mo. 362, loc. cit. 372, 30 S. W. 339. Not only was he required to look, but also to listen. He must not venture blindly on the track without first using his senses of hearing and sight. *Lien v. Railroad*, 79 Mo. App. 475, loc. cit. 480. And if for any reason his sight was obstructed, that was all the more reason for a greater exercise of his sense of hearing.

[3, 4] The statute (section 3140, R. S. Mo. 1909) required the engineer to ring the bell a distance of 80 rods from the crossing and keep ringing it until the crossing is passed, or to sound a whistle at least 80 rods from the crossing and to sound it at intervals until the crossing is reached, and makes the road liable in damages for a failure to do so, but provides that "nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury." And while evidence of an injury at a public crossing, where the statutory signals are not given, makes a prima facie case and throws the burden of proving nonliability on the defendant (*Weigman v. Railroad*, 223 Mo. loc. cit. 721, 123 S. W. 38), yet, this does not abrogate the rule of contributory negligence. Even if the statutory signals were not given, if a person by exercising ordinary care could have avoided injury and fails to do so, he cannot recover, since he is guilty of contributory negligence. *Hayden v. Railway*, 124 Mo. 566, 28 S. W. 74; *Hugart v. Railway*, 134 Mo. 673, 36 S. W. 220; *Green v. Railway*, 192 Mo. 131, 90 S. W. 805; *Smith v. Railway*, 150 Mo. App. 1, 129 S. W. 719; *Crumpley v. Railway*, 111 Mo. 152, 19 S. W. 820. And while in certain cases it is said that a person about to cross a railway has a right to presume that the statutory signals will be given, it is only where the person is paying attention, and *can neither see nor hear anything indicating that a train is coming*, that he can assume without negligence that, if one were coming, the signals would be given. *Donohue v. Railroad*, 91 Mo. 357, loc. cit. 363, 2 S. W. 424, 3 S. W. 848; *Kennayde v. Railroad*, 45 Mo. 255, loc. cit. 261; *Ernst v. Railroad*, 35 N. Y. 9, 90 Am. Dec. 761; *Weigman v. Railroad*, 223 Mo. 699, loc. cit. 719, 123 S. W. 38. So that where a person can see and hear, or *can do either*, he cannot rely blindly upon any presumption that the signals will be given. "A railroad

crossing is within itself a signal of danger. The law imposes upon the traveler the duty of exercising caution at such places. He must make some effort to find out if there is an approaching train before he drives upon the tracks. He can close neither his eyes nor his ears. The means of self-protection given him must be used." *Burge v. Railroad*, 244 Mo. 76, loc. cit. 94, 148 S. W. 925. If, therefore, the collision had occurred on a clear day of ordinary weather, no one could well contend that deceased was not guilty of contributory negligence in driving upon the crossing in front of this swiftly moving and heavy train. The question then arises what effect or change in that regard does the foggy condition of the weather present so as to take his act out of the realm of contributory negligence?

[5] So far as his ability to *hear* the train is concerned, there was nothing, in the way of obstructions or of fog, to prevent that. Not a witness declared that they had any difficulty in hearing on account of the fog. On the contrary, all of the evidence was that the day was still, there was no wind blowing, and *all* of them heard the train easily and distinctly at distances varying from a quarter to three-quarters of a mile away, and that within an exceedingly short time prior to the accident. Some of these witnesses were in closed houses at the time. Neither did any of them have any difficulty in locating the place and direction from whence the sound came and the character of the train. In addition to this, it was conceded that the train consisted of an engine and caboose with 23 cars loaded with coal comprising a train of 1,100 tons going 35 miles an hour over a trestle the north end of which was scarcely 100 yards southeast of the crossing. One of the witnesses spoke of the roar and rumble it made in going over this trestle, and it is a well-known fact that the noise and roar is increased by a train passing over such a structure.

As to the ability to *see* the train, notwithstanding the fog, plaintiff had only three witnesses who could be said to speak on this point. One of these was young Henderson, who saw the train a quarter of a mile away and recognized it as a freight at the moment it was passing over the trestle. The second was P. M. Ward, who heard it a half mile away and saw it a quarter of a mile distant. The third was Woodson Swope, who was at Whitton when the accident occurred, who did not test the foggy condition of the atmosphere by looking at the train or any other object, but who, when asked to what extent was the view obscured, expressed himself in these words: "Well, I don't suppose you could have seen anything very far. I don't suppose you could have seen a train over 50 yards very much; I wouldn't judge that you could." Defendant had two witnesses who said they saw the train, one Bert Lumry, who was



walking on the railroad toward the crossing from the northwest and saw and heard it before it reached the crossing, and the other, Alvin Whitton, who was at Whitton and upon going outside saw the train fully half a quarter away and recognized it as a freight train.

If now it was the duty of deceased to both look and listen for the train, what grounds have we for saying that he is excused from negligence in not seeing or hearing it? As said in *Burge v. Railroad*, supra, 244 Mo. 76, loc. cit. 94, 148 S. W. 925: "In this case witnesses more unfavorably located than was deceased heard the 'roar' of the approaching train. What the witnesses heard the deceased could have heard had he been in the exercise of due care. What they saw he could have seen by the exercise of due care. The fact that they heard the approaching train is conclusive that he was not exercising his sense of hearing to determine whether or not there was an approaching train." Certainly he had no excuse for not *hearing* it, since every one, who was in hearing distance at all, heard it. And the two who were in a position to know whether or not it could be *seen* at the time of the collision said *they saw* it. Can it be said under such circumstances that we can indulge in the *presumption* that deceased was in the exercise of ordinary care? Do not the uncontradicted facts destroy that presumption? As said in *Burge v. Railroad*, 244 Mo. loc. cit. 94, 148 S. W. 925: "There is no room for the presumption of due care in this case. Such presumption is a presumption of fact, and upon the appearance of the facts in evidence the presumption takes flight, and no longer has a place in the case. *Higgins v. Railroad*, 197 Mo. 318 [95 S. W. 863]; *Tetwiler v. Railroad*, 242 Mo. 178 [145 S. W. 780]; *Morton v. Heidorn*, 135 Mo. loc. cit. 617 [37 S. W. 504], and cases therein cited." Where the positive and uncontradicted facts, such as were shown in this case, show that if deceased had taken those precautions which the law required of him to both look and listen, he would have been aware of the approach of the train, the presumption of due care cannot stand. *Tomlinson v. C., M. & St. P. Ry. Co.*, 134 Fed. 233, 67 C. C. A. 218; *Rollins v. C., M. & St. P. Ry. Co.*, 139 Fed. 639, 71 C. C. A. 615.

But it is said that Osborn faced an unusual and confusing obstruction to the free exercise of his senses of sight and hearing by reason of the fog. There is no evidence whatever that his hearing was interfered with. No one else had any difficulty in hearing the train. And while it is perhaps well known that in a dense fog, so dense that objects only a few feet away are not distinguishable, sounds are distorted and misleading, yet such is not the case where the fog is of that character that objects can be seen 50 yards away. We are also reminded that the deceased was in an inclosed cart with

his ears partly muffled. This, however, cannot serve to relieve deceased of negligence, but rather increased the degree of care required of him under such circumstances. The rule is well stated in 2 *White on Personal Injuries on Railroads*, § 1083, where it is said that it is the duty of a person intending to cross a railroad track to listen as well as look, and if dust temporarily obscures his view he must stop and wait to get a better view, or *listen* for a train, and that a like rule obtains in a case where the view is obscured by falling snow or a fog, and a traveler who, under such circumstances, drives upon the track without taking the extra precautions demanded by the unusual conditions cannot recover. A railroad crossing is a warning of danger, and one who crosses it knows he is encountering a danger, and must act with care proportionate to the danger. 3 *Elliott on Railroads*, § 1165. If he is in an inclosed vehicle with his ears muffled and a fog is prevailing, these conditions, so far from relieving him of care, should increase the amount of care to be taken. Ordinary care under normal conditions would not be ordinary care under such unusual conditions. For "no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety." *Sanguinette v. Railroad*, 196 Mo. loc. cit. 489, 95 S. W. 386. "The measure of precaution to be observed by a traveler depends often upon the circumstances and surroundings." *Laun v. Railroad*, 216 Mo. loc. cit. 579, 116 S. W. 553. If the fog was so great that he could not see down the track for more than 50 yards, then it was all the more incumbent upon him to listen. And where is there any evidence in the case from which even an inference can be drawn that *if he had listened* he would not have heard what *all the witnesses say they heard*?

The case at bar is not like the case of *Weighman v. Railroad*, 223 Mo. 699, 721, 123 S. W. 38. In that case the view was hidden by an engine and a long train of cars standing about eight feet from the side of the track, and the standing engine by its noises prevented the plaintiff from hearing the approaching train, and there was no evidence that the latter made any noise to be heard. In the case at bar, the evidence is agreed that the train made a great noise, and that every one in hearing distance heard it, and there were no obstructions to prevent deceased from hearing it. This shows, as said in the *Burge Case*, that deceased "failed to hear, when to listen was to hear, because all the witnesses heard." So that, even if the evidence of *Woodson Swope* that a train could not be seen more than 50 yards be given the fullest weight and effect, yet, since that obstruction to deceased's sight would demand greater use of his hearing, and as the evidence shows that all others did hear,

where is there any room for the presumption that deceased did listen? The evidence was that his sight and hearing were both good; that the train was making a great noise. If his hearing was good, and he listened, why did he not hear what others heard? In the presence of the undisputed fact that if he listened he could hear what others could hear, and the further undisputed fact that all others did hear, what basis is there for the presumption that he listened but did not hear, and should be relieved of negligence because he failed to hear? "Presumptions of this character are presumptions of fact—and the presumption takes flight upon the appearance of the facts themselves. When the facts themselves are in evidence there is no place for a presumption as to those facts." *Burge v. Railroad*, 244 Mo. loc. cit. 95, 148 S. W. 925.

The deceased and the engine reached the crossing at the same moment. Calculations, based on the rate of speed each was shown to have been traveling, show that when deceased was 100 feet from the crossing the train was about 875 feet therefrom, less than a quarter of a mile away, the distance at which others saw the train at that moment. While deceased was traveling from this 100 foot point to a point 15 feet from the track, where he was still in a place of safety, the train traveled at least 675 feet nearer the crossing, and with its 1,100 tons burden had thundered over the trestle (the north end of which was 240 feet away), making a noise which attracted the attention of persons in every direction, further away, and certainly not so well situated to hear, as was deceased. As said in *Chicago, etc., Ry. v. Andrews*, 130 Fed. loc. cit. 71, 84 C. C. A. 399, quoted in *Waggoner v. Railroad*, 152 Mo. App. loc. cit. 179, 133 S. W. 68, common knowledge tells us that such a train over such a track makes a great noise not rendering it possible for it to come unexpectedly upon one who is possessed of a good sense of hearing and is reasonably employing it under the circumstances which otherwise permit its free use.

[8] Viewing the case under every aspect possible in the light of the evidence, the presumption that deceased was in the exercise of ordinary care was clearly overcome by all the evidence as to the fact that the train

could have been heard had deceased listened. And as to the possibility of its being seen, the facts disclosed by the evidence of all the witnesses, who were so situated as to have opportunity for observation, show that it could have been seen had deceased looked. Where credible witnesses, having opportunity for observation, testify that a fact exists, no conflict arises from the expression of an opinion to the contrary by another witness where it affirmatively appears that his situation was not such as that he could have observed and formed an opinion concerning the fact about which he attempts to express an opinion. *McGrath v. Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Henze v. Railroad*, 71 Mo. 636; *Bennett v. Railroad*, 122 Mo. App. 703, 99 S. W. 480. A witness, who has sufficient knowledge of the facts and is so situated as to be able to form an opinion, may give that opinion as to the distance an object could be seen, or the distance one object was from another, but such evidence is of a weak character as compared to positive testimony on the subject; and where the witness is shown not to have been present at the time and place in question so as to have been able to form an opinion on the matter, it will not have sufficient probative force to create a conflict with such other positive testimony. *McCreery v. Railway*, 221 Mo. loc. cit. 28, 29, 120 S. W. 24; *Markowitz v. Railroad*, 186 Mo. loc. cit. 359, 85 S. W. 351, 69 L. R. A. 389. While a witness may testify that certain things could or could not have been seen from one point to another, it must be shown that he was in a position to form an opinion and did form it, and that his statement is something more than a mere guess. However, if *Swope's* estimate as to the distance the train could be seen on account of the fog is entitled to probative force so as to create a conflict in the evidence as to obstructions to sight, there was no conflict whatever as to there being any trouble in hearing the train. If deceased could not see on account of the fog, then he was required to use his sense of hearing, and if he failed to exercise ordinary care in that regard, he cannot recover. The undisputed evidence shows that he did fail in that regard, and hence the judgment must be reversed. It is so ordered. All concur.

**ADAM ROTH GROCERY CO. v. HOTEL MONTICELLO CO. (No. 13,635.)**

(St. Louis Court of Appeals. Missouri. May 5, 1914. Rehearing Denied May 21, 1914.)

**1. APPEAL AND ERROR (§ 877\*)—REVIEW—QUESTIONS PRESENTED.**

On defendant's appeal from an order granting plaintiff a new trial on the ground of newly discovered evidence, the appellate court will not review the action of the trial court in denying plaintiff's motion on the ground of surprise; the decision being against plaintiff, who did not appeal, and depending on a question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

**2. ACCOUNT STATED (§ 1\*)—WHAT CONSTITUTES.**

An account stated is the settlement of an account between the parties, with the balance struck in favor of one of them, upon the debtor or his agent admitting to the creditor or his agent the latter's right to payment of the balance.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1-8; Dec. Dig. § 1.\*]

**3. ACCOUNT STATED (§ 20\*)—ACTION ON—JURY QUESTION.**

In an action on an account stated, where the facts are undisputed, the question whether they constitute an account stated is for the court.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 9, 40, 94, 95, 97-99; Dec. Dig. § 20.\*]

**4. ACCOUNT STATED (§ 5\*)—PROOF OF ACCOUNT STATED.**

Entries in a debtor's books will not alone constitute an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16-29; Dec. Dig. § 5.\*]

**5. NEW TRIAL (§ 99\*)—NEWLY DISCOVERED EVIDENCE—GROUNDS.**

Newly discovered evidence, warranting a new trial, is evidence which, by the use of proper diligence, a party could not have discovered prior to trial, and which is material to the issue, and not merely cumulative or impeaching.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.\*]

**6. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

In an action on an account stated, brought in 1911, where the complaint alleged that the account was due in 1908, plaintiff, having been defeated, was not entitled to a new trial, on the ground of newly discovered evidence, consisting of evidence that in 1907 defendant executed a deed of trust for the benefit of its creditors, which named plaintiff as a creditor, that the trustee thereunder approved plaintiff's claim, and that defendant's books, which were in the trustee's possession, showed the account was stated, for plaintiff must have had notice of the deed of trust, and by reasonable diligence could have procured this evidence before trial; the fact that defendant's books were in the possession of the trustee not amounting to any concealment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

**7. NEW TRIAL (§ 104\*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.**

This evidence was merely cumulative, and did not warrant a new trial, particularly as the claim approved was a few dollars in excess

of that in suit, so as to destroy the identity of the two claims.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

**8. APPEAL AND ERROR (§ 854\*)—REVIEW—NEW TRIAL.**

Where the trial court granted a new trial solely on the ground of newly discovered evidence, and refused it on the ground that the verdict was against the weight of the evidence, the appellate court cannot, to sustain the order granting the new trial, weigh the evidence to determine whether the lower court's order could be upheld on the latter ground, it appearing that it was improvidently granted on the ground assigned; for, while the appellate court is not confined to the ground stated by the lower court, it cannot weigh the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

**9. APPEAL AND ERROR (§ 987\*)—REVIEW—WEIGHT OF EVIDENCE.**

The appellate court cannot weigh the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

**10. APPEAL AND ERROR (§ 977\*)—REVIEW—NEW TRIAL.**

While the appellate court will pay great deference to the granting of a new trial by the lower court, that tribunal's order is not conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

**11. NEW TRIAL (§ 99\*)—NEWLY DISCOVERED EVIDENCE.**

Motions for new trial on the ground of newly discovered evidence should be construed with strictness, and granted only as an exception.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by the Adam Roth Grocery Company against the Hotel Monticello Company. From an order granting plaintiff a new trial, defendant appeals. Order reversed and cause remanded, with directions.

John H. Boogher, of St. Louis, for appellant. L. Frank Ottogy, of St. Louis, for respondent.

REYNOLDS, P. J. On the 22d of July, 1911, plaintiff commenced its action against defendant, both parties corporations.

The petition is in three counts. The first count avers that on March 2, 1908, defendant was indebted to plaintiff in the sum of \$576.89, "for the money then found to be due by said defendant to plaintiff, and by them both agreed to, upon an account stated between them, which said sum the said defendant then and there promised to pay, but that said sum is still due and wholly unpaid." Judgment is asked for this with interest from March 2, 1908.

The second and third counts are on notes.

A general denial interposed, the cause was

tried by the court, a jury being waived. Upon the conclusion of the trial the court gave a declaration of law to the effect "that an account stated is an account settled between the debtor and creditor therein, in which a sum of money or a balance is agreed on and an acknowledgment by one in favor of the other of a balance or sum certain to be due and an express or implied promise to pay the same by one to the other; and the plaintiff in this cause having sued and declared in the first count of its petition, not upon an itemized account, but upon an alleged account stated, the court cannot find for plaintiff herein on said count unless the plaintiff has by the greater weight of the evidence proven an account stated between plaintiff and defendant," and the finding on this was for defendant.

The finding was for plaintiff on the other two counts, based upon the notes.

Both parties filed motions for a new trial. That of defendant was overruled; that of plaintiff was sustained by the court on the ninth ground stated in its motion. That ninth ground is to the effect that since the trial plaintiff has discovered new evidence consisting of entries in the books of defendant, showing that the account was stated between the parties and that plaintiff is entitled to recover on the first count, which new evidence, it is alleged, plaintiff could not have heretofore produced "because the same was in the custody of the defendant's trustee," the trustee a Mr. J. W. Taylor. Another allegation in this ninth ground is that since the trial, plaintiff has discovered that in "a chattel deed of trust," made and executed by defendant on February 19, 1908, for the benefit of his creditors, the total amount of the indebtedness admitted by defendant as due plaintiff was the sum of \$1,580.91, "a part of which consisted of one note, which has since been paid, the balance consisting of the three counts set forth in the petition in this case." The third allegation in this same ninth ground is, that plaintiff has discovered since the trial "that the trustee of the defendant, J. William Taylor, did on the 8th day of May, 1908, allow the plaintiff's claims in the total sum of \$1,201.76, being the item sued on in the three counts of this case, which was done with the consent and acquiescence of the defendant and its officers and agents."

This ninth assignment or ground concludes with the statement, "that all of said evidence has come to the knowledge of the plaintiff since the trial of this cause and it was not owing to want of due diligence that the said evidence did not come to its knowledge sooner."

Among the other grounds for a new trial is the tenth, to the effect that plaintiff and its counsel were surprised by the testimony of John H. Boogher, to the effect that the account had not been stated, "because the said Boogher had heretofore admitted to the

plaintiff and its counsel that the said indebtedness was due and had led counsel to believe that he would not contest the case, as the defendant was insolvent and the only way plaintiff could recover was to pursue the said Boogher and the other stockholders for amounts due by them for unpaid subscriptions for the capital stock of the said defendant company."

Excepting to the action of the court in sustaining the motion, which it did solely on the ninth ground above, and in granting a new trial on that count, but holding the finding as to the other two counts in abeyance until the final determination of the cause, defendant has duly perfected its appeal to our court.

[1] We have set out the tenth ground stated in the motion for new trial, namely, surprise, merely because the learned counsel for respondent argues that proposition before us in support of the action of the trial court. This question of surprise, however, has not been argued by counsel for appellant. As the action of the court on that ground is against respondent, and as its determination rests upon the weight given to the testimony of the respective parties in support of it, that is to say, turns entirely upon a question of fact, we feel concluded by the action of the trial court on that, and confine ourselves to a consideration of its action in sustaining a motion for a new trial on the ground of newly discovered evidence.

[2-4] Beyond any question, concededly, the first count of the petition is on an "account stated," in the technical, common law meaning of that term.

The learned trial judge, in the declaration of law which he gave has very correctly stated the law applicable to actions on an account stated. In point of fact his declaration is practically a copy of an approved instruction as set out in *Powell v. Pacific Railroad*, 65 Mo. 658, loc. cit. 661, and which he cited. So all authority holds. Thus in a footnote under the title "Account," subtitle, "Account Stated," Black (Law Dictionary [2d Ed.] p. 17) says that an account stated is "the settlement of an account between the parties, with the balance struck in favor of one of them; an account rendered by the creditor, and by the debtor assented to as correct, either expressly, or by implication of law from the failure to object." In line with this see *Ottoby v. Winsor*, 137 Mo. App. 272, 119 S. W. 40. Black further says in the same note: "The acknowledgement or admission must have been made to the plaintiff or his agent."

In 1 Am. & Eng. Ency. of Law (2d Ed.) p. 437, par. 8, and following, an account stated is defined as, "An agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or im-

plied, for the payment of such balance.

\* \* \* An account must be stated between the person in whose favor the balance appears, or his duly authorized agent, and the person against whom the balance lies, or his duly authorized agent. \* \* \* Admissions to third persons not connected with the creditor do not constitute an account stated." At page 453 of the same work, it is further said: "Admissions made to third parties may be evidence to the jury of a previous accounting then admitted to have taken place, if they are unequivocal as to a specific amount acknowledged to be due, although such admissions cannot in themselves constitute a statement of account." Further, at page 454: "Where all the facts are undisputed, the question as to whether they constitute an account stated is for the court; but where there is conflicting evidence the question should be submitted to the jury." We may add that entries of the account in the books of the debtor, do not, of themselves, constitute an "account stated."

[5] With these definitions in mind we come to the consideration of the action of the learned trial court in sustaining the motion for the new trial filed by plaintiff, on this ninth ground, which, as before remarked, and briefly, was by reason of newly discovered evidence. That must mean evidence which, by the use of proper diligence and availing itself of data or facts accessible to it, the party did not and could not have discovered prior to the trial. It must also mean that the newly discovered evidence is material to the issue, is not merely cumulative, is not in the nature of mere impeachment, and if proven would tend to sustain plaintiff's cause of action.

We have so recently gone over this matter of the essentials to the award of a new trial on the ground of newly discovered evidence in *Stahlman v. United Railways Co.*, 166 S. W. 312, not yet officially reported, but the opinion filed April 7, motion for rehearing overruled April 24, 1914, that we will not go into it here, but refer to that opinion on this point.

[6, 7] What is depended upon as newly discovered evidence in this case, as will be observed, relates to the execution of a certain deed of trust, to the action of the trustee under that deed of trust, and to the listing of this account in some former proceeding. As to this latter proposition, the identity of the account is not established, for according to the affidavits filed, the account listed was larger in amount than the one here involved; larger, it is true, by only a few dollars, but sufficient to destroy the identity of the two accounts. The plaintiff here, according to the affidavits, knew all about these matters. The affidavit of the attorney shows that he has only been in charge of the business of this plaintiff since May, 1911. It will be noticed that in the petition the account stated is alleged to have accrued March

2, 1908. It appears, therefore, that the transactions connected with this account occurred long before this attorney could possibly know anything about it, and lack of knowledge, or lack of diligence cannot be charged against him. But when we consider the case of his client, a very different situation is presented. It appears by the affidavits in the case, from the testimony, for that matter, that this defendant company was in difficulties in January, 1907, at which time it executed a mortgage or deed of trust to the Mr. Taylor named in one of the affidavits, and that plaintiff was named therein as a creditor. The facts connected with this matter are not particularly pertinent here but anyone curious concerning them can find a very full recital of them in the case of *Adam Roth Grocery Co. v. Hotel Monticello Co.*, 148 Mo. App. 513, 128 S. W. 542. It is impossible to believe that the officers and managers of plaintiff company were not aware of all of these transactions. Bringing this action on an account stated, as they did, and being met with a general denial, plaintiff was bound to know that its action was being resisted and was bound to go into court prepared to make out its case. It in fact pushed for trial and successfully defeated an attempt of defendant to secure a continuance. It knew that under a general denial defendant could produce any and all evidence tending to deny an account stated. The fact that the books relating to this trusteeship were in the custody of the trustee is of no significance and amounts to no case of concealment. Plaintiff knew they were there; if denied access to them, due process of the court would have given access to them. It may be assumed that the deed of trust was of record, certainly plaintiff knew of it. It appears by the affidavits in the case that the officers of the defendant company knew that Mr. Taylor had been acting under the deed of trust, in attempting to adjust the affairs of defendant. The affidavit of the credit man of plaintiff, who had been such through all of these years, shows conclusively that the books in the possession of Mr. Taylor did contain entries relating to this transaction, and that he—affiant—knew it. The facts as to this are very much in line with those in *Cook v. St. Louis & Keokuk R. R. Co.*, 56 Mo. 380.

Without passing upon the question as to whether these books and the recital in the deed of trust in which Taylor was the trustee would, with other evidence, prove an account stated, it is sufficient to say that all of this testimony was easily procurable and should have been in the minds of the officers of plaintiff company. At most, giving this testimony all the effect claimed by plaintiff, it would have been merely cumulative, and that being so, it affords no cause for a new trial. See cases cited in the *Stahlman Case*, supra.

It appears by the affidavit of the credit man of defendant that the original accounts

showing the items which constitute the total in the so-called account stated, have been lost or destroyed. He sets out in his affidavit "that the same were kept in loose leaf sheets and are not retained by the plaintiff, but after a lapse of time are usually destroyed, and although he has made strict search for the same since the decision of this case *in order that an action may be brought against the defendant on an open account, if such an action could be maintained*, but that he has been unable to find the said loose leaf sheets and unless a new trial is granted herein the plaintiff must entirely lose the sum sued for in the first count of its petition, and affiant believes that if the court will grant a new trial that on such retrial the new evidence hereinabove recited would result in a judgment for the plaintiff on the said first count of its petition." (Italics ours.)

According to this affidavit of the credit man, plaintiff might sustain an action on an open account, and it was evidently in the mind of that affiant that the action of plaintiff was to be on an open account; he does not pretend to stand on an account stated.

On the authorities referred to in *Stahlman v. United Railways Co.*, supra, we are unable to conclude that plaintiff here has shown any proper diligence in preparing for the trial, has shown any reason why the evidence now sought to be produced and said to be in existence was not as accessible and easily ascertained and produced at this trial. Furthermore, as before stated, at best, it was cumulative.

[8, 9] It is argued that the trial judge can set aside the verdict of the jury on the ground that it is against the weight of evidence, or, for that matter, of his own motion, and that the appellate court, in reviewing the action of the trial court, is not confined to the ground stated by the court for setting aside a verdict, if on an inspection of the record the appellate court is satisfied

that that action is right on any other ground.

These propositions are not disputed. The only ground assigned by the trial court for setting aside the verdict is the ninth in the motion for new trial. The only other ground now urged as sustaining the action of the trial court, is that the verdict is against the weight of the evidence. This was one of the grounds set up in the motion for a new trial and was disallowed by the trial court in sustaining the motion on the one ground alone. To require us to hold that the action of the trial court can be sustained in granting a new trial on the ground of the weight of the evidence would require us, as an appellate court, to weigh that evidence. That we cannot do.

[10] While we pay great deference to the action of the trial court in sustaining a motion for a new trial, the very fact that the law provides for an appeal from that action, is a sufficient answer to the contention made that we are concluded by that action. We are concluded by the finding of a jury or of a court in an action at law, and when he is the trier, on the facts, but not on the law nor the application of the law to the facts.

[11] Motions for a new trial on the ground of newly discovered evidence are regarded with a jealous eye and construed with remarkable strictness by the courts. They should be tolerated, not encouraged; viewed with aversion, rather than favor; granted as an exception, and refused as a rule. *State v. McLaughlin*, 27 Mo. 111; *Cook v. St. Louis & Keokuk R. R. Co.*, supra; *State v. Sansone*, 116 Mo. 1, loc. cit. 15, 32 S. W. 617.

For these reasons the action of the circuit court in setting aside its finding on the first count is reversed and the cause remanded with directions to that court to enter up judgment in favor of defendant on the first count in the petition, and in favor of the plaintiff on the two remaining counts.

NORTONI and ALLEN, JJ., concur.

**ELLIOTT et al. v. CITY OF BROWNWOOD.**  
(No. 2335.)

(Supreme Court of Texas. May 6, 1914.)

**1. DEATH (§ 11\*)—ACTION FOR DEATH—COMMON-LAW RIGHT.**

Under the common law, in force in the state until changed by Rev. St. 1911, art. 4694, damages were not recoverable for death by wrongful act.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.\*]

**2. DEATH (§ 33\*) — LIABILITY — MUNICIPAL CORPORATIONS—"ANOTHER."**

Under Rev. St. 1911, art. 4694, authorizing an action for the death of any person caused by the wrongful act, negligence, unskillfulness, or default of "another," a municipal corporation is not liable for the death of a person caused by its negligent failure to maintain its streets in a safe condition for travel.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 49; Dec. Dig. § 33.\*]

Certificate of Dissent from Court of Civil Appeals of Third Supreme Judicial District.

Action by Mary B. Elliott and another against the City of Brownwood. There was a judgment for defendant, rendered on sustaining a general demurrer to the petition, and plaintiffs appeal to the Court of Civil Appeals, which certified the facts to the Supreme Court. Question certified (166 S. W. 932) answered.

Fisher & Allison, of Georgetown, and Arch Grinnan, of Brownwood, for appellants. C. L. McCartney, of Brownwood, and W. F. Ramsey and C. L. Black, both of Austin, for appellee.

**BROWN, C. J.** The Court of Civil Appeals of the Third Supreme Judicial District has certified the following facts to this court:

"In this case the plaintiffs seek to recover damages from the defendant, the city of Brownwood, on account of the death of Otho S. Elliott, the husband of one and the father of the other plaintiffs. They predicate their cause of action upon alleged negligence of the defendant in maintaining a certain street and bridge or culvert across the same. The trial court sustained a general demurrer to the plaintiffs' petition. The latter appealed to this court, and we affirmed the judgment of the trial court; Special Associate Justice John M. Furman dissenting.

"A motion for a rehearing is now pending in this court, and we have granted a motion made by appellants to certify the question of dissent. As shown by the majority opinion, a copy of which is hereto attached and made a part hereof, it was held that a municipal corporation is not liable for injuries resulting in death, although such death may have been caused by such corporation's negligence in reference to its streets; and that ruling was based upon what was said and

done by the Supreme Court in *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029; *Flemming v. Texas Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250; and *Searight v. City of Austin*, 42 S. W. 857. The views of the dissenting judge are stated in the opinion filed by him, a copy of which is also hereto attached and made a part hereof. The opinion of the majority of the court and the dissenting opinion clearly disclose the question of law as to which the dissent exists, and that question is hereby certified to the Supreme Court for decision."

This question of law is presented by the facts. Is the city of Brownwood liable to appellants, in damages, for the death of Otho S. Elliott?

[1, 2] Prior to the enactment of article 4694, R. S. 1911, the common law was in force in Texas, and damages could not be recovered for the death of any one. The portion of said article pertinent to this question reads:

"An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: \* \* \*

"2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

The word "another" means "another person," and it is claimed by appellants that a municipal corporation is a person within the meaning of the word "another," person being understood; thus construed it would read "another person."

The issue has been decided by this court in the following cases by refusing applications for writs of error: *Ritz v. City of Austin*, 1 Tex. Civ. App. 455, 20 S. W. 1029; *Searight v. City of Austin*, 42 S. W. 857. In each case the Court of Civil Appeals held that damages could not be recovered against a municipal corporation when the injury resulted in death. Application was made in each case to this court for writ of error, which was refused. In the case of *Searight v. City of Austin*, the sole question presented to this court was by assignment of error distinctly claiming that the error consisted in holding that a recovery could not be had against a municipal corporation for death occasioned by its negligence. Able counsel with earnestness and ability urged upon this court the proposition that municipal corporations were embraced in the statute. This court could not have refused that application without passing upon and overruling the assignment. Since that decision was made, and application refused, it has been considered settled in this court.

We answer that there could be no recovery against the city of Brownwood on the facts stated.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**FT. WORTH BELT RY. CO. v. JONES et al.**  
(No. 2352.)

(Supreme Court of Texas. May 20, 1914.)

**MASTER AND SERVANT (§ 285\*)—DEATH OF SERVANT—QUESTIONS FOR JURY.**

On evidence in an action for a switchman's death by falling from a car upon its sudden stop to avoid striking an iron pipe, on the issue whether the pipe was placed on the track by the employes of the impleaded defendant, *held*, that the trial court did not err in peremptorily instructing a verdict for such defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.\*]

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by Helen Jones against the Ft. Worth Belt Railway Company, which impleaded Armour & Co. Judgment for plaintiff and for Armour & Co., and defendant Railway Company appeals. Certified question from Court of Civil Appeals. Question answered in the negative.

H. M. Chapman and Lassiter, Harrison & Rowland, all of Ft. Worth, for appellant. McLean & Scott, of Ft. Worth, for appellee Jones. Capps, Cantey, Hanger & Short and David B. Trammell, all of Ft. Worth, for appellee Armour Co.

**BROWN, C. J.** The Court of Civil Appeals has failed to find and certify the facts as required by article 1619, Revised Statutes 1911, but refers this court to the opinions for the facts involved. Having received submission of the question, we will endeavor to state the facts. The question submitted is stated thus: "Whether or not, under the circumstances stated in said opinions and otherwise shown by the record, the trial court erred, as assigned by appellant, in peremptorily instructing a verdict in favor of appellee Armour & Co."

The facts are so stated that we must copy the following in order to be sure of setting out all that is material. We copy from the opinion as follows: "Frank Jones was employed by the Ft. Worth Belt Railway Company as a switchman. On March 2, 1910, while serving in that capacity, he and Swope, another switchman, were stationed on the rear car of one of that company's trains. This train was backed in upon a switch track leading to Swift & Co.'s plant, thus placing the car upon which the switchmen were riding in front. While the train was thus moving, Jones and Swope discovered an iron pipe lying across the track ahead of them, and one or both gave to the engineer a signal to stop the train. In obedience to this signal, the train was stopped, or its speed checked, so suddenly that Jones fell upon the track in front of the car and was run over and killed. Helen Jones his widow, for herself and minor children instituted this suit against the Ft.

Worth Belt Railway Company to recover damages as a result of the death of her husband, and, from a judgment in favor of plaintiff, the railway company has appealed."

Omitting that which relates alone to the railroad company, we copy from the opinion as follows:

"The Ft. Worth Belt Railway Company interpleaded Armour & Co., alleging that the latter company placed the iron pipe in question upon the track, and that in so doing it was guilty of negligence; that the railway company was ignorant of the fact that the pipe was upon the track; that the negligence of Armour & Co. in placing the pipe upon the track was the direct and proximate cause of the accident; and by reason of such facts they prayed for judgment over against Armour & Co. In the event the railway company should be held liable to the plaintiffs for the death of Frank Jones. In obedience to a peremptory instruction by the court the jury returned a verdict in favor of Armour & Co. upon this plea over against it, and that instruction is assigned as error by appellant.

"H. D. Stephenson testified that he was employed by Armour & Co. as one of the millwright gang, and at the time of the accident was engaged with other employes in putting in concrete forms for the erection of the reservoir in the holes previously made by the excavations mentioned above; that he witnessed the accident and saw the pipe upon the railway track at that time. He further testified as follows: 'I was working with a foreman named Swodener. Kichter was running the bull gang. His gang had dug those holes for these concrete forms, and some of the same gang were putting in the concrete. \* \* \* There was no work being done there that I remember of in which any iron pipe such as I saw there was being used. I did not see any such pipe that was in use there. We were not using it. These other men and myself were working for Armour & Co. This cement business was part of a reservoir that Armour & Co. was putting in on their property.'

"W. S. Woodward, superintendent of transportation for the appellant, reached the place of the accident shortly after the accident and inspected the iron pipe in question. He testified as follows: 'Now the reservoir is on the right-hand side as you are shoving into Swift's plant, and these condensers as I call them are about 6 feet from the track; but I have no idea of the depth of them—may be 6 feet or 10 feet, or 12, or might be deeper. I should think they are probably 16 by 20 feet in size. I do not know how long this work of excavation had been going on at that particular place. Armour & Co. were doing that excavation, and the railroad had nothing to do with it. I should think, as near as I can remember, this work had been going on there generally, along that place where this pipe

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



was picked up, about two weeks. \* \* \* This pipe is a deal more rusty now than it was at that time. It was rusty at that time but not so rusty as it is now. In my judgment that pipe had been in use—it was an old pipe. \* \* \* I will say that there was an embankment of dirt next to the rail on the west side, and the other side where this excavation was the dirt was piled on them. \* \* \* The track was level, about 20 or 30 feet, or a little higher than the rail with the dirt; but it was south of where this excavating was, I should think about 20 or 30 feet as near as I can remember. \* \* \* It was between 20 and 30 minutes after the accident before I got to the scene of it. The remains of the deceased were still there when I got there. They had not been removed. This pipe I testified about this morning was still there. At that time the pipe was not as rusty as it is now. It was rusty, but not as much as it is now. This is the same pipe that was there at that time. It did have the appearance of having been buried in the ground. There was no difference in the appearance of the pipe in the rust as to having been buried from one end to the other. The condition of the ground immediately west of the track, say from a point opposite the second pier from the south, or down to where we found this pipe, was that there was loose dirt piled right in here (indicating on the map heretofore referred to in this record). By "here" I mean between the pier and the railroad. I don't remember about that being the south pier. I don't remember nothing about those piers. I should think that dirt was piled up 2 feet higher than the rail, about that. At the point where it was 2 feet higher than the rail, I should think that was probably 3 feet from the rail, or about that, and it sloped down. That dirt did not interfere with the movement of the train, it was not over the rails. I suppose that dirt came out of the excavations that were dug for those piers, or foundations, rather. I don't know how long it had been after these foundations had been dug and completed before the crew went to put in those boxes to hold the concrete. \* \* \* When I got there the pipe had been picked up by some one and was lying up on a pile of dirt. It had been removed, and all I know about that being the pipe, you understand, is what I was told there. I do not know that that is the pipe they hit. When I got there it was generally understood that that was the pipe, and it was the one that was pointed out to me, and this is that pipe. There was no other pipe around there.'

"Referring to the railway track where the accident happened, the witness Woodward further testified: 'This track at this place was not No. 9. It was Swift's lead. It ran to Swift & Co.'s plant and the Southwestern Mechanical Company's plant. In hauling stuff to Armour & Co. it would not come in over that track at all. In hauling out things

from Swift & Co.'s plant, and also from the Southwestern Mechanical Company's plant, it would come out over this track that we call "Swift's lead." You ask me if it is not a frequent occurrence in both Swift & Co.'s plant and in the Southwestern Mechanical Company's plant that old iron is junked, and I answer you by stating that we call it scrapped. It is sold to the junk dealers here. It is hauled out there over this track out to the place where it is kept until they come and get it; coming from the Mechanical Company's plant, or from Swift & Co.'s, you do come over that track. It is true that such pipe as this—that is true of such pipe as this frequently.'

"Ben Roy, a steam fitter in the employment of Armour & Co. at the time of the accident, was talking to the foreman of the millwright gang as the train approached and witnessed the accident. He testified: 'There was dirt piled up there on the west side of the track, from a point where this gentleman and I were standing when we saw this pipe on the track, between us and them. It was piled higher than the track. It was sloping down. The dirt sloped down; sloped down probably within 8 inches of the track. That dirt came out of those holes along there by the reservoir that they put this concrete in for the condenser. That was not on the rail. The only thing I seen on the rail was this pipe. \* \* \* I was then in the employ of Armour & Co. I had business at the reservoir, or I would not have been there. I had worked from that point to the top of the engine room. There was no work being done there, in which this pipe was being used, that I know of, or such pipe as I saw there at that time. I was a steam fitter, engaged in working around that place at that time. If there was any work being done there in which such pipe as this was being used, I do not know anything about it. I do not know of any one besides myself that was using it there, or why they would have it there. That piece of pipe which was shown me is not the pipe, in my judgment. The piece of pipe I seen was a newer piece of pipe than that; but it was an old pipe, but not so rusty as that.'

"Upon the issue whether or not the iron pipe was placed upon the track by Armour & Co.'s employes, the foregoing is substantially the entire testimony introduced.

"The majority of this court are of the opinion that the testimony recited above, considered in connection with the failure of Armour & Co. to prove that no such pipe had been taken from the ground during the excavations, and the absence of any evidence showing the presence of any persons at the place of the accident, immediately prior thereto, other than the employes of Armour & Co., tended to support the affirmative of that issue, and that the court erred in peremptorily instructing a verdict in favor of Armour & Co.

"The writer, however, is unable to concur in this conclusion."

The fact that Armour & Co.'s servants were at work near the track cannot furnish a basis for a presumption that they placed the pipe on the track. It did not rest upon Armour & Co. to prove that their servants did not place the pipe there, but the burden was upon the railroad company. A presumption of fact cannot rest upon a fact presumed. The fact relied upon to support the presumption must be proved. "No inference of fact should be drawn from premises which are uncertain. Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were the facts in issue. One presumption cannot be based upon another presumption." 16 Cyc. 1051; Mo. Pac. Ry. Co. v. Porter, 73 Tex. 307, 11 S. W. 824. No fact or circumstance was proved in this case which justifies the presumption that the pipe was placed upon the track of the railroad by any person under the control of Armour & Co.

The trial court did not err in giving peremptory instructions to the jury to return a verdict for Armour & Co.

#### AMERICAN BONDING CO. OF BALTIMORE v. LOGAN. (No. 2361.)

(Supreme Court of Texas. May 6, 1914.)

##### 1. COURTS (§ 247\*)—QUESTIONS REVIEWABLE—CERTIFIED QUESTIONS TO SUPREME COURT.

A fact not disclosed by the statements and opinions of the Court of Civil Appeals certifying a question to the Supreme Court cannot be considered by the Supreme Court as a basis for its answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 749, 751-754, 757, 759, 760, 762-764; Dec. Dig. § 247.\*]

##### 2. HOMESTEAD (§ 184\*)—EXEMPTIONS—CONSTITUTIONAL PROVISIONS.

The exemption provided for by Const. art. 16, § 50, declaring that the homestead of a family shall be protected from forced sale applies to the homestead while the head of the family is living, but furnishes no rule for its distribution after his death.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 245; Dec. Dig. § 184.\*]

##### 3. HOMESTEAD (§ 142\*)—EXEMPTIONS—CONSTITUTIONAL PROVISIONS.

Const. art. 16, § 52, providing that on the death of a husband or wife, or both, the homestead shall descend as other real property of decedent, governed by the same laws of descent and distribution, determines the disposition of a homestead after the death of the owner, and determines the persons who shall take it and their respective interests, but not the conditions which may be imposed on the inheritance.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-280; Dec. Dig. § 142.\*]

##### 4. HOMESTEAD (§ 142\*)—RIGHT OF HEIRS—EXEMPTIONS.

Under Const. art. 16, §§ 50, 52, protecting the homestead of a family from forced sale, and providing that, on the death of the husband, the homestead shall vest as other real property of decedent, and Rev. St. 1911, arts. 3235, 3422, 3427, 3785, 3786, declaring that on the death

of a person intestate his estate shall vest immediately in his heirs at law, providing that on the insolvency of the estate on final settlement title of the widow and children to the property and allowances set apart to them shall be absolute, and that the homestead shall not be liable for the payment of debts, and declaring that the homestead of the family shall be exempt from forced sale for the payment of debts, the homestead of an insolvent vests, on his death, in his heirs in the proportions fixed by the general statute of descent and distribution, exempt from liability for debts, and the proceeds of a voluntary sale thereof by the heirs are also free from all debts, though the probate court failed to set aside the homestead for the benefit of the members of the family, entitled to the benefit of the property under article 3413, notwithstanding article 3787, providing that the proceeds of a voluntary sale of the homestead shall not be subject to garnishment or forced sale within six months after the sale, and the homestead rights of an unmarried daughter forming part of the family of decedent may not be off set against the surety's liability on the bond of her deceased father, given as her guardian.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-280; Dec. Dig. § 142.\*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Jessie Logan against the American Bonding Company of Baltimore. There was a judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, and it certified a question to the Supreme Court. Question answered in the negative.

Meador, Davis & Senter, of Dallas, for appellant. Wood & Wood, of Dallas, for appellee.

HAWKINS, J. The following statement and certified question are from the Court of Civil Appeals for the Fifth Supreme Judicial District, at Dallas:

"This suit was instituted by Jessie Logan, a feme sole, on June 3, 1910, against the American Bonding Company of Baltimore, to recover the sum of \$1,000.00, with interest and costs of suit. The basis of the suit is that the said company was surety on the bond of W. J. Logan, as guardian of the plaintiff, Jesse Logan; that after the execution of said bond the said guardian, as such, collected the sum of \$1,000 belonging to his ward, Jessie Logan, and died May 3, 1909, without having turned over said sum to her, and without having accounted to her in any way for the same or any part thereof; that by reason of the premises the said surety, the American Bonding Company, became liable to plaintiff for said sum of money, with interest. The defendant pleaded a general denial, and specially that W. J. Logan, plaintiff's father and guardian, owned and occupied certain real estate situated in the city of Dallas as a homestead; that after his death, and under and by agreement of his surviving widow and children, said property was sold, and from the sale of the same the plaintiff, Jessie Logan, received December 1, 1909, sums of money aggregating

\$2,124.50; that, defendant being surety on the bond of W. J. Logan, as guardian of Jessie Logan, and W. J. Logan being dead, it was entitled to an offset against its liability on said bond to the extent of the amount received by Jessie Logan from the estate of her guardian. The prayer of the answer was that in the event the court should conclude plaintiff was entitled to judgment against defendant for any amount, that such amount be credited with whatever amount plaintiff received from the estate of her said father and guardian. The case was tried by the court without the intervention of a jury on the following agreed statement of facts: 'W. J. Logan was, during the year 1900, and for many years prior thereto, a married man, and resided in Dallas county, Tex., and in the city of Dallas. Said W. J. Logan died in the city of Dallas on May 3, A. D. 1908. He was married twice. His first wife died during the first part of the year 1900 in the city of Dallas. He had two children only by his first wife, to wit: Jessie Logan, the plaintiff in this suit, and John Logan, a male. At the time the wife died, Jessie, a girl, was about 15 years old, and John was about 13 years old. At the time of the death of the said mother of Jessie and John Logan, she left to her two said children two insurance policies on her life, each for the sum of \$1,000. Each of these policies was payable jointly to the said children. After the death of the mother of Jessie and John, their father, W. J. Logan, was shortly thereafter, and during the year 1900, on his application, appointed guardian of the estate of said two children by the county probate court of Dallas county, Tex., and on the 13th day of November, A. D. 1900, took the requisite guardian's oath, and entered into bond, as required by law, with the defendant, the American Bonding Company of Baltimore, a corporation, as surety; said bond was made payable to the county judge of Dallas county, was in the sum of \$4,000, and was conditioned as required by law in such cases, and duly and legally approved by the then acting county judge of Dallas county, and filed with the clerk of said probate court. The said W. J. Logan continued as the guardian of the estate of Jessie and John until the death of said W. J. Logan, which was on May 3, 1908. On the 12th day of December, A. D. 1900, W. J. Logan, as guardian of said children, collected one of the said insurance policies, which was \$1,000. On the 7th of February, A. D. 1901, said W. J. Logan collected the other policy, which was \$1,000. One-half of the \$2,000 collected on the policies belonged to Jessie Logan. The said W. J. Logan never at any time accounted to the probate court, or to Jessie Logan, for said \$1,000 belonging to her or any part thereof. The guardianship was pending and unsettled at the time of the death of said W. J. Logan on May 3, A. D. 1908. The said W. J. Logan, by the exercise of the proper care, could

have loaned said \$1,000 and kept it loaned at the rate of 8 per cent. per annum from January 1, A. D. 1902, until his death. The said Jessie Logan arrived at the age of 21 years during the latter part of the year 1906. She has never been married. The said Jessie Logan never received said \$1,000 or any part thereof from her father, unless it be as hereinafter stated. The said W. J. Logan married the second time during the year 1905; his second wife, Mrs. Jennie Logan, is still living. The said W. J. Logan and his said second wife, during their marriage, adopted, according to the statutes of Texas, as a legal heir, one Dorothy Logan, a girl who was a minor at the time she was so adopted, and who is now a minor. At the time of the death of said W. J. Logan, his family consisted of himself, his said wife, Jennie, his daughter, Jessie, an unmarried daughter, John Logan, a boy, and Dorothy Logan, the adopted daughter. Soon after the death of W. J. Logan, and during the year 1908, R. H. Lee was by the county probate court of Dallas county, Tex., appointed administrator of the estate of said W. J. Logan, and he thereafter, within due time, qualified and gave bond as such administrator. The said W. J. Logan owed debts at the time of his death, and his estate was insolvent, and so adjudged by the probate court, and so recognized throughout the administration proceedings, but the value of the homestead exceeded the debts of the said W. J. Logan. The said W. J. Logan never after the said Jessie Logan arrived at the age of 21 years filed any account for final settlement of the guardianship matter, nor was the guardianship ever closed or settled during the lifetime of said W. J. Logan. No part of the \$1,000 collected by the said W. J. Logan for plaintiff ever came into the possession of the said R. H. Lee, as administrator of the estate of W. J. Logan. The only property that came into the possession of R. H. Lee, as administrator of the estate of W. J. Logan, was the homestead of W. J. Logan and his family, and which was occupied by said W. J. Logan and his said family at the time of his death, and which has been occupied by his said family since the time of the death of the said W. J. Logan up to the time it was sold. The same is situated in the city of Dallas, and consists of adjoining lots, and was the resident homestead of said W. J. Logan and family at the time of his death. It was recognized by said administrator and by said probate court as the homestead of the family of W. J. Logan, and exempt from the payment of the debts of said W. J. Logan, because of its homestead character, except as to taxes; but it is not agreed that the interest that plaintiff, Jessie Logan, had in said homestead by inheritance from her father, W. J. Logan, or the proceeds that she received from a sale of said homestead cannot be set off against the claim sued on in this case; that is a question of law we refer to the

court for settlement. The said homestead was sold in December, 1909, for the sum of \$10,500, and it was, in fact, worth that sum when sold, and was worth about \$8,000 when W. J. Logan died; the administrator, Mrs. Jennie Logan, Mrs. Jennie Logan, as guardian for Dorothy Logan, a minor, John Logan, and Jessie Logan, joining in the deed of conveyance. The said Jessie Logan received about \$2,100 in December, 1909, of the purchase money. Upon this state of facts the court concluded that the plaintiff, Jessie Logan, was entitled to recover of the defendant the sum of \$1,000, with interest thereon at the rate of 10 per cent. per annum from the 1st day of January, A. D. 1902, until the 3d day of May, 1908, and 6 per cent. per annum from May 3, 1908; that plaintiff received out of the proceeds of the sale of the homestead in December, 1909, \$2,100, but that the same was not a lawful offset against the amount plaintiff was entitled to recover, because the estate of W. J. Logan at the time of his death was insolvent, and plaintiff, being an unmarried daughter and constituent member of the family, residing on said homestead, up to the date of the sale of the same, took the amount received by her free from the debts of her father.'

"At a former day of the present term a majority of this court held that there was no error in the conclusions and judgment of the lower court; that the defendant, under the facts stated, was not entitled to offset its liability on the guardian's bond with any portion of the amount received by the plaintiff from her father's estate. To these conclusions Mr. Justice Bookhout dissented, and held to the view that under the facts stated, that appellant, The American Bonding Company of Baltimore, as surety on the bond of W. J. Logan, deceased, as guardian of the appellee, Jessie Logan, was entitled to set off the amount of the judgment obtained by the said Jessie Logan against it by the \$2,100 received by her from the estate of her father, and that appellant's first assignment of error should be sustained. The case is now pending before us on appellant's motion for a rehearing and a motion to certify the point of dissent, in the event a rehearing is denied, is also pending. We therefore deem it advisable to certify the question set out below to the honorable Supreme Court of Texas for adjudication:

"Question: Was the appellant, under the facts stated, entitled to offset its liability on the guardian's bond with the amount of \$2,100, or any portion thereof, received by the appellee, Jessie Logan, from the estate of her father in the manner shown?"

The conflicting opinions from the Court of Civil Appeals in this case, referred to in its certificate, were sent up with it, but need not be set out here.

Said majority opinion, by Associate Justice Talbot, cites, in its support, the following authorities: Sayles' Statutes (R. S. 1895)

arts. 1869, 2055, 2060, 2061; Scott v. Cunningham, 60 Tex. 566; Reeves v. Petty, 44 Tex. 249; Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485; Childers v. Henderson & Co., 76 Tex. 664, 13 S. W. 481; Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Cameron v. Morris, 83 Tex. 14, 13 S. W. 422; Roots v. Robertson, 93 Tex. 365, 55 S. W. 308; Ford v. Sims, 93 Tex. 586, 57 S. W. 20; Krueger v. Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663; Sossaman v. Powell, 21 Tex. 664; Griffe v. Maxey, 58 Tex. 210.

In dissenting, Associate Justice Bookhout cites Givens v. Hudson, 64 Tex. 471; Roots v. Robertson, 93 Tex. 365, 55 S. W. 308; Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485; American Bonding Co. v. Logan, 132 S. W. 897; Ashe v. Yungst, 65 Tex. 631; Martin v. McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585; Wilson v. Helms, 59 Tex. 680; Fagan v. McWhirter, 71 Tex. 567, 9 S. W. 677.

This certified question, under the facts, involves no issue relating to purchase money, taxes, or improvements, or to partition, or to abandonment, or to rights of creditors where none of the heirs is a widow, or a minor child, or an unmarried daughter remaining with the decedent's family, or where some of the heirs are, and others are not, such members of such family, or to the right of a surviving spouse to sell the homestead property for the purpose of paying community debts, or to the right of such spouse to appropriate it at a fair valuation, or sell it, or have it sold, or set apart to him or her, upon an accounting in community, for the purpose of reimbursing such spouse for separate funds expended in payment of community debts, or to rights of heirs as among themselves.

[1] We call special attention to these facts: When W. J. Logan died, he resided on said homestead property, and had so resided thereon continuously since prior to the death of his first wife. Their two children, Jessie and John, had lived with him thereon since prior to the death of their mother. W. J. Logan's second wife and their adopted daughter, Dorothy, who was a minor, were also living with him on said homestead when he died, and thereafter the stepmother, Jessie, John, and Dorothy all continued to live together thereon until it was voluntarily sold. Jessie, appellee, reached the age of 21 years before her father died, but she never married prior to said sale. John was a minor when his father died—a fact which is not disclosed by said statement and opinions from the Court of Civil Appeals, and therefore cannot be considered by us as a basis for our answer to the certified question, but which is shown by the findings of fact approved by that court in the case of American Bonding Company v. John A. Logan, which is reported in 132 S. W. 895, but did not reach this court.

The estate of W. J. Logan was insolvent, and it was so adjudged by the probate court.

Said homestead property was recognized by that court and by the administrator as the homestead of his said family, and as exempt from liability for his debts, but was not expressly set apart by said court to said members of his family for their use and benefit. Some of these facts are not vitally essential, but they are all illuminating.

For convenience in expression, we treat the facts of this case upon the assumption that the homestead property was separate property of W. J. Logan; but, if it was community property of his first marriage, that fact is immaterial here in so far as the first wife's half interest in the property is concerned, because appellant's claim had its inception after the date of her death.

We doubt if the principles fixed by our Constitution and statutes relating to homestead exemptions, which must control our answer, can possibly be stated more plainly or forcibly than they have been stated heretofore in numerous opinions of this court, through long years; but reference to the provisions out of which those decisive principles grow and a brief review of some of those decisions may help to bring those principles into bolder perspective, as applied to the material facts of this case, and so assist in settling at rest the issues upon which the Court of Civil Appeals divided.

Every Constitution of Texas has contained provision, more or less general, against the forced sale of the homestead of a family.

[2, 3] Section 50 of article 16 of our present Constitution declares that "the homestead of a family shall be, and is hereby, protected from forced sale," with certain exceptions which are immaterial here. Discussing its effect, this court said, in *Roots v. Robertson*, 93 Tex. 371, 55 S. W. 309: "The exemption expressed in section 50 applies to property while the head of the family is living, but furnishes no rule for its disposition after his death. *Givens v. Hudson*, 64 Tex. 473; *Zwernemann v. Von Rosenberg*, 76 Tex. 525 [13 S. W. 485]." See, also, *Ford v. Sims*, 93 Tex. 589, 57 S. W. 20. Section 52 of said article 16 provides that: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution." That provision was inserted in our Constitution after this court decided, in *Horn v. Arnold*, 52 Tex. 161, that, under the Probate Act of 1848, which was adopted under a former Constitution, in insolvent estates the widow and minor children took an absolute title to the homestead, to the exclusion of the adult heirs; and, as this court has repeatedly suggested, said provision probably was intended to prevent a reenactment of the statutes on which that decision was based. *Zwernemann v. Von Rosenberg*, 76 Tex. 525, 13 S. W. 486; *Roots v. Robertson*, 93 Tex. 371, 55 S. W. 309; *Ford v. Sims*, 93 Tex. 591, 57 S. W. 21.

In each of those cases this court said: "In the previous Constitution of the state the disposition of the homestead after the death of the owner was left wholly to the wisdom of the Legislature. It is so also in the present Constitution, except as to the manner of its descent and the use reserved to the surviving spouse and the minor children." And in the first and in the last of those cases this court said also: "The language 'shall descend and vest as other property of the deceased' was employed, we think, to determine the persons who should take and their respective interests, but not the conditions which were to be imposed upon the inheritance. It was not, in our opinion, intended that the homestead should descend charged with the payment of debts as other property." That idea is developed in the next succeeding clause of said section 52, which is, "and shall be governed by the same laws of descent and distribution." See, also, *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422.

Thus we are pointed to our statutes relating to homestead exemptions, and also to those relating to administration of estates of decedents, in connection with which they must be construed. As to their meaning and effect as applied to the issues now before us, no difference of opinion in this court has been manifested, so far as we are aware. We find none in the cases cited by the Court of Civil Appeals or in the briefs of the parties in this case.

It is true that in *Zwernemann v. Von Rosenberg*, 76 Tex. 523, 13 S. W. 485, which arose under our present Constitution and statutes bearing on the subject, Chief Justice Stayton, in a forcible dissenting opinion, held that, although certain minor children of both decedents took their inherited shares in the homestead property exempt from debts of the ancestor, the adult heirs (other than an "unmarried daughter remaining with the family of the deceased") were not so favored, under our laws, but took their inherited shares in said property subject to such debts; but that point, upon which, alone, Judge Stayton's dissent was based, is not involved in this case; so even his holding thereon is not in conflict with the answer which we make herein to said certified question. The meaning of said statutory provisions and their bearing and effect upon the questions involved in the case at bar are well worked out and illustrated in the majority opinion of this court in said *Zwernemann Case*, in which then Associate Justice Gaines (afterward Chief Justice) voiced the views of the majority. Among the conclusions stated therein were these, in substance: Prior to the present Constitution the Legislature had steadily pursued the policy of exempting from sale under administration, for payment of debts, such property of decedent as had been exempt from forced sale during his lifetime. By act of January 9, 1843, such exemption embraced "the same amount of property and the same kind—if

so much belong to the estate in kind—that is exempt from sale under fieri facias or execution." Pasch. Dig. art. 1061. The scope of that exemption was enlarged by the act of May 11, 1846, which provided that, if there was not found among the decedent's effects all of the specific articles which were exempt under the Constitution and laws, the Chief Justice should order a sale of sufficient other property to purchase such articles for use of the widow and children. Pasch. Dig. art. 1107. Their rights were still further somewhat enlarged by the act of March 20, 1848 (Pasch. Dig. art. 1305), and under it this court held that, where the estate was insolvent, the widow and children took an absolute title to the property set apart to them. *Green v. Crow*, 17 Tex. 180. See, also, *Reeves v. Petty*, 44 Tex. 254; *Horn v. Arnold*, 52 Tex. 164.

In *Scott v. Cunningham*, 60 Tex. 566, the act of August 15, 1870 (Pasch. Dig. art. 5487), which provided that "the property reserved from forced sale by the Constitution and laws of this state, or its value, if there be no such property, does not form any part of the estate of a deceased person, where a constituent of the family survives," was construed in harmony with the construction which had uniformly been given to said earlier laws on that subject. Said act of 1870 was in force when our present Constitution took effect, and, as it was not repugnant to that instrument, remained in force until supplanted by later statutes.

[4] Under none of said statutes, down to and including said act of 1870, was such exempt property subject to sale for payment of debts, under order of the probate court, in case a constituent of decedent's family survived him, and such was also the effect of the statutes under which the *Zwernemann Case* arose. Old article 2335, now article 3785 (2395) (2335), provided: "The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: The homestead of the family," etc. Act April 15, 1870; Act April 23, 1874; Paschal's Dig. arts. 6003, 6834. The homestead was defined by old article 2336, now article 3786 (2396) (2336).

The constituents of the family for whose use and benefit R. S. art. 1993, now article 3413 (2046) (1993), made it the duty of the probate court, at a certain defined juncture, to set the homestead "apart" were "the widow and minor children and unmarried daughters remaining with the family of the deceased." R. S. old art. 2002, now article 3422 (2055) (2002), provided that in the event of final insolvency of the estate "the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and of the preceding chapter, shall be absolute, and shall not be taken for any debts of the estate, ex-

cept as herein after provided," the references being to R. S. old articles 2007 and 2008, relating to classes of debts not material to this inquiry.

Under a literal interpretation of said article 2002, the property, in case of such insolvency, would descend absolutely to such widow, minor children, and unmarried daughters to the exclusion of other adult children, but nevertheless free from claims of creditors of the decedent. However, such literal construction would bring said statute into conflict with said section 52 of article 16 of the Constitution, which was designed to prevent that very result and to require, in effect, that, as the homestead was thus free from all claims of the decedent's creditors, it should pass to those who would be entitled to it, under the general statute of descent and distribution, were it not homestead, and were there no creditors of the decedent; consequently said article 2002 cannot be held to so exclude heirs other than such widow, minor children, and unmarried daughter remaining with the family from inheriting the property as other heirs.

The leading object of the Legislature, in dealing with the subject, was to provide that exempt property be not subject to sale by order of the probate court for payment of debts generally, in the event either husband or wife or a minor child, or an unmarried daughter remaining with the family of the deceased owner, survive him. That object is manifested by other portions of our statutes relating to administration of estates of decedents. Old article 1817, now article 3235 (1869) (1817), originally adopted August 9, 1876, provides that, when a person dies, all his estate not devised or bequeathed shall vest in his heirs, but all of it, "except such as may be exempted by law from the payment of debts shall still be liable and subject in their hands to the payment of debts" of such former owner. Old article 2007, now article 3427 (2060) (2007), following section 50 of article 16 of the Constitution, exempts the homestead from all debts of the estate, except for purchase money, taxes, and improvements, and is to be construed with, and as limited by, said article 2002, which does not apply to any homestead other than that of a decedent who leaves surviving a widow, or a minor child, or an unmarried daughter remaining with the family. In support of that construction *Givens v. Hudson*, 64 Tex. 471, is cited by Judge Gaines. Effect will therefore be given to such leading purpose of the Legislature in enacting said article 2002, and to such portion of that article as is so found to be not repugnant to the Constitution.

From the concluding portion of that opinion by Judge Gaines we make this excerpt: "The provisions we have quoted clearly show, we think, that it was the legislative intent to utterly exempt the homestead from the claims of the general creditors of the estate.

provided a constituent of the family survived the decedent, and, in case the estate was insolvent, to remove it beyond the pale of administration. This is in accordance with all previous legislation, and is not repugnant to the Constitution. \* \* \* The homestead should be held exempt from the payment of debts and to descend, not as prescribed in article 2002, but as provided in the Constitution." That decision by the majority of this court was reached upon careful study of the issues involved, and, in part, in opposition to the matured views of Judge Stayton; it has been followed by this court; the material statutes under which it was rendered have not been changed; and to that decision we adhere. Its correctness upon the principal point in the case before us is recognized in the following cases: Childers v. Henderson, Adm'r, 78 Tex. 664, 13 S. W. 481; Lacy v. Lockett, 82 Tex. 190, 17 S. W. 916; Cameron v. Morris, 83 Tex. 14, 18 S. W. 422; Roots v. Robertson, Adm'r, 93 Tex. 372, 55 S. W. 308. We consider it decisive of the case at bar, at least to the extent that the homestead property passed to the heirs of W. J. Logan free of all claims of his creditors, and so remained until it was voluntarily sold.

Clearly mere failure of the probate court to set the homestead apart for the use and benefit of said members of his family divested said heirs of no constitutional or statutory right, and conferred no right whatever upon appellant. Sossaman v. Powell, 21 Tex. 664; Griffe v. Maxey, 58 Tex. 213. And, since appellant never had or acquired any character of interest in or claim upon said homestead property, appellant was not in any manner or to any extent concerned in said sale of the property or in the disposition by addressee of her share of the proceeds.

We are convinced that careful consideration of the cases cited in said opinions from the Court of Civil Appeals, if given in the light of the immediately material facts of each case, will surely dispel what may, at first blush, erroneously appear to be serious conflicts among those decisions.

For instance, in the Givens Case, in which no dissent was expressed, the opinion shows that Smith's heirs who claimed his homestead property as exempt were all adults when he died, and none of them was his widow or minor child or unmarried daughter remaining with his family; and that, as a consequence, it was held that his homestead passed to his heirs subject to the claims of his creditors.

As we have already indicated, the Zwernemann Case, like the case at bar, involved essentially different facts, in that the decedent left surviving him several such constituents of his family, who, as we have seen, had a right to demand that the homestead property be set apart to them, for their use and benefit, as exempt. And in every consideration of the Givens Case it should be remembered

that the decision therein was cited approvingly by Judge Gaines in the Zwernemann Case in support of the exemption which was sustained in the latter case. However, it must be conceded that Judge Stayton's reasoning in the Givens Case would deny to all the heirs of a decedent, except such surviving constituents of his family, as are enumerated in said old article 1993, all benefits growing out of or resulting from the fact that the homestead was exempt down to the time of his death. It must also be admitted that in his opinion in the Givens Case and in his dissenting opinion in the Zwernemann Case Judge Stayton presented that theory of construction with some force, and that he adhered to those views tenaciously, as shown by his dissents in Childers v. Henderson, supra, and in Lacy v. Lockett, supra. But in the Zwernemann Case the majority of this court refused to follow him, as we have seen, and distinctly held that where Brau's widow and children, some being minors and some adult males, continued after Brau's death to reside upon the homestead property until the widow died, and thereafter some of said minors continuously so occupied it, although without any order of court permitting them to do so, and Brau's estate was insolvent, his homestead property was not liable for his debts, but descended to and vested in his heirs, including, alike, his minor children, who were, and his adult sons, who were not, among the three favored classes so designated by said old article 1993, thus holding that the exemption in favor of such constituents of the family operated, under the statutes, to relieve the inherited interests of all the other heirs, though they were adults, of all liability for debts of the decedent.

Applying here so much of said principles as are applicable, and inasmuch as Jessie Logan, at date of her father's death and down to said voluntary sale of the homestead property, was an unmarried daughter remaining with his family thereon (to say nothing of any exemptions for the use and benefit of the widow, the son and the adopted daughter), the facts of the case at bar bring it within the rule so announced by Judge Gaines, yet not in conflict with the rule so insisted upon by Judge Stayton, in the Zwernemann Case.

Again, in the Root Case, the decedent, Putnam, left surviving him no widow or minor children or unmarried daughter remaining with the family to whom his homestead property could have been set apart by the probate court; consequently that case falls within the decision in the Givens Case, and not within, nor yet in conflict with, the majority decision in the Zwernemann Case.

The original decision of the majority of the Court of Civil Appeals in this case is not in conflict with the decision of this court in any of the cases which we have thus briefly reviewed, and as we have seen, is not

even in conflict with said views of Judge Stayton, as expressed by him in the Givens Case and in the Zwernemann Case; while none of them goes to the extent of supporting said dissenting opinion of Associate Justice Bookhout.

We are unable to perceive that the cases cited by him in support of the right of a community survivor to sell the homestead without consent of the heirs of the deceased spouse, to pay community debts, or to reimburse such survivor for his separate funds paid out on community debts, have any material bearing upon said certified question, inasmuch as that right of such community survivor rests upon other statutes, and is one with which creditors of the decedent cannot legally interfere, and, in this instance, was one with which such creditors had no concern whatever, in contemplation of law.

Attorneys for appellant have referred to R. S. 1911, art. 3787, which provides that "the proceeds of the voluntary sale of the homestead shall not be subject to garnishment or forced sale within six months after such sale" (Acts 1897, p. 131); but we think it has no bearing upon the questions before us.

We are therefore of the opinion that, under our Constitution and statutes and decisions, and the facts and circumstances of this case, the homestead property, upon the death of W. J. Logan, descended to and vested in his heirs, in the proportions fixed by our general statute of descent and distribution, exempt from liability for his debts, and absolutely free from any and all claims of any of his creditors; and all proceeds of the voluntary sale of said property by said heirs were likewise free from any and all such claims, even though the probate court had failed to formally and expressly set said homestead apart for the use and benefit of such constituent members of his family as were entitled to the entry of such order and to such use and benefit of said property, under R. S. 1911, art. 3413 (2046) (1993), and even though there had been no final settlement of his estate disclosing its final insolvency.

We accordingly answer said certified question negatively.

### SCOTT et al. v. TOWNSEND et al. (No. 2664.)

(Supreme Court of Texas. May 20, 1914.)

#### 1. WILLS (§ 165\*)—UNDUE INFLUENCE—EFFECT ON DISPOSITION—DECLARATIONS OF TESTATOR.

Where undue influence, as distinguished from mental incapacity, is in issue and is independently proved, testator's declarations, expressive of a mental state produced by such influence, whether contemporaneous with the execution of the will or within a reasonable time before or after its execution, are admis-

sible on the question of his free agency in executing it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

#### 2. WILLS (§ 21\*)—VALIDITY—CAPACITY.

Testamentary incapacity implies the want of intelligent mental power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 48, 49; Dec. Dig. § 21.\*]

#### 3. WILLS (§ 155\*)—VALIDITY—UNDUE INFLUENCE—WHAT CONSTITUTES.

Undue influence in the procurement of a will, in itself implies a mind strong enough to make a valid will if unhindered by dominant influence; it is shown only when a will is made under such subjection or surrender of the natural freedom of will and action as to speak the mind of another, but it is not necessary that the mind be reduced to a state of incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

#### 4. WILLS (§ 165\*)—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR.

Declarations of a testator that the will was produced by undue influence, or that it is not his will, or his statement of like nature, are incompetent to prove the fact of undue influence, or as direct evidence that it produced the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

#### 5. WILLS (§ 165\*)—UNDUE INFLUENCE—EFFECT ON STATE OF MIND—DECLARATIONS OF TESTATOR.

In a will contest on the ground of undue influence by testatee, the wife of testator, his declaration that she had been after him to make a will was only a statement of a fact not tending to show his state of mind or the effective operation of such act when he executed his will, the fact alone that he made such declaration not tending to show the effect of the alleged undue influence upon his mind, and was within the hearsay rule and inadmissible, even as limited by the court to the issue of his state of mind; the limitation being ineffectual, since it sought to limit testimony to an issue it nowise tended to prove.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

#### 6. WILLS (§ 400\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of such incompetent evidence was prejudicial, since it offered direct proof of one of the most important features of the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-878; Dec. Dig. § 400.\*]

#### 7. WILLS (§ 165\*)—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS OF TESTATOR.

In a will contest on the ground of undue influence by the wife of testator, to the exclusion of a daughter, the testator's declaration that his wife had always wanted him to make his will, and his declarations that his wife had a hostile or unfriendly attitude toward the daughter, were hearsay in character, and inadmissible on the issue of the effect of such influence on testator's mind.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

#### 8. TRIAL (§ 85\*)—OBJECTION TO EVIDENCE—EVIDENCE ADMISSIBLE IN PART.

Where a single declaration of a testator, admitted on the issue of undue influence, was offered as a whole and was inadmissible in part, it should have been excluded upon objection, even though part was admissible, or else the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



trial court should have allowed the introduction of only so much as was admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.\*]

**9. WILLS (§ 165\*)—UNDUE INFLUENCE—EVIDENCE—AFFECTION TOWARD BENEFICIARY.**

In a will contest on the ground of undue influence exercised by the wife of testator to the exclusion of a stepdaughter, testator's declarations, expressive of affection for his daughter and her son, and an intention to provide for both of them in his will, were admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

**10. WILLS (§ 399\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Where a bill of exceptions to the admission of evidence in a will contest did not show that a declaration of testator, subject to distinct objection, was separately objected to, but simply disclosed an objection against all of his testimony, including the part admissible, as well as that inadmissible, there was no reversible error in receiving the inadmissible part, since as the parts were distinct, it was the duty of counsel to indicate by his objection that it was incompetent, and the court was under no obligation to separate the testimony and apply the objection only to the inadmissible part, though such rule did not apply to declarations which were entire and not subject to distinct objection.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 868; Dec. Dig. § 399.\*]

**11. WILLS (§ 164\*)—UNDUE INFLUENCE—EVIDENCE.**

In a will contest on the ground of the undue influence of contestee, the wife of testator, to the exclusion of contestant, a stepdaughter, evidence that contestee was urging the execution of some important paper by the testator which he was reluctant to execute, though it was not identified as his will, and that she had several times threatened to take their minor son from him unless he signed such paper, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

**12. WILLS (§ 164\*)—UNDUE INFLUENCE—HOSTILITY OF PRINCIPAL BENEFICIARY.**

In such contest the fact of hostility on the part of the contestee toward the stepdaughter, and her design to exclude her from benefits under the will, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

**13. WILLS (§ 164\*)—UNDUE INFLUENCE—HOSTILITY TOWARD CONTESTANT—EFFECT ON INTEREST OF INNOCENT BENEFICIARY.**

In such case, where the contestee was only one of the beneficiaries under the will, and at the time of the trial had not elected whether to take under it or to claim her interest in the community property, and where the principal beneficiary was her son, an infant incapable of collusion to unduly influence the making of the will, and whose interest under it was several, the contestee's declarations of hostility toward the contestant were admissible, notwithstanding it might injuriously affect the separate interest of her son, although the general rule is that where attack is made upon a will as a valid instrument, and not upon a specific bequest to the one whose declarations are offered, and there are other interests which will be thereby affected that are several from that of the declarant and existing in favor of one not in collusion with him, the declarations should not be admitted, on the ground that the inter-

est of such innocent beneficiary is not to be thereby destroyed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

**Error to Court of Civil Appeals of Second Supreme Judicial District.**

Contest of the will of Winfield Scott, deceased, by Mrs. Georgia Scott Townsend and another against Mrs. Elizabeth Scott and others. Judgment in the district court for contestants, on appeal from the county court, was affirmed by the Court of Civil Appeals (159 S. W. 342), and contestees bring error. Reversed and remanded.

Capps, Cantey, Hanger & Short, of Ft. Worth, Williams & Stedman, of Austin, and Stephens & Miller and A. J. Clendenen, all of Ft. Worth, for plaintiffs in error. McLean, Scott & McLean, Spoons, Thompson & Barwise, and R. B. Young, all of Ft. Worth, for defendants in error.

**PHILLIPS, J.** The case is before the court on petition for writ of error, filed in the Court of Civil Appeals prior to July 1, 1913, to have reviewed the judgment of the honorable Court of Civil Appeals for the Second District, affirming the judgment of the district court of Tarrant county setting aside the probate by the county court of an instrument therein admitted to probate as the last will of Winfield Scott, and annulling it. Answer having been made to the petition, we may determine the case.

The suit was instituted by Mrs. Georgia Scott Townsend, the daughter of Scott, joined by her husband, the substance of the allegations of her petition in the district court being that the execution of the purported will, which was dated September 29, 1909, was procured by Mrs. Elizabeth Scott, the second wife of Scott, and who survived him, through undue influence by her exerted, which he was unable to resist, and of which the will was the immediate result; that it did not represent his own will in respect to the disposition of his estate, but the wishes and will of Mrs. Elizabeth Scott, whose purpose was to accomplish practically the disinheritance of the contestant, Mrs. Townsend, and make herself and the minor son of herself and Scott, Winfield Scott, Jr., the chief beneficiaries of his estate. Allegations were also made of Scott's want of mental capacity at the time the will was made, and that Mrs. Scott procured the execution of the will by fraudulently agreeing to herself execute a will, which she failed to do; but in the district court the only issue made by the contest submitted to the jury was that of undue influence. The contest failed in the county court, but, as stated, the judgment of the district court on a jury verdict was favorable to the contestant.

For a proper understanding of the questions dealt with in this opinion and their relation

to the issue presented by the contest, the following is a sufficient statement of the case as gained from the findings of the honorable Court of Civil Appeals:

The testator, Winfield Scott, was a man of robust physique, strong-willed, of good business judgment, and had accumulated by his own efforts his entire fortune of approximately \$3,000,000, according to the inventory and appraisement filed in connection with the probate of his will, his indebtedness at the time of his death, after the application of \$100,000 collected upon life insurance policies and used for that purpose, being approximately \$800,000. He was in a normal condition of mind at the time he executed the will in dispute, and at all other times to the date of his death, and there was no evidence introduced upon the trial indicative of his want of testamentary capacity. His first marriage was in 1877. The only child of that marriage was the contestant, Georgia Scott Townsend, who was born in 1878, a few weeks before the death of her mother. In the year 1884 he married Mrs. Elizabeth Scott, the mother of Winfield Scott, Jr., the only child of that marriage, born in November, 1901, and accordingly about eight years old at the time of the execution of the will in September, 1909. Following the death of her mother in 1878 Mrs. Townsend lived with her grandparents in Missouri until September, 1886, when she was placed by her father and stepmother, Mrs. Elizabeth Scott, in the Ursuline Convent, a school at Dallas, Tex. She attended this school for several years, thereafter living with her father and Mrs. Scott until her marriage in 1897 with John T. Carter, which was contracted in opposition to the wishes both of her father and Mrs. Scott. During this marriage she lived in Dallas. She married her present husband, John R. Townsend, in 1905; their minor child being the Winfield Scott Townsend referred to in the will.

On March 4, 1898, Mrs. Townsend, then Mrs. John T. Carter, joined by John T. Carter, executed to her father a deed conveying to him her inherited interest in the community estate of his first marriage. It recited that her father had maintained and supported her, and had, on March 12, 1895, conveyed to her lots 1 and 2 in block 115 in the city of Ft. Worth, with a frontage of 50 feet on Main street, which had cost him approximately \$15,000 and upon which he was then erecting a three-story brick building for her, and that the conveyance it expressed was made for such consideration and the further consideration that her father should complete the building on the lots named. It also contained this recital: "In connection with the consideration for this instrument, it is understood that the said lots Nos. 1 and 2, with the building being erected thereon, is of value far in excess of the interest which the said Mrs. Jno. T. Carter inherited from

her mother. (Of course this instrument is not intended in any way to affect the interest of the said Mrs. Jno. T. Carter as one of the heirs at law in the estate of the said Winfield Scott on his death.)"

On April 6, 1903, her father conveyed to Mrs. Townsend, then Mrs. Carter, lots 8 and 16 in block B-7, Daggett's addition to the city of Ft. Worth, extending between Main and Houston streets with a depth of 200 feet and a frontage of 50 feet upon each street, reciting as its consideration her and her husband's conveyance to her father of lots 1 and 2 in block 115, which, as stated, had been conveyed to her in 1895. Scott gave to Mrs. Townsend during her first marriage a home in Dallas costing \$8,000, and later another home in Colorado Springs, Colo., costing \$11,500, and from time to time money for her personal expenses, automobiles, a horse and buggy, jewelry, etc.

The will was executed by Scott, in September, 1909, as stated, at Ft. Worth, approximately two years before his death, which occurred at Ft. Worth in October, 1911. At the time of its execution he was temporarily residing with his wife and minor son in St. Louis, Mo., later resuming his residence at Ft. Worth. He had spent the summer of that year in Europe with Mrs. Scott and the boy, Winfield Scott, Jr., accompanied by a colored nurse, Rose Hill, the witness hereafter referred to by that name, the party returning to St. Louis early in September. After his return he made a trip to Ft. Worth, arriving there about September 24th, and while there the will was prepared, and, on the 29th of September, 1909, executed. A few days before the date of its execution Scott carried to Judge George Miller, his attorney, a former will, executed in 1905 and then in force, with a list of the property he desired to devise to each beneficiary, and employed and directed him to prepare the will in controversy. It was prepared by Judge Miller accordingly, with a codicil attached to the original draft at Scott's specific direction, the will and the codicil both being read over to him before execution. At this time Mrs. Elizabeth Scott was in St. Louis; her return to Ft. Worth not occurring until the January following. The beneficiaries named in the will are the testator's wife, Mrs. Elizabeth Scott, his son, Winfield Scott, Jr., his daughter, Mrs. Townsend, the contestant, and her son, Winfield Scott Townsend. Mrs. Scott and A. B. Robertson, a business associate of the testator, were named as executors.

The will recites that a large part of the property held by the testator was community property of himself and Mrs. Elizabeth Scott; that he had theretofore caused to be transferred to her as her separate property certain lots in the city of Ft. Worth, designated in the will, which had been paid for out of their community funds, and which were of the aggregate value of \$500,000. There fol-

lows this recital a devise to Mrs. Elizabeth Scott of specific property in Ft. Worth. By a further provision the residue of his estate, remaining after the payment of all debts and expenses of executing the will and not specifically disposed of by the will, was devised to Mrs. Scott. The value of the property devised to Mrs. Scott, as fixed by the appraisers, was approximately \$355,000.

In respect to Mrs. Townsend the will recites that the value of the community estate of the testator and her mother, his first wife, was approximately \$20,000; that during her infancy he had supported and educated her in a manner suitable to her social station, and at an expense of more than the income of her part of such community estate, and that in settlement of her interest in the community estate of her mother and himself, and as an advancement out of his own estate, he had given her lots 8 and 16 in block B-7, Daggett's addition to the city of Ft. Worth—the same property described in his deed to her of April 6, 1903, above referred to, and in return for which conveyance it appears Mrs. Townsend, then Mrs. Carter, had deeded to him the property previously conveyed to her by his deed of March 12, 1895—which were of the value of more than \$200,000; and that he had also given her a home in Denver, Colo., wherein she then resided with her husband and son, of the value of \$15,000. There follows this recital a devise to Mrs. Townsend of a life estate in four and a fraction lots in Ft. Worth, specifically described, with remainder over after death to her son, Winfield Scott Townsend, and any other child or children thereafter born to her, upon which the appraisers fixed a valuation of approximately \$90,000.

It was shown that the separate property of Mrs. Elizabeth Scott, which the will recites as having been previously transferred to her, yields in rents approximately \$2,500 per month, and that the property recited in the will as having been previously given by the testator to Mrs. Townsend, viz., lots 8 and 16 in block B-7, Daggett's addition in the city of Ft. Worth, still owned by her at the time of the testator's death, was before that time yielding in rents \$1,000 per month.

The property devised by the will to Winfield Scott, Jr., consisted of property in Ft. Worth, specifically described, and all lands then owned by the testator, or which might thereafter be acquired by him in Tarrant county outside of the corporate limits of Ft. Worth, and in Johnson and Parker counties, constituting his ranch. The valuation fixed by the appraisers upon this property was approximately \$1,675,000.

The devise to Mrs. Elizabeth Scott is absolute, but with the request that she not sell or incur the property, and that she devise it to Winfield Scott, Jr., in which connection expression is made of the testator's absolute confidence in her. The devise to Winfield Scott Townsend of the remainder of the es-

tate in the property devised to Mrs. Townsend for life is upon the condition that he shall not have the power to sell, convey, or incur it, or dispose of it otherwise than by will; that if he shall die intestate and without issue, it shall pass to the heirs of the testator's body, and if he shall attempt to incur it, the property shall revert to the heirs of the testator's body and be disposed of as provided for the residue of his estate. The devise to Winfield Scott, Jr., is upon the condition that he shall have no power to sell, convey, or incur any of the real estate devised to him, or to dispose of it otherwise than by will, that if he dies intestate and without issue before reaching the age of 50 years, such property shall pass to the heirs of the testator's body, and that should he attempt to incur it, it shall revert to the heirs of the testator's body, and be disposed of as provided for the residue of the estate. It is further provided in the will that if any other child or children are born to the testator and Mrs. Elizabeth Scott, they shall share equally with Winfield Scott, Jr., in the property devised to him, and subject to the same conditions attached to such devise, and that if Mrs. Townsend dies leaving no child surviving her, the remainder of the estate in the property devised to her for life shall vest in such of the testator's heirs at law as are then living, subject to the conditions contained in the will with reference to specific devises to such heirs at law. A bequest of \$10,000 is made to A. B. Robertson as compensation for his services as executor. The sum of \$10,000 is set apart for the payment of attorney's fees to maintain the will in the event it should be contested. And it is further provided that if any devisee under the will should contest it, or seek to invalidate any of its provisions, his or her claim to any interest in the testator's estate should forfeit, and such interest should become a part of the residuary estate.

The codicil provides that if the testator shall survive Mrs. Elizabeth Scott, all of the property devised to her under the will shall go to Winfield Scott, Jr., subject to the same conditions imposed in the devise made to him in the will.

The inventory of the estate filed by the executors recited that all of the property included within it was the community property of the testator and Mrs. Elizabeth Scott, and that she reserved the right to thereafter determine whether she would elect to accept under the will or claim her community interest.

The last illness of the testator was of about three weeks' duration. Mrs. Townsend was then living at Denver, and was not informed of her father's illness until she received a telegram from his private secretary on the day of his death, sent on the preceding day to Denver and forwarded to Kansas City, where she was visiting. During such illness the testator called for his daughter,

but, according to the testimony of Mrs. Scott, she was not sooner notified of his condition because of the attending physician's assurance that his illness was not serious; the physician testifying that he did so advise Mrs. Scott.

Evidence was introduced indicative of hostility upon the part of Mrs. Scott toward Mrs. Townsend, extending over a considerable period. Mrs. Scott testified that their relations were pleasant, and that she entertained feelings of parental regard for Mrs. Townsend at all times. It does not seem to be disputed that Scott cherished an affection for his daughter, Mrs. Townsend, and it was shown that he had expressed an intention to make liberal provision for her in his will. Other evidence was to the effect that he desired the bulk of his property to go to his minor son, Winfield Scott, Jr., and that he made his will to accomplish that purpose; that he was satisfied with it, and desired that its provisions be carried out. The Court of Civil Appeals has also found that there was direct and positive evidence in the case tending to show an effort on the part of Mrs. Scott to unduly influence the testator to so make his will as to exclude Mrs. Townsend from a share in his estate.

The principal question presented by the petition for writ of error is that of the admissibility of certain declarations of the testator, testified to by various witnesses tendered by the contestant, admitted by the court as probative of the state of his mind at the time of his execution of the will, and therefore competent as tending to prove that the alleged undue influence was effectively exercised and produced the will as its result, an essential part of the issue made by the contest. It is unnecessary in this case to enter upon any general review of the subject of the competency as proof of the declarations of a testator in a will contest, a subject, it may be said, which has commanded as much attention and upon which there has been expressed as much pronounced diversity of view as any within the entire field of judicial decision; but that there may be no confusion in applying to these declarations the rule of this court upon the subject, it is important that there be no doubt as to what is the rule. Its determination is deemed advisable, therefore, at the threshold of the case, a course suggested by the conflict of views urged in the argument, both in relation to the true rule and its application, as well as to the effect of previous decisions of the court.

[1] In *Johnson v. Brown*, 51 Tex. 65, the immediate question was the admissibility of a testator's declarations indicative of his feeling toward the beneficiaries named in a will, contested upon the ground of forgery. It was held that in such a case his declarations, before and after the date of the proposed will, expressive either of feelings of ill will or kindness toward the beneficiaries, are admissible, not in disparagement of the will,

nor as proof sufficient in themselves to overcome the testimony of the subscribing witnesses, but as evidence of an independent collateral fact—the state of feeling between the parties—and therefore tending in some degree to prove the issue before the court. The case did not involve declarations of a testator offered upon the issue of undue influence to show his state of mind at the time of the execution of the will and as tending to prove the subjection of his mind to such influence, but in the discussion of the question before it the opinion of the court plainly expresses assent to the rule that, where undue influence, as distinct from mental incapacity, is the issue, and is independently proved, declarations of the testator expressive of a mental state produced by such influence, whether made contemporaneously with the execution of the will or within a reasonable time before or after its execution, are admissible as an aid in the determination of the question of his free agency in making the will.

In *Robinson v. Stuart*, 73 Tex. 267, 11 S. W. 275, where the issue was both undue influence and mental incapacity, it was held that declarations of a testator, there shown to have been made in a letter written before the execution of the will, indicative of hostility toward the principal legatee, are admissible; *Johnson v. Brown* being cited in support of the ruling, as well as *Kennedy v. Upshaw*, 66 Tex. 450, 1 S. W. 308.

In *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, the proceeding was to probate a will alleged to have been lost. Its probate was contested upon the ground that the will had been revoked by the testatrix. Her declarations that she had sent for the will and destroyed it, as well as her declarations complaining of ill treatment at the hands of the principal beneficiary, were held to be admissible as tending to prove that the testatrix had revoked the will. In Chief Justice Gaines' opinion in that case, *Kennedy v. Upshaw*, 64 Tex. 411, holding as inadmissible a declaration of a testator, made after the date of an alleged codicil, which was charged to have been forged, to the effect that he had not changed his will, was reviewed, as was also *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663, holding that a testator's declarations, not a part of the res geste, were not admissible upon the issue of forgery, and, as evidencing a state of mind, are competent only where the issue is his mental capacity. *Kennedy v. Upshaw* was apparently distinguished upon the ground that the declaration there considered amounted to the statement of a mere legal conclusion, and *Throckmorton v. Holt* was distinctly not followed, its doctrine being in effect clearly rejected by the conclusion reached and announced by the court upon the question before it, in support of which *Johnson v. Brown* and *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619, were cited. These

decisions very plainly indicate the repudiation by this court of the theory that the test of the competency of a testator's declarations not a part of the *res gestæ* of the making of the will, is whether the issue of mental capacity is present in the case, or that, where the issue is undue influence alone, such declarations are incompetent generally to show the testator's state of mind at the time of the execution of the will, unless there be proof also of his mental weakness. Rankin v. Rankin, 105 Tex. 451, 151 S. W. 527, which has been strongly urged by counsel for the plaintiffs in error, marks no departure from the court's rule of decision upon the subject. The opinion in that case of Chief Justice Brown quotes from *Throckmorton v. Holt*, whose holding the court had declined to follow and apply in *McElroy v. Phink*, the quotation in some respects expressing a view antagonistic to that of this court as announced in previous decisions, and in others declaring a rule of general recognition. The case, however, is authority for what it decided rather than for the quoted views of another court which had been rejected by our own decisions. The issues both of mental weakness and fraud and undue influence were made by the pleading in the case as the basis of the attack upon the deed, which was dated November 24, 1898. The Court of Civil Appeals had found that at the time of the execution of the deed Mrs. Charlotte Rankin was over 70 years of age, and for some time prior to its execution had been in feeble health and weak in mind; but this court held there was no proof of the practice of fraud or undue influence upon her in the making of the deed. In this state of case the actual decision of the court was that her declarations, made in May or June, 1899, concerning the fraud, did not tend to prove that her mind was weak when she made the deed; that the witness testifying to the declarations also testified that her mind was clear at the time she made them; that the declarations themselves evidenced her clear recollection of the details of the transaction; and that, if they were untrue and simply the expressions of a disordered mind, they presented no reason for disturbing the conveyance, "because there was no proof of fraud or undue influence." Under the distinct holding of the court that there was an absence of any proof of undue influence, all question as to the admissibility of the declarations was removed, since the rule is general that such declarations are not competent as proof in themselves of the influence. The case is not authority for the proposition, since it in no wise assumes to decide the question that, where undue influence is independently proved, a testator's declarations, made within a reasonable period from the date of the execution of the will, indicative of his mental state at that time and of the operation of the influence, are not competent as proof of the effect of the influence upon his mind. On the contrary, the de-

cisions of this court clearly support the view that they are admissible, under the circumstances just stated, for the purpose of showing the testator's state of mind, and regardless of the issue of mental capacity.

[2, 3] The nature of the issue makes this conclusion inevitable. The law recognizes undue influence in the procurement of a will as a distinct ground for its avoidance. In its essential elements it has no real relation to the ground of mental incapacity. Testamentary incapacity implies the want of intelligent mental power, while undue influence bespeaks in itself the existence of a mind of strength sufficient to make a valid will if unhindered by the dominant influence, and such a mind as would have produced a valid will but for the coercion or restraint to which it was subjected. The issue is proved only when free agency is shown to have been supplanted, which means a testament made under such subjection or surrender of the natural freedom of will and action as that it speaks the mind of another. It is not necessary that the mind be reduced to a state of incapacity, for the invalidity of the will may then be established upon that ground alone. It is sufficient, though the mind be capable to the full extent that the law requires for testamentary capacity, if as a result of the exertion of the influence independence of volition be overcome, liberty to act subdued, and freedom of will be therefore subverted. Conditions at once suggest themselves where, under the operation of such influence, free agency is yielded knowingly, as the result of mere weakness of character, or under the emotion of fear, or through the desire for peace, where the mind succumbs to a force of such power as reduces it to a state of subjection, but where the exercise of free will is renounced with recognition of the presence of the superior force and under the consciousness of the surrender. In such cases all idea of mental weakness is repelled. On the contrary, a capable mind is necessarily presupposed. It is true the fact that free agency is overcome implies weakness in any one who yields it, but it is not essentially a weakness of mind, though mental weakness may exist and materially contribute to the successful operation of the influence, a condition probably urged as concurring in most of the cases in which the issue is found. But it may as fully imply weakness of character, as distinct from mere weakness of mind, or any other condition whereby the will is rendered susceptible to the influence employed.

[4] Remembering that all evidence is of necessity according to the subject-matter of the inquiry, when the nature of the proof entitled and necessary to be made under the issue comes to be considered, it is equally plain that, where undue influence is otherwise proved, the testator's declarations, if indicative of his mental condition at the time of the execution of the will as presumably produced by the operation of the influence

and made within a period not too remote from that time, fall entirely without the hearsay rule, and are admissible as original evidence. This proceeds from the condition of the issue being only partly proved, where the fact of the existence of the influence or its attempted exertion is alone established, and is never fully proved, unless it be further shown that it was effectually exercised, its purpose accomplished, and the will thereby produced. The presence of those things which may ordinarily constitute such influence, conditions favorable to its efficient operation, and effort to subdue the will of the testator by its means, may all be shown to have concurred; yet, if in the face of them the mind of the testator was unswayed from its own independent course, pursued its own bent, maintained its own integrity of purpose, and produced a will in accord with his own wishes, the testament is valid, and the law will protect and enforce it, even though it be such in its provisions as was sought to be procured.

How, then, under the issue is the further essential fact—that the influence was successfully practiced, to the subversion of the testator's free agency, and produced the will as its result—to be established or disproved? His declarations that the will was thereby procured, or that the instrument was not his will, or his statements of like nature, are, of course, inadmissible, since his declarations are not competent to prove the fact of undue influence, or as direct evidence that it produced the will. But where there is competent evidence of the exercise of undue influence, the issue as to whether it was effectually exercised necessarily turns the inquiry, and directs it to the state of the testator's mind at the time of the execution of the will, since the question as to whether free agency is overcome in its very nature comprehends such an investigation. The ascertainment of his state of mind at the time of the making of the will affords, in other words, a means of determining whether the influence was successfully exerted; and the question then narrows to whether his declarations are competent to establish his state of mind. Here we know from human experience that conduct is not an absolute criterion for determining whether the mind has acted freely or under constraint, working out its own intentions, or merely expressing the dominance of a stronger will. By itself it furnishes at best only a partial standard of the state of a man's mind, and therefore only an imperfect light for the inquiry, because mere acts, while generally speaking loudly, do not always speak truly, and, judged by themselves, are so subject to misinterpretation as to preclude their acceptance as an entirely reliable test. All other evidences tending to disclose the mental condition under which the will was made are accordingly not to be rejected, but such as may reasonably be depended upon should be recognized and

availed of. While the mind does not always express itself fully and truly, or reveal its actual state, in what a man says, such is nevertheless the more common form of its expression, and hence a usual indication of its condition; and, with the exception of conduct, it affords generally the only method we have of ascertaining the mental state under which a particular act is done. As a means, therefore, of determining the mental state at such time, voluntary declarations, indicative of it, rest upon as sure a ground as any which the inquiry provides, and properly come within that class of unsworn declarations to which the law gives the character and probative force of original evidence upon certain issues, because, from their nature, they admit of no better or more reliable proof.

The important consideration to be observed, however, in this connection is that the declarations be such as reasonably tend to disclose what the state of the testator's mind was at the very time of his making the will. If, for instance, they are shown to have been made at a time not in reasonable proximity to its execution, their remoteness condemns them as any efficient or trustworthy aid in determining what his state of mind then was, and they should be excluded for that reason alone. Furthermore, though they are shown to have been made within such reasonable period, unless they are reasonably indicative of what his mental state was at that time, they constitute no evidence upon this part of the issue and should be rejected. The alleged acts of undue influence or attempts to practice it, the attitude toward each other of parties affected by the will, and other matters of that kind, though relevant to the main issue, can no more be proved by recitals found in the testator's declarations than through the unsworn statements of any other person. His declarations concerning such matters are hearsay, just as they would be if made by any other third party. At this state of the proceeding the law is concerned solely with ascertaining what the state of his mind was when the will was made. Such of his declarations as tend to disclose it fall without the hearsay rule because they are of probative force upon that question, and, from the nature of the inquiry, are of the best evidence capable of being produced. But to avoid the admission of purely hearsay testimony, it is but proper to require that the declarations offered to prove the mental condition of the testator be of such nature as tend to reveal it by being in themselves expressive of his mental state. By the observance of this rule his declarations are permitted to perform their rightful office in the trial, but are denied use for those purposes for which they are incompetent.

We have thus dealt with the general question in an effort to present what we conceive is the true relation and proper use, as evidence, of a testator's declarations in a will

contest based upon the ground of undue influence. It is one of great importance and deep interest, and is not without its difficulties, as is evidenced by the division of the best minds that have sought to determine and define the correct doctrine upon the general subject. But it seems to us that these views result as the logical conclusion of sound reasoning upon the question; that they are confirmed, as well, by established authority, and will insure the application of right principles to the declarations we will now proceed to consider.

Rose Hill, the negro woman employed as a nurse for the minor son of the testator, was permitted to testify as a witness for the contestant, over objection, that just before the family went to Europe in June, 1909, the testator said to her that "Mrs. Scott had been after him to make a will." In permitting this declaration of the testator to be proved, the trial court instructed the jury that it was admitted only for the purpose of showing, or tending to show, if it did, the condition of the testator's mind at the time of the execution of the will, and should be considered for no other purpose. A charge to the same effect, in substance, was given, embracing in its reference all of the declarations of the testator admitted in evidence. Rose Hill is shown to have been an important witness in the case. She had previously testified to an occurrence upon the boat between the testator and Mrs. Scott during the return trip from Europe early in September of the same year, on the 29th of which month the will was made, when, according to her testimony, "there were some very important papers mentioned by Mrs. Scott, and Mr. Scott did not seem to be very anxious to sign some papers; I don't know what it was. Mrs. Scott had some business she wanted him to attend to; I don't remember what it was; I cannot say exactly what it was, but I know she threatened him with taking the child away from him if he did not sign the things she wanted him to do; threatened to take Winfield, Jr., away from him." The theory of the contestant was that the will was the paper Mrs. Scott was endeavoring to have her husband execute, according to the testimony just related; while Mrs. Scott testified that there were no business papers or instruments of any kind that she asked the testator to sign while they were on the ship, other than an agreement for the settlement of a certain business controversy, on account of which it was thought he stood in some danger of his life, which she said she had all the time importuned him to sign. Rose Hill had also previously testified that just before the testator left St. Louis for Ft. Worth, where a few days later the will was made, Mrs. Scott requested her to leave the room, with the boy, where she and her husband were, saying that "she had some business matters that she had to attend to, or some business papers

that she wanted Mr. Scott to see to while he was in Texas."

[5] The testator's declaration, testified to by this witness, that "Mrs. Scott had been after him to make a will" was clearly inadmissible. It was but a naked statement of fact, a plain narration of a past occurrence, which Scott's declarations were wholly incompetent to prove. Such a statement, made by him as to what his wife had been trying to get him to do, was as certainly inadmissible as a similar statement by any other person. The effect of its admission was to permit the use of his declarations for the purpose of establishing an effort by Mrs. Scott to have him make his will, or, in the light of the issue in the case and other testimony such as we have referred to, an attempt by her to exercise the undue influence charged, since, under the allegations, to induce the testator to make his will was essentially the prime object for which it was exerted, a purpose for which the law emphatically says a testator's declarations cannot be used, as upon such issue they are purely hearsay. Underhill on Wills, § 161. The limitation placed upon the testimony by the court at the time of its admission, and by subsequent instruction, that it was to be considered only upon the question of Scott's state of mind was, from the nature of the declaration itself, ineffectual, since it sought to limit the testimony to an issue it in no wise tended to prove. An attempt to limit testimony to a certain purpose is a vain proceeding, as the minds of men ordinarily operate, unless the testimony in itself at least suggests the purpose, and is capable of being appropriated to the consideration of the question to which it is in terms limited. The mind recognizes the distinction of impression created by a particular statement which conveys a dual idea, and is perhaps capable of confining its operation to the consideration of one of such impressions to the exclusion of the other's effect; but, whatever be the attempted limitation, it is not so constituted as to exclude the certain effect of a given statement where it is the only effect of which the statement is susceptible.

In what way did this declaration of the testator that "his wife had been after him to make a will" tend to prove his state of mind, either at that time or when the will was made, so as to subject it to consideration upon that question to the exclusion of other issues? Or, in the use of the expression that she had been "after" him, how was it capable of conveying to the minds of the jury any other idea than that his wife had been importuning him to make his will, or had been engaged in a persistent effort to that end? Did it suggest any fear or awe upon his part, or any state of coercion or subjection from any cause under which his mind or will rested? Did it indicate any mental condition whatever, or anything pertaining to his mind beyond the mere faculty

to remember the occurrence and the ability to express his thought, common to every ordinary narrative statement? In an effort to discover from it some indication of a state of mind produced or operated upon by an undue influence, to discern some effect upon the mind that such an influence might cause—and unless it affords such an indication or discloses such an effect the incompetency of the testimony is not open to question—what evidence of that nature does this declaration reveal? It is a patent statement of previous action on the part of his wife; but wherein does it indicate any mental state of his own, or any effect produced upon him by that or any other action or conduct of his wife? Here, on the question for which alone it was competent, if at all, it is altogether silent, disclosing neither emotion nor any character of constraint of mind, and giving no suggestion that this action of his wife, or any previous conduct on her part, had produced any effect upon him, one way or another. The declaration does not purport to signify any mental attitude of the testator; it, in effect, withholds any such expression. It bears upon its face only the semblance of a naked recital of an effort by the testator's wife to have him make his will, is proof of nothing beyond that, and nothing else in our opinion can be deduced from it. To say that it anywhere betrays other than an ordinary mental condition, such as is common always when men narrate occurrences relating to themselves, is to impose upon the declaration a character it does not possess, and extend to it an effect of which it is not fairly susceptible.

The argument has been made that the fact alone that the testator gave utterance to the declaration was proof tending to show the effect of the alleged undue influence upon his mind, or, in other words, that the fact that he said to this witness, in June 1909, that "his wife has been after him to make a will," tended to show that his mind was under her influence. This course of reasoning is probably ingenious, but is unsound, unless we are prepared to admit that any recital by a man of something his wife or some other person had been trying to get him to do is for the same reason indicative of a condition of mental constraint. We know, however, that such recitals in themselves convey no such indication, and common reason forbids any such significance being attached to these. If the bare narration of another's importunity is to be received as an evidence of mental coercion or restraint, the validity of any will is subject to be determined according to the mere discretion of the testator's utterance rather than the exercise of free agency in its execution. No reference could be made to only the commonplace confidences of the marital relation except at the peril of such a statement being later used as a revelation that one of the parties had been victimized into a

state of mental humiliation and subjection. The oftener the husband or wife might speak of the other's desires or efforts in regard to those things that might properly concern them both the stronger proof would it afford, not of that normal respect and deference of which such expressions are a usual token, but of an unnatural condition induced by a sinister influence. The law recognizes that that or any other close relation may prove favorable to imposition. It permits the use of declarations of a testator, as evidence of his state of mind, where they serve to indicate a mental condition. But when the declaration is but the narration of a particular circumstance in regard to even a very important matter, and no hint or suggestion is given of any uncommon effect produced upon the mind by that which is related or of any unusual mental condition, it should indulge, we think, no such finely wrought theory as that which assumes that it is some undue state of mind which provokes the narrative. If a declaration by a testator that the party charged with having practiced the undue influence had sought to have him make his will is competent to show his state of mind, his naked statement of any other fact in relation to the exercise, or the attempted exercise, of the influence would be equally competent for the same purpose under this theory. According to it, the effect of the fact related would be the force in each instance which provoked the comment, and the fact of the comment would therefore be evidence of the effect. We would quickly reach the result of every such declaration being rendered admissible under the guise of showing the state of the testator's mind, though it indicated none other than an ordinary condition, and the hearsay rule against such declarations would soon succumb to the operation of the exceptions made to it.

[8] That this incompetent testimony was likewise prejudicial to the plaintiffs in error is, in our opinion, not open to question. It afforded direct proof, through a statement made by the testator himself, of one of the most important features of the issue in the case. The theory of the contestant being that the exertion of undue influence by the testator's wife produced the will, proof of effort on her part to have him make it necessarily supplied a strongly persuasive circumstance in support of that position. It was as cogent a fact as could be produced to establish the exertion of the alleged influence, since under the issue it was subject to be construed, both as an attempt to practice it, and as expressly marking its direction toward the object of its alleged exercise. Incompetent testimony of such force and capable of such effect under this issue cannot, in our judgment, be treated as harmless. A legal trial is as important as a correct result. We have no disposition to lightly reverse the action of a trial court. Without any tendency to emphasize errors that are



immaterial, its judgment should be accorded the presumptions the law imparts to it. But the rules of law, by whose observance only can rights be legally determined, are entitled to the same deference, and have an equal claim upon the conscience of a court.

James W. Coffee, a witness for the contestant, was permitted to testify to a declaration of the testator made to him in the spring of 1909, which included the statement "that his wife had always wanted him to make his will, and that his wife did not like Georgia," meaning Mrs. Townsend, the contestant.

Jan L. Forrester, a professional nurse, who is shown to have attended Mrs. Townsend in Colorado Springs, Colo., in June of 1907, was permitted to testify to a declaration made by the testator to her upon the occasion of a visit to his daughter at that time, which included the statement, "If I mention Colorado or coming to see Georgia [Mrs. Townsend] Mrs. Scott gets up some excuse to keep me home," and upon the witness asking what Mrs. Townsend had done to Mrs. Scott to make her feel that way toward her, he stated, "She was a mere child, and that Mrs. Scott would raise hell if he mentioned it."

John F. Baker, Jr., an agent for the testator and in charge of his correspondence, in November, 1906, was permitted to testify to a declaration made by him at that time to the witness in respect to keeping his mail from Mrs. Scott unless he was there, which included a statement "that there was a feeling between Mrs. Scott and his daughter which it was unnecessary for him to go into."

Floyd E. Singleton, who was in his employ as a stenographer, testified to a declaration of the testator, made in April or May, 1910, which included the statement "that Mrs. Scott and Mrs. Townsend did not like each other, and that Mrs. Scott did not like Mrs. Townsend."

[7] The testimony of the witness Coffee of the testator's declaration "that his wife had always wanted him to make his will" was inadmissible for the reasons we have above stated in reference to the testimony of the witness Rose Hill. The statements made by the testator that we have above quoted from his testimony, and that of the other witnesses just named, indicating a hostile or unfriendly attitude on the part of Mrs. Scott toward Mrs. Townsend, were also hearsay in their character, and should not have been admitted over objection. The feeling of Mrs. Scott toward Mrs. Townsend could not be shown by the testator's declarations; and proof of her feeling toward her stepdaughter did not tend to establish the state of his mind.

[8] The statements of the testator, testified to by the witnesses just named and above quoted, were, as shown by the bills of exception, apparently but parts of particular entire declarations made by the testator testified to by them, the other portions of which were not incompetent in our opinion. In each in-

stance, however, the particular declaration, of which the statement we have quoted was a part, appears to have been offered as a whole—at least it does not appear that the unobjectionable part was offered separately—and being inadmissible in part, should have been excluded, upon objection, or else the trial court should have permitted the introduction of only so much of it as was admissible. *Robinson v. Stuart*, 73 Tex. 267, 11 S. W. 275.

[9] The bill of exception relating to the foregoing testimony of the witness Coffee contains other distinct declarations of the testator, expressive of affection for his daughter, Mrs. Townsend and her son, and an intention to provide for both of them in his will. Such declarations were admissible. *Johnson v. Brown*, 51 Tex. 65; *Underhill on Wills*, § 161.

[10] The bill does not show that the declaration which included the objectionable statement to which we have referred in the testimony of this witness was separately objected to. It simply discloses an objection apparently urged against all of his testimony, including the declarations which were good as against it, as well as the one which was properly subject to it. We would not hold in this state of the record that reversible error was committed in admitting the objectionable testimony of this witness, since, as the declarations were distinct, it was the duty of counsel to indicate by their objection that which was incompetent. When the declarations, taken all together, were objected to as a whole, as appears from this bill of exception, under the established rule the court was under no obligation to separate the testimony and apply the objection to only the inadmissible part of it. This cannot be said, however, in respect to the testimony of the witnesses Jan L. Forrester, Baker, and Singleton, to which we have above alluded. We think it is proper to treat the bills of exception relating to their testimony as respectively showing the tender by the contestant of a distinct declaration of the testator offered as a whole, and against which, therefore, one objection could be properly leveled, which was done. What was testified to by these witnesses as having been said to them by the testator very clearly appears, we think, from these bills of exceptions, to have constituted, in each instance, an entire declaration made by him at the time, one connected and related statement, though composed of more than one sentence, and offered by the contestant as such. Where a declaration so appears to be entire and so offered, there could be no occasion for requiring separate objection to the several parts of it.

The testator's declarations indicative of his feelings toward his daughter were clearly admissible, as we have stated. The testimony of the witness Mrs. Squire of declarations of the testator made in October, 1909, set forth in the twenty-first and twenty-second bills

of exception, and complained of in the fourth assignment in the application, was of that character, and therefore properly admitted.

[11] The testimony of the witness Rose Hill, as to the occurrence between the testator and Mrs. Scott on the ship during their return trip from Europe in September, 1909, to which we have before referred, was competent. It tended to prove the issue of undue influence through the statement of the witness that Mrs. Scott was urging the execution of some important papers by the testator, which he exhibited a reluctance to execute, and that she threatened to take his minor son from him unless he complied with her wishes. That the witness was unable to identify the papers referred to in her testimony as the will of the testator did not affect its admissibility. The occurrence was an admissible circumstance under the issue; and it was for the jury to judge of its weight, and to say to what papers it was that the testimony related.

We entertain the same opinion in respect to the further testimony of this witness, which is made an additional ground of the application for the writ of error, to the effect that "Mrs. Scott had several times threatened her husband to take their son and go away if he did not do the things she wanted done, and that he never wanted to do the things she asked him to do, and that she stated that quite often, and that Mr. Scott said if Winfield was 14 years old he would take his child and go himself." This was proof of a circumstance relevant to the issue in the light of other testimony in the case. Evidence having been adduced of what appeared to be a threat by Mrs. Scott to take his boy from the testator unless he signed certain important papers, which it was within the province of the jury to say related to the testator's will, other evidence tending to establish a disposition upon her part to so threaten him as to things she desired him to do was thereby made relevant. It was admissible as a circumstance to show an inclination or tendency to compel in that way the doing by the testator of what she wanted done, to be considered by the jury in connection with other testimony in the case in determining whether the will was the result of the employment of such means. Where it is sought to be established under this issue that a person had such power over the testator as to constitute undue influence, a proper step in the process is the production of evidence of his disposition, through the proof of other such instances, to use coercive means toward the testator for the accomplishment of his purposes. *Lewis v. Mason*, 109 Mass. 169. The issue admits, generally, of only evidence circumstantial in its nature; and while such a circumstance as this would be remote under different conditions, it in a sense portrayed here, if true, a domineering attitude assumed by the testator's wife toward him in relation to things she wanted

done, in the light of which the contestant was entitled to have considered her acts introduced in evidence as immediately relating to the will.

Testimony offered by the contestant of certain statements or declarations of Mrs. Scott, made out of the presence of the testator, was permitted. In the main they were expressive of hostility or unfriendly feeling on her part toward Mrs. Townsend. One of them, stated to have been made shortly after the marriage of the testator's daughter to John T. Carter, was, "I am certainly glad that Georgia has married and that it has happened, because Mr. Scott promised me to cut her off entirely." Another, stated to have been made in 1907, was, in substance, that "she did not want Mrs. Townsend and her husband to come to the Fat Stock Show at Ft. Worth, to which the testator had invited them; that she did not like any of Mr. Scott's people; that they were not her kind; that the testator had done too much already for Mrs. Townsend, and that she did not want him to do any more; that what Mr. Scott had at that time belonged to her and Winfield, and that testator had already given Mrs. Townsend all that she was entitled to at the time of her mother's death, and she did not want him to give her any more; and that the testator had already promised her that he had made all the provision he was going to make for her." Another was stated to have been made after the occasion of a visit by Mrs. Townsend's husband to the Scott home in St. Louis in 1909, at which time, according to the witness, Mrs. Scott said that "Mr. and Mrs. Townsend need not be watching around to see what they could get out of Mr. Scott, because she would see that they did not get any more than they had." And another was stated to have been made after a visit of Mrs. Townsend, then Mrs. Carter, shortly after the birth of Winfield Scott, Jr., to the effect: "What did Georgia say about the baby? I bet Georgia feels like killing that baby because she knows she isn't going to get this out of Mr. Scott's estate now." And a further statement was testified to as having been made when Winfield Scott, Jr., was about six months old, in substance, "that her boy was going to be a millionaire boy because he was going to get all those blocks on Main street, in Ft. Worth; that Miss Georgia had always displeased her father, and she did not think she could get very much out of the property."

[12, 13] It is strongly urged against these declarations that as Mrs. Scott was only one of the beneficiaries under the will, and at the time of the trial had not elected to take under it; that as the principal beneficiary was Winfield Scott, Jr., an infant incapable of collusion to accomplish the making of an improper will, and whose interest under it was several—such statements of hers, which would inevitably affect his interest, were

not admissible. This testimony presents probably the most difficult question in the case as determinable by the authority upon it. It may be said that the weight of authority is to the effect that as a general rule, where attack is made upon the will as a valid instrument, and not upon a specific bequest to the one whose declarations are offered, and there are other interests which will be thereby affected that are several from that of the declarant and existing in favor of those not in collusion with him, the declarations or admissions of such legatee should not be permitted, upon the ground that the interests of such innocent legatees are not to be destroyed through the instrument of his statements. There is a marked conflict of authority upon the question. That such is the weight of authority has been questioned. In *re Arnold's Estate*, 147 Cal. 583, 82 Pac. 252. A careful consideration of the question, aided by a thorough examination of the authorities upon it, has convinced us, however, that as applied to a case of this character, with the issue as it is, and under the relation of the parties, particularly that existing between Mrs. Scott and the principal beneficiary, her minor son, declarations made by her as the party charged with having wrongfully procured the will with the design of excluding the contestant from any substantial share in the estate, of the nature shown, indicative of hostility toward the contestant and the harboring of such design, were admissible for that purpose. The fact of such hostility and design is always provable under this issue as an essential, and in most instances as an indispensable, part of the contestant's case. That it may injuriously affect an innocent interest presents no obstacle to the making of such proof. It is a feature of the attack to which, in such a case, all interests affected by the will are subject. A valid will is necessary for them to have any legal standing; and no interest, therefore, can claim exemption from the force of competent evidence to establish that the will, as a testamentary instrument, is invalid. In a proceeding of this character it is the will as an entire instrument, whose validity is only *prima facie* in the contest, in other words the very basis of the right to every interest affirmed under it, which is sought to be impeached. There is necessarily involved in the very issue on trial the question of whether any interest exists under the will; and it is of doubtful correctness to say in such a case that any beneficiary has acquired under it an interest of such vested character as to make inadmissible against him any relevant fact or circumstance tending to establish its invalidity that under the issue is admissible against the legatee who is charged with having wrongfully procured it.

The fact of hostility of a beneficiary charged with the wrongful procurement of a will,

toward one excluded under it, and his design to accomplish such exclusion, being necessarily provable, in such a case, against every interest claimed under the will, how may it be properly proved? We know that in the general sense it is only capable of being fully proved by showing, not only the conduct of such a beneficiary, but by evidence of his statements, as well, in that connection. Are such declarations hearsay as to another beneficiary, not involved in the alleged wrong, and whose interest under the will is several, but who is before the court seeking to uphold it? Whatever might be affirmed as a general rule upon the subject, it is clear to us that, for the purpose we have stated, these declarations of Mrs. Scott are not to be here so considered. A part of the design charged against her in the case was to procure a will in which her son would be a principal beneficiary, as well as containing favorable provision for herself. A part of her purpose is alleged to have been directed to the disinheritance, practically, by the testator of the contestant, his daughter. To accomplish both purposes she is charged with having procured the will by her exercise of undue influence over him. She was a party to the suit and a proponent of the will. Under these circumstances her declarations, tending to show hostility on her part toward the contestant and a design to bring about her exclusion from the estate, and therefore affording proof of motive for the exertion of undue influence over the testator, were admissible both against herself and the other beneficiary for the purpose stated, though we think it proper for the court to limit the testimony accordingly. We do not regard it as necessary to review the authorities cited upon the question by the plaintiffs in error. Some of the cases do not relate to the question as it is here presented, though others directly support their position. There is marked conflict, as we have said, upon the general question; but the following may be cited in support of this holding: *Williamson v. Nabers*, 14 Ga. 286; *Gibson v. Sutton* (Ky.) 70 S. W. 188; *Shepardson v. Potter*, 53 Mich. 106, 18 N. W. 575; *Brown v. Moore*, 6 Yerg. (Tenn.) 272; *Crocker v. Chase*, 57 Vt. 413; *Peeples v. Stevens*, 8 Rich. (S. C.) 198, 64 Am. Dec. 750; *Mullen v. Helderman*, 87 N. C. 471; *Lundy v. Lundy*, 118 Iowa, 445, 92 N. W. 39.

On account of the erroneous admission of the testimony we have indicated, the judgments of the district court and the honorable Court of Civil Appeals are reversed, and the cause remanded. We have discussed the other testimony as a ruling for the further trial of the case. That made the subject of assignments of error in the application we have not discussed we regard as having been properly admitted.

Reversed and remanded.

**WYRES v. STATE. (No. 2877.)**

(Court of Criminal Appeals of Texas. April 8, 1914. On Motion for Rehearing, May 13, 1914.)

**1. CRIMINAL LAW (§ 1092\*)—APPEAL—BILL OF EXCEPTIONS—DENIAL OF CHANGE OF VENUE.**

By express provision of Code Cr. Proc. 1911, art. 634, refusal of change of venue is not reviewable unless bill of exceptions be filed at the term at which the order was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2820, 2834-2861, 2919; Dec. Dig. § 1092.\*]

**2. JURY (§ 103\*)—CHALLENGE FOR CAUSE—OPINIONS.**

Under Code Cr. Proc. 1911, art. 692, subd. 13, it is not error to overrule challenge for cause to jurors, though they say that from newspapers and report they have an opinion in the case; they saying it is not such as would influence their verdict, and that they talked with no witness, and had seen none of the evidence.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461-479, 497; Dec. Dig. § 103.\*]

**3. JURY (§ 142\*)—CHALLENGE—STATEMENT OF GROUND.**

Stating merely that he is objectionable, without stating or showing why, is no statement of ground of objection to a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 500, 630; Dec. Dig. § 142.\*]

**4. CRIMINAL LAW (§ 396\*)—EVIDENCE—BALANCE OF CONVERSATION.**

Under Code Cr. Proc. 1911, art. 811, providing that when part of a conversation is given in evidence the whole on the same subject may be inquired into by the other party, defendant, in an effort to show that B., indicted with him for the murder, did the killing and threw deceased's head in the water, having elicited from a state's witness that B. told him the head was in the water, where he afterwards found it, the state could show that, when B. told witness where the head was, he said defendant threw it there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.\*]

**5. CRIMINAL LAW (§ 528\*)—EVIDENCE—STATEMENTS OF INCOMPETENT EVIDENCE.**

Under Code Cr. Proc. 1911, § 791, declaring one indicted for the same offense an incompetent witness for defendant, his statement, made while in jail under indictment, that he alone had anything to do with the crime, is inadmissible for defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 528.\*]

**6. CRIMINAL LAW (§ 1170½\*)—WITNESSES (§ 297\*)—PRIVILEGE OF WITNESS—CODEFENDANTS.**

Sustaining the claim of privilege of one indicted for the same offense as defendant, when called as a witness for the state, was not error; nor prejudicial to defendant, who claimed such witness was alone guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\* Witnesses, Cent. Dig. §§ 1011, 1026-1037; Dec. Dig. § 297.\*]

**7. CRIMINAL LAW (§ 780\*)—ACCOMPLICE TESTIMONY—NECESSITY OF CHARGE.**

B., the alleged accomplice, not having testified, but refused to do so, when called by the state, a charge on accomplice testimony is not

called for, though defendant elicited from a witness for the state that B. told him where the head of deceased was, and said witness then testified that at the same time B. told him defendant had placed it there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

**8. CRIMINAL LAW (§ 1170½\*)—HARMLESS ERROR—ALLOWING QUESTION.**

Though the fact, which the state attempted to elicit by a question to defendant, was inadmissible against him, allowing the question, which in and of itself was not of a harmful nature, was not prejudicial; he having answered against the existence of the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

**On Motion for Rehearing.**

**9. CRIMINAL LAW (§ 1111\*)—BILL OF EXCEPTIONS—CONCLUSIVENESS.**

Where one accepts a bill of exceptions as qualified by the court in approving it, he is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.\*]

**10. CRIMINAL LAW (§ 815\*)—CHARGING ON AFFIRMATIVE DEFENSE.**

The court did not fail to charge, as is its duty, on defendant's affirmative defense, his evidence raising only the issue that he did not kill deceased, but that B. and R. did so, and the court charging that if the jury believe deceased was cut and killed by B. and R., or either of them, and that defendant had no connection therewith as principal, or have a reasonable doubt thereon, they will acquit; and then properly applying to the case the law as to who are principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

Appeal from District Court, Falls County; Richard I. Munroe, Judge.

Buss Wyres was convicted, and appeals. Affirmed.

Scott & Ross, of Waco, and W. E. Rogers, of Marlin, for appellant. Frank Oltorf, Co. Atty., of Marlin, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder and his punishment assessed at death.

[1] The first ground relied on is that the court erred in not sustaining the application for a change of venue in this case. Article 634 of the Code of Criminal Procedure reads: "The order of the judge granting or refusing a change of venue shall not be revised on appeal unless the facts upon which the same was based are presented in a bill of exceptions prepared, signed, approved and filed at the term of court at which such order was made." The term of court at which appellant was tried adjourned July 26th. The bill of exceptions was not filed until August 1st. Under the plain mandates of the law, we are not authorized to review the action of the court, the bill not being filed within the time required by law; but, if we did do

so, the evidence would not show that the court abused his discretion in refusing to change the venue. *Adams v. State*, 35 Tex. Cr. R. 285, 33 S. W. 354; *Kutch v. State*, 32 Tex. Cr. R. 184, 22 S. W. 594; *Smith v. State*, 31 Tex. Cr. R. 14, 19 S. W. 252.

[2] Appellant also complains that the court erred in not sustaining his challenge for cause to Messrs. Roscoe Fortune, J. T. Allen, Wilmer McKea, B. F. Bruner, and J. E. Buck. These men answered that from reading newspapers and from reports that they had an opinion in this case, but each answered that it was not such opinion as would influence their action in finding a verdict. They further testified they had talked with no witness in the case, and had not seen any of the evidence published. Neither one of these men served on the jury, but were peremptorily challenged by appellant. Under such circumstances, this bill presents no error. Subdivision 13, of article 692; *Sawyer v. State*, 39 Tex. Cr. R. 557, 47 S. W. 650; *Miller v. State*, 32 Tex. Cr. R. 319, 20 S. W. 1103; *Suit v. State*, 30 Tex. App. 320, 17 S. W. 458.

[3] In the next bill it is shown that, after appellant had exhausted his challenges, T. E. Cypert, a salesman, was called to be examined as a juror in said cause, whereupon the defendant through his counsel advised the court that he had exhausted all his peremptory challenges, and that this juror, to wit, T. E. Cypert, was an objectionable juror to him, and asked the court to require him to stand aside, which the court refused to do, and, after the state had accepted said juror, ordered said juror sworn as a member of the jury of said cause, to which action of the court the defendant then and there excepted. It is not contended that Mr. Cypert had formed an opinion from hearsay or otherwise, and the record does not disclose that he had ever heard of the case until summoned on the venire. Just the bare statement that the juror was objectionable would be no ground, without stating or in some way showing why said juror was an objectionable juror. In qualifying the bill the court states this juror was not challenged by appellant. Under no phase would the action of the court in this matter present error.

[4] Sheriff M. J. Poole was introduced as a witness for the state, and on cross-examination by appellant's counsel he was asked if he did not search for the head of deceased, that had been severed from the body, on Saturday night and Sunday, and if he did not find it Sunday evening, and, when he answered in the affirmative, he was asked: "Q. Did you get any information from anybody as to where the head was? A. Yes, sir. Q. Who gave you the information? A. Bounce Baty. Q. He told you where it was? A. Yes, sir. Q. You didn't see Buss Wyres that night? A. No, sir." The record discloses that appellant, Bounce Baty, and another were indicted, charged with the murder of John Richey. These questions were pro-

pounded and answers elicited by appellant in an effort to show that Bounce Baty had killed Richey, cut off his head, and threw it in the creek. On redirect examination the court permitted the state to prove by Mr. Poole that, when Bounce Baty told him where the head was, he said that appellant threw it in the water, where he had told the sheriff he would find the head, and where he did find it. As appellant first elicited a part of this conversation in an effort to show that Bounce Baty did the killing and threw the head of deceased in the water, then it was permissible to show that the conversation as a whole would not bear such construction. Having elicited the part of the conversation he did, there was no error in permitting the state to elicit the remainder of what was said by Baty at this time, as it was clearly necessary to render intelligible and plain that part appellant had introduced. Article 811, C. O. P.; *Carter v. State*, 59 Tex. Cr. R. 73, 127 S. W. 215; *Spearman v. State*, 34 Tex. Cr. R. 279, 30 S. W. 229.

[5] After the state had introduced this testimony, the defendant then offered to prove by John Hughes and Guadalupe Gonzales that after appellant, Bounce Baty, and Dud Reed had been indicted, charged with this murder, and while they were all in jail, that Hughes and Gonzales had heard Bounce Baty say that he, "Bounce Baty, had killed John Richey and cut his damned head off, and that no one else had anything to do with it." Bounce Baty was at this time under arrest and in jail under indictment charged with this offense, and he was not a competent witness to testify to these matters for appellant, and, as he himself could not so testify, such statements would not become evidence by him stating it to third parties. An unsworn statement, made in jail at the time he was an incompetent witness, would not be admissible in evidence when his sworn testimony would not be admissible. Article 791, C. O. P.; *Blain v. State*, 24 Tex. App. 626, 7 S. W. 239; *Smith v. State*, 41 Tex. 354. In *Long v. State*, 10 Tex. App. 197, Judge White tersely states the rule to be: "If he cannot testify in person, how can he state facts to others and thereby enable them to testify to matters wholly derived from him? To permit this would be to abrogate the law which \* \* \* renders him forever incompetent to testify. \* \* \* No fact stated by or derived from him can, so long as the disability remains, be detailed as testimony by another or used as evidence." See, also, *Gayle v. Bishop*, 14 Ala. 552; *Walker v. State*, 39 Ark. 221; *People v. Quong Kun* (Gen. Sess.) 34 N. Y. Supp. 260; *State v. Williams*, 67 N. C. 12; *Horbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608; *Nettles v. Harrison*, 2 McCord (S. C.) 230; *Queen v. Neale*, 2 Cranch, C. C. 3 Fed. Cas. No. 11,504; 1 Phil. on Ev. 5; 1 Rus. on Crimes, 695; 1 Chit. Crim. Law, 190; *Starkie on Ev.* 117; *People v. McGee*, 1 Denio (N. Y.) 19.

[6, 7] The state called Bounce Baty as a witness, when he, through his counsel, claimed his privilege of not being required to testify, as he was under indictment charged with the same offense. He was a competent witness for the state under our statutes had he been willing to testify; but, when he claimed his privilege, the court promptly sustained it. There was no error in this proceeding, and in no way could it injure appellant. He by his testimony was contending that Bounce Baty and Dud Reed had committed the murder, in which he in no way participated, and, when Bounce Baty claimed that his testimony might tend to incriminate him (Baty), this, if anything, would have a tendency to sustain the contention of appellant, and in no wise would it tend to show his (appellant's) guilt. Nor was there any error in not charging on accomplice testimony. When Baty was called, he testified to no fact; in fact declined to testify; that the defendant had elicited from the sheriff that it was through information received from Baty he had found the severed head, and testified that at the same time Baty told the sheriff appellant had placed it at this place, did not call for a charge on accomplice testimony. *Gracy v. State*, 57 Tex. Cr. R. 68, 121 S. W. 708.

[8] As the defendant answered the question in the negative, propounded to him by the state, to which appellant objected, no harm could result therefrom, even if it had been an improper question. We do not think what his mother may have said and done would have been admissible against appellant, and, had the question been answered other than in the negative, error might be presented; but the question in and of itself was not of a harmful nature, when he answered, no, and no effort was made to follow the question with any other or different proof.

We have carefully reviewed each ground in the motion for new trial, and think the charge of the court not subject to the criticisms therein contained. The evidence offered in behalf of the state would justify a finding that deceased was killed by appellant, Baty, and Reed, and his head severed from his body and thrown in the creek; that each of them was present, and knowing the unlawful intent participated therein; therefore there was no error in the court defining who are principals in the commission of an offense, and submitting that issue to the jury. No special charges were requested, and every phase of the case was included in the court's charge and in a manner extremely fair to appellant.

The judgment is affirmed.

#### On Motion for Rehearing.

Appellant has filed a lengthy motion for rehearing, in which he reiterates each ground in the motion for a new trial. However, he has filed an argument in support of some of

the grounds, and these only we deem it necessary to discuss, as the others were passed on in the original opinion, and, while appellant contends we were in error in each of them, yet he cites no authorities in support of such contentions. However he cites us to the case of *Julius Kunde v. State*, 22 Tex. App. 65, 8 S. W. 325, which he claims supports his contention that the statement made by Bounce Baty while in jail under arrest should have been admitted in evidence. In the *Kunde* Case it is held that it is permissible to show that another committed the crime, and this proposition of law we have never questioned, and do not now question it, where the inculpatory facts are such as are proximately connected with the transaction, by any legal and legitimate testimony, and, if any legal and legitimate testimony had been excluded by the court tending to show that another and not appellant committed the offense, of course it would be error. But the mistake that appellant makes is that evidence rejected was legal evidence. In *Kunde v. State*, supra, it was held: "It was error to refuse to permit the defendant to reproduce the testimony of the deceased witness E. T. Rhodes. By this testimony defendant proposed to show acts and declarations on the part of his codefendant, Taylor Kunde, occurring shortly prior to the murder, which \* \* \* acts and declarations tended strongly to show malice on the part of Taylor Kunde towards Drennon [deceased] and a motive on his part to commit the murder." This court followed that opinion in the case of *Robertson v. State*, 63 Tex. Cr. R. 216, 142 S. W. 533, Ann. Cas. 1913C, 440, in holding that when a witness is dead his testimony at a former trial could be reproduced, and we think it is a sound proposition of law, and the case of *Dubose v. State*, 10 Tex. App. 230, is also the law, and this decision has been followed by this court since it has been rendered. But the error in appellant's contention is that the statement that Baty made which he desired to have the witnesses testify to was made while Baty was in jail under arrest charged with this offense. When Baty is placed on trial, would any one contend that this testimony would be admissible against him? We think not, for the statute prohibits it. Appellant in his argument insists that the statement was *res gestae* of the transaction, and if so, of course, it would be admissible; but in the record before us there is nothing to sustain this contention, and the court in approving the bill states: "The bill is allowed with the following explanation that the statement sought to be proved by the witness was made, if at all, long after the homicide, and while the said Bounce Baty was in jail under indictment for the same offense with which the defendant Buss Wyres is charged."

[9] Appellant criticises that part of the original opinion where we said, "Bounce

Baty was at this time under arrest and in jail under indictment charged with this offense, and he was not competent to testify to these matters for appellant, as he (Baty) could not so testify," and said we are in error in stating that Baty was under indictment at this time. Appellant accepted the bill of exceptions, as approved by the court, which so stated, as shown by the quotation above, and in it the judge does affirmatively state that the statement was not *res gestæ* of the transaction, was made "long after the homicide, and at a time when Baty was in jail and under indictment for this offense." And when one accepts a bill thus qualified, under all the decisions, he is bound thereby. *Hardy v. State*, 31 Tex. Cr. R. 239, 20 S. W. 561; *Levine v. State*, 35 Tex. Cr. R. 647, 34 S. W. 969; *Brown v. State*, 32 Tex. Cr. R. 119, 22 S. W. 596. Appellant also refers us to the case of *Pace v. State*, 61 Tex. Cr. R. 436, 135 S. W. 379. In that case the appellant offered to prove by Byron Kyle that he had a conversation with Cain in which Cain admitted that he did the killing. At the time Cain made the statement to Kyle, he was not under arrest, and had not been indicted for the offense; consequently the testimony was admissible as in the *Kunde Case*, but neither of the cases are authority for the admission of a statement made by one in jail while under indictment for the offense. And on the other hand, the statute expressly inhibits the admission of such testimony, as shown by the article of the Code and authorities cited in the original opinion.

Appellant also contends that we should consider the bill in regard to the change of venue, claiming that such bill presents the matter within the rule announced in the cases of *Gallagher v. State*, 55 Tex. Cr. R. 50, 115 S. W. 47; *Barnes v. State*, 42 Tex. Cr. R. 297, 59 S. W. 882, 96 Am. St. Rep. 801; and *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. 953. In each of those cases the bills were filed in term time; consequently they nor either of them are in point in this case, the bill having been filed after the adjournment of court for the term. As said in the original opinion, the statute prohibits us from considering a bill on change of venue not filed during the term. Article 634, C. C. P. See, also, *Adams v. State*, 35 Tex. Cr. R. 285, 33 S. W. 354; *Kutch v. State*, 32 Tex. Cr. R. 184, 22 S. W. 594; *Miller v. State*, 31 Tex. Cr. R. 609, 21 S. W. 925, 37 Am. St. Rep. 836; and *Gibson v. State*, 53 Tex. Cr. R. 360, 110 S. W. 41, and cases there cited. In the *Gibson Case* it is said: "This rule is not only statutory, but it has been so often decided and enforced that it cannot be longer said to be a debatable question."

[10] The next question is that the court failed to charge on appellant's affirmative defense, and he argues at length that it is the duty of the court to so do. This is con-

ceded, and the evidence of defendant raised only the issue that he did not do the killing, but that Bounce Baty and Dud Reed were the parties who killed deceased. The court instructed the jury: "If you believe from the evidence that the said John Richey was cut and killed by Bounce Baty and Dud Reed or by either of them, and that the defendant had no connection with the killing as a principal as that term is hereinafter explained, or if you have a reasonable doubt thereon, you will return a verdict of not guilty." And subsequent to this, the law as to who are principals was properly applied to the case.

The motion for rehearing is overruled.

#### MOORE v. STATE. (No. 3123.)

(Court of Criminal Appeals of Texas. May 6, 1914.)

#### LARCENY (§ 29\*)—INDICTMENT—REQUISITES—"THEFT."

An indictment for "theft," defined by statute as the taking of personal property from the possession of another with intent to deprive the owner of the value thereof, which alleges that accused fraudulently took personalty of prosecutor from the possession of prosecutor without his consent, and with the intent of accused to appropriate the property to his own use, is fatally defective for failing to allege accused's intent to deprive prosecutor of the value of the property.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 60, 63; Dec. Dig. § 29.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6938, 6939.]

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Woodward Moore was convicted of theft, and he appeals. Reversed, and cause dismissed.

J. M. Elliott, of Memphis, and Fires & Diggs, of Childress, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for the theft of \$210.

On this appeal he presents but one single question—the validity of the indictment. Our statute is: "Theft is the fraudulent taking of corporeal personal property belonging to another from his possession \* \* \* without his consent, *with intent to deprive the owner of the value of the same*, and to appropriate it to the use or benefit of the person taking." Pen. Code 1911, art. 1329. The indictment in this case, after the necessary preliminary allegations, avers that Woodward Moore, "did then and there fraudulently take \$210, \* \* \* the same being the corporeal personal property of and belonging to Homer Blum, from the possession of the said Homer Blum, without the consent of the said Homer Blum, with the intent to appropriate it to the use and benefit of him, the said Woodward Moore." It will be seen by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index 166 S.W.—73

this that the indictment omits one of the requisites of this offense, and one of the requisites of the indictment, to wit, "With intent to deprive the owner of the value of the same." There can be no question, from the statute above quoted, and the many decisions of this court uniformly so holding, that the indictment is fatally defective because of the omission above shown. We take it that this must have been an inadvertency by the pleader. There are no other words in the indictment supplying this necessary requisite, which was left out.

We must therefore reverse and dismiss this cause.

### HILLIS v. STATE. (No. 3124.)

(Court of Criminal Appeals of Texas. May 6, 1914.)

#### 1. HOMICIDE (§ 118\*)—SELF-DEFENSE—RIGHT OF LANDLORD.

A landlord who let farm land for crop rent, the tenant agreeing to work the crops, may, upon the tenant's failure, enter and work the crop for the benefit of both, and, where he peacefully acquired possession, he is not a trespasser, and, if the tenant attempts by display of force to drive him from the land, may defend himself.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 168-171; Dec. Dig. § 118.\*]

#### 2. HOMICIDE (§ 276\*)—TRIAL—INSTRUCTIONS.

Where accused claimed that he entered upon his land to work the crop for the benefit of himself and his tenant who had abandoned it, and that upon the tenant's attempting to drive him therefrom by display of force he killed deceased in defending himself, he is entitled to have his theory of the case submitted, and it is improper for the court to charge that he was under no circumstances entitled to go upon the land.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.\*]

#### 3. HOMICIDE (§ 192\*)—EVIDENCE—ADMISSIBILITY.

Where accused, who had rented his land for crop rent, entered and commenced cultivation when the tenant abandoned the crop, and, upon the tenant and deceased attempting to drive him therefrom by display of force, killed deceased, evidence of the advice given by a justice of the peace whom accused consulted before he entered on the land is admissible to show that he had no intention of provoking a difficulty and killing the tenant or any one who attempted to assist him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 415; Dec. Dig. § 192.\*]

#### 4. HOMICIDE (§ 182\*)—EVIDENCE—ADMISSIBILITY.

Where accused, who leased his land for crop rent, killed deceased when he and the tenant attempted to drive accused from the land, upon which he entered to work the crop, claiming that the tenant had abandoned it, evidence of the condition of the crop is admissible on the question of abandonment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 386; Dec. Dig. § 182.\*]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Wylie Hillis was convicted of manslaughter, and he appeals. Reversed and remanded.

R. H. Jones, of De Kalb, and B. D. Hart, of Texarkana, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. On an indictment charging murder, appellant was convicted of manslaughter and his punishment assessed at three years in the penitentiary.

The material facts are practically undisputed. They show that appellant, Hillis, rented to Anias Griffin from 12 to 18 acres of land for the year 1913. Griffin was to pay one-third of the corn and one-fourth of the cotton as rent. Appellant testified, and Griffin did not deny it, that Griffin first applied to appellant to rent the land for his (Griffin's) brother. Appellant declined to rent to Griffin's brother, and, upon further negotiations to rent it himself, appellant said he knew Griffin had a hired hand and he asked him, in case the hired hand quit, would he work the crop on his land anyway, and Griffin told him he would; that if he rented it he would work appellant's land if he had to let the other that he had lie out; and that he thereupon rented him the land under said agreement. Griffin planted some 7 acres of the land in cotton in the early part of April, 1913, but failed to work it at all. He also failed to plant several acres of it in cotton until the last of May. On May 23d, appellant saw him, and he then promised that on the following Monday he would work out the 7 acres of cotton. On that day Griffin and his hired hand plowed two furrows only in this cotton, then loaded up their plows, and carried them away. About 12 o'clock that day appellant went to see him again and asked him how he came to quit working that cotton, and he said it was so rough he could not plow it. He asked him then what he was going to do with it, and he said he did not know; that he thought maybe he had better hoe it before he tried to plow it, but that he did not know when he would do that, not that week anyhow; that he had other work to do and did not know when he would get to that. Appellant then offered to work the cotton out for him and let him pay him for working it that fall when he gathered his crop; or, if he would hire anybody else, he would advance him the money to pay for it and wait till the fall for his money. Griffin refused to give him any satisfaction and would not say what he would or would not do. Appellant then went to town to see what he could do—whether he could work the crop or have it worked, or what to do with it. He went to the justice of the peace and talked to the justice of the peace. The court, on the state's objection, refused to let appellant tell what the justice of the peace advised him about it. Appellant then went back to work in that 7 acres on Tuesday morning, which was May 27th. He worked therein until the afternoon Thursday. Thursday afternoon Griffin and his brother-in-law, Hill,



came down to where he was and saw him about going to work again in that cotton, and, learning from him that he was going to continue his work, Griffin refused to let him do it, warned him not to do it, and ordered him away. Appellant refused to go, claiming that he had a right to work the crop for their mutual benefit. Griffin thereupon got a club and with his brother-in-law threatened to beat him up with it and ran him out of the field and forbade him to come back therein. Appellant swore that Griffin then said to him, "I am not going to work it, and, you damned son of a bitch, you are not going to work it." Appellant then asked him to go to town with him and he would prove to him he had a right to work it, and Griffin replied that he made his own law and refused to go with him to town or see anything further about it. Appellant borrowed a gun, took it with him, and he and his wife went down in the same cotton field and went to work therein the next morning. He also hired Mr. Stout and Mr. Stout's daughter to work with him in that cotton. He testified he carried the gun to the field with him to protect himself and prevent his being run out of the field by Griffin. After appellant and his wife and Mr. Stout and his daughter had been at work some time in this cotton, the deceased, Mr. Barlow, and Griffin came into the field. Barlow and Griffin saw appellant and said parties with him in the field, and, as soon as he got in hallooing distance, he halloosed: "Hey! Hey! Get out of there, you damned sons of bitches. I will kill every one of you." This seems to have been repeated. Barlow had a gun with him, holding it in his hands somewhat presented. He and Griffin kept approaching appellant in that attitude. When they got in 75 or 80 yards, Mr. Stout told appellant not to do anything; that he would go and stop them. He attempted to do so. As soon as Barlow recognized Stout, he apologized to Stout and said to him, pointing to appellant, "There is the damn son of a bitch I am after," and continued approaching until he got 15 or 20 steps from appellant. Appellant in the meantime had gotten back by a tree against which his gun was leaning and picked up the gun and got behind, or attempted to get behind, the tree. Barlow said, "Look out, everybody," threw his gun to his shoulder, and fired at appellant. His gun was loaded with buckshot. Some of the shot struck the tree about even with appellant's head. Appellant was not struck. When Barlow said, pointing to appellant, "There is the damn son of a bitch I am after," and, "Look out, everybody, God damn you," threw his gun to his shoulder, appellant then leveled his gun at deceased, and they both shot almost simultaneously. Some of the witnesses said deceased, Barlow, shot first. One of them thought appellant shot first, but the effect of the testimony of all is that the shots were almost simultaneous, whichever one shot first. Appellant's gun was loaded with

squirrel shot—small shot. Several of them struck deceased about the breast and face. One only went into his eye, and thence into his brain, which killed him. The others would not have killed him.

[1, 2] Appellant has many objections, timely and properly made, to the charge of the court. The case seems to have been tried under the theory that appellant had no right whatever to work this crop or to go on the land for that purpose. Among other things, the court charged the jury: "Under the undisputed facts in this case, you are instructed that the defendant had no right to forcibly go on the land and premises for the year 1913, and to work and cultivate the cotton thereon situated over the protest and against the consent of the said Griffin." In our opinion the case was tried on the wrong theory, and this charge was erroneous.

The appellant contended, and his evidence tended to show, if it did not show, that Griffin, in fact, had abandoned the cultivation of the crop, and under the terms of their contract appellant would not have been a trespasser if, as contended and testified by him, he went upon the land to work out the crop for the mutual benefit of both of them, and not for the purpose of taking the crop away from Griffin. Besides this, the court in his charge seemed to treat the facts as if Griffin was in actual possession of the field at the time and appellant was forcibly attempting to take possession thereof and eject Griffin. The evidence does not establish any such state of facts. It shows that appellant, under the claim of right, had gotten actual possession of this field and was working it out for his own and Griffin's benefit, and that Griffin and Barlow—his uncle, the deceased—were themselves attempting to forcibly put appellant out of possession and to actually kill him because he was in possession, and, under the facts, to entirely deprive appellant of the right to defend his very life, which is not the law applicable to this case at all. The case should have been submitted, by the charge of the court, under appellant's theory and testimony, as well as that of the state, and under the appellant's theory and his testimony he had the right to go upon said land and work out said crop for the mutual benefit of himself and Griffin. *Bettis v. Key* (Civ. App.) 128 S. W. 1160. See, also, *Rogers v. Frazier* (Civ. App.) 108 S. W. 727.

Appellant has some bills of exceptions to the exclusion by the court of some of his testimony. The state objects to the consideration of these bills because they are wholly insufficient. The state's contention, we think, is perhaps correct; but, in view of the fact that the case must be reversed, it is necessary to pass upon some of these questions, in view of another trial.

[3] A material question was as to the intent of appellant in going upon the land and cultivating this cotton crop. The state's the-

ory was that he was a trespasser, without any rights on the property; that he went there armed with a gun and was going thereon and working the crop against the will of Griffin and against his positive orders; and that his object and purpose was to provoke a difficulty and get an opportunity to kill Griffin, or any one who attempted to assist him. His contention was that he had no such intent, but that under the terms of the contract he had a right to go there and work the crop; that Griffin had failed and refused to do so, and in effect had abandoned the crop; and that he took his gun with him solely to protect himself. Under such circumstances, it was very material for appellant to show, and he had the right to show, that before he went on the land to work the crop he had advised with the justice of the peace, and, if the justice of the peace had advised him that under the circumstances he had a right to go upon the ground and work the crop, he was entitled to make such proof; and the court erred in not permitting him to show that he had advised with the justice of the peace, and that the justice of the peace, if he did so, advised him that he had a right to go upon the land and work the crop.

[4] We are also of the opinion that the court erred in excluding all testimony as to the condition of the crop, under the circumstances of this case. In our opinion that was a material inquiry, and appellant was entitled to the evidence to show the condition of the crop, in view of the lateness of the season, so that the jury could determine, under appellant's theory and testimony, whether Griffin had in fact abandoned or neglected the crop so as to practically amount to the same thing, and, under the terms of the contract, to go upon the land and work the land for his own protection and benefit.

There are other complaints to several portions of the court's charge, some of which we think are well taken. We deem it unnecessary to discuss them in view of what we have said about the case above. Doubtless, upon another trial, the case will be tried upon the right theory, and the charge of the court will be so drawn as that the present objections thereto will not be applicable.

The judgment is reversed, and the cause remanded.

#### SOMERS v. STATE. (No. 3119.)

(Court of Criminal Appeals of Texas. April 29, 1914.)

#### CRIMINAL LAW (§ 927\*)—TRIAL—CONDUCT OF JURY—SEPARATION.

In a felony case a juror, after the evidence was all in and argument begun, and while they were in charge of an officer going to supper, slipped off and went three or four blocks and got his horse and took him to a livery stable. He was gone between 15 and 30 minutes, and admitted talking to two people. The only evidence heard on the motion for new trial was the testimony of the juror, the state content-

ing itself with showing that the juror was favorable to defendant. *Held*, that defendant should have been granted a new trial because of such separation, since, under the statute, when a separation was shown, the burden was upon the state to show that nothing improper took place during the separation, and should have called the two witnesses to whom the juror admitted to have talked.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2257-2262; Dec. Dig. § 927.\*]

Prendergast, P. J., dissenting.

Appeal from District Court, Washington County; Ed R. Sinks, Judge.

Aaron Somers was convicted of an assault with intent to murder, and he appeals. Reversed and remanded.

Buchanan & Stone and Mathis, Teague & Embrey, all of Brenham, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for an assault with intent to murder. The punishment for said offense is not less than 2 nor more than 15 years' confinement in the penitentiary. His punishment was fixed at 2 years, the very lowest. There is no statement of facts on the merits of the case. I take it none was deemed necessary. There is no bill of exceptions and no complaint in any way of the charge of the court. I must therefore conclude that without any doubt he had a fair and impartial trial and the evidence established his guilt. The 12 jurors found that he was guilty beyond a reasonable doubt. The learned trial judge must have so found; otherwise he would have granted a new trial.

The sole and only ground appellant has, or urged in the lower court, or this, is that, because one of the jurors separated from the others before verdict, this, and this alone, entitles him to a new trial. He in no way intimates that the juror who separated from the others acted corruptly, was approached in any way by any person about the case, or that he said anything to any one, or that any one said anything to him about the case, while he was separated from the jury. As stated, his sole and only ground is that one juror separated from the others—that and nothing else.

The uncontroverted facts on this matter are shown by a properly agreed statement of the evidence which was heard by the court on the trial of the motion for new trial on said ground. It shows: After all the evidence was in, and one argument by the state's attorneys and one by the defendant's attorney had been made, supper time arrived, just before night. The trial was suspended so that all parties could go to supper. The court was to reconvene after supper and hear the concluding arguments. The jury was placed in charge of the proper officer, who started with them to a restaurant, a block or two away, to get their suppers. The juror

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Breedlove, while the jury was on the ground floor in the courthouse, going to supper, without the knowledge of the officer, or any of the other jurors, slipped away from them, for the sole purpose of going to a wagon yard where he had tied his horse that day, to procure the horse, take him to a livery stable, and have him watered, fed, and kept till next morning. His horse was tied in a wagon yard a little more than three blocks from the courthouse. He passed up the street from the courthouse to his horse, going along the street; he saw a large number of persons in the street, but said not a word to any one, and no one said a word to him; he got on his horse, rode him down the street past the courthouse to about two blocks, in the opposite direction from where he had his horse tied, to a livery stable. He there turned his horse over to a negro boy he found there, telling him simply and solely to water and feed his horse and keep him till the next morning. Immediately upon giving these directions and turning the horse over to the boy, he started back to find and get with the jury. The other jurors, in the meantime, had gone to the restaurant, ordered, and were eating, and had probably about concluded their meal when the sheriff discovered that one of the jurors was absent. He thereupon gave instructions to another party to hunt and find and bring back this juror. This party started out to hunt him, and found him on the same block where the jurors were eating their suppers in the restaurant, seeking them. He was on the sidewalk. The party hunting him was on the opposite side of the street, and when he saw him, hailed him and told him that they were looking for him, and indicated where they were, pointing towards the restaurant. The juror then went in the restaurant to the other jurors, and stayed with them until after the verdict was rendered. On the first ballot the jury stood six for conviction and six for acquittal; said juror voting for acquittal. On a second ballot all of the other jurors voted for conviction, but this juror still stood out for acquittal, and so voted. Later he agreed to the verdict of conviction, and the jury so found. At no time did this juror seek to use his influence with any of the other jurors to have them find appellant guilty. From the time this juror first left the other jurors until he returned to them he says was from 10 to 15 minutes; others say it was 15 or 20 minutes—a mere estimate as to the time. Neither appellant, nor his attorneys knew or heard anything of this juror separating himself from the others or what had occurred thereabouts until the next day after the trial was concluded, and after the verdict was rendered.

The question then is: Does this separation of this juror from the others entitle appellant to a new trial?

The statute, article 745, C. O. P., is: "After the jury has been sworn and impaneled to try any case of felony, they shall not be

permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the state and the defendant, and in charge of an officer."

Article 887, C. O. P., is: "New trials, in cases of felony, shall be granted for the following causes, and for no other." Then the statute gives nine separate and distinct grounds which would authorize a new trial. Not one of them says that the separation of the jury shall be such ground. The only one of these several grounds which could at all be construed to embrace the separation of the jury is the eighth, which is: "Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial; and it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and a verdict may, in like manner, in such cases be sustained by such affidavit." That this juror separating himself from the others was misconduct by him there can be no question. But the statute says that for such misconduct to authorize a new trial it must be when "*the court is of opinion that the defendant has not received a fair and impartial trial.*" Not that separation alone would authorize or require a new trial, but only when the court is of the opinion that because thereof the defendant has not received a fair and impartial trial.

Unfortunately the decisions of this state are not uniform on this subject. These articles of our Code, 745 and 887, have been therein continuously, at least since 1856, when the Codes were first adopted. The Supreme Court of this state, when it had jurisdiction, in construing these articles held that before the court was authorized to grant a new trial because of the separation of the jury, the appellant had to show that because thereof he had not had a fair and impartial trial. In other words, unless he showed injury he was not entitled to a new trial.

On this subject, in *Jack v. State*, 26 Tex. 4, the Supreme Court said: "There may have been misconduct on the part of some of the jurors; but, when a new trial is sought on the ground of misconduct of the jury, it must be shown to have been such misconduct as has affected the fairness and impartiality of the trial."

In *Wakefield v. State*, 41 Tex. 557, the Supreme Court said: "It is not pretended that the juror conversed with any person in regard to the case, or that the defendant has not received a fair and impartial trial because of any misconduct of the jury. The juror may have been guilty of misconduct but it is not shown that it has had any influence on the fairness of the trial, and that the discretion of the court was not properly exercised in overruling that ground of the motion. *Jack v. State*, 26 Tex. 4; and *Jenkins v. State* [41 Tex. 128], decided at Austin during the last term."

In *Ogle v. State*, 16 Tex. App. 361, this court, through Judge Willson, said: "The mere separation of a jury [pending verdict] is not cause for a new trial. In addition to the separation in contravention of the law, \* \* \* It must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned." He cited the statute and *Davis v. State*, 3 Tex. App. 91; *Cox v. State*, 7 Tex. App. 1; *West v. State*, 7 Tex. App. 150; *Russell v. State*, 11 Tex. App. 288.

In *Stewart v. State*, 31 Tex. Cr. R. 154, 19 S. W. 908, where it was shown that two jurors, unaccompanied by any officer, had separated from the others, took some bedclothes upstairs, went into a friend's room, got a drink of whisky, and upon being asked by him they told him the jury had not agreed upon a verdict, the court said: "This, however improper and suspicious, would not of itself warrant a reversal; it not being shown that probable injustice was done."

In *Boyettt v. State*, 26 Tex. App. 703, 9 S. W. 277, where the jury separated and appellant sought a new trial on that account which was a murder case with a life sentence and affirmed, Judge Hurt said: "In cases like the one in hand, and where the jury separated without permission of the court, to reverse, it must appear that the juror conversed with others about the case, or was guilty of misconduct to the prejudice of the accused." He cited *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550, and the *Jack and Wakefield Cases*, supra, and *March v. State*, 44 Tex. 64; *De Friend v. State*, 22 Tex. App. 570, 2 S. W. 641.

Judge White, in section 865, p. 559, of his *Annotated Criminal Code Procedure*, says: "To reverse because the jury separated without the consent of the court, it must appear that the separating juror conversed with other persons about the case, or committed other misconduct to the prejudice of the accused." He treats this subject on two grounds: First, "separation by consent"; and, second, "separation without consent." The statute and decisions also make this distinction. This case comes within the second class.

We have many cases more recently decided, and even almost down to this very date, citing and approving the rule above announced and the decisions cited in this second class. However, other decisions may be found indicating, and perhaps holding, that when a separation of the jury has occurred by permission of the judge, contrary to the statute, the court will not look into the question at all to see whether any injury has occurred or might have occurred. These decisions are more especially under said first class. Clearly the trend of the later decisions under both classes go no further than holding that when a separation has occurred, the burden is on the state to show that no injury occurred. This may perhaps be regarded now

as the rule. Certainly it is as liberal to an accused as the statute authorizes or the courts should require.

In *Dowd v. State*, 55 Tex. Cr. R. 367, 116 S. W. 571, in considering the misconduct of the jury in one separating from the other jurors and talking about the very case on trial, this court said: "In appellant's motion for a new trial he complains of the misconduct of the jury in that, after the jury retired to consider their verdict, one of them talked with the county judge of the county. In the course of said conversation, the county judge remarked to the said juror, Lyon, that the defendant (meaning this defendant) was guilty of murder. That said judge did not know until said juror was leaving his office that he was a juror in the case. That the juror was absent from the others, and defendant says that such separation was not had by his knowledge or consent, nor by the knowledge or consent of his counsel. This motion is sworn to by the defendant, but we find no evidence in the record to support the affidavit; but the judgment of the court recites that the court heard the evidence on the motion, and that same should be overruled. This is the only matter complained of in the motion for a new trial." And the court affirmed the case.

In *Robinson v. State*, 58 Tex. Cr. R. 556, 126 S. W. 278, in which the court affirmed a death penalty, this court, through Judge McCord, said: "The mere separation of a jury pending verdict is not cause for a new trial; in addition to the separation, in contravention of law, it must be further made to appear by reason of such separation probable injustice to the accused has been occasioned"—citing and reviewing many of the cases cited supra and others.

In *Barnes v. State*, 61 Tex. Cr. R. 44, 133 S. W. 887, the court, through Judge Davidson, said: "One of the grounds of the motion for new trial is that the jury separated after being impeached. The facts show that the horse of one of the jurors had gotten out of the pasture where he had placed it for safe-keeping during the trial, and was passing along the street dragging a rope; that the juror left the jury and caught the horse a distance of 25 or 30 steps away, and that an attorney in the case walked up and took the horse to take care of, or at least to relieve the juror of the trouble of the matter. There was nothing said by the juror to the attorney or the attorney to the juror, or by anybody to the juror in regard to the case. The above is the substance of the matter in regard to the separation. We are of opinion that this is not of sufficient importance to require a reversal."

In *Galan v. State*, 150 S. W. 1172, the court, through Judge Davidson, in discussing appellant's bill complaining that the court permitted part of the jurors to separate and intermingle with other people in the courtroom without being accompanied by proper

officers, and in violation of the statute, said: "It does not undertake to show that the jurors had anything to do with the people, or talked with them, or had any discussion with them, or that anybody spoke to them." See, also, to the same effect *Kinney v. State*, 148 S. W. 783; *Phillips v. State*, 59 Tex. Cr. R. 537, 128 S. W. 1100; *Cabrera v. State*, 56 Tex. Cr. R. 156, 118 S. W. 1054; *Jones v. State*, 153 S. W. 897; *Parshall v. State*, 62 Tex. Cr. R. 177, 138 S. W. 759. A large number of other cases to the same effect could be cited, but we deem it unnecessary to do so.

The record does not intimate that the juror Breedlove, on the motion for new trial heard by the court, did not testify the truth, the whole truth, and nothing but the truth. His reputation for truth and veracity was not attacked. The court saw and heard him when he testified. His testimony must have undoubtedly convinced the judge that he was swearing the truth. Besides, if he had talked to any one, or any one had talked to him, about the case or any other matter other than what he testified, it seems to us witnesses could have been found and produced who would have disputed him. The fact that he had separated and where he had been and what he had done was learned just after the trial was concluded. Everything then was fresh. Taking the whole matter, we are satisfied that the trial judge, a very careful, fair, and impartial one, was thoroughly convinced that no injury whatever to appellant was shown by the separation of said juror from the others. This court, through Judge Hurt, in *Davis v. State*, 28 Tex. App. 560, 13 S. W. 997, said: "To reverse in the absence of probable injury would be contrary to principle."

Again, there is no circumstance or intimation in this record that said juror had any cause or reason whatever to testify falsely or to act corruptly. His action and vote on the jury demonstrates that he was not against, but for, appellant. Certainly, it cannot be contended with any show of reason that said juror would ignore, or did ignore, his oath, wherein he swore to render a true verdict according to the law and the evidence. Being a fair and impartial juror, there is no intimation in the record to even suggest that his verdict was not rendered in accordance with the law and the evidence. Because a juror who has no motive whatever to do otherwise sits in a case, and, where the evidence and the law shows a man is guilty beyond a reasonable doubt, so finds, can be no imputation against him that because of this he would swear falsely or act corruptly or do other than obey his oath, as was done in this case. He is not a criminal, nor in any way charged as such, and should not be so treated, by implication or otherwise. Even where an accused is properly indicted, charged with a crime, he is presumed to be innocent until his guilt is established be-

yond a reasonable doubt. Formerly, whenever a trial of one accused of a felony began, the sheriff had to take charge of him, and, pending the trial, incarcerate him in the jail. Such is not the law now. Even a criminal, pending trial, if on bail before, continues on bail until his conviction, and even after conviction, when the penalty assessed is confinement in the penitentiary for less than 15 years and he appeals he can still remain on bail and be at his liberty while appealing. While the statute requires that after a trial for felony begins the jury shall be kept in charge of the sheriff, and that they shall not be permitted to separate nor converse with any one about the case, because an ignorant juror, without the slightest corrupt motive, absents himself from the jury for a short time, he should not be regarded as a criminal, nor the trial whereon he sits as a juror, held absolutely void because thereof.

The judgment of the court overruling appellant's motion for new trial expressly states that the judge heard evidence on said ground of appellant's motion. The evidence referred to doubtless is the said statement of facts in the record on that question. Thereby the judge unquestionably must have believed and held, as the evidence clearly justified him to do, that it was clearly shown that no injury whatever did occur, or could have occurred, to appellant by the separation of said juror. The evidence, I think, without contradiction clearly shows no injury to appellant. Again, as shown above, the evidence must have established unquestionably and beyond a reasonable doubt the guilt of appellant, that no error whatever was committed in the trial of his case, and that he, without any doubt, had a fair and impartial trial. The jury assessed the lowest penalty that could be assessed under the law, and in my opinion the court below correctly overruled appellant's motion for new trial, and the judgment should be affirmed, and I respectfully dissent to the reversal, which the court orders.

DAVIDSON and HARPER, JJ. We cannot agree to the above opinion, and think the case should be reversed. It is shown that the juror, without the knowledge of the officer in charge of the jury, intentionally left the jury, and he says he went a distance of between three and four blocks to where his horse was tied; that he then got on his horse and went a distance of seven or eight blocks to Mr. Machett's stable, and turned his horse over to the person in charge of the stable, and told him to keep him and feed him; that he did not then know where the remainder of the jury was, and he went in search of them, traveling the streets of the town of Brenham; that there were lots of people on the streets; that he saw one McAdoo, who was not an officer, and who told him they were looking for him, and told him

the jury was in a certain restaurant, and he went to this restaurant and joined the jury. The record shows he was separated from the remainder of the jury for from 15 to 30 minutes. In the opinion by Presiding Judge PRENDERGAST it is admitted that under all the decisions, where a separation is shown, the burden is upon the state then to show that nothing improper took place during the time the juror was separated from the others, and all the cases cited in the opinion so holding, and in which it was held not to present reversible error, the state assumed the burden, and brought the witnesses before the court. In this instance the state did nothing of the kind. The defendant placed the juror Breedlove on the stand and proved the separation, and proved by him that he thought he could "get back before the officer found it out"; that he saw lots of people, but denied he spoke to but two men, McAdoo and the man in charge of the livery stable. The state called neither McAdoo nor the man at the stable to the witness stand. It contented itself with proving that the juror first voted for an acquittal, and then for conviction and two years in the penitentiary. If anything improper took place, the juror could hardly be expected to tell about it, and a juror, "like Caesar's wife, should be above suspicion." The court has gone as far as it should go in holding that if the prosecution takes the laboring oar and shows that the separation was temporary, unintentional, and the juror came in contact with no one on the outside, or if he did come in contact with any one to bring such person before the court, and fully investigate all that took place while the juror was separated from the others, it presents no reversible error. In this case we have a man who intentionally slipped off from the others, hoping to get back before his absence was discovered, he says. It is further shown that he was traveling up and down a street filled with people, going about alone. The Legislature, in providing that "after a jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of defendant, and in charge of an officer," meant no separation should take place unless an officer was with the juror. This statutory law prohibits any separation unless the juror is accompanied by an officer. As before said, our court has gone a long way in order to uphold the trial court in holding that, after a separation is shown to have taken place, if it is then shown that the defendant suffered no injury, the case will not be reversed. This statute was passed, we think, as much to protect the public as the defendant. The public has a right under it, for it is of the highest public importance that proper punishment be met-

ed out to those guilty of crime, and if all that was necessary to be shown was that the "defendant got the lowest punishment," then the fact that a juror was "influenced" to vote for an acquittal, but, if he could not secure an acquittal, then compromise on the lowest punishment, and when that was shown, no further inquiry be made might result in untold harm. There may be some conflict in the decisions, but not any very serious one, we think. It has always been held that an incidental separation, where the juror came in contact with no outside person, would not be cause for a reversal; that talking over the telephone would be no ground for reversal, where the parties were brought before the court and detailed the conversation, although highly improper; that when the separation was caused by sickness or some unavoidable cause, or incidentally arose, and the parties were brought before the court and examined, and the trial court found that nothing improper had taken place, we would not reverse his action. But we do not think the authorities have gone so far that, where a juror intentionally slipped off, traveled the streets of a town, on which many people were gathered, and where he admits speaking to two, and neither of these two brought before the court, we should lend our sanction to it. It opens the door too broadly, and would in effect render meaningless that provision of the Code, for such holding would mean that, if a juror who intentionally absented himself should first vote for acquittal, and subsequently agree to a conviction for a minimum term, no testimony other than that of the juror was necessary, and, of course, he would not admit improper conduct on his part. We are of the opinion that this is such a separation as the law prohibits, and the state has not met the burden of showing nothing improper could have or did take place, and the case therefore should be reversed. *McCampbell v. State*, 37 Tex. Cr. R. 607, 40 S. W. 496; *Boyet v. State*, 26 Tex. App. 690, 9 S. W. 275; *De Friend v. State*, 22 Tex. App. 570, 2 S. W. 641; *Neal v. State*, 50 Tex. Cr. R. 585, 99 S. W. 1012; *Barnett v. State*, 50 Tex. Cr. R. 542, 99 S. W. 556; *Gant v. State*, 55 Tex. Cr. R. 284, 116 S. W. 801, and cases there cited.

The judgment will be reversed.

#### SASSER v. STATE. (No. 3067.)

(Court of Criminal Appeals of Texas. April 15, 1914. Rehearing Denied May 13, 1914.)

#### 1. CRIMINAL LAW (§ 720\*) — CONDUCT OF TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

Where two defendants were indicted for the same offense, the action of the district attorney in stating, in the presence of the jury when calling as a witness one of the defendants on the trial of the codefendant that he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would dismiss the case as against the defendant because he was satisfied that he was not guilty, was improper, and the dismissal should have been made by the court without the knowledge of the jury if the court approved the action of the district attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

**2. CRIMINAL LAW (§ 421\*)—HEARSAY—REPUTATION.**

On a trial for violating the local option law, it is error to permit a witness to state that he had heard people say that they believed accused was selling whisky.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 976-983; Dec. Dig. § 421.\*]

**3. INTOXICATING LIQUORS (§ 36\*)—LOCAL OPTION LAW—VALIDITY OF ADOPTION.**

Under Rev. St. 1911, art. 5728, authorizing the contest of a local option election, provided the contest is instituted within 30 days after the declaration of the result, otherwise it shall be conclusively presumed that the election and the result are valid, a local option election, alleged to have resulted in prohibition, cannot be attacked after 30 days after the declaration of the result, on the ground of irregularities in the order declaring the result and the publication thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 43, 44; Dec. Dig. § 36.\*]

**4. INTOXICATING LIQUORS (§ 227\*)—UNLAWFUL SALE—REPUTATION OF ACCUSED.**

On a trial for violating the local option law, a witness, knowing the reputation of accused as a bootlegger of whisky in prohibition territory, may testify as to whether his reputation is good or bad.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 287; Dec. Dig. § 227.\*]

Davidson, J., dissenting in part.

Appeal from District Court, Marion County; H. F. O'Neal, Judge.

Jessie Sasser was convicted of violating the local option law, and he appeals. Reversed and remanded.

T. D. Rowell, of Jefferson, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at one year in the penitentiary.

After the election is said to have been held, the commissioners' court met to declare the result of the election. The order declaring the result is as follows: "Oct. 8, 1910. Ordered by the court, that the election for local option for precinct No. 5, the same was this day tabulated by the court, as follows, to wit: For prohibition 105; against prohibition, none. Said election occurred September 24, 1910." The above is recited from the bill of exceptions. This is all of the order, shown by the bill of exceptions and statement of facts both, with reference to the order of the court declaring the result of the election. When this was offered various and sundry and divers objections were urged to its introduction, which we deem unnecessary to state. The objection covered every possible phase. The statute (article 5721, Re-

vised Civil Statutes) reads as follows: "Said court shall hold a special session on the eleventh day after the holding of said election, or as soon thereafter as practicable, for the purpose of opening the polls and counting the votes; and, if a majority of the votes are 'For prohibition,' said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed limits, except for the purposes and under the regulations specified in this title, until such time as the qualified voters therein may at a legal election held for that purpose by a majority vote decide otherwise; and the order thus made shall be held to be prima facie evidence that all the provisions of law have been complied with in giving notice of and holding said election, and in counting and returning the votes and declaring the result thereof." Then follows article 5722, which provides that the order, after properly being entered, shall be published for four successive weeks in some newspaper, or in the absence of a newspaper in the county, then by posting copies for said length of time. An inspection of article 5721 shows there was no order entered in this case declaring the result and putting prohibition in force, as provided by the statute. There is simply a tabulation or statement of the votes as being favorable to prohibition. There was no order of the court following this, as the statute requires. The objections should have been sustained, and the order excluded.

Another bill was reserved to the publication by the judge, among others things, because there had been no legally declared result, and that the publication was not authorized until the proper order had been entered declaring the result. It is unnecessary to discuss this question. The basis of this publication was the proper order declaring the result of the election. For authorities on the first proposition see Branch's Crim. Law, § 550, and the statute above quoted. The contest provided by article 5728 is only authorized after the proper order declaring the result has been made of record, and the election has been declared to be in force by the proper authorities; therefore that question cannot arise in the case. The time for contesting the election had not arisen, and that phase of the law cannot be applied in this case. There is nothing to contest until the result has been declared and proper order entered as contemplated and required by the statute. The trial judge seems to have taken the same view of it as shown by the bill of exceptions, to the effect that when objection was made to the introduction of the order undertaking to declare the result of the election, the court stated from the bench he really believed the exception to the introduction of the order was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

well taken, yet he permitted it to go to the jury. We are of opinion that the trial judge was correct in stating that the law was not in effect, and, instead of permitting it to go to the jury, he should have excluded it.

[1] Another bill recites that when the state introduced the witness Welborne, who was indicted also for making the same sale of liquor for which defendant was being prosecuted, and which indictment was then pending on the court docket, the district attorney stated, in the presence and hearing of the jury, as follows: "I am going to dismiss the case against this man because I don't believe Mr. Welborne sold any whisky. I have looked into and I don't believe he sold any whisky." Exception was taken to this remark. We are of opinion that this should not have occurred in the presence and hearing of the jury. Welborne was indicted for selling the same whisky, and the belief of the district attorney in dismissing the case against him, when he tendered him as a witness, should not have gone to the jury. The belief of the district attorney, or his action in dismissing this case, was not a matter for the jury, but for the court alone; and, if the district attorney saw proper to dismiss the prosecution against Welborne, it should have been done in writing, and his reasons stated in writing, subject to the approval of the court. If the court approved it, then the indictment or prosecution could have been dismissed. See White's Ann. Penal Code, §§ 37, 630, 709. These articles are the same in the Revised Statutes of 1911; the numbering, however, is different from what it is in White's Annotated Penal Code. Upon another trial this matter should not occur.

[2] Another bill recites that M. C. Stallcup, justice of the peace in precinct No. 5, in which it is alleged this sale occurred, was called as a witness for the state. While upon the stand he was asked this question: "Do you know what defendant's reputation is in the community in which he lives, on the question of whether or not he is a bootlegger of liquor?" to which the witness answered: "I have heard that he sold whisky before this trouble. I heard a year or two back that Jessie Sasser was selling whisky; those people told me they believed he was selling whisky." Objection was urged to this testimony. On the question of reputation we do not believe this testimony was admissible as to what people told witness they believed about it. What people believed about his selling whisky would not be admissible against appellant. We are of opinion this testimony, under the circumstances and manner detailed in this bill of exceptions, should not have been permitted to go to the jury. In view of the fact that he was charged with selling whisky, what the people believed about his being a bootlegger, or selling whisky, may have influenced the jury to determine this question adversely to appellant. Matters of that sort become more or less

important, according to the facts of the case. Appellant's evidence placed it beyond his power to have been guilty. He proved a clear case of alibi by several witnesses, who show that he could not have been guilty. The sale occurred at night, and he had to be identified at night, and he denies his presence and the entire transaction. Welborne and two or three others had some whisky independent of the bottle supposed to have been bought from defendant, and with which they became very much intoxicated, and spent the night in reveling. As this record is presented, we do not believe that this conviction ought to stand, and that these matters discussed are erroneous.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J., and HARPER, J.

[3] Being unable to concur in that part of the opinion holding that prohibition is not in force in precinct No. 5 in Marion county, we will state our reasons for so holding. The record discloses that the commissioners' court of the county on September 5, 1910, ordered an election to be held September 24, 1910; that in accordance with said order the election was held on that day, and thereafter the commissioners' court met and tabulated the returns, and declared the result, showing that the vote was unanimous for prohibiting the sale of intoxicating liquors, being 105 for and none against. The record further discloses that the following publication was had in the Jefferson Jimplecute: "Order Declaring Result of Local Option Election Held in and for Justice's Precinct No. 5 of Marion County, Texas, on September 24, A. D. 1910. Whereas, an election was duly and legally petitioned for and ordered to determine whether or not the sale of intoxicating liquors should be prohibited in justice precinct No. 5 of Marion county, described and bounded as follows, to wit: [See original boundary in commissioners' court records.] And, whereas, said election was by the honorable commissioner's court of said county, on September 5, 1910, duly and legally ordered and held on Saturday, September 24, A. D. 1910; and, whereas, the result of said election were duly made to said commissioners' court, and were duly opened and counted on the 8th day of October, 1910; and it appearing to the court that a majority of the votes cast at said election held in said precinct on the day aforesaid were for and in favor of prohibition: It is therefore now ordered by the court that the sale of intoxicating liquors within the limits of said justice precinct No. 5 of Marion county, Tex., as heretofore defined by metes and bounds, be and the same is hereby absolutely prohibited, except for the purposes and under the regulations specified by the law (title 69, art. 3385, of the Local Option Laws of Texas) until such time as the qualified voters of said precinct may by a majority vote otherwise decide. The



total number of votes cast at said election was 105. The number for prohibition was 105. The number against prohibition was none. It is hereby declared by this court that the result of said election held on September 24, 1910, is that prohibition has carried in said precinct No. 5, by a majority of 105 votes. It is further ordered that this order declaring the result of said election shall be published for four successive weeks in some newspaper published in Marion county, Tex., to be selected by the county judge of Marion county, Tex., for that purpose. It is further ordered that the sale of intoxicating liquors, except as hereinbefore mentioned, within the above-described justice precinct No. 5, of Marion county, Tex., shall be absolutely prohibited, and that said prohibition shall begin and take effect immediately, and shall be enforceable from and after the date of the last aforesaid publication of this order. R. A. Loomis, County Judge, Marion County, Tex." It further appears that this publication was made in the paper selected by the county judge, and for the length of time required by law. It apparently appears that, more than three years after the election had been held and result thereof declared, for the first time the contention is made that the order declaring the result is insufficient in law to put prohibition in force, as the minutes of the court do not specifically show that in declaring the result they at that time entered an order prohibiting the sale of intoxicants, although the publication shows such an order was made. That is, though it appears that such an order was made, the failure of the clerk to enroll it on the minute book prevents prohibition going into effect until he does so enroll, and another publication is had. We are frank to admit that the decisions of this court rendered prior to 1907 would support such contention, and this was the reason for the Legislature passing an act that, unless a contest of the election is instituted *"within thirty days after the result has been declared,"* it shall be conclusively presumed that said election as held and the result thereof declared are in all respects valid and binding upon all the courts. Article 5728, Rev. Stats. And in this article it is provided that the district court shall have jurisdiction to try and determine all matters connected with said election, including the petition for the election and all *proceedings and orders relating thereto, embracing final count and declaration and publication of result putting local option into effect, etc.* So it is thus seen that the Legislature provided that all matters relating to the sufficiency of any of these steps must be contested within 30 days after the court has declared the result, and, if it is not done, the courts must conclusively presume that all necessary legal steps were taken. If one three years after the result has been declared can contest the sufficiency of the order declaring the result and prohibiting the sale, then why not con-

test the sufficiency of the petition for the election, the sufficiency of the order ordering the election, the fact that the notice had not been posted, or any other step provided in the law? This law was intended to put an end to all these matters after the lapse of time provided for the contest, and it has been so held in an unbroken line of decisions by this court since the passage of the act.

This court, in the case of *Evans v. State*, 55 Tex. Cr. R. 450, 117 S. W. 167, held that this act of the Thirtieth Legislature, regulating the contest of local option elections and providing for the conclusiveness thereof, was constitutional, and "it follows therefore that the court did not err in refusing to permit appellant, after the expiration of 60 days, to introduce evidence going to show irregularities or defects in the initiatory steps necessary to place local option into effect. It was proper for the court to have the county attorney to introduce sufficient number of the orders of the commissioners' court to show that the county had adopted local option. It was also proper, as stated, to refuse to permit appellant to contest the validity of said orders after the expiration of the 60 days."

In *Doyle v. State*, 59 Tex. Cr. R. 61, 127 S. W. 816, it was held: "It is contended, among other things, that the precedent steps necessary to put local option in force in Johnson county had not been complied with, and that for many reasons, urged in bills of exception and insisted on in brief of counsel, said election was invalid and nugatory. Whatever we might conclude in respect to these several matters, in the absence of the statute passed by the Thirtieth Legislature (Acts 30th Leg. c. 8), requiring contests to be made of local option elections theretofore or to be thereafter held, it is sufficient to say that, in the absence of a contest, we must and shall assume that the judgment and decree putting local option in force and the proclamation of the county judge had the effect to institute the law in that county, and that this presumption and conclusion are conclusive on us and on appellant."

In *Harryman v. State*, 53 Tex. Cr. R. 474, 110 S. W. 926, it was held: "Where upon trial of a violation of the local option law it appeared that the publication was made as provided by law, the court correctly charged the jury that the sale of intoxicating liquors was at the time \* \* \* prohibited in said county."

In *Alexander v. State*, 53 Tex. Cr. R. 505, 111 S. W. 145, it was held: "Various objections to the orders of the commissioners' court are in the record, but, under an act of the Thirtieth Legislature that went into effect August 11, 1907, which provides that contests of elections, where the local option law was in force at the time the act was passed, should be contested within 60 days, none of the objections to the orders can be considered. The record shows there was no civil contest of the local option law. For a

discussion of this matter see *Wilson v. State*, 107 S. W. 818; *Hardy v. State*, 52 Tex. Cr. R. 420, 107 S. W. 547."

In the case of *Ex parte Thulemeyer*, 56 Tex. Cr. R. 337, 119 S. W. 1146, where it was contended that no order appeared on the minutes of the commissioners' court showing a creation of the justice precinct in which it was alleged that an election had been held and prohibition had been adopted, it was held that his remedy was by contest of the election under the above provisions of the statute, and the question could not be inquired into on habeas corpus.

In the *Jerue Case*, 57 Tex. Cr. R. 215, 123 S. W. 415, it was held: "The other question relates to the supposed invalidity of the local option election under which appellant was sought to be held, for the reason, in substance, that the notice of the election was not completed and published in the manner required by law. Since the passage of the act of the Thirtieth Legislature, in respect to contests of local option elections and the presumption of validity, in the absence of such contest, this point is no longer available to appellant."

In the case of *Wesley v. State*, 57 Tex. Cr. R. 277, 122 S. W. 550, it was held: "Many of the questions raised on the appeal relate to the sufficiency of the orders, judgments, and decrees of the commissioners' court of Howard county putting local option into effect. Since there was no contest as provided by the act of the Thirtieth Legislature, these matters cannot be considered by us, but we must assume and hold, as the court below did, that the law was in all respects regular and valid." See, also, *Coleman v. State*, 54 Tex. Cr. R. 396, 112 S. W. 1072; *Gipson v. State*, 58 Tex. Cr. R. 404, 126 S. W. 267; *Wilson v. State*, 107 S. W. 818; *Hardy v. State*, 52 Tex. Cr. R. 420, 107 S. W. 547; *Romero v. State*, 56 Tex. Cr. R. 435, 120 S. W. 859. Many other cases might be cited in which it is held that, after the lapse of time in which a contest may be filed, no question can be raised as to the sufficiency of the petition, the sufficiency of the order ordering the election, or any other order made by the court, but we do not deem it necessary to do so, and will only add that in no event would this render invalid the election, but if in fact the order putting in effect prohibition in that precinct is not of record in the minutes of the court, the court can now enter up an order in its minutes so declaring, and no other election would be necessary. *Crockett v. State*, 40 Tex. Cr. R. 173, 49 S. W. 392.

[4] Another matter we would mention is that, while it was not permissible for Judge Stallcup to answer the question as he did, yet under the facts in this case it was permissible to ask him if he knew the reputation of appellant as a bootlegger of whisky in prohibition territory where he lived, and, if he answered that he knew it, it would then

be permissible to be asked if it was good or bad, and the witness answer good or bad as the facts authorized, but on direct examination he could not tell what others had said to him.

#### ANDERSON et al. v. STATE. (No. 3069.)

(Court of Criminal Appeals of Texas. April 1, 1914. Motion to Reinstate April 22, 1914. On Motion for Rehearing, May 13, 1914.)

#### 1. BAIL (§ 94\*)—FORFEITURE OF BAIL—APPEAL—DISMISSAL—DEFECTIVE APPEAL BOND.

On an appeal from a judgment forfeiting a bail bond, an appeal bond which recited that notice of appeal was given to the "Supreme Criminal Court of Appeals," and was conditioned for the payment of costs in the "Supreme Criminal Court of the State of Texas," was insufficient to confer jurisdiction upon the Court of Criminal Appeals, and the appeal will be dismissed.

[Ed. Note.—For other cases, see *Bail, Cent. Dig. §§ 418-423; Dec. Dig. § 94.\**]

#### 2. BAIL (§ 94\*)—FORFEITURE—APPEAL—DEFECTIVE APPEAL BOND—FILING NEW BOND.

On appeal from the forfeiture of a bail bond, the same rules govern as govern in civil matters, and, where the appeal is dismissed for a defect in the appeal bond, the appellants may still prosecute their appeal by filing a proper bond.

[Ed. Note.—For other cases, see *Bail, Cent. Dig. §§ 418-423; Dec. Dig. § 94.\**]

#### Motion to Reinstate.

#### 3. BAIL (§ 59\*)—BOND—APPEAL FROM JUSTICE COURT—VALIDITY.

A bond on appeal from the justice court conditioned upon the defendant making "her appearance before the county court" is in substantial conformity with the statutory requirement that it be conditioned to "make her personal appearance."

[Ed. Note.—For other cases, see *Bail, Cent. Dig. §§ 256½-262; Dec. Dig. § 59.\**]

#### 4. BAIL (§ 75\*)—LIABILITY ON BOND—APPEAL FROM JUSTICE COURT—BREACH.

Under Pen. Code 1911, art. 921, requiring a bond on appeal from a justice court to be conditioned to the appearance of defendant, a bond may be forfeited if the defendant fails to appear, even though her attorney did appear and announce ready for trial.

[Ed. Note.—For other cases, see *Bail, Cent. Dig. §§ 309-312, 315-321; Dec. Dig. § 75.\**]

#### 5. BAIL (§ 94\*)—LIABILITY ON BAIL BOND—ACTIONS—APPEAL.

An objection that a bond given on appeal from a conviction in a justice court was invalid because it was not in an amount double the fine and costs, which objection was not supported by proof in the record, and was first made in the amended motion for a new trial, will not be considered on appeal from the forfeiture of the bond.

[Ed. Note.—For other cases, see *Bail, Cent. Dig. §§ 418-423; Dec. Dig. § 94.\**]

Appeal from Nacogdoches County Court; Geo. F. Ingraham, Judge.

Johnnie Anderson was convicted of a misdemeanor in a justice court and appealed to the county court. From a judgment of the county court forfeiting the bond given on such appeal, the defendant and her sureties appeal. Appeal dismissed, but reinstated on

tender of a sufficient bond, and judgment affirmed.

B. F. Amonette, of Navasota, for appellants. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. [1] Judgment final was entered against appellants at the November term, 1913, of the county court of Nacogdoches county on a forfeited bail bond, from which judgment appellants gave notice of appeal to this court, but a few days later gave a bond on appeal which recites that notice of appeal was given to the "Supreme Criminal Court of Appeals," and is conditioned for the payment of all costs which may accrue in the "Supreme Criminal Court of the State of Texas." There being no such court in this state, this bond does not confer jurisdiction on this court. This court is termed by the Constitution and laws of this state the "Court of Criminal Appeals," and, as the bond given is not conditioned for the payment of such costs as may accrue in this court, and we could enter no judgment thereon, it does not confer jurisdiction on this court, and the cause is dismissed from the docket.

[2] As it appears from the transcript that notice of appeal was given to this court, and the same rules govern in this character of proceedings that govern in civil matters, appellants, if they so desire, may still prosecute their appeal to this court by filing a proper bond and taking proper proceedings to bring the matters before this court.

The appeal is dismissed.

#### Motion to Reinstate.

This case was dismissed at a former day of this term on account of defective appeal bond, and appellant now asks that the case be reinstated, tendering a sufficient bond, and it is so ordered, and the case will now be considered on its merits.

Johnnie Anderson was, on March 27, 1912, convicted of a misdemeanor, and her punishment assessed at a fine of \$10, from which judgment she gave notice of appeal to the county court, and executed the following appeal bond:

"The State of Texas v. Johnnie Anderson. No. 971. In Justice Court of Precinct No. 1, Nacogdoches County, Texas. Whereas, on the 27th day of March, A. D. 1912, in the above-styled and numbered cause, at a term of said court then in session, the defendant, Johnnie Anderson, was convicted on a complaint charging her with a misdemeanor, and fined by the court in the sum of ten dollars and cost, from which said judgment the defendant has appealed to the county court of Nacogdoches County, Texas: Now, therefore, we, the said Johnnie Anderson, as principal, and ——— and ———, as sureties, acknowledge ourselves bound to pay the state of Texas the sum of eighty (\$80.00) dollars, con-

ditioned that the defendant, Johnnie Anderson, shall well and truly make her appearance before the county court of Nacogdoches county, Texas, at the next regular term, to be begun and holden on the third Monday in April, A. D. 1912, the same being the 15th day of said month, at the courthouse in said county, in the city of Nacogdoches, and there remain from day to day and from term to term to answer in said cause on trial in said court, then this obligation to become null and void, otherwise to remain in full force and effect. Johnnie Anderson. B. E. Strahan, Surety. M. S. Lloyd, Surety. G. U. Davis.

"Approved this 27th day of March, A. D. 1912. J. F. Perritte, Justice of the Peace, Precinct Number One, Nacogdoches County, Texas."

[3] The first contention made by appellant is that this bond is not a statutory bond, in that the word "personal" is omitted; the conditions being that she "shall make her appearance before the county court, and there remain from day to day," etc., while the statute provides it shall be conditioned to "make her personal appearance." The bond is in substantial compliance with the Code, and was not void because the word "personal" was omitted therefrom. *Cyechawalch v. State*, 23 Tex. App. 430, 5 S. W. 119, and cases cited.

[4] His next contention is that, when the case was called, while the appellant did not appear in court, yet her attorney did appear and announce ready for trial, therefore no forfeiture could be declared. This construction had been given article 921 of the Code prior to its amendment in 1901 (Laws 1901, p. 291). Before amendment the bond was conditioned for the payment of the fine and costs adjudged against the appellant in the county court; but as amended in 1901 the bond is conditioned solely for the appearance of the defendant, and in no way binds the sureties on the appeal bond to pay the fine and costs. So the bond now required by law binds the defendant to make his appearance before the county court, and, in the event he fails to do so, it may be forfeited, if the county attorney is unwilling to proceed with the trial in the absence of the defendant. It is now nothing more than an appearance bond.

[5] While in the amended motion for a new trial it is alleged that the bond is not in an amount double the fine and costs in the justice court, this ground is supported by no proof in the record. It is true appellant, in a bill of exceptions, recites that the fine was \$10 and the costs \$33.10, aggregating \$43.10, yet the court, in approving the bill, says this question was not raised on the trial of the case, nor in the original motion for a new trial, but was first sought to be raised in the amended motion for a new trial filed more than two weeks after the entry of final judgment, and that he held it came too late. Did

the record disclose that any proof was offered in support of the allegation, a serious question might be raised; but we do not deem it necessary to pass on this question, it being sought to be raised by an unsworn plea after judgment, and, the record before us containing no proof that the bond was not in fact double the fine and costs, the judgment is now affirmed.

DAVIDSON, J., absent at consultation.

#### On Motion for Rehearing.

HARPER, J. Appellant, in his motion for rehearing, asks us to allow him to make proof in this court of a fact not made in the court below, or, if made, not included in the bill of exceptions filed in the court below.

This is not a trial but an appellate court, and we pass on the case on the record made in the court below, and do not hear evidence in addition to that contained in the record. All other questions raised were passed on in the original opinion.

The motion for rehearing is overruled.

#### FIELDS v. STATE. (No. 3122.)

(Court of Criminal Appeals of Texas. May 6, 1914.)

#### WEAPONS (§ 9\*)—CARRYING WEAPONS—LIABILITY.

An owner who lives on his premises, and who has rented a part thereof on shares, and who with his tenant jointly cultivates the crops, is on his own premises, and his act in carrying a pistol while there is not punishable.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 8; Dec. Dig. § 9.\*]

Appeal from San Jacinto County Court; E. W. Love, Judge.

Jiles Fields was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

J. M. Hansbro, of Cold Springs, and A. T. McKinney, of Huntsville, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol. Appellant's first assignment of error is: "There was error in the judgment of the trial court because the verdict of the jury is contrary to and not supported nor justified by the evidence adduced upon the trial of said cause in this: (a) All of the evidence adduced upon the trial of said cause, and which was uncontroverted, showed that the defendant, at the time he was charged with having carried the pistol, was upon his own premises, and which said premises were held and occupied by himself and family as a homestead, and that at no time was he off of his said premises. (b) The undisputed evidence shows that, if the witness Tot Dunnam was a tenant of the said Jiles Fields, he was not such tenant as

was, under the law, entitled to the exclusive possession (as against defendant) of the lands cultivated by him; the evidence showing that both the defendant Jiles Fields and the said Dunnam worked the lands jointly and together, and the said defendant had never parted with his right of possession to said premises, nor that said Dunnam had had such a contract as entitled him to the exclusive possession, as against this defendant, the owner of said premises. (c) The undisputed evidence shows that the defendant Jiles Fields, with his family, occupied said premises as his home, and had never parted with his right to so occupy the same, nor had invested the said tenant, Dunnam, with any right to the exclusive possession of the same, and that, if said Dunnam had any rights of possession whatever, it was simply a joint right with defendant. (d) The undisputed evidence shows that, if the said Dunnam was the tenant of the said Jiles Fields, they, the said Fields and the said Dunnam, worked the said premises jointly; the said Fields furnishing the teams and tools with which the lands were cultivated, and the said parties, Fields and Dunnam, 'working the said lands through and through,' as expressed by the witnesses—that is, the said lands were cultivated, planted, and gathered by the said Fields and Dunnam, jointly."

The evidence and all the evidence sustains this assignment, and is insufficient to sustain the verdict. Appellant lived on the premises, and, while he had rented a portion of the place to Tot Dunnam on halves, yet it is shown that appellant and Dunnam worked the crops "through and through"; that they jointly cultivated the crops. Appellant helped Dunnam break the land, plant the crop, cultivate it, and gather it, and Dunnam worked in appellant's crop the same way; appellant owning all the land.

The judgment is reversed, and the cause remanded.

#### IRVING v. STATE. (No. 3102.)

(Court of Criminal Appeals of Texas. April 29, 1914.)

#### 1. HUSBAND AND WIFE (§ 312\*)—ABANDONMENT OF WIFE—INDICTMENT.

An indictment which charged that the defendant deserted and abandoned his wife, but did not directly allege that he had a wife or give her name, was insufficient to charge an offense.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1109; Dec. Dig. § 312.\*]

#### 2. PARENT AND CHILD (§ 17\*)—ABANDONMENT OF CHILD—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for the abandonment of defendant's minor son, evidence which does not establish the name of the son as charged in the indictment is insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. PARENT AND CHILD (§ 17\*)—INDIOTMENT—SUFFICIENCY—NAME OF CHILD.**

In an indictment for the abandonment of defendant's minor child, it is necessary to allege the name of the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.\*]

**4. HUSBAND AND WIFE (§ 313\*)—ABANDONMENT—PROSECUTION—SUFFICIENCY OF EVIDENCE.**

In a prosecution under an indictment charging in separate counts the abandonment by defendant of his wife and of his minor child, evidence held to show that defendant had merely left his family temporarily in order to secure work, and to make a new home for them, and therefore not to sustain a conviction.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. § 313.\*]

**5. HUSBAND AND WIFE (§ 304\*)—ABANDONMENT AND NONSUPPORT—CONSTRUCTION OF STATUTE.**

The statute making punishable the abandonment of a wife and minor child by a husband and father does not impose a penalty for mere temporary separation due to inability to furnish support, but implies a purpose on the part of the defendant not to support his family, where there is no justification or excuse for his failure to do so.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.\*]

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

Earnest Irving was convicted of abandoning his wife and minor son, and he appeals. Reversed and remanded.

G. R. Lipscomb, of Ft. Worth, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. The information contains two counts. In the first count, omitting formal parts, it is alleged appellant "did then and there unlawfully, without justification or excuse, desert and abandon his wife, leaving her in destitute and necessitous circumstances, without support, and in danger of becoming a public charge." In the second count it is alleged appellant "did then and there unlawfully, without justification or excuse, desert and abandon his minor child, Robert Irving, leaving him in destitute and necessitous circumstances, without support, and in danger of becoming a public charge, against the peace and dignity of the state."

[1] The first count is attacked because of the failure to name or state the name of the defendant's wife, or that he had any wife; defendant having no notice of having deserted any certain person, and only has notice of having deserted an unknown and uncertain person occupying a legal status, to wit, a wife. Appellant further alleges that same is vague, uncertain, and indefinite, and wholly insufficient in law. We are of the opinion that count is subject to the motion to quash, and that it should have been sustained. The statute reads as follows: "Any husband who shall willfully or without justification desert, neglect or refuse to provide

for the support and maintenance of his wife, who may be in destitute or necessitous circumstances shall be deemed guilty of a misdemeanor." Acts 33d Leg. c. 101. The count criticised does not contain an allegation even that defendant had a wife, except inferentially by charging he did abandon his wife. It does not even undertake to give a name, and there is no reason given why the pleader failed to insert the name of the wife. From the record, it is clearly evident that the name of the wife was known, because she was used as a witness in the case. The court should have sustained this motion to quash.

[2] The second count, which charges appellant with abandoning the son named Robert, in our judgment, is not proved by the evidence. It did not undertake to prove the name of the child by the witnesses. There is evidence in the record to the effect that he left his wife in August, 1913, and contributed very little money to her support subsequently. With reference to the child, the evidence shows the baby was born to the wife of appellant during the month of January, 1914, and the further fact is stated by her that "I was at home with my father and mother when he was born." So it would seem from this evidence that a child was born to appellant's wife in January, 1914, and it is supposed to be a boy by reason of the fact he is referred to as "he." The information charges that it was a son, and his name was Robert Irving.

[3] The evidence does not identify Robert Irving set out in the information as the child of whom the witnesses spoke. It may have been, or it may not have been; but, the name having been alleged, it was necessary to prove it, and in fact it was necessary to allege it.

[4] Generally under the facts we do not believe the state has made out a case against appellant. It is shown that he and his wife had married about 18 months or such matter prior to the institution of this prosecution; that they lived with his father-in-law and mother-in-law for some time, who rendered them some assistance, and finally, doubtless with the assistance of the father-in-law, appellant and his wife secured a home of their own, or a place to which they could move, and to which they did move. After they had moved into this place, the brother of appellant's wife also came and occupied part of the house. On account of the ill treatment, threats, violence, etc., of his brother-in-law, appellant left this house with his wife and went back to the home of his father-in-law, at which place they remained a while. Then he and another negro secured a room or place in another part of the city and instituted what they called a pressing club. While at this pressing club, his mother-in-law and another woman came there and with a piece of cordwood gave appellant rather a severe beating. He says he could not afford to fight a wo-

man, and he got away. He went to see his wife and told her that he was going away, and would come back and get her as soon as he could get money enough to set up housekeeping. The wife says: "We got along all right during the time we stayed together; he was good to me and supported me to the best of his ability. He never told me that he would not come back to me; but on the two nights that he stayed with me, after leaving in August, he stated that he would come back and get me as soon as he could get money enough to set up housekeeping." The wife says she did not know how much he worked while he was gone from her, or how much money he earned. After he left in August he visited his wife on two different occasions. Appellant testified: That, when he was first married, he and his wife were very poor and lived with her father and mother for some time, and, with their assistance, they started to housekeeping and rented a part of the house to his wife's brother. That on account of mistreatment by his brother-in-law, threats, etc., he went back to his father-in-law's with his wife and continued to live there, and he supported his wife there until August, 1913, at which time he and one of his friends attempted to establish a cleaning and pressing shop on Mills street in the city of Ft. Worth, and during the month of August—the exact date he did not remember—his mother-in-law and another woman came to the shop and seized a stick of cordwood and began beating him, and gave him an "awful beating." He says: "I was afraid to strike her; I didn't want to get arrested, and I was afraid to go back home, as I thought I would get into trouble with them again, and I did not want to get into trouble with any of them. I did not have any money to move my wife with, and I did not have any property from which I could realize money, or I would have moved her away from her parents. I decided that the best thing that I could do would be to move away and earn enough money to begin keeping house anew." He says he went from Tarrant county to Hill county and there worked on a farm; that he could not get steady work, but worked at odd jobs as best he could. Appellant, speaking of himself and wife, uses this language: "We are like all negroes, both me and my wife work; she washes and irons for the white ladies, and I work at anything that I can get to do. She has always worked that way since we were married, and has practically supported herself, or at least has contributed a great deal to the support of ourselves." He says: "I love my wife, and I want to live with her, and I also love my child, and want them both, and I would have lived with my wife during this time if she had not been at her parents, or, if I had the money to moved them with, I would have done so. I left them for the purpose of trying to get us a home of our own. I always told my

wife that as soon as I could we would go to living together, but that I could not live with her and her at her parents. I did not know when my child was born, and I have never contributed anything to his support."

There is nothing in this record, under this testimony, as we understand it, that would justify the conclusion that appellant had deserted his wife. He had gone away under the circumstances, and under the testimony of he and his wife the idea of permanent desertion or abandonment is utterly wanting. There is no evidence in the case that the wife was in necessitous circumstances, and the state did not undertake to prove it. Nor is there anything to indicate, as charged in the indictment, she was likely to become a charge upon the public. The evidence shows, and it is all there is in the record, that these two people were negroes; they both worked as indicated by the testimony, and the wife had all along supported herself practically, and had at least contributed to the support by washing and things of that sort that negro women do. He had gone away temporarily to seek a place to get money to get a home for them to go together.

[5] It would not do to hold that every temporary separation of husband from the wife would subject him to a prosecution under this statute. Nor do we believe it would be anything like a reasonable or fair construction to place upon this statute that the Legislature intended it to so operate; that is, because of the poverty of the husband, and his inability to make money, he should be subject to a prosecution and a fine of from \$25 to \$500 and imprisonment in the county jail for a year, under evidence of the character here mentioned. This statute carries with it the idea of willfulness on the part of the husband or father, as the case may be, and the purpose not to support his wife or child, either or both, which does not mean, and was not intended to mean, that, because a man is unfortunate in not having money to support his wife, therefore he should be subject to criminal prosecution. The law carries the distinct basic proposition with it that it must be willful or without justification or excuse. This testimony does not only not carry this idea but seems to exclude it—the testimony of the wife and the defendant both.

Believing that this conviction was wrong, the judgment is reversed, and the cause remanded.

#### LAFOON v. STATE. (No. 3106.)

(Court of Criminal Appeals of Texas. April 29, 1914. Rehearing Denied May 27, 1914.)

#### RAPE (§ 64\*)—EXCESSIVE PUNISHMENT.

Where a grown man was convicted of statutory rape upon testimony showing intercourse with a girl under the age of 15 years, the assessment of his punishment at confinement in the penitentiary for nine years, which is with-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the limits fixed by the statute, is not excessive.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 105; Dec. Dig. § 64.\*]

Appeal from District Court, Jones County; Jno. B. Thomas, Judge.

Claude Lafoon was convicted of statutory rape, and his punishment assessed at nine years' imprisonment in the penitentiary, and he appeals. Affirmed.

Cunningham & Oliver, of Abilene, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of statutory rape, and his punishment assessed at nine years' confinement in the state penitentiary.

There are no bills of exception in the record in regard to the introduction of testimony, and the only grounds in the motion allege the insufficiency of the testimony and that the punishment is excessive. The punishment is within the limits fixed by the Legislature for this character of offense, and is therefore not excessive. It appears that Rosa Lee Finch is certainly under the age of 15 years, and she swears positively to an act of intercourse. Appellant is a grown man, and under such circumstances, if the jury believed the testimony offered in behalf of the state, as they evidently did, we are not surprised at the punishment inflicted.

The judgment is affirmed.

#### MARTONI v. STATE. (No. 3094.)

(Court of Criminal Appeals of Texas. April 15, 1914. On Motion for Rehearing, May 6, 1914.)

#### 1. BAIL (§ 65\*)—RECOGNIZANCE ON APPEAL—DISMISSAL.

Where the recognizance fails to specify the punishment imposed in the trial court, an accused's appeal must be dismissed.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 285; Dec. Dig. § 65.\*]

On Motion for Rehearing.

#### 2. VAGRANCY (§ 3\*)—EVIDENCE—ADMISSIBILITY.

Under an indictment, charging vagrancy for loitering in a disorderly house from the 1st of October until the date of the filing of the complaint, evidence that accused was seen in disorderly houses more than a year before is inadmissible, where there was no showing that he was at such places between that time and the time specified in the complaint.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 3. CRIMINAL LAW (§ 1139\*)—EVIDENCE—ADMISSIBILITY.

On appeal from a conviction in the corporation court, accused is entitled to a trial de novo in the county court, and hence the judgment rendered against him in the corporation court is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3000; Dec. Dig. § 1139.\*]

#### 4. VAGRANCY (§ 3\*)—PROSECUTION—EVIDENCE.

Evidence in a prosecution for vagrancy for loitering in disorderly houses held insufficient to support a conviction.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Appeal from Bowie County Court; Lee Tidwell, Judge.

Sil Martoni was convicted of vagrancy, and he appeals. Reversed and remanded.

F. M. Brooks and Rogers & Dorough, all of Texarkana, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. [1] On motion of the Assistant Attorney General this appeal will have to be dismissed. The recognizance fails to specify the amount of the punishment imposed in the trial court. This is a statutory requirement, without which the recognizance will not be sufficient. For this reason the motion will be sustained, and the appeal dismissed.

#### On Motion for Rehearing.

On a former day of the term the appeal herein was dismissed for want of a sufficient recognizance. In compliance with the law this defect has been cured as authorized by the statute, and the appeal will be reinstated and disposed of on its merits.

[2] Appellant was tried in the justice court on a charge of vagrancy for loitering in and around houses of prostitution. The complaint and information charge that from about the 1st of October, 1913, and before the making and filing of this complaint, appellant did unlawfully, and thence continuously up to the date of the filing of this complaint, the said Sil Martoni being a male person, habitually associate with prostitutes, and the said Sil Martoni during said time did then and there habitually loiter in and around houses of prostitution. Upon his conviction in the corporation court he prosecuted an appeal to the county court. In that court the punishment was assessed in excess of \$100, and from this conviction he appealed to this court.

During the trial, over objection of appellant, evidence was introduced showing that he was seen at a house of prostitution in April, 1912, and seen to carry his trunk away from this house of prostitution. Various grounds of objection were urged; among others that it was too remote, and not included within the charge filed against him, it being specified he was guilty as a vagrant in that he loitered around and visited these houses of prostitution from about the 1st of October to the time of making the complaint, which was the 7th of November. We are of opinion these objections are well taken. Having specified the time at which he was a vagrant, the state would be relegated to the charge set forth in the complaint. There was no evidence showing his being in houses of

prostitution between the date mentioned in April, 1912, and that set forth in the complaint from October 1, to November 7, 1913.

[3] Another bill of exceptions recites that the judgment of conviction in the corporation court was admitted in evidence against him in the trial in the county court. The judgment recited that he pleaded guilty in the corporation court. Various objections were urged to this. The statute provides that where the conviction occurs in an inferior court and appeal is prosecuted to the county court, the trial in the county court shall be de novo as if there had not been a trial in the inferior court. It might be sufficient to state this was a trial de novo, and this evidence was not admissible. This was the judgment from which he had appealed.

[4] It is also urged the evidence is not sufficient. Under the case of *Ellis v. State* (Tex. Cr. App.) 145 S. W. 339, we are of the opinion appellant's contention should be sustained. The witness Hawkins testified he had seen defendant at Willie Williams' house about three times between October 1, 1913, and November 7, 1913. Jennie Dorsch testified she saw him there once or twice. These visits were all in the daytime; that he only stayed a few minutes and went away. De Fee testified that during the time specified he searched Willie Williams' house a number of times; sometimes in the daytime, and sometimes at night; saw defendant there once during that time. Brywn testified he was deputy sheriff, and during the time alleged in the complaint he saw the defendant at Willie Williams' house two or three times. On cross-examination he said he saw him there once or twice; it was in the daytime when he saw him there. This is the state's case. We are of the opinion that this evidence does not sustain the conviction.

The judgment is reversed, and the cause is remanded.

#### WILLIAMS v. STATE. (No. 3125.)

(Court of Criminal Appeals of Texas. May 6, 1914.)

#### 1. HOMICIDE (§ 300\*)—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

Where the only eyewitness testified that decedent began shooting at accused, and that accused shot once, and then waited a little time and shot again, and it appeared that decedent and his wife were both killed, an instruction that, if accused shot decedent's wife, with intent to kill her, then decedent, if present, could defend her, and accused was, on account of such defense, put to the necessity of taking the life of decedent to save his own life, the right of self-defense would be cut off, was prejudicial, as unduly limiting the right of self-defense, in view of the facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

#### 2. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY EVIDENCE.

Declarations of accused's infant children, made on coming alone to the home of witness,

that their parents had declared before the children left home that they were going to kill decedent, were inadmissible as hearsay, though when the children came to the home of witness they appeared to be excited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

Appeal from District Court, Upshur County; M. B. Briggs, Special Judge.

Campbell Williams was convicted of murder, and he appeals. Reversed and remanded.

O. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, his punishment being assessed at five years' confinement in the penitentiary.

The theory of the state was that appellant had, prior to the killing, a quarrel with his sister-in-law, Lillie Dixon, the wife of the deceased, Charlie Dixon; that shortly before the killing, and on the same day, appellant stated that if Lillie Dixon cursed him again he "would get his gun and go up the road." He did not say where he would go up the road, but the inference is supposed to be that he would go to her house and shoot Lillie Dixon. That is an inference, but not stated as a fact. About sundown appellant and his wife went to a neighbor's house to get some pepper with which to season sausage, they having killed hogs that day. Upon leaving home they sent their two children to a neighbor's house close by. The facts further show that deceased, Charlie Dixon, and his wife, Lillie Dixon, were both killed. The bodies were found in a room in the house. The evidence shows that the deceased fired three shots with his pistol, and appellant fired two with a gun. The evidence seems to be conclusive that deceased was out in the yard, between the house and the road along which appellant and his wife were traveling, when the shooting occurred. There was blood trailed from that point into the house, and also some shells were found indicating the pistol had there been fired. It is also in evidence that in going after the pepper and returning they had traveled the road that led by the house of deceased, and that as appellant passed by Dixon fired upon him, and that appellant shot in self-defense. The evidence is that Lillie Dixon was with her husband in the yard at the time the shooting occurred. The two bodies were found in the house, not far apart, on the floor, and the gun and pistol of deceased were also found in the house, close together. There is evidence that appellant may have fired the first shot, that mainly arises from the evidence of the witness who testified to facts indicating, in the judgment of that witness, the gun fired before the pistol fired. The defendant's testimony was positive that deceased fired the first shot. The issues are presented by the facts.



Exception was taken to the court's charge upon manslaughter, but under the decisions of this court it is unnecessary to discuss that, inasmuch as the bill of exceptions is not specific enough to bring it within the rule laid down in *Ryan v. State*, 64 Tex. Cr. R. 628, 142 S. W. 878, *Berg v. State*, 142 S. W. 884, and *Byrd v. State*, 151 S. W. 1068. We are of opinion, however, that upon another trial the charge on manslaughter should be given free of the objections now urged to it. On account of these decisions, however, the matter is not further discussed.

[1] At the request of the state the following charge was given: "I give you in charge, as part of the law of self-defense, that if you believe from the evidence beyond a reasonable doubt that the defendant went to the house of deceased and made an unlawful assault upon the wife of deceased, Lillie Dixon, and shot her with intent to kill her, if he did so shoot her, and that in so doing he was not justifiable under the law of self-defense given you in charge, then I instruct you that Charlie Dixon, under such circumstances, if he was present and saw such assault was about to be committed, would have the right to defend her against such assault, if any, and defendant was thereby, on account of such defense by the said Charlie Dixon, put to the necessity of taking the life of deceased, Charlie Dixon, if he did, to save his own life from an assault by the said Charlie Dixon at the time and place, you are instructed that his right of self-defense would thereby be cut off, unless you further find that in the shooting, if he did shoot, or shoot at, Lillie Dixon and Charlie Dixon, defendant acted upon adequate cause, as explained to you in the main charge on manslaughter." This charge, to say the least of it, is very confusing; but we are of the opinion the charge was error, and upon a phase not made by the testimony.

The only eyewitness who testified to the transaction was appellant's wife. After testifying about going to a neighbor's house and getting the pepper and starting back home, she says: "The first thing I noticed, as we were passing Charlie Dixon's house, Charlie got up and come out and told Campbell—said, 'God damn it, didn't I tell you I was going to kill you the next time you passed this road?' and he commenced shooting at him. Charlie shot first once or twice. Campbell shot one time, then shot again. He shot once, then waited a little bit, and shot again." Without going into the cross-examination of the wife, that is her testimony in chief on this particular phase of the case. There is, therefore, no evidence before the jury, as we understand this record, that justified the court in giving the state's requested charge that appellant made any unlawful assault upon the wife of deceased, as indicated in the requested charge given. This charge was used to cut off the defendant from his right of self-defense upon the theory that he shot at the wife of deceased first, and therefore

he could not justify in shooting deceased, Charlie Dixon. If appellant shot at the wife of deceased first, and her husband, Charlie Dixon, came, and then defendant shot at him in defense of his life, of course, appellant would have no right of self-defense. But the facts do not justify such charge, and it was an unwarranted limitation upon appellant's self-defense theory under the facts. The charge should not have been given.

[2] Bill of exceptions No. 5 was reserved to the ruling of the court admitting certain testimony, in substance, as follows: While Tave White was testifying in behalf of the state, and after she had testified that the defendant's children came to her house the night of the homicide, about 7 o'clock, and that nobody came with them to her house, and that there were two of the children, the oldest being about eight or nine years of age, she was then asked by state's counsel the following question: "Now, did they say anything about Campbell Williams, or his wife, or what they were doing, or where they were going, or why they were there?" Appellant objected on various grounds, that the testimony was irrelevant, and the answer thereto would be hearsay, and not admissible, and was calculated to elicit hearsay testimony, which objection was by the court overruled, and the witness was permitted to answer the question as follows: "When they came in there they told me that their papa and mama said—that was before they left home—they said they was going to kill Mr. Charlie Dixon and Aunt Lillie; that is what they told me when they came in the house." To which objection was again urged, for the reason that the testimony was hearsay, and that the witness was not testifying from her personal knowledge of the fact, but solely from information derived from others, and because the same was irrelevant, hearsay, and highly prejudicial to the rights of the defendant, and was calculated to inflame the minds of the jury and injure the rights of the defendant, and the court overruled these objections. The court in signing the bill thus explains it: "That the witness stated that 'when the children came in they appeared to be badly scared and excited, and the youngest was almost crying.' Therefore the evidence was admitted on the theory that same was a spontaneous outburst from the children, was the act itself speaking through the child, and, occurring just before the shooting, is *res gestæ* on the question of malice and intent of the defendant, all of which is fully presented in Tave White's testimony in statement of facts."

Reference to the statement of facts does not explain anything further than as stated. It is shown by the evidence of the witness that these children went to her house about the time stated and made these statements to the witness White as testified; at least the witness so testifies. The bill of exceptions and statement of facts both show that appel-

lant and his wife were not present, and knew nothing of the statements made by the children to White. This testimony was clearly inadmissible under all the authorities. It was hearsay, pure and simple. It could not be part of the res gestae. The children were not present at the homicide and knew nothing about it. The entire testimony, including the witness White, excludes the idea that the children were present at the homicide, and clearly shows they were, at the time of the homicide, at the house of the witness White. It was not legitimate testimony, and was of the most damaging character. These children were not used as witnesses.

For the reasons indicated, the judgment is reversed, and the cause remanded.

### WILLIS v. STATE. (No. 2571.)

(Court of Criminal Appeals of Texas. April 15, 1914. On Motion for Rehearing, May 20, 1914.)

#### 1. HOMICIDE (§ 52\*)—MANSLAUGHTER—PROVOCATION.

A love letter, written by deceased to defendant's wife, which unexpectedly came into defendant's possession a few days before the homicide, was not statutory adequate cause for provocation, so as to reduce such homicide to manslaughter, where defendant, after receiving the letter, was with deceased on several occasions before the homicide, since, though insulting conduct towards a female relative is, under the statute, adequate cause, the killing must take place immediately upon the happening of the conduct or at the first meeting of the parties.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.\*]

#### 2. HOMICIDE (§ 181\*)—ADMISSIBILITY OF EVIDENCE—PREVIOUS QUARREL AND ILL FEELING.

Though such letter was not statutory adequate cause, yet it could be and should be considered by the jury in passing upon defendant's state of mind at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 383-385; Dec. Dig. § 181.\*]

#### 3. HOMICIDE (§ 42\*)—MANSLAUGHTER—PROVOCATION.

Deceased boarded at defendant's hotel until trouble arose because of his attentions to defendant's wife, which also caused defendant's wife to leave him, going to her father's home. On the morning of the homicide defendant received a letter from his wife in reply to a letter from him, informing him that she was writing to deceased, and that, as they had separated, she wanted him to leave her alone, that she would write to whom she pleased, etc., which facts were already known to defendant. Held, in view of defendant's previous knowledge of all the facts contained in the letter, such letter was not in itself statutory adequate cause to reduce the killing to manslaughter, unless it led defendant to believe that deceased had been guilty of adultery with his wife, and whether it did so lead him was properly submitted to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 65, 66; Dec. Dig. § 42.\*]

#### 4. HOMICIDE (§ 239\*)—ADMISSIBILITY OF EVIDENCE—PREMEDITATION, DELIBERATION, ETC.—PREVIOUS QUARRELS AND ILL FEELING.

Though such letter in itself was not suf-

ficient provocation, yet it might be when considered with all the antecedent conduct and acts of deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 502; Dec. Dig. § 239.\*]

#### 5. HOMICIDE (§ 295\*)—MANSLAUGHTER—PROVOCATION.

While the provocation, to reduce a homicide to manslaughter, must arise at the time of the commission of the offense, yet antecedent matters should be considered in passing upon the state of defendant's mind; but the court should not enumerate them, but tell the jury that they must look to all the facts and circumstances in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

#### 6. CRIMINAL LAW (§ 1092\*)—PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS.

Bills of exceptions not properly filed within the time allowed by law cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

Davidson, J., dissenting.

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Frank Willis was convicted of murder in the second degree, and he appeals. Affirmed, and motion for rehearing overruled.

Dan Jackson, of El Paso, and Joe W. Taylor, of Waco, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder in the second degree, and his punishment assessed at fifteen years' confinement in the penitentiary.

This case was tried in 1911, and for more than two years the record was not filed in this court, and when filed no statement of facts accompanied it; but appellant's counsel filed an affidavit stating that he had secured the approval of and filed a statement of facts within the time provided by law, and asked that this court postpone consideration of the case until the statement of facts could be substituted. Under article 884 of the Code of Criminal Procedure of 1895, of course time was granted. Subsequently we are informed that by search the statement of facts was found, and it is now on file in this court, and shows to have been filed in the court below within the time allowed by law. Such negligence is inexcusable, for now it will soon be three years since this case was tried in the court below, and it is such delays as this that has caused discussion of and demand for change in our procedure, when a change in procedure in this matter is not so much demanded as a compliance with the law as it is written.

The court only submitted murder in the second degree and manslaughter in his charge, and fully presented the law of self-defense and insanity as applicable to the evidence. The main complaint as to this charge is to that part submitting the issue of man-

slaughter; it being contended that it is too restrictive, etc. The facts in this case would show that appellant was a married man, and kept a hotel at Eddy. Deceased worked at a gin and boarded at appellant's hotel. Appellant became jealous and suspicious of the attentions deceased was paying to his wife, and testifies to many circumstances, which finally led to a breach, and deceased quit boarding at this hotel and went elsewhere to board. It also caused a breach between appellant and his wife, and after several quarrels or scenes appellant's wife left and went to visit her father at San Saba, and brother at Lometa. He contends that he did not know that this was a permanent separation, and he visited her at the home of her brother in Lometa, and while there by going to the post office he secured a letter addressed to his wife signed "K. C." The letter reads:

"Eddy Texas. Mrs. Temple Willis, Lometa, Texas. Dearest one: Will ans. your sweet letter which I received this morning. listen dear frank left this morning and the letter I got was broken open and had been red before I got it. it was opened while in the post-office. Girl I would give anything to see you and talk with you for awhile and you dont want to see me any more than I do you. Sweet Heart I cant write much for frank has gone and he may call for your mail so if you get this write and let me no, and I will write more next time. If I dont hear from you I will keep writing so dont worry about me I will come out all write. I may get killed but he will haft to do it dont think anything A bout this writing until I see what is going to come up and I will write often iff ever thing is all write So love me and stay with me and we will come out all write. I took up for you and would do it again iff necessary So bee good and true and I will do the same. Yours forever K. C."

After getting this letter, he and his wife again had words, and the record would authorize the jury to conclude that appellant was then informed by his wife, if he had not been so informed prior thereto, that the separation was permanent. After leaving Lometa, appellant went to Dobbins, and on September 24th wrote deceased the following letter:

"Bud Albright Your plans are known Dont carry them out Stop! Think! Dont! Dont! 8-pair of eyes are on you. 'Take warning!' Dont go no further You know what I mean. It is not J. C. You dont know me. Will be near you when you get this. You are not all to blame No harm will be done you. Do right Letters have not all reached their destination That is enough."

Envelope: "Albert Albright, Eddy, Texas."

Postmarked: "Dobbins, Tex., Sept. 24, 1910."

Appellant returned to Eddy and frequently met deceased after he had secured the "K. C." letter and written the letter herein copied. In fact he was in the barber shop in Eddy with deceased on Saturday night, and in a

restaurant with him on Sunday, just prior to the killing Monday morning, October 10th.

There is another letter in the record which appellant says he received from his wife on the morning he killed deceased. It reads:

"Yes Frank I got your letter and I have been writing to Albert and he has been writing to me. What is it to you—we are separated, so you let me alone. You had better let him alone, if you dont he will fix you; he said that he had taken all that he was going to take off of you—now one of you will get killed if you dont let me alone. He is not afraid of you and I dont think you are afraid of him. I dont want neither one of you to get killed, but Frank listen to me; he will kill you—so you tend to your own business. I have left you and I will write to any one I please. Temple."

Mrs. Willis testifies she wrote appellant this letter on Friday or Saturday before the killing on Monday morning. He says he did not receive it until Monday morning, and had not received it when he was in the barber shop with deceased on Saturday night, nor when he was with him on Sunday. The state's evidence is that while deceased, Albert Albright, was in the tailor shop of O. L. Wicks Monday morning, sitting on a table or counter, and while Wicks was showing J. W. Morrow some samples of cloth, appellant came in the tailor shop and, without a word being passed, shot Albright, who fell to the floor, appellant continuing to shoot him or shoot at him; that so far as they noticed appellant said nothing to deceased, nor deceased to him; that Albright made no move or demonstration of any kind. Appellant testifies that he was in the tailor shop when deceased came in, being behind Morrow and Wicks, with his back to the door; that he heard them speak to Albright, and he turned and looked around; that deceased was leaning against the counter, and as he looked around deceased gave him an angry and threatening look and reached for his hip pocket as if to draw a pistol, and he thought his life was in danger, when he shot deceased and killed him. While the record is rather voluminous, yet we think this is a sufficient statement of the case to render intelligible the rulings herein made.

On the issue of manslaughter, after defining manslaughter as it is defined in the statute, the court instructed the jury: "The following are deemed adequate causes: Insulting words or conduct, if any, of the person killed towards a female relation of the party guilty of the homicide. When it is sought to reduce an unlawful killing to the grade of manslaughter by reason of such insulting words or conduct, if any, towards a female relation, it must appear that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the party killed after having been informed of such

insults. In determining whether or not there was adequate cause, the jury have the right to consider all the facts and circumstances in evidence, both before and at the time of the killing." He also at the request of appellant gave the following special charge as a part of the law of the case: "You are instructed that, if you should find from the evidence that on the morning of the homicide, and shortly prior thereto, the defendant received a letter written by his wife, the reading of which produced in the mind of the defendant the honest belief that the deceased had committed adultery with Temple Willis, the wife of defendant, and that such knowledge produced such a degree of anger, rage, or resentment as to render the mind of Frank Willis incapable of cool reflection, and that, while laboring under such degree of anger, rage, or resentment, he shot and thereby killed deceased on the first meeting after receiving such letter, and that his act was not justifiable by reason of his acting in self-defense, or while he was insane, then and in that event he would be guilty of manslaughter, and you should say by your verdict affixing the penalty therefor."

[1, 2] We do not think it can be contended that the letter herein copied signed "K. C." could in law be deemed adequate cause under the evidence, for appellant had met deceased a number of times after he had received and read that letter; in fact had written to deceased the letter herein copied. So in law that passes out as presenting "adequate cause" to reduce the offense to manslaughter; but appellant is right in his contention that it could be and should be considered by the jury in passing on his state of mind at the time he shot deceased. If it were not for the fact that he had received the letter from his wife on the morning of the homicide, the letter signed "K. C." would be a most cogent circumstance to prove a premeditated killing, instead of tending to reduce the grade of the offense to manslaughter. In passing on this character of question in the case of *Miles v. State*, 18 Tex. App. 170, Judge Hurt says: "While it is true that the provocation must arise at the time of the commission of the offense, and the passion must not be the result of a former provocation, yet in passing upon the sufficiency of the provocation, and on the effects of the passion upon the mind of the defendant, the past conduct of the deceased toward defendant, his threats and bearing, in fact all the facts and circumstances in the case, should be considered by the jury. An act standing alone may not be a sufficient provocation, but may be ample when it is one of a series of similar acts, or when it has been preceded by an insolent and aggravating course of conduct, whether similar or not to the act committed at the time of the homicide. We are of the opinion that the charge of the court was too restrictive upon the subject, and that the attention of the jury

should have been directed to all the facts of the case, not by the special enumeration of each; but they should have been told that, in passing upon the sufficiency of the provocation, and the effects of the passion upon the mind of the defendant, they must look to all the facts in the case."

It is seen that Judge Hurt says antecedent matters can be looked to in passing on the state of mind of appellant, but the court should not enumerate them, but the jury should be told that they must look to all the facts and circumstances in the case. Judge Davidson, in the case of *Reinhardt v. State*, 60 Tex. Cr. R. 662, 133 S. W. 265, in overruling the state's motion for a rehearing, aptly and tersely states the rule to be: "Had the jury been instructed with regard to these extraneous matters which necessarily entered into the mind of the appellant, it is possible and fully probable that his punishment, although convicted of manslaughter, might have been less than the five years, the maximum penalty which was given him by the jury. This evidence certainly had a tendency to enhance the passion. It was the beginning and cause of the passion, and the circumstances occurring subsequently added to this passion, and, while he could not rely upon the occurrences of the previous night as a basis of manslaughter, because the insulting conduct had occurred in his presence and had passed, yet, in viewing the transaction at the time of the homicide, these circumstances were of the most cogent and terrific force." And it will be found by reference to all of our decisions that, if insult to a female relative is relied on to reduce the offense to manslaughter, the killing must take place at the first meeting after the occurrence, and the court should so instruct the jury, and under no phase of the case could a previous insult be adequate cause, where the parties had met and passed, and such previous insult can only be considered in passing on appellant's state of mind, etc., at the time of the homicide. In all other cases the provocation must arise at the time, and the antecedent circumstances can be looked to in passing on the adequacy of the cause and the state of mind of the person on trial.

[3-5] It is not shown by the record that appellant knew of any misconduct of deceased, after he had seen and passed him, except such as might be inferred from the letter received from his wife; and the court aptly in the special charge given instructs the jury that, if this letter led him to believe that deceased and his wife had been guilty of improper conduct, he would be guilty of no higher offense than manslaughter, and it was for the jury, and not this court nor the trial court, to draw the deductions from the language used in the letter. It may be that this letter emphasized the fact that deceased was writing to his wife, a fact already known to him, and he met and passed deceased after receiving that information, and it may

be that prior to that time he had a lingering hope that a reconciliation between himself and his wife might be brought about, and this letter blasted that hope; but, with the knowledge of facts already known to him, this would not be statutory adequate cause, but it would be an incident to be considered with other facts and circumstances in the case as to whether adequate cause existed, and the court did so inform the jury in the following language: "It is your duty, in determining the adequacy of the provocation (if any), to consider in connection therewith all the facts and circumstances in evidence in the case, both before and at the time of the killing, and, if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition." Had the letter written by the wife in and of itself been a statutory adequate cause, appellant's complaints might be well founded; but it is only by inference or deduction that the language used would be adequate cause in law, and the court instructed the jury specifically as requested by appellant that if, from the language of the letter, an impression was made on defendant's mind leading him to believe that his wife and deceased had been guilty of adultery, this would be adequate cause; and it was proper for the court to instruct the jury that, in passing on this question, they should consider all the facts and circumstances in the case, and, if all together were sufficient at the time of the killing to create this impression in his mind, and to render defendant's mind incapable of cool reflection, it would reduce the offense to manslaughter. In other words, if the letter written by the wife was clothed in language that would lead an ordinary man to believe that deceased and his wife's conduct was such as to be an insult to an ordinary man, this would be statutory adequate cause; if not, yet it might be considered with other facts and circumstances in evidence in passing on that issue. What is in this letter? It tells him his wife was writing to deceased, and he was writing to her. He had known this fact for a month, and passed and repassed deceased. It recites they had separated, and she wanted appellant to let her alone, that she would write to whom she pleased. If this had been the first information appellant had received that deceased was corresponding with his wife, it might be adequate cause; but this fact was known to him before he received

this letter, and he had not called deceased to account for it when he met him. It then goes on and advises appellant to let deceased alone, and it might be said, it threatens, if he did not do so, deceased would kill him; but this would not be statutory adequate cause, but would be considered a circumstance with the other facts and circumstances in the case. Not only had appellant seen the "K. O." letter, but he testified to many facts and circumstances occurring at the hotel prior to the separation; but all this time he was daily coming in contact with deceased, and it would have been improper for the court to have undertaken to have enumerated these various matters, for none of them in law were statutory adequate cause at the time of the killing. If there was statutory adequate cause, it must arise from the letter written by his wife to him, viewed in the light of all the antecedent circumstances in evidence. It is not a case where the language used in the letter is in and of itself adequate cause in law; but to render it so it took a consideration of the previous acts and conduct. While it is true that when he received the "K. C." letter, had the killing taken place when he first met deceased thereafter, this would in law be adequate cause in and of itself; but he by his acts and conduct condoned this, and then it became like any fact in evidence a circumstance to be considered with the other facts in evidence, and it would have been error and upon the weight of the testimony for the court to have selected this isolated circumstance and instructed the jury in regard to the weight to be given thereto. The court's charge as a whole, together with the special charge given at appellant's request, fairly and fully presented the law of manslaughter as applicable to the evidence adduced on this trial, and it is not subject to the criticisms of appellant. The court also fairly and fully presented the law of self-defense and insanity as made by the testimony. In fact we think the court's charge as a whole is subject to none of the criticisms contained in appellant's motion for a new trial, and so ably argued and presented in his brief.

[6] The bills of exception in regard to the introduction of evidence cannot be considered by us. The rules governing such matter are stated by this court in the case of *Riojas v. State*, 36 Tex. Cr. R. 185, 36 S. W. 268, and cases there cited. So far as we have been able to ascertain, the rules there announced have always been followed by this court. One must use due diligence in securing the approval of his bills of exception, and see that they are properly filed within the time the law permits this to be done.

The judgment is affirmed.

DAVIDSON, J. (dissenting). 1. In view of all the facts found in this record, I do not believe conviction for an offense higher than

manslaughter is justified. That deceased brought about the separation of appellant and his wife is not debatable. There was no other cause for the trouble attempted to be shown. That deceased perhaps went further than alienation and separation of the parties is justified by the facts. The letter received a few moments before the killing placed his mind beyond cool reflection, and *this is the cause for the killing, viewed in the light of other conduct by deceased.* *Stewart v. State*, 52 Tex. Cr. R. 273, 105 S. W. 809.

2. The defendant was entitled to a charge: (1) Submitting insulting conduct affirmatively and separately from circumstances generally. (2) Another distinct charge on combination of causes, previous conduct, etc. I do not think the charge was sufficient, nor the verdict justified for murder.

#### On Motion for Rehearing.

HARPER, J. Appellant has filed a motion for rehearing, reciting at length the testimony of appellant, and that introduced in his behalf, and says this would show no higher grade of offense than manslaughter, if appellant was not insane, and he did not act in self-defense. Unfortunately for appellant this is not all the evidence in the record; but this court, as did the jury, must take into consideration all the evidence offered in behalf of the state, and from all the testimony adduced pass on the issues raised. Appellant takes his evidence alone, that on Saturday night before the killing wherein he stated he had heard certain matters about his wife leaving her brother's residence, and that he thought she had fled with deceased, about him going to Temple, what was there said and done, and about the inquiry he made to locate the deceased on Saturday night and Sunday. If the jury had believed this, doubtless their verdict might have been different. But that such evidence did not present the true state of facts was evidently found by the jury. The state offered evidence that appellant was in Eddy Saturday night and Sunday, and not in Temple, and that he was with deceased in the barber shop at Eddy Saturday night, and with him in the restaurant in Eddy on Sunday evening and appellant shortly after the killing, in talking with George Morris, asked Morris if he knew he (Morris) had prevented him from killing Albright Sunday night in the restaurant; that he intended to kill him Sunday night, and he (Morris) walked between them. Morris also said that appellant said that he saw Albright in the barber shop Saturday night, and that he intended to kill him when he got out of the barber chair, and would have done so but that Ferguson, the barber, was between him

and Albright, and he was afraid he would kill the barber. Morris swears positively he saw appellant and deceased in the restaurant together on Sunday night before the killing the next morning. R. C. Elliott testified he heard appellant make these statements to Mr. Morris. Will England testified for the state that appellant and deceased were in Ferguson's barber shop together Saturday night before the killing on Monday. Thus it is shown, if the testimony offered by the state is true, and appellant told the truth shortly after the killing, he was not in Temple Saturday night, and none of those things took place that appellant's attorney narrates so tragically in his argument, based on appellant's testimony on this trial. In his motion the contention is also made that deceased and appellant's wife had been guilty of adultery, yet a few days after the killing appellant testified at the examining trial, and swore, "I do not believe that Bud Albright [deceased] ever had intercourse with my wife." If he did not so believe at the time of the killing, and he so testified under oath, it is not strange that the jury did not give great weight to his testimony on this trial that he did so believe, and especially so when he also testified before the grand jury that he did not so believe, and in his testimony before the grand jury appellant admits he saw deceased Sunday night in Eddy, therefore it is not strange that the jury did not place much faith in his testimony on this trial when he said he thought he had run off with his wife Saturday until he met him Monday morning. The other facts which appellant recites in his motion as showing there was no higher grade of offense than manslaughter made by the evidence are met in the same way by the testimony offered by the state.

Appellant insists that, although his bills were not filed for more than 100 days after court adjourned, yet, as there was a mistake of law as to when they should have been filed, we ought to consider them. In the case of *George v. State*, 25 Tex. App. 229, 8 S. W. 25, a much stronger case was made legally, and from an equitable standpoint, yet the court struck them from the record. Appellant used not one-half the diligence the attorneys in that case show they used; in fact in this case the use of diligence to have the bills filed is not shown, but a mistake as to the law is only pleaded.

The court's charge, especially when we consider the special charges given at appellant's request, was a full, fair, and apt presentation of the law as applicable to the testimony adduced on this trial; and the motion for rehearing is overruled.

**A. J. BIRDSONG & SON v. ALLEN et al.**  
(No. 614.)

(Court of Civil Appeals of Texas. Amarillo.  
May 2, 1914.)

**1. EVIDENCE (§ 230\*)—ADMISSIBILITY—LETTERS.**

In an action for the conversion of cotton, which a chattel mortgagee claimed under a mortgage made by a landowner before he conveyed to defendants, a letter written by the landowner, explaining that he had sold the land and was renting from the grantee on shares, and that defendants were to take the first cotton, is admissible only against the writer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.\*]

**2. EVIDENCE (§ 589\*)—WEIGHT—SUFFICIENCY.**

The jury are not bound to accept the testimony of the parties to the cause.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.\*]

**3. TRIAL (§ 143\*)—JURY QUESTION.**

Where the evidence as to an issue of fact is conflicting, the question is one for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 348; Dec. Dig. § 143.\*]

**4. JUDGMENT (§§ 98, 310\*)—DEFAULT—CODEFENDANTS—AMENDMENT.**

Where one of the several defendants, though duly cited, made default, the court should have rendered judgment against him by default; hence the judgment for plaintiff was properly amended so as to include him, though the verdict failed to mention him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 156-158, 601-603; Dec. Dig. §§ 98, 310.\*]

**5. JUDGMENT (§ 314\*)—VERDICTS—AMENDMENTS.**

Under the direct provisions of Rev. St. 1911, art. 2016, a judgment following the verdict may be amended in case of miscalculation, where it can be done by reference to the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 610-612, 616; Dec. Dig. § 314.\*]

Appeal from Jack County Court; J. P. Simpson, Judge.

Action by W. V. Allen against A. J. Birdsong & Son and another begun in justice court. From a judgment for plaintiff, the named defendants appeal. Reversed and remanded.

See, also, 165 S. W. 46.

Sporer & McClure, of Jacksboro, for appellants. Fitzgerald & Cox, of Wichita Falls, for appellees.

HALL, J. R. O. Wilson executed two notes to W. V. Allen for \$68 each and a mortgage upon two bales of cotton to be raised by him during the year 1912, to secure one of the notes. Thereafter Wilson sold the land, upon which the cotton described in the mortgage was to have been grown, to A. J. Birdsong & Son, and entered into a contract with Birdsong & Son for the cultivation of the land. According to the terms of this contract it is contended by the appellants that the relation of master and serv-

ant between Birdsong and Wilson existed, and because of such relation the chattel mortgage given by Wilson to Allen was destroyed. Allen instituted this suit in the justice court of Jack county to recover the amount of the notes and against Birdsong for the value of the two bales of cotton. The record shows no pleadings whatever on the part of either Wilson or plaintiff Allen.

[1] The first assignment of error complains of the action of the court in admitting in evidence a letter written by Wilson to Allen, in which Wilson states: "The landlord taken the first two bales of cotton. I sold my place last fall and rented on the halves this year so the landlord furnished me this year, and he would not let me have the first two bales," etc. The material issue in the case was as to the relationship existing between Wilson and the appellants. Appellants insist that while this letter may have been admissible as against Wilson, its effect should have been limited, and the jury instructed that it was not admissible as against them. This assignment must be sustained, and because the court failed to limit the effect of the letter in its charge, the judgment must be reversed, and the cause remanded. *Wolf v. Galbraith*, 39 Tex. Civ. App. 351, 87 S. W. 390; *Texas Loan & Trust Co. v. Angel*, 39 Tex. Civ. App. 166, 86 S. W. 1056.

The second assignment of error complains that the charge of the court did not state correctly the plaintiff's cause of action to the jury. Reference to the charge shows that this assignment is not well taken. In fact the statement made by appellant in the brief contradicts the assignment.

The third and fourth assignments assail the charge of the court. We think the charge as a whole was a correct presentation of the issues presented by the appellant's amended original answer and the general denial of the plaintiff presumed by the statute.

[2, 3] The sixth, seventh, eighth, ninth, and tenth assignments go to the sufficiency of the evidence to support the verdict and judgment. The testimony of Allen is that Birdsong first claimed the cotton by virtue of his landlord's lien. The testimony of Birdsong and his son, supported by the testimony of Wilson, tends to show that the relation of landlord and tenant or tenants in common did not exist between them, but that the relation was that of master and servant. We are not informed by appellants' brief what the special charges requested and refused were, but reference to the transcript shows that they practically presented the same issues as the general charge; and, in view of the conflict in the evidence, and by reason of the rule that the jury were not bound to believe either of said witnesses, since they were parties to the suit, and interested in the controversy (*Thomas v. Saunders*, 150 S. W. 769), we think the court was correct in submitting the issues to the jury,

and that the evidence was sufficient to require such submission.

[4] The record discloses that the court first rendered a judgment against Birdsong & Son, in favor of W. V. Allen, and, upon motion thereafter made and at the same term, amended the judgment, both as to parties and amount, and complaint is made under the eleventh assignment that, because the verdict of the jury did not mention Wilson, no judgment should have been rendered against him. Wilson was duly cited and filed no answer, and in no way contested the right of appellee Allen to recover against him. The court should therefore have rendered judgment by default against Wilson, and the amendment of the first judgment to that extent was proper.

[5] The verdict of the jury was in favor of plaintiff, "for the amount of note and interest to date, and 10 per cent. for attorney's fees as stipulated by same, amounting to \$85.56," and the first judgment was rendered in favor of Allen against Birdsong & Son for that amount. Upon motion, however, it was ascertained that the jury had made a miscalculation, and that the amount of the note secured by chattel mortgage upon the cotton converted by Birdsong & Son was \$91.60. Article 2016, R. S. 1911, expressly authorizes the court to correct its judgment where it can be done by reference to the record in cases of miscalculation.

Appellant insists that the judgment against Birdsong & Son is upon the note. We do not so construe the judgment. We think it is against them for an amount equal to the note, interest, and attorney's fees, but for the value of the cotton alleged to have been converted by them to that extent. However this may be, it is an error which will not probably arise upon another trial.

The fourteenth and fifteenth assignments of error are without merit. Because of the error of the court in refusing to limit the effect of the letter from Wilson to Allen, the judgment is reversed, and the cause remanded.

O. A. ELMEN & CO. et al. v. GODSEY.  
(No. 6559.)

(Court of Civil Appeals of Texas. Galveston.  
April 22, 1914.)

1. APPEAL AND ERROR (§ 544\*)—REVIEW—NECESSITY OF STATEMENT OF FACTS.

In the absence of a statement of facts, it cannot be determined whether error was committed in any of the matters complained of by assignments, the refusal to instruct a verdict for defendants, failure to submit the issue of any consideration for the contract sued on, and that a paragraph of the charge did not fully and correctly state the issues raised by the pleadings and was on the weight of the evidence and confusing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

2. APPEAL AND ERROR (§ 544\*)—REVIEW—NECESSITY OF STATEMENT OF FACTS.

Even if a charge submitted a theory of plaintiff's case not authorized by the allegations of the petition, it cannot in the absence of a statement of facts be held this was "reasonably calculated to cause and probably did cause the rendition of an improper judgment," so as, under Court of Civil Appeals rule 62 (149 S. W. x), to authorize a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Action by Frank W. Godsey against C. A. Elmen & Co. and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. V. Fleming, of Beaumont, for appellants.  
J. D. Wilkerson, of Beaumont, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellants to recover the sum of \$650, or in the alternative 2½ per cent. of the purchase price of a tract of 640 acres of land in Jefferson county, described in plaintiff's petition. The amount claimed by plaintiff was alleged to be due under a contract with the defendants for services rendered them by plaintiff in effecting the purchase of said land. The defendants answered by general demurrer and special exceptions and general and special denial of the allegations of the petition. The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$650.

No statement of facts has been brought up with the record. At a former day of this term appellants filed a motion to substitute the statement of facts alleged to have been filed in this court with the record, and subsequently lost, by an agreed statement of facts filed with said motion. The motion was granted and the substitute ordered filed; but upon a rehearing of said motion on application therefor filed by appellee, it was conclusively shown that no statement of facts was filed with the record, and counsel for appellants were mistaken in so stating in their motion to file the substitute. Upon this showing we set aside our order granting the motion to substitute the statement of facts. The statement of facts filed as a substitute cannot be regarded as a statement of facts and will not be considered.

[1] The first assignment of error complains of the refusal of the trial court to instruct the jury to return a verdict for the defendants.

The second assignment complains of the failure of the court to submit to the jury the issue of whether there was any consideration for the contract declared on by plaintiff.

The third assignment complains of one of the paragraphs of the court's charge on the ground that it does not fully and correctly state the issues raised by the pleadings and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index





Dickerson calls for the M. Carabajal, and its northwest corner is found and identified on the ground. The J. C. Hale calls for the A. Dickerson and none of its corners are found. Survey No. 1, S. A. & M. G. Railway is located as follows: "Beginning at the S. W. corner of John C. Hale No. 19 at a stake in the north line of the Almerone Dickerson; thence north 1900 varas a stake; thence west 1900 varas a stake; thence south 1900 varas a stake; thence east 1900 varas with the north boundary line of the said Dickerson to the place of beginning." The field notes of survey No. 2, S. A. & M. G. Ry. Co. are as follows: "Beginning at the S. W. corner of survey No. 1 a stake; thence north with west line of said survey 1900 varas a stake, it being the N. W. corner of same; thence west 1900 varas a stake; thence south 1900 varas a stake; thence east 1900 varas the place of beginning." To construct these surveys course and distance from the southwest corner of the Jos. Weeks will establish the west boundary line of S. A. & M. G. Ry. No. 2 at the place contended for by appellant. But to regard the northwest corner of the Almerone Dickerson and to run course and distance for its northeast corner, and then to construct in their order the Hale, S. A. & M. G. Ry. No. 1 and S. A. & M. G. Ry. No. 2, course and distance according to their field notes, respectively, will establish the disputed boundary line in accordance with the judgment of the trial court in keeping with the contention of appellee. We think the latter method is the proper one. The evidence abundantly authorizes the conclusion that the southwest corner of the Jos. Weeks and the northwest corner of the Almerone Dickerson are the only original corners of any of these surveys now definitely located by the testimony. We think the line in dispute can be more certainly located from the northwest corner of the Dickerson than from the more remote corner at the southwest of the Jos. Weeks. Furthermore, the northwest and the southwest quarters of survey No. 2 were resurveyed and patented prior to appellant's patent covering the land in controversy and the line established by the honorable district court coincides with that established in the resurvey, and for that reason as well the judgment is supported by the evidence.

There is no error in the judgment, and it is affirmed.

#### TARDIO v. FIRST NAT. BANK OF BRYAN. (No. 5280.)

(Court of Civil Appeals of Texas. San Antonio. May 6, 1914.)

#### 1. BILLS AND NOTES (§ 377\*)—FORGERY—ESTOPPEL.

Where the apparent maker of a note accompanied by the payee thereof represented to a bank that the note was good, and the bank on the payee's indorsement took the note and paid the money thereon, such maker was estopped

from defeating a recovery by the bank on the note on the ground that it was a forgery.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 952; Dec. Dig. § 377.\*]

#### 2. BILLS AND NOTES (§ 459\*)—PARTIES—PROPER PARTIES.

The maker of a note is the proper party defendant in an action thereon, and, if he desires that the payee shall be made a party, he must request it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1424-1433; Dec. Dig. § 459.\*]

Appeal from Brazos County Court; J. T. Maloney, Judge.

Action by the First National Bank of Bryan against Frank Tardio. From a judgment for plaintiff, defendant appeals. Affirmed.

W. M. Hilliard, of Caldwell, for appellant.  
V. B. Hudson, of Bryan, for appellee.

CARL, J. The First National Bank of Bryan brought suit against appellant, Frank Tardio, on a note, alleged to have been executed and delivered by appellant to C. E. Edwards on September 15, 1911, for the sum of \$350, payable on September 1, 1912, and bearing 10 per cent. interest per annum; and it was alleged that, before the maturity thereof, said note was transferred by Edwards to appellee, and further showed that same was entitled to a credit of \$111.05 of date November 20, 1912. The defendant, Tardio, answered, pleading non est factum, and alleging that the note was a forgery. In reply to this, the appellee alleged in a supplemental petition that on or about August 24, 1912, appellant requested the bank to take up his \$350 note held by C. E. Edwards, which it is alleged appellant represented he had given for rent, and that same was a valid, subsisting, and unpaid claim against Tardio which he then and there promised to pay at maturity; that thereafter the bank did take up said note from Edwards; and that appellee was present at the time said note was taken up by the bank at his request; and that same was so taken up at the special instance and request of Tardio. It is further alleged that appellant has since ratified and confirmed the transaction, in that on November 20, 1912, he paid thereon \$111.05, which was indorsed thereon as a credit; that, if said note is a forgery, the bank had no notice of the same, and was an innocent purchaser, without notice, for a valuable consideration and at the instance and representation of Tardio that same was a genuine instrument, and was for rents for 1912; and that Tardio did not inform the bank that same was a forgery, but represented it to be a true and valid instrument, binding on him (appellant), and that Tardio was responsible for appellee's buying the note. The defendant below denied these matters in a supplemental answer.

The trial was before the court, and the findings of fact are, in substance, as follows:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On August 24, 1912, the defendant went to the First National Bank of Bryan and told H. O. Boatwright, its president, that he owed C. E. Edwards a rent note for the sum of \$350 which would be due September 1, 1912, and which he could then pay, but that Edwards was insisting on the payment of the same, and that it would be an accommodation to him if Boatwright would take up said note, thereby relieving him of worry and harassment that Edwards was causing him. Thereupon Boatwright consented to take it up, and Tardio left the bank, and in a short while returned in company with Edwards. Boatwright asked them if they had the note, to which Edwards replied that he did not have it then but would get it. Appellant and Edwards left the bank together, and, while Edwards was gone for the note, Tardio came into the bank two or three times inquiring if Edwards had returned with the note. In about 30 minutes Edwards and appellant came into the bank together, and Boatwright asked Tardio if they had the rent note, to which he replied that Edwards had it. In the presence of Boatwright and Tardio, Edwards indorsed a rent note purporting to be defendant's note, and Boatwright, in the presence of both the others, took the note and paid Edwards \$350, the face value of the note. It was at the special instance and request of Tardio and upon his statement that he would pay said note at maturity that Boatwright agreed to take it up, and appellant was with Edwards when he came into the bank, saw him indorse and deliver the note to the bank, and saw the money paid to Edwards. Tardio turned over to the bank two bales of cotton on August 24, 1912, to be applied as a payment on the note. The note is a forgery, but the bank had no notice that it was a forgery until about September 1, 1912, when the defendant came into the bank and told Boatwright the note was a forgery, but then and several times thereafter promised to pay the same, after he knew it was a forgery. He had never disclaimed the debt prior to the suit. The receiver of the estate of C. E. Edwards got the proceeds of the sale of the cotton left by defendant, but afterwards left \$111.05, representing the sale price of the cotton, with the bank which was entered as a credit on the note. The judgment was for \$260.73. The court found that defendant, before the discovery of the forgery, by his statements and actions had misled the bank, and thereafter promised to pay the same, thus ratifying the said note, and that he is estopped from asserting that the note is a forgery.

We do not agree with the finding of the trial court that defendant paid the \$111.05 after the discovery of the forgery. He left the cotton there before the forgery was discovered, and Boatwright collected the money and held it until Jacob Fuchs, the receiver of Edwards' estate, called for it and collected it. Later, in November, the receiver paid the

money back to the bank, and it was credited on the note, November 20, 1912.

[1] It will be seen that appellant, himself, induced the bank to take up the note. Tardio received nothing himself, but it cannot be said that his promise to pay the debt evidenced by the note was without consideration. He induced the bank to part with the money. He came with Edwards to the bank, saw him indorse the note and receive the money; and, if he did not know the note was forged, he should have known it, because he was in a position to know or to have found out if he had used ordinary care. An equitable estoppel will be created, "not only when the party sought to be concluded knows the material facts he is charged with having represented or concealed, but also where he is 'in such position that he ought to have known them, so that knowledge will be imputed to him.'" *Weinstein v. Bank*, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23. There was no neglect or fault on part of the bank, and, granted that Tardio did not know the note was forged at the time he got the bank to take it up, "if there was no neglect in the plaintiff, yet there was no reason to throw off the loss from one innocent man upon another innocent man." *Bigelow on Estoppel*, 482. But in this case, if there was any fault or negligence in any one, it was the defendant and not in the plaintiff. And where two parties are equally innocent, and yet a duty devolves upon one which he fails to perform and injury results, of the two, the one so failing to discharge the duties he owns should be the loser. Tardio had gone there and made the request, as an accommodation to him, that the bank take up his note and came there with the forger who negotiated it in his presence. If the note were not genuine, whose duty was it there to make that known? The banker could reasonably assume that, since he had requested that the note be taken up and had come with the forger, the note actually indorsed was genuine. Appellant was getting the note taken up, and the consideration and accommodation were being extended to him.

Representations do not always have to be made by words. The actions of the party may proclaim facts more eloquently than words; and when Tardio went out and got the man who held the note and brought him in there to the bank, stood there, and saw the whole transaction, it amounted to saying to Boatwright that this is the note I wish taken up. *Edwards v. Dickson et al.*, 68 Tex. 617, 2 S. W. 718; *Bigelow on Estoppel*, 486; *Weinstein v. Bank*, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; *Page v. Arnim*, 29 Tex. 53.

In the case of *Mo., etc., Ry. Co. v. Yale*, 27 Tex. Civ. App. 10, 65 S. W. 57, it is said: "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was

a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act that way to his damage, the first is estopped from denying that the facts were as represented." Again, *Cyc.* (16-752ff) cites the Texas case of *Henry v. Bounds*, 46 S. W. 120, in support of the well-established doctrine that: "Where a person liable on a note promises a prospective purchaser to pay same, or represents to him that the obligation is valid, and that there is no defense to it, he is estopped to resist payment in an action by such person who has taken the paper in reliance on his representation."

"Equitable estoppel is the effect of voluntary conduct of a party whereby he is precluded both at law and in equity from asserting the rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has, in good faith, relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." *Griffith v. Rife*, 72 Tex. 185, 12 S. W. 168; *Bridges v. Johnson*, 69 Tex. 714, 7 S. W. 506; *Edwards v. Dickson*, 66 Tex. 613, 2 S. W. 718.

[2] If appellant had desired that Edwards be made a party or could have derived any comfort from so doing, he should have taken that step himself. Tardio, as the payor named and the man who had induced the bank to buy the note, was the proper party to be sued. We are not saying that a forged instrument is not void; but we do say that under all the facts in this case appellant, by his acts, has placed himself in a position where the fact that the note is forged will not avail him anything against the party whom he induced to take it up for him.

The assignments are all overruled, and the judgment is affirmed.

# **MILLER v. SEALY OIL MILL & MFG. CO.** (No. 5,281.)

(Court of Civil Appeals of Texas. San Antonio. May 6, 1914.)

## **1. MASTER AND SERVANT (§ 44\*) — CONTRACT OF EMPLOYMENT—BREACH—DEFENSE—BURDEN OF PROOF.**

Plaintiff having sworn to a breach of a contract of employment by defendant, the burden was on it, if it desired to defend on the ground that plaintiff could have obtained other employment, to prove the same.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 59; Dec. Dig. § 44.\*]

## **2. MASTER AND SERVANT (§ 41\*)—CONTRACT OF EMPLOYMENT—BREACH—MEASURE OF DAMAGES.**

In an action for an employer's breach of a contract of employment, the plaintiff's measure of damages is the compensation stipulated for in the contract for the balance of the term, in the absence of allegation of proof in mitigation

of damages by the defendant that plaintiff could have obtained other employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

## **3. MASTER AND SERVANT (§ 41\*) — CONTRACT OF EMPLOYMENT—BREACH—ILLNESS.**

Where an employé, after having been wrongfully discharged, was ill for a time, the period of such illness could not be deducted from his damage recoverable for breach of the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

## **4. TRIAL (§ 252\*)—REQUEST TO CHARGE—EVIDENCE.**

A charge presenting an issue not raised by the evidence is erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.\*]

## **5. MASTER AND SERVANT (§ 37\*) — CONTRACT OF EMPLOYMENT—BREACH—DEFENSES.**

It was no defense to an employer's breach of an employment contract that the employé refused to accept a lower salary than that agreed on.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 43; Dec. Dig. § 37.\*]

## **6. CORPORATIONS (§ 426\*)—ACTS OF OFFICERS—EMPLOYMENT CONTRACT—RATIFICATION.**

Where the officers and directors of defendant corporation paid plaintiff \$75 per month under an employment contract for a year between plaintiff and the corporation's president, who acted without authority, such acts constituted a ratification of the contract for the entire term by the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.\*]

Appeal from Austin County Court; C. G. Krueger, Judge.

Action by J. E. Miller against the Sealy Oil Mill & Manufacturing Company. Judgment for plaintiff for less than the relief demanded, and he appeals. Reversed and remanded.

W. I. Glenn and Johnson, Matthaei & Thompson, all of Bellville, for appellant. W. I. Hill and C. C. Glenn, both of Sealy, for appellee.

**FLY, C. J.** This is a suit instituted by appellant to recover damages arising from the breach of a contract of employment. Appellant alleged that he was employed by appellee to perform the work of a bookkeeper, as well as any other work that might be required, for one year beginning June 1, 1911, on a salary of \$75 a month; that he worked until January 1, 1912, when he was discharged by appellee; that he was paid for five months, but appellee refused to pay him for the last two months, and he sought to recover his salary, not only for those two months, but for the other five months of the year for which he was employed, the whole amounting to \$525. The cause was tried by jury, and resulted in a verdict and judgment for appellant in the sum of \$53.

The facts showed that appellant worked for appellee for seven months, that for five

months he was paid \$75 a month, but for the last two months he was not paid anything, as he refused to accept \$60 a month, and on January 1, 1912, he was discharged. Appellant was employed by one W. W. Moore, who testified that he was acting at the time as president and general manager of the corporation. There was some evidence tending to show that the other officers of the corporation knew of the contract and acquiesced in it.

[1] Appellant having sworn to a breach of the contract by appellee, if appellee desired to defend on the ground that appellant could have obtained other employment, the burden of establishing the defense rested on it. The court placed the burden on appellant of showing that he made diligent efforts to obtain employment. This was error. *Porter v. Burkett*, 65 Tex. 383; *S. W. Tel. Co. v. Bross*, 45 S. W. 178; *Peacock v. Coltrane*, 44 Tex. Civ. App. 530, 99 S. W. 107; *Weber Engine Company v. Bradford*, 34 Tex. Civ. App. 543, 79 S. W. 46.

[2] The court charged the jury that, if appellant proved his contract and a breach thereof, and that he made diligent effort to obtain other employment, he should recover for the time from November 1, 1911, to June 1, 1912, "except for such period of time as he was sick during that time." It was in evidence that appellant had pneumonia some time after he was discharged. The charge did not give the proper measure of damages. The measure of damages was the compensation stipulated for in the contract, in the absence of allegation and proof by appellee that he could have obtained other employment, which proof would not be a complete defense. *Weber Engine Company v. Bradford*, herein cited.

[3] The time appellant was sick after his discharge could not be deducted from his damages. Appellee should not be allowed to defend against its breach of a contract by showing the misfortune of appellant; there being no such stipulation in the contract.

[4] The third assignment of error is sustained. There was no testimony tending to show that appellant had overdrawn his salary, but that it was paid to him without cavil or question until November, 1911. The charge presented an issue not sustained by the evidence.

The fourth, fifth, and sixth assignments of error are overruled. There was testimony raising the issues submitted in the charges assailed in the assignments.

[5] Appellee could not protect itself from the consequences of its breach of the contract by showing that appellant refused to accept a lower salary than that agreed upon, and the court erred in so instructing the jury. The special charge set out in the eighth assignment of error should have been given by the court.

The court properly refused the charge set

out in the ninth assignment of error, which was clearly on the weight of the evidence.

[6] The president and manager had no authority to employ men for a year at an agreed salary, unless he had been given such authority by the charter, or had been given general control and management by the stockholders or directors, but, even if he had no such authority, the corporation may be estopped to deny such authority, if it has clothed him with apparent authority to act for it in making contracts or doing other acts. It may also impliedly or expressly ratify contracts or other acts done without authority. If the corporation accepts the benefit of the contract or acquiesces therein with knowledge, it impliedly ratifies it. *Clark & Marshall, Priv. Corp.* § 701, pp. 2132-2143. If the officers and directors of appellee paid appellant \$75 a month under an employment by its president, the corporation should not be heard to deny his authority to make the contract. A ratification with knowledge of authority to employ for five months would carry with it a ratification for the entire time. If the directors had knowledge of the contract, or if the facts are such as to justify the presumption that they did have knowledge then a failure to disaffirm amounts to ratification. Acquiescence implies knowledge. *Clark & Marshall, Priv. Corp.* § 717, p. 2191.

Moore testified that he told Hackbarth and Schler, directors, about the contract with Miller, and it was not error to allow Schler to deny that such information was given him.

The contract was in writing, as evidenced by a letter from Moore to Miller, in which he informed him that everything had been arranged "your salary to be \$75 per month for one year."

For the errors indicated, the judgment is reversed and the cause remanded.

# BOWEN v. SPEER et al. (No. 6529.)

(Court of Civil Appeals of Texas. Galveston.  
April 17, 1914.)

## 1. VENDOR AND PURCHASER (§ 16\*)—OFFER AND ACCEPTANCE—ACCEPTANCE BY MAIL.

One receiving by mail a proposition of purchase or sale has the right, within a reasonable time, and before it is withdrawn, to accept by a writing, deposited in the post office, duly stamped for delivery, and such acceptance is binding from the time it is so deposited, whether delivered or not; but, if the offeror limits the time for acceptance, it may be accepted at any time within such limit, unless during that time, and before acceptance, the offer is withdrawn, and notice thereof given.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

## 2. VENDOR AND PURCHASER (§ 351\*)—VENDOR'S BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages for the vendor's breach of his offer to sell after its acceptance is the difference between the market value of

the property at the time of the breach and the price at which it was offered.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

**3. VENDOR AND PURCHASER (§ 16\*) — OFFER AND ACCEPTANCE—SUFFICIENCY OF ACCEPTANCE.**

Where the owner of a lot offered to take \$500 net cash, provided he could have the money in hand by May 28th, an unconditional acceptance by mail, by which the owner, by simply executing a deed waiting for him at a bank, could have the money in his hands by the 28th, was sufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

**4. VENDOR AND PURCHASER (§ 343\*)—VENDOR'S BREACH OF CONTRACT—LIABILITY FOR DAMAGES.**

A vendor who, after the acceptance of his offer to sell, sold the land to others, thereby placing it out of the purchaser's power to enforce specific performance, was liable to the purchaser for damages sustained by such a breach of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1023-1029; Dec. Dig. § 343.\*]

**5. TORTS (§ 12\*)—INTERFERENCE WITH CONTRACTUAL RELATIONS.**

One who knew of an offer to sell land, and of its acceptance, and of the condition that the money should be in the vendor's hands by May 28th, and who, for his bank, loaned the purchaser the money to pay for it, and who also knew that the purchase price would be paid within such time on the owner's tender of his deed, and who two days before such date induced the owner to sell the land to him, was liable to the purchaser for damages resulting from the breach of the contract of sale.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 13; Dec. Dig. § 12.\*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by R. E. Bowen against H. A. Speer and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

E. B. Pickett, Jr., of Liberty, for appellant. Marshall & Harrison, of Liberty, for appellees.

**McMEANS, J.** On May 22, 1909, H. A. Speer was the owner of lots Nos. 1 and 4 in block No. 6 in the town of Liberty. On that date W. L. Bingle, a real estate agent, acting for appellant, Bowen, wrote to Speer, who resided in the city of San Antonio, as follows: "I have another applicant for your 2 lots in the town of Liberty, authorizing me to pay \$500.00 for the 2 lots. Please let me hear from you in regard to the sale of it."

Speer, on May 24, 1909, replied to Bingle by letter as follows: "Replying to your favor of 22d, will say that I will take \$500.00 cash, net to me, clear of all taxes, abstract, or commission, for my 2 lots in Liberty, provided you can arrange it so I can get my hands on the money by the 28th of this month. Thanking you for the inquiry, and with best personal regards," etc.

Receipt of this letter containing Speer's

proposal was communicated by Bingle to appellant, Bowen, who at once began to arrange for the raising of the needed \$500 to pay for the lots. Appellant testified that on May 26, 1909, after banking hours he called upon appellee Zeiss, who was the president of a bank in Liberty, and who was at his office in the bank, and explained to him the necessity of at once obtaining a loan for \$500, and told him that he was going to purchase with it the two lots of Mr. Speer. Zeiss told Bowen that the bank was then closed for business for the day and requested him to call the next day; but Bowen explained to him the necessity of his sending a check that evening, which was, as Bowen testified, on May 26th, so that Speer could get the money by the 28th. Zeiss then told Bowen, upon the latter agreeing to furnish certain collateral security, that he would lend him the money, and that he could send his check by that day's mail, and that he could execute the note the next day. Accordingly Bowen had a deed prepared to be signed by Speer conveying to himself the lots, and inclosed the same with this check for \$500 on the Liberty bank, payable to Speer, addressed to the First National Bank of San Antonio, together with a letter to the latter bank directing it to deliver the check to Speer upon his signing and acknowledging the deed. This letter, the deed, and the check were inclosed in an envelope, properly stamped and addressed, and duly deposited in the mails in time for it to leave Liberty on the evening train. There was also sent in the same envelope a letter written by the cashier of the Liberty bank to the Frost bank directing the latter to pay Bowen's check therewith inclosed. At the time of the mailing the above letter there was also mailed a letter from Bingle to Speer, properly addressed and stamped, accepting for Bowen his offer, and requesting him to call at the Frost bank and sign and acknowledge the deed, and to receive the check inclosed with it. After Bowen had talked with Zeiss about buying the lots, Zeiss, who had been wanting the lots himself, taking advantage of the information acquired from Bowen, appears to have concluded to beat Bowen to it, so he took the first train out from Liberty to San Antonio, arriving early the next morning, which he testified was on the morning of May 26th. The evidence was sufficient, we think, to justify the conclusion that he really reached San Antonio on the morning of the 26th, although this is in direct conflict with the testimony of Bowen to the effect that he arranged with Zeiss to borrow the money on the afternoon of that date. However that may be, the testimony leaves no doubt that the letter of acceptance and the letter inclosing the check were mailed on the same day that Zeiss started for San Antonio, and before he concluded the purchase of the lots. It appears that Bowen's letter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

accepting Speer's proposition, and inclosing the deed and check, did not reach Speer until the afternoon of the 27th. Zeiss arrived in San Antonio the day after he left Liberty and at once hunted up his friend Herman F. Schmitt, and procured him to purchase the lots from Speer for \$500 net, taking the deed in his (Schmitt's) name, with the agreement and understanding that Schmitt would thereafter deed the lots to Zeiss. Zeiss paid the purchase price to Speer through Schmitt. A little less than a year later Schmitt conveyed the lots to Zeiss, and thereafter, before this suit was brought, Zeiss conveyed the lots to C. W. Fisher and H. C. Compton. Speer received the letter notifying him of Bowen's acceptance of his offer not later than the afternoon of May 27th, and soon thereafter directed the Frost bank to return the deed and check to him, which was done. On the morning of May 27th Bowen executed his note to the Liberty bank for \$500 in accordance with the arrangement made with Zeiss, and was given credit by way of deposit in that bank for that sum, and had that sum to his credit at that time.

On May 25, 1911, Bowen brought this suit against Speer and Zeiss to recover damages for the breach of contract to sell to him the lots in question, setting up the facts and the further fact of the sale of the lots by Zeiss, thereby placing it beyond plaintiff's power to compel specific performance, and prayed for a judgment against both. Upon a trial before the court, without a jury, judgment was rendered in favor of defendants, and plaintiff has appealed.

We shall not consider appellant's assignments of error in detail, but think it sufficient to say that the points hereinafter discussed are sufficiently presented by them.

[1] It appears to be the law that, when a party submits to another through the mail a proposition of purchase or sale, the receiver of the proposition has the right, within a reasonable time, and before it is withdrawn, to accept by a writing deposited in the post office, duly stamped, ready for carriage and delivery, and such acceptance binds the proposer of the contract from the time the deposit is made in the post office, whether it be delivered or not. *Mortgage Co. v. Davis*, 96 Tex. 508, 74 S. W. 17, 97 Am. St. Rep. 932. But if the proposition so made gives a limit of time in which it may be accepted, then the person to whom it is made may accept the same at any time within the limit given, unless the proposer during said time, and before acceptance, withdraws the offer and notifies the other party thereof. *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

[2] Where an owner, after his offer has been accepted, or during the time in which the proposed purchaser is given to accept, sells to some other person, and in the latter case when the offer is accepted within the time limited, without notice of the withdrawal

thereof by the owner, a liability for damages as for breach of contract arises, and the measure of damages is the difference between the market value of the property at the time of the breach and the price at which the owner had so offered to sell it. *Kempner v. Cohn*, supra; *Kempner v. Heidenheimer*, 65 Tex. 591; *Nevins v. Thomas*, 80 Tex. 597, 16 S. W. 332.

Where a person to whom such an offer of sale is made accepts the same within the time in which he is limited by the offer, another person knowingly inducing the person making the offer to break his contract thus made is liable for the damages caused by such breach of contract. *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914; *Brown Hdw. Co. v. Ind. Stove Works*, 96 Tex. 453, 73 S. W. 800; *Lytle v. Railway*, 100 Tex. 292, 99 S. W. 397, 10 L. R. A. (N. S.) 437; *Davidson v. Oakes*, 128 S. W. 944.

[3, 4] Keeping in mind the foregoing principles, we think that under the facts stated Bowen accepted Speer's offer at such a time and in such manner as to complete a contract between them for the sale of the lots, and that, when Speer sold to Zeiss, he thereby breached his contract and became liable to Bowen for such damages as the latter sustained thereby. Speer's proposal was definite, and the only condition imposed by him was that the purchase price should be in his hands by the 28th. Bowen's acceptance was unconditional, and the facts sufficiently show that he took every step necessary to put the money in Speer's hands by the time specified. In the ordinary course of business affairs the sending of a check is in itself sufficient. But when we recall the acts of Bowen in arranging for the money and depositing it in the bank to meet the payment of his check, and when it is remembered that the cashier of the Liberty bank wrote to the Frost bank to cash the same upon the execution of the deed by Speer, and when Speer, by simply executing the deed, could have the money in his hands by the 28th, we think that Bowen had sufficiently complied with the only condition imposed by Speer in his offer (*Hoskins v. Dougherty*, 29 Tex. Civ. App. 318, 69 S. W. 106), and, these facts having been shown, the contract of sale was binding on Speer, and, had he not sold the lots Bowen could have enforced specific performance thereof. Speer having sold the lots to Zeiss, and Zeiss having sold them to others, thus placing it out of the power of Bowen to enforce specific performance, his right to damages against Speer, if he sustained any, for a breach of the contract is, we think, certain. *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

[5] But under the facts stated is Zeiss also liable for damages to Bowen? We think so. Zeiss knew of Speer's offer to Bowen, of the latter's acceptance, and of the condition imposed by Speer that the money should be in

his hands by the 28th. He, for his bank, agreed to loan, and did loan, Bowen the money to pay for the lots. He knew that Bowen was mailing to the Frost bank his check, payable to Speer, in payment for the lots, and the cashier of the bank of which Zeiss was president wrote to the Frost bank to cash the same when it was properly presented by Speer; and Zeiss knew it would be paid whenever Speer so presented it. Having knowledge of the facts, he hurried to San Antonio, and, although he knew that Bowen had until the 28th to accept and pay the purchase price, he, on the 26th, induced Speer to sell to him, and thereby to revoke his offer to Bowen before the expiration of the time given Bowen within which to accept.

We think under these facts Zeiss became liable to Bowen under the rule stated in *Raymond v. Yarrington*, supra, and other cases cited in the same connection.

It is our opinion that the court erred in not rendering judgment against both Speer and Zeiss for the damages sustained by Bowen, and, for this error the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

#### FIDELITY & CASUALTY CO. OF NEW YORK v. J. W. CROWDUS DRUG CO. (No. 1305.)

(Court of Civil Appeals of Texas, Texarkana, April 29, 1914. Rehearing Denied May 7, 1914.)

#### INSURANCE (§ 183\*)—POLICY—CONSTRUCTION—AMOUNT OF PREMIUM.

An employer's liability policy stated that the premium of \$113.90 placed therein was based or estimated upon data furnished in the schedule as to the amount of compensation paid employes, and, further, that the premium, though, should be subject to adjustment if the compensation was greater or less than the estimated sum stated in the schedule, etc. The compensation paid was in fact greater than the amount so estimated. *Held*, that the \$113.90, the amount estimated, was not conclusive of the amount of the premium, and the insurer could recover the additional amount shown to be due.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 394; Dec. Dig. § 183.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by the Fidelity & Casualty Company of New York against the J. W. Crowdus Drug Company. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

The suit is by appellant against appellee to recover the amount of certain additional premiums covering a period of three years, alleged to be due by the terms of a policy of liability executed by appellant in favor of the drug company. The appellee, besides general denial, averred that there was a verbal waiver by the appellant of Condition

N in the policy, and further that by a rider attached to and forming a part of the policy it was agreed to continue in force the policy for the fixed sum of \$113.90 per year. The only question submitted to the jury for their decision was that of waiver of increased premiums, and the verdict was in favor of the defendant.

The evidence shows that on July 27, 1907, the appellant issued and delivered to appellee a policy of insurance, which, as material to be stated, reads:

"No. 120202. The Fidelity and Casualty Company of New York, hereinafter called the 'company,' in consideration of one hundred thirteen 90/100 dollars (\$113.90) premium and the statements hereinafter set forth in the Schedule of Statements, which statements the assured makes and warrants to be true by the acceptance of this policy, except the statements concerning the compensation of employes which are estimated, does hereby agree to indemnify the J. W. Crowdus Drug Company of Dallas, county of Dallas, state of Texas, hereinafter called the 'assured,' for a period of twelve months beginning on the 27th day of July, 1907, noon, and ending on the 27th day of July, 1908, noon, standard time at the place where this policy has been countersigned, against loss from the liability imposed by the law upon the assured for damages on account of bodily injuries or death, accidentally suffered while this policy is in force, by any person or persons while within the premises described in the Schedule or upon the sidewalk or other ways immediately adjacent thereto provided for the use of employes or the public, subject to the following conditions:

"Condition L. No erasure or change appearing on the face of this policy as originally printed and no change or waiver of any of its terms or conditions or statements shall be valid unless indorsed hereon, and signed by the president or vice president or one of the secretaries of the company. Notice to or knowledge by any agent or any other person shall not be held to waive any of the terms, conditions or statements hereof.

"Condition N. The premium for this policy is based on the data given in the Schedule. If the compensation of employes is greater or less than the estimated sum stated in the Schedule, or if the data otherwise given in the Schedule is erroneous, the premium charge shall be subject to adjustment on the basis of the rates stated in the analysis of premium given below. The company shall be entitled to examine the pay roll accounts and to check all other items of the Schedule whenever it desires to do so."

There was attached to the policy the following rider: "Form 22 C. Date July 27th 1907. 'Installment Form.' It is hereby understood and agreed that the assured under Gen. Lia. policy No. 120202 may cause the insurance to be continued from noon of the 27th

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



day of July, 1908, to noon of the 27th day of July, 1909, standard time, at the place where this policy has been countersigned, by the payment of \$113.90 dollars, and that the payment at the expiration of said period of the further sum of \$113.90 dollars shall continue the insurance for the period of one year, to wit, from noon of the 27th day of July, 1909, to noon of the 27th day of July, 1910, standard time, at the place where this policy has been countersigned. Nothing herein contained shall be held to abrogate the right of the company to cancel the policy as provided in it. Attached to and forming part of Gen. Lia. policy No. 120202 of the Fidelity and Casualty Company of New York to the J. W. Crowdus Drug Co. and dated July 27, 1907. Robt. J. Hillas, Vice President-Secretary."

Under the "Schedule of Statements" set forth in the policy there appears as follows: "Estimated wages of office men, \$6,000.00, at 5 cents per \$100; estimated wages of all other employes engaged on the premises, \$6,000.00, at 20 cents per \$100." Acting on this statement of estimated wages, which was made by the appellee to appellant's general agent, the appellant's general agent fixed \$113.90 as the amount of the premium, based on the rate of 5 cents per \$100 for office men, and 20 cents per \$100 for all other employes. Appellee accepted the policy when it was delivered to it. It was proven without dispute that the books of appellee showed actual wages paid by it to its employes from July 27, 1907, to July 27, 1910, which was the life of the policy, to be \$180,204.78, and that this was the correct amount that the premiums during the three years mentioned should have been paid on at the rate per \$100 specified in the policy, instead of \$12,000 as erroneously represented by the data furnished by appellee in the "Schedule of Statements" in the policy. It was agreed by the parties that in calculating the premium payable based on the amount of wages paid there was a balance unpaid above \$113.90 of \$69.18 for each of the three years during which the policy was in force. At the end of both the first and second years the appellee sent a check for \$113.90 to pay the premium for each year; and appellant offered evidence going to show that it issued and mailed to appellee for each payment a renewal receipt, which, among other things, recited that the policy was continued in force for another year, "subject to all the conditions and agreements contained in the aforesaid policy." The appellee does not offer testimony to show whether it did or did not receive the renewal receipts. The testimony does not establish in point of fact that appellant, or its authorized agent acting within the scope of his authority, had waived its right to additional premiums to the \$113.90 paid each year, based on the amount of the compensation paid the employes of appellee. The further question arising on the

record is one of law under the undisputed facts above set out.

Thomas & Rhea and G. D. Hunt, all of Dallas, for appellant. Seay & Seay, of Dallas, for appellee.

LEVY, J. (after stating the facts as above). According to the policy, the appellant contracted to indemnify the appellee against loss in legal liability for damages "in consideration of \$113.90 premium and the statements hereinafter set forth in the Schedule of Statements." It is further stipulated in the policy that "the premium for this policy is based on the data given in the Schedule. If the compensation of employes is greater or less than the estimated sum stated in the Schedule, or if the data otherwise given in the Schedule is erroneous, the premium charge shall be subject to adjustment on the basis of the rates stated in the analysis of premium given below." The "rates stated in the analysis of premium" given in the policy provides "5 cents per \$100" of the wages paid "office employes," and "20 cents per \$100" of the wages paid "all other employes engaged on the premises." Appellee by accepting the policy would be held to have agreed to all its terms. The policy clearly evidences the agreement of the parties to base the sum of the premium payable on the amount of wages paid by appellee to its employes at the rates specified in the policy for each \$100 paid such employes. According to the wording of the policy, the sum of \$113.90 was placed therein as the premium payable under the rates specified as based on the data given in the schedule. The data given in the schedule, which was furnished by appellee for the purpose of fixing the amount of the premium, shows "estimated wages" paid employes in the total sum of \$12,000. The \$113.90 recited as the sum of premium payable being, according to the policy, fixed on "estimated wages" only, then, in view of the further stipulation of the parties, and under the undisputed facts of this case, the sum of \$113.90 would not be conclusive of the amount of premium that was payable by appellee. The further stipulation provided that the premium charge should be "subject to adjustment" if "the compensation is greater or less than the estimated sum stated in the Schedule, or if the data otherwise given in the Schedule is erroneous." It was proven without dispute that the "estimated wages" in the total amount of \$12,000 stated in the schedule was way below the true and correct amount of the total wages paid by appellee to its employes. And the true and correct amount shown by the books of appellee was conclusively proven. The true and correct amount of the total wages paid its employes being thus truly arrived at, it then became, under the policy, a mere matter of mathematical calculation, and nothing more, to get the amount of the premium payable, for the rates

were expressly fixed and agreed upon in the face of the policy. Where there is nothing left open for the parties to do but to ascertain the amount of the pay roll and then merely to mathematically compute, as here, the amount of the premium, the agreement of the parties should, in order to carry out its purpose and plain intent, be understood as meaning to pay what may be due from one party to the other. And in view of the stipulation of the parties and the undisputed facts, it is believed that the appellant has shown a right of recovery for the additional amount of premiums, which, in amount, are admitted. There is no evidence of any probative force whatever introduced showing that appellant, or its authorized agent acting within the scope of his authority, had waived its right to the additional premium sued for. It follows that appellant was entitled, under the facts, as a matter of law, to recover, and the court should have given the peremptory instruction asked for by appellant. Assignment No. 1 is therefore sustained, and this disposes of the appeal.

The appellee argues that the rider on the policy fixes the premium payable and should control. The rider merely authorizes a renewal, and does not introduce new or additional terms, or modify or alter Condition N in the policy.

The judgment is reversed and here rendered in favor of the appellant for \$207.54, with interest at 6 per cent. from October 25, 1911, and for the costs of the trial court and of this appeal.

#### SOCKWELL v. SOCKWELL et al. (No. 1303.)

(Court of Civil Appeals of Texas. Texarkana.  
April 29, 1914. Rehearing Denied  
May 21, 1914.)

#### 1. GIFTS (§ 48\*)—GIFTS INTER VIVOS—EVIDENCE.

Where a will contest and an action of trespass to try title were consolidated and heard together, the proponent claiming the land in controversy under the will and the contestants under a parol gift from testatrix prior to her death, a witness was properly permitted to testify that, about two years before the execution of the will, testatrix stated that she had given the property to contestants, and would that day deliver possession; such being admissible, not on the issue of the execution of the will, but to prove the gift inter vivos.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 87-94; Dec. Dig. § 48\*]

#### 2. TRIAL (§ 91\*)—RECEPTION OF EVIDENCE—EFFECT OF FAILURE TO OBJECT TO EVIDENCE.

When evidence is not objected to when offered, unless good reason for the delay is shown, the court has a wider discretion in passing upon its admissibility upon motion to strike out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91\*]

#### 3. WILLS (§ 164\*)—PROBATE—EVIDENCE.

In a will contest, where the issue was whether the proponent procured its execution by fraud, a letter, written by proponent to his

uncle, seeking to borrow money, and stating, "If you could know what I know which is coming to you and your family through my work I think you would remember me," was properly admitted; it being shown that, under the will, the uncle's wife received a good share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164\*]

#### 4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—EVIDENCE.

Though testimony was objectionable, its admission was not ground for reversal, where testimony to the same effect was admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. § 1050\*]

#### 5. WILLS (§ 165\*)—PROBATE—EVIDENCE—ADMISSIBILITY.

Declarations by testatrix, at or about the time of the alleged execution of a will offered for probate, disclosing unfriendly feeling towards persons who were beneficiaries under the will, were relevant and material in a contest charging fraud, as tending to show that testatrix did not knowingly and willingly make the bequest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165\*]

Appeal from District Court, Hunt County;  
A. P. Dohoney, Judge.

Application by Melvin Sockwell to probate will of Mrs. Catherine Hale, deceased, in which Mrs. Mattie Sockwell and others were contestants, consolidated with an action of trespass to try title by Mrs. Mattie Sockwell and others against Melvin Sockwell. From a judgment for contestants and plaintiffs, contestee and defendant appeal. Affirmed.

J. H. Morgan, Neyland & Neyland, and Sherrell & Starnes, all of Greenville, for appellants. Clark & Leddy, of Greenville, for appellees.

HODGES, J. In April, 1912, the appellant, Melvin Sockwell, filed in the county court of Hunt county an application for the probate of an instrument purporting to be the last will of Mrs. Catherine Hale, deceased. It was alleged in the application that Mrs. Hale died on the 7th day of February, 1912, leaving an estate valued at \$25,000. The instrument offered as her will was dated June 13, 1907, and contained, among others, a provision bequeathing to the appellant, her grandson, an undivided half interest in a lot in the town of Greenville on which were standing some brick buildings. James F. Sockwell, a son-in-law, was appointed executor without a bond. This application was contested by Mrs. Mattie Sockwell, joined by her husband, James F. Sockwell. The contestants alleged that the instrument offered was not the will of Mrs. Catherine Hale; that it was not signed by her, nor by any one authorized by her; that if in fact Mrs. Hale did sign the paper, she did so under a misapprehension of its contents, believing that it bequeathed to Mrs. Sockwell the entire interest in the brick buildings referred

to. It was further charged that the execution of the instrument was procured by the fraud of the appellant and one Byron Logan, together with other persons unknown to contestants; that these parties exercised an undue influence over Mrs. Hale, and through fraud and deception induced her to sign the instrument. When the cause came on for trial in the county court a judgment was rendered admitting the will to probate. From this judgment the contestants prosecuted an appeal to the district court. While the contest was pending in the county court the appellees, Mrs. Sockwell joined by her husband, filed in the district court of Hunt county a suit against the appellant in the form of an action of trespass to try title, in which it was alleged that Mrs. Hale during her lifetime made a parol gift of the lot in controversy to the plaintiff, and that the latter had, on the faith of that gift, entered into possession and had made permanent and valuable improvements on the property. The petition also set out in detail the character of the improvements, when made, and the value claimed as the result of each. This suit and the application to probate the will were consolidated and tried on June 11, 1913. A judgment was rendered refusing to probate the will, and in favor of Mrs. Sockwell for the property sued for.

The case was submitted to a jury on special issues, and the finding of the jury was, in substance, as follows: (1) In 1905 Mrs. Hale gave the lot in controversy to Mrs. Sockwell, and delivered possession to the latter with the intention that the property should thereafter be that of the donee. (2) That Mrs. Sockwell, with the knowledge and acquiescence of Mrs. Hale, made permanent and valuable improvements upon the property as follows: Sidewalks adjacent to the property, \$750, improvements on the lot and other paving, \$1,268.50, and that the property had been enhanced in value by reason of these improvements to the extent of \$3,000. (3) That Mrs. Hale did not understand the contents of the paper offered for probate as her will by the appellant, and was induced to have her name signed thereto by fraud and deception.

The evidence shows that Mrs. Hale was 92 years old at the time of her death, and had been blind and in feeble health for several years prior thereto. Her condition was described as being as helpless as that of a child, and it was shown that she required constant attention. Much of her time during her later years had been spent with her daughter, Mrs. Sockwell. It also appeared from the evidence that Mrs. Hale had made two other wills prior to 1907; one in 1902, and another in 1905. In the will of 1905 all of the lot in controversy was bequeathed to Mrs. Sockwell, whereas under that of 1907 Mrs. Sockwell only received an undivided half interest, the other going to the appellant.

[1, 2] During the progress of the trial M. M. Chandler, one of the witnesses to the will of 1905, testified that he had signed that will as a witness, that he remained for some time thereafter and talked with the family, and that Mrs. Hale remarked that she would never bother him any more about witnessing another will, and then explained why she had changed a former will—that she had given the brick property to her daughter, Mattie Sockwell, and would turn it over to her that evening, for her past kindness and favors. This testimony was admitted without any objection. Some time thereafter the defendant moved the court to strike out all that part in which the witness stated what she (Mrs. Hale) was going to do with reference to turning over the property to Mattie Sockwell. The ground of this objection, as shown by the bill of exception, is as follows: "Because the same related to something that she was going to do in the future which might not be done." The refusal of the court to sustain that motion is the basis of one of the assignments of error. In her suit filed in the district court, which was then being tried, Mrs. Sockwell was relying upon a parol gift from her mother, coupled with possession and valuable improvements made, and not upon the will, as the basis of her claim to the property. By the testimony of this witness the donor is represented as saying that she had given the property to Mrs. Sockwell, and would that evening deliver possession. The manifest purpose of this testimony was to prove a gift *inter vivos*, not to disprove the execution of the will of 1907. We think the testimony was admissible as against the objection urged. 6 Enc. Ev. pp. 211, 212, and cases cited in the notes. But even if this evidence was subject to the objection, it cannot be said that the court abused his discretion in refusing to exclude it after it had once been admitted without objection. When an objection is delayed without showing some reason for so doing, the court has a wider discretion in passing upon the admissibility of testimony than when an objection is made at the time the testimony is offered. *Ry. Co. v. Lamothe*, 76 Tex. 223, 13 S. W. 194; *Ry. Co. v. Andrews*, 29 S. W. 920. The bill of exception gives no reason why an objection was not sooner made, nor does it appear from any other portion of the record that there was any good reason for the delay.

[3] Appellees offered in evidence the following letter from the appellant: "Denver, Colo., May 15, 1911. Mr. J. J. Alexander, Santa Anna, Texas—My dear Uncle: No doubt you may be surprised to hear from me, but I knowing you to be a friend and true—at that—I do not hesitate in asking you my want. Now Uncle I went broke this A. M., which I am very sorry to state to you, in fact it is the first time that I have ever been in such a fix for quite a few years. Yesterday (May 15th) I was worth \$5000.00

cash at the bank, but to-day I am worth only what I can show. Now if you have a few dollars you can spare for a few days please accommodate me and send to address I may give you (J. J. please never say anything about me writing you.) I have made money fast since coming out here, but J. J. you know it takes all for man to exist on this kind of a game, but if you can favor me do so at once, for I know it will be to your advantage some time. Now I would not you to ever mention me writing you for this—for I know if you could see me and know what I know which is coming to you and your family through my work I think you would remember me by the past. So Uncle J. J. A. if you can favor me kindly do so at once and for God sake and mine say nothing. Yours devotedly, Melvin Sockwell." On the margin of the second page of this letter appeared the following: "J. J. A. Please never say anything about me writing you." This was objected to upon the ground that on its face the letter had no reference to the will offered for probate, and was irrelevant and immaterial. In their contest the appellees had charged fraud and deception in the execution of the will of 1907, and it was permissible for them to prove those facts by circumstances. We think it was for the jury to determine, under all the facts, whether or not this letter referred to that will. Appellant was present in court at the time, and had an opportunity to explain the letter and to show what he was referring to, if not to the will. This he failed to do. If he was referring to this will, the language used was strong evidence of fraud. It was shown by a comparison of the two wills that under the last the wife of the party to whom the letter was addressed received a larger portion of the property than under the will of 1905.

[4] In the third, fourth, and sixth assignments of error the appellant complains of the admission of testimony, mainly upon the ground that it was irrelevant and immaterial. Even if this testimony was objectionable its admission cannot now be considered grounds for reversing the judgment, because testimony to the same effect was admitted from other sources without objection.

[5] The appellant requested the following charge, which was refused: "You will not consider any statements or declarations made by Catherine Hale before the execution of the will dated —, June 1905, if statements or declarations were made, or after the execution of said will, if executed, nor any declarations or statements made by said Catherine Hale before the execution of the will of date — day of —, 1907, if same was executed, or declarations or statements made after the execution of said will, if executed, but such declarations or statements made by said Catherine Hale, if made, can be considered by you only for the pur-

pose of assisting you in arriving at whether or not Catherine Hale did in fact make a parol gift of the land in controversy to Mattie Sockwell, if said declarations or statements do assist you. Such declarations or statements, if made, cannot be considered by you in considering the probate of the will of 1907, but such testimony, in your deliberations, shall be limited to the issue as to whether or not a parol gift was made by Catherine Hale to Mrs. Mattie Sockwell of the property in controversy." This charge is, to say the least, confusing. In one portion it tells the jury without qualification not to consider any statements made by the testator either before or after the execution of either of the two wills referred to. In the latter part it tells the jury that they should consider such declarations only for the purpose of determining whether or not a parol gift of the lot had been made to Mrs. Sockwell, and for no other purpose. But even if the charge had been properly framed, we do not think the court erred in refusing to give it. Some of the declarations referred to disclosed unfriendly feelings on the part of the testatrix toward the appellant, and a pronounced disinclination to bequeath to him any portion of her property. Such declarations, made at or about the time the instrument offered as a will was executed, are relevant and material, in a contest charging fraud, as tending to show that the testator did not knowingly or willingly make the bequest. It is neither natural nor common for testators to give their property to those toward whom they entertain hostile feelings. Those declarations were circumstances to be considered by the jury. *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308; *Johnson v. Browne*, 51 Tex. 79; *Robinson v. Stuart*, 73 Tex. 269. 11 S. W. 275; 1 Underhill on Wills, §§ 132, 161. Some of them referred to in the charge were offered by the appellant himself, without any qualification or restriction. It was only after other declarations tending to show a hostile state of mind towards him that he deemed it expedient to ask the court to place the restrictions upon their consideration.

The remaining assignments are overruled, and the judgment is affirmed.

## GULF, C. & S. F. RY. CO. v. HICKS et ux. (No. 1314.)

(Court of Civil Appeals of Texas. Texarkana.  
April 30, 1914.)

### 1. DEATH (§ 103\*)—QUESTIONS FOR JURY—RESULTING LOSS OR INJURY.

In an action by the parents of a young man of 23 killed in a wreck due to defendant's negligence, held, on the evidence, that the question whether plaintiffs had any reasonable expectation of pecuniary benefit from him was for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.\*]

**2. DEATH (§ 86\*)—RIGHT OF ACTION—LOSS OR INJURY.**

In an action under the statute by the surviving wife, parents, etc., for damages from injury resulting in death, there can be no recovery, unless plaintiffs had a reasonable expectation of pecuniary benefit from deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 112–114, 117, 119; Dec. Dig. § 86.\*]

**3. DEATH (§ 99\*)—DAMAGES—EXCESSIVE DAMAGES.**

In an action by surviving parents about 65 years of age for damages from the death of a son 23 years of age, where it appeared that plaintiffs were engaged in farming and stock raising, and were worth about \$30,000, that deceased was skilled in such business, and when at home assisted therein and in household work, that he was considerate of their health, and had on occasions called a physician to see them, and that he had stated that he intended to remain unmarried while his mother lived, in which the jury, under Rev. St. 1911, art. 4704, might allow such damages as they thought proportionate to the resulting injury, a verdict of \$5,500 was excessive and would be reversed, unless a remittitur of \$4,400 was filed.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.\*]

Willson, C. J., dissenting in part.

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

Action by W. F. Hicks and wife against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiffs for \$5,500, and defendant appeals. Reversed and remanded for new trial, unless a remittitur of \$4,400 was filed, in which event judgment reformed.

Terry, Cavin & Mills and A. H. Culwell, all of Galveston, for appellant. Evans & Carpenter, of Greenville, for appellees.

WILLSON, C. J. On September 25, 1911, as the result of the wrecking of one of appellant's freight trains near Celeste, appellees' son, Ira Delos Hicks, a young man nearly 23 years old, was killed. At the time the wreck occurred deceased, employed by appellant as a brakeman, was on the top of one of the cars forming the train. Appellees charged, the jury found, and we find, that the wrecking of the train was due to negligence on the part of appellant, in that it was operating same at too great a speed over a track not reasonably safe because of rotten ties. The appeal is from a judgment for \$5,500—apportioned \$500 to the father, and \$5,000 to the mother—recovered by deceased's parents as the damages they suffered because of his death.

[1, 2] At the time of deceased's death appellee Hicks was about 65, and his wife about 63 years old. They had several children, all married and living in homes of their own, except deceased, their youngest child, who lived with them when not at work elsewhere. Besides about 60 head of stock cattle, 15 head of brood mares, and other property, the value of which is not shown in the record, appellees owned the 800 acres of land, worth about

\$30,000, on which they lived in Hill county, where they engaged in farming and stock raising. Deceased was kind-hearted, sober, trustworthy, industrious, skilled in the business his father was engaged in, and was devoted to his mother. When at home with them he assisted his father in buying, feeding, and shipping cattle, and in doing other work around the place, and his mother in looking after and marketing chickens, eggs, etc., in the work involved in operating a dairy she carried on, and in various other kinds of work she engaged in as a housekeeper. Deceased understood caring for sick people, and was a capable nurse. He was attentive and helpful to his mother, not only in assisting her in her work, but also in accompanying her to church when, as often happened, she otherwise could not have gone. He had declared he did not intend to marry as long as his mother lived, but intended to remain unmarried, so he could see after and take care of her. On one or two occasions he had the witness Dr. Mayner to call professionally to see his father or mother, stating to him that his father and mother "were getting old and needed attention, and his father would not call a doctor very often when he needed one," and that he (deceased) "would settle the bill, and for me (witness) to come to him for it." Deceased and his father had entered into an agreement, the terms of which were stated in testimony of the latter as follows: "The agreement we had was that I was to furnish 25 mares and 50 or 60 head of cattle, and he was to get one-half of the increase for his labor. \* \* \* He was to run the farm, and what we made was to be used that way. If we did not use all that we made on the farm, the balance was to be sold, and it was to be ours, mine and his; if anything was left, not used, we were to dispose of it, and it was to belong to us. We were to divide the profits on the stock business half and half, and, if there was anything left on the farm, we were to divide that. \* \* \* He was going to come home Christmas and take charge of everything and carry out the agreement we made, take charge of the stock, cattle, horses, and farm."

In the statement just made we think we have recited substantially all the facts relied on to show pecuniary loss to appellees as a result of the death of deceased. Appellant insists that it cannot be said it appeared from those facts that appellees had reasonable expectation of pecuniary benefit from deceased had he not been killed, and that therefore the judgment in their favor is not supported by evidence, and cite, as supporting their contention, *Winnt v. I. & G. N. R. R. Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172; *D. & W. Ry. Co. v. Spicker*, 61 Tex. 427; *Texas Portland Cement Co. v. Lee*, 36 Tex. Civ. App. 482, 82 S. W. 306; *Railway Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104; and

*Standard Light & Power Co. v. Muncey*, 33 Tex. Civ. App. 416, 78 S. W. 981.

The two cases first cited are so unlike this one in their facts as to render it unnecessary to further refer to them.

The Johnston Case was not a suit by parents for damages for the death of their child, but was a suit by the widow, a minor daughter, a married daughter, and a son who lacked only a few months of being 21 years of age, of the deceased. The judgment was in favor of the widow and minor daughter for \$5,000 each, and in favor of the son and married daughter for \$2,500 each. It was shown that the deceased earned \$125 per month as a locomotive engineer. There was no testimony showing that he had contributed anything to his son or to his married daughter. In reversing the judgment, so far as it was in favor of the son and married daughter, the Supreme Court said: "The damages recoverable in an action of this character are for the pecuniary loss of the party benefited by the recovery. Before a recovery can be had, the loss must be proved like any other fact. It is difficult to imagine a case in which it can be proved directly. It must be proved by circumstances, such as the relation and ages of the deceased and the surviving relative, the capacity of the former for earning money, and his disposition to contribute pecuniarily to the aid of the latter. In this case the circumstances repel the idea that the son and married daughter of the deceased had any just grounds to expect pecuniary assistance from the father. The law does not and cannot compel the party causing the death to give a gratuity in these cases. The recovery is to compensate a loss and not to confer a bounty."

The Lee Case was a suit by the widow and parents of the deceased, 25 years old at the time he was killed, in which each of the parents recovered judgment for \$500 on facts found by the Court of Civil Appeals to be as follows: "That up to the time of the marriage of the deceased, A. G. Lee, he contributed largely to the support of his father and mother, J. G. and Mary Lee, but after such marriage he contributed nothing to their support. That at the time of the trial of the cause in the court below J. G. Lee was 67 years old, and Mary Lee was about 60 years old. J. G. Lee's health was good; but Mary Lee's health was bad and had been for many years. J. G. Lee was a carpenter by trade; but the amount of property owned by him and his wife is not shown. Nor does it appear from the evidence what income, if any, J. G. and Mary Lee had, or that they needed pecuniary aid from their son." On the ground that the facts stated were not sufficient to support it, the judgment in favor of the parents was reversed by the Court of Civil Appeals. That court said: "It does not appear from the evidence that they [the parents] had any reasonable expectation of receiving any pecuniary benefit from him [de-

ceased] in the future had he lived. It was essential for the parents of the deceased to show that they had suffered some pecuniary loss by reason of his death in order to authorize a verdict for any amount in their favor. This they failed to do." The value of the case as a precedent is weakened by the fact that the Supreme Court, in overruling, on other grounds, the application of the parents for a writ of error, were careful to say they did not wish their action to be construed as meaning that they thought the judgment in favor of the parents was not supported by the evidence. *Texas Portland Cement Co. v. Lee*, 98 Tex. 236, 82 S. W. 1025.

The Muncey Case was a suit by the wife for the benefit of herself and the father and mother of the deceased. The judgment in favor of the father and mother for \$1,000 each was attacked on the ground that the proof showed "deceased did not contribute anything toward their support, and there was no proof of their receiving any pecuniary benefit from a continuation of his life." In disposing of the contention, the Court of Civil Appeals said: "We are of the opinion that this objection is well grounded. The evidence shows that, after deceased married, he contributed nothing to the support of his parents, and that there was no necessity therefor, and there is no evidence to show that they had any reasonable expectation of receiving any pecuniary benefit from him thereafter had he lived. The relationship itself does not give a right of recovery. It must be shown that they have sustained some pecuniary loss by the injury upon which the jury could legally base a verdict."

While this case is like the Lee and Muncey Cases in some of its facts, it is unlike them in that here deceased not only performed service of pecuniary value to his parents after he became 21 years of age, when he was under no legal obligation to do so, but had declared it to be his intention to not marry during his mother's lifetime, so that he might more effectually look after and care for her. But those cases, and the Johnston Case also, make it plain that a recovery should be denied in such cases in the absence of testimony showing that the plaintiff has reasonable expectation of pecuniary benefit from the deceased had he not been killed. In view of appellees' financial condition and the contract he and his father had entered into, as shown by the testimony, the writer is strongly inclined to think it so improbable that a necessity for deceased to aid his parents pecuniarily ever would have arisen, or that such aid ever would have been rendered to them by him, that it should be said, as a matter of law, that they had no reasonable expectation of such benefit from him. The other members of the court, however, are of opinion the testimony made a question as to whether appellees had such

expectation or not, which should have been, as it was, submitted to the jury. The conclusion, therefore, is that appellant's contention that the testimony was not sufficient to show pecuniary loss to appellees should be overruled.

[3] But, conscious as we are of the fact that "the damages in such cases are essentially indefinite" (Railway Co. v. Kindred, 57 Tex. 508), and of the fact that the statute declares that in such cases "the jury may give such damages as they may think proportioned to the injury resulting from such death" (article 4704, R. S. 1911), and loath as we are to substitute our own judgment for that of the jury as to the proper amount to award as damages, we nevertheless are agreed that under the circumstances shown by the testimony the verdict and judgment are so plainly and radically excessive they should not be permitted to stand. It is clear, we think, when the financial condition of appellees is kept in mind, that it was extremely improbable that appellees ever would have needed pecuniary assistance, and therefore that the assistance of that nature which deceased reasonably could have been expected to render to them would have been trivial, and that a much smaller sum than \$5,500 would have fully compensated appellees for the loss of that nature suffered by them. We are of opinion that the judgment should not have been for a sum in excess of \$1,100, and that it should be reversed, unless a remittitur of \$4,400 of the amount recovered is filed.

The assignments presenting other questions for review are overruled.

The judgment will be reversed, and the cause remanded for a new trial, unless, within 20 days from this date, a remittitur of \$4,400 of the sum recovered is filed, in which event it will be so reformed as to adjudge a recovery in favor of appellees, in the proportions determined by the jury, of the sum of \$1,100.

#### WHITE et al. v. LOWRY. (No. 6553.)

(Court of Civil Appeals of Texas. Galveston. April 18, 1914.)

#### APPEAL AND ERROR (§ 742\*)—REVIEW—HARMLESS ERROR.

An assignment of error, complaining of the refusal of the court which rendered a default judgment against defendants to file findings of fact and conclusions of law, must be overruled where the statement thereunder did not show the ground of the motion for new trial, excuse defendants' default, or show that they had a good defense; it not appearing defendants were in any way harmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from District Court, Jefferson County; John M. Conley, Judge.

Action by M. W. Lowry against E. A. White and others. From a judgment for plaintiff, defendants appeal. Affirmed.

P. A. Dowlen and David E. O'Fiel, both of Beaumont, for appellants. Jas. A. Harrison, of Beaumont, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellants to recover on a note for \$3,483.55 and to foreclose a mortgage lien given by appellants, upon land described in the petition, to secure the payment of said note. The defendants were duly served with citation on June 12, 1912. On February 3, 1913, no answer having been filed by the defendants, judgment by default was rendered in favor of plaintiff for the amount due upon the note and foreclosing the lien upon the land described in the petition. Appellant in due time filed a motion to set aside the judgment by default, and for a new trial. This motion was heard and overruled by the court on the 29th day of March, 1913, which was the last day of the term of the court. Appellants excepted to the ruling of the court, gave notice of appeal, and requested the court to file conclusions of fact and law. No conclusions were filed by the court. On June 24, 1913, appellant presented to the trial judge a bill of exceptions to his failure to file conclusions of fact and law. This bill was approved by the judge and filed by the appellants on said date. In his approval of the bill the judge states that his failure to file the conclusions was due to the fact that in the press of other business he "overlooked the preparation and filing" of said conclusions and orders that the bill be filed and made a part of the record.

The only assignment of error presented in appellants' brief complains of the failure of the trial judge to file his conclusions of fact and law. As presented the assignment shows no sufficient ground for a reversal of the judgment. The statement under the assignment does not show the grounds of the motion for new trial; and, so far as we are informed by the brief, appellants may have had no defense to plaintiff's suit. There is nothing in the statement in the brief to indicate what, if any, issues of fact would or could have been raised by the defendants had they filed an answer before the judgment by default was rendered, nor is there anything to show upon what ground appellants sought to excuse their failure to answer, or that any issue of fact was raised upon this ground of the motion. From this showing it does not appear that conclusions of fact and law could have been of any benefit to appellants, and consequently the assignment as presented does not show any error prejudicial to appellants. Unless the statement under an assignment shows that the error complained of was probably harmful, the assignment fails to present ground for the reversal of the judgment of the trial court. The assignment is overruled. Texas Lumber Mfg. Co. v. Prince (Tex. Civ. App.) 154 S. W. 231. This disposes of the only question presented

by appellants' brief, and it follows that the judgment of the court below must be affirmed; and it has been so ordered.

Affirmed.

**BOLTON v. UNITED STATES FIDELITY & GUARANTY CO. et al.**  
(No. 1290.)

(Court of Civil Appeals of Texas. Texarkana.  
March 26, 1914.)

**APPEAL AND ERROR (§ 387\*)—PERFECTION OF APPEAL—BOND.**

Where a judgment appealed from was rendered at a term of the district court ending April 5th, and the motion for new trial was overruled April 4th, but appellant did not file an appeal bond until June 12th, there was no compliance with Rev. St. 1911, art. 2084, requiring an appeal bond to be filed within 20 days after the expiration of the term, and the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064-2070; Dec. Dig. § 387.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action between James E. Bolton and the United States Fidelity & Guaranty Company and others. Judgment for the company, and Bolton appeals. Dismissed.

Pierson, House & Pierson, of Dallas, for appellant. Hunt, Myer & Teagle, of Houston, and Seay & Seay, of Dallas, for appellee United States Fidelity & Guaranty Co. J. L. Goggans, of Dallas, for appellee Dallas County.

**WILLSON, C. J.** It appears that the judgment appealed from was rendered January 25, 1913, at a term of a district court for Dallas county, which commenced January 7th, and which by authority of law (article 30, subd. 44, p. 33, R. S. 1911) continued until April 5, 1913. It further appears that appellant's motion for a new trial was overruled April 4, 1913, and that he then gave notice of an appeal to the Court of Civil Appeals for the Fifth District. It further appears that appellant was a resident of Dallas county, and that he did not file an appeal bond until June 12, 1913. So much appearing, it is clear, under repeated decisions of the courts of this state construing article 2084, R. S. 1911 (Burr v. Lewis, 6 Tex. 80; Ry. Co. v. Whatley, 99 Tex. 128, 87 S. W. 819; Trim v. Planters' Cotton Oil Co., 163 S. W. 103), that this court has not jurisdiction to hear and determine the appeal. Said article of the statutes is as follows: "An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment in the cause is rendered by the appellants giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling a motion for a new trial, which shall be noted on the docket and entered of record, and by his filing with the clerk an appeal bond, where bond is required by law, or affidavit in lieu thereof, as hereinafter provided, within

twenty days after the expiration of the term. If the term of the court may by law continue more than eight weeks, the bond or affidavit in lieu thereof shall be filed within twenty days after notice of appeal is given, if the party taking the appeal resides in the county, and within thirty days, if he resides out of the county." It will be noted that appellant, being a resident of the county where the cause was tried, to comply with the statute should have filed the appeal bond within 20 days from April 4, 1913, when he gave notice of an appeal, and that, instead of doing so, he delayed filing same until more than 60 days had elapsed after such notice was given. In this attitude of the case all we can do is to dismiss the appeal.

**TURNPAUGH et al. v. DICKEY et al.**  
(No. 1328.)

(Court of Civil Appeals of Texas. Texarkana.  
April 30, 1914.)

**HOMESTEAD (§ 154\*)—ABANDONMENT—SEGREGATION.**

Complainants purchased a triangular piece of ground containing a half acre or less in an unincorporated town, built a house and outbuildings thereon, using it as their home. After the town was incorporated, complainants constructed another house on another portion of the lot and divided the two by a high board fence. The second house was rented from month to month with the intention of removing it to another place thereafter. The lot was never platted or cut into two separate lots, and complainants always reserved the particular premises on which the second house was located for use of himself and family. Held, that the division of the property by the fence and the construction of the second house did not constitute an abandonment of the homestead character of that portion of the premises so as to render it subject to execution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 307; Dec. Dig. § 154.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by J. H. Dickey and others against J. W. Turnpaugh and others, to set aside a sale of real property under a judgment as a homestead. From a judgment for complainants, defendants appeal. Affirmed.

On January 12, 1911, the appellant Turnpaugh recovered a personal judgment against J. H. Dickey for \$222.92, with interest and costs. An abstract of the judgment was properly recorded. On January 17, 1913, an alias execution was issued on the above judgment and levied on certain described land of appellee Dickey, and appellant Turnpaugh, the execution creditor, became the purchaser under the sale. Claiming that the land so sold was their homestead, appellee and his wife brought this suit against the purchaser and the sheriff to set aside said sale and cancel the deed made thereunder. Besides the plea of denial, the appellant, in affirmative plea, prayed that the court foreclose his judgment lien on a specifically described portion of the



land, claiming the same had been segregated before the sale from the remainder of the home and abandoned as a part of the original homestead. The case was tried to the court without a jury, and judgment was entered in favor of plaintiffs for the land.

The evidence establishes that in 1902 appellee J. H. Dickey purchased a tract of land, in triangle shape, of a half acre or less, out of the J. Van Rupper survey, and located near the Polytechnic College in Tarrant county. Polytechnic was not incorporated as a town at the time of the purchase, but has since, at some date not given, been incorporated, and at the time of the trial the land in suit lay within the incorporate limits of the town. At the time of the purchase of the land, Dickey built a house in the northeast corner of the land, and drilled a well in the southern part of the triangle, and moved with his wife and children into the house as the homestead of the family. After moving into the house, appellee built a barn, washhouse, a coalhouse and sheds, and other out-houses shown on the plat in the record, for family use in connection with the home. Appellee is a plumber, is actively engaged in that business, and has his plumbing shop on the southwest portion of the lot. During the year 1911 appellee's wife inherited a sum of money from her aunt, and \$1,000 of the money was used to erect a small house on the northwest portion of the lot. An upright board fence was then built between this house and the residence, which extended in a southerly direction to a point opposite the coalhouse built some time prior thereto. There were a gateway and drive, about eight feet wide, on the west and running with the cross fence, leading from the street on the north to the coalhouse, and connecting with a gateway at the southern end of the cross fence and next to the horse lot. At the south end of the cross fence is also the washhouse mentioned as having been previously built. From the time of the erection of the house in 1911 to the trial, the appellee has rented the same to tenants. The testimony, however, admittedly shows that appellee erected this house on the lot, intending to keep it there only temporarily until he could purchase another lot and remove it. The house was only rented by the month and the right reserved by appellee to terminate the tenancy at the end of any month, and was never rented to any one having live stock, chickens, or children. The driveway was used by appellee as a means of ingress and egress to and from his stock lot on the south of the lot, and the coalhouse and washhouse were used in common by the appellee's family and the tenants. The lot had never been platted or cut into two separate lots, and appellee did not intend to do so, and he always reserved the particular premises on which the house last erected was located for the use of himself and his family.

The evidence supports the finding of fact, as involved in the judgment of the court, that all the premises constituted the homestead of appellee and his wife, and that he did not intend the house to be permanently rented, and had not discontinued the use of any part of the entire lot for any homestead purpose, and did not intend any discontinuance or abandonment of any part of the original homestead.

Wm. Booth, of Ft. Worth, for appellants.  
L. H. Burns, of Ft. Worth, for appellees.

LEVY, J. (after stating the facts as above). The first assignment predicates error upon the refusal of the court to foreclose appellants' judgment lien on that part of the original homestead of appellee, as described in appellants' answer. The judgment of the court involves the finding of fact by him that appellee did not intend to segregate and abandon any part of his original homestead. It is believed that there is sufficient evidence to support the trial court's finding of fact, and this court would not be warranted in ruling that the trial court, as a matter of law, erred in rendering judgment for the appellees. In the case of *Blackburn v. Knight*, 81 Tex. 326, 16 S. W. 1075, relied on by appellants, the trial court there made the finding of fact, as supported by the evidence, that "the defendants, because of the permanent renting of the premises, and of their limiting themselves to the use, and to the right of the use, of the strip of 14 feet, had, before the levy of the plaintiff's execution, abandoned their homestead rights in all of the lot in controversy except a strip of 14 feet wide along the north side." Then the court said, "If there be evidence to support the several findings of fact above set out, they will not be disturbed by this court." The other cases cited by appellant also turn on the particular finding of fact in the evidence, as must every case presenting this question.

The judgment is affirmed.

# POPE v. COMMONWEALTH BONDING & CASUALTY CO. (No. 1320.)

(Court of Civil Appeals of Texas. Texarkana.  
May 8, 1914. Rehearing Denied  
May 21, 1914.)

## 1. APPEAL AND ERROR (§ 883\*) — QUESTIONS REVIEWABLE—PEREMPTORY INSTRUCTIONS—CONSENT OF PARTIES.

Where the court intimated to the parties that it would not allow a verdict to stand for defendant, and a consultation between the court and the attorneys resulted in the suggestion that a peremptory instruction should be given, and thereafter defendant's attorneys consulted defendant, and announced that they had no objection to that proceeding, defendant consented to a peremptory instruction, and could not complain on appeal thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3611; Dec. Dig. § 883.\*]

## 2. TRIAL (§ 45\*)—CONDUCT OF TRIAL—EXCLUSION OF EVIDENCE.

Where the court asked counsel for defendant whether he had any testimony to offer, and counsel replied that he had not, but that he rested, an assignment complaining that the court over the objection of defendant made defendant rest his case before introducing all his testimony was without merit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action to cancel an accident and health policy by the Commonwealth Bonding & Casualty Company against Francis M. Pope, who, by cross-action, sought a recovery on the policy for an accidental injury. From a judgment canceling the policy and denying relief on the cross-action, defendant appeals. Affirmed.

McLean, Scott, McLean & Bradley, Frank R. Graves, and Mays & Mays, all of Ft. Worth, and D. A. Frank, of Dallas, for appellant. Capps, Cantey, Hanger & Short and David B. Trammell, all of Ft. Worth, for appellee.

LEVY, J. The suit was brought by appellee against appellant to cancel an accident and health policy, upon alleged grounds of fraud in procuring the issuance of the same. The defendant answered by denial, and by cross-action sought recovery on the policy for an alleged accidental injury to the left leg, resulting in its partial loss, and also for libel. The court peremptorily instructed a verdict for the cancellation of the policy, and against the cross-action of the defendant. The appellant predicates error upon the giving of the peremptory instruction. There appears in the statement of facts, properly agreed to by the parties and approved by the court, the recital of proceedings had immediately before the instruction was given.

[1] According to the record, without copying the whole statement, the court had the jury to retire, and then intimated to the parties that he would not allow a verdict to stand in favor of appellant, in view of the testimony, and "thereupon a general consultation between the court and the attorneys for both sides as to the course that should be pursued occurred," which resulted in the final suggestion that a peremptory instruction be given. After the consultation between the court and the attorneys had occurred, the record states that "thereupon Pope's attorneys asked for time to consult their client, and they and Pope retired to the rear of the courtroom, and after some minutes returned and announced that they had no objection to that proceeding." The effect of the proceeding was, we think, that appellant consented to the giving of the peremptory instruction, and, having consented, he cannot now complain. *English v. City of Ft. Worth*, 152 S. W. 179.

[2] The second assignment makes the con-

tention that the court, over the objection of the defendant, made the defendant rest his case before he had introduced all of his testimony. The recital mentioned of the proceedings shows that the court asked the counsel for the defendant, "Have you any testimony to offer on behalf of the defendant?" to which the attorney replied, "We have not, your honor; we rest."

In the state of the record the judgment is affirmed.

## MAPLE v. SMITH. (No. 312.)

(Court of Civil Appeals of Texas. El Paso. April 30, 1914. Rehearing Denied May 28, 1914.)

### 1. APPEAL AND ERROR (§ 544\*)—RECORD—STATEMENT OF FACTS—NECESSITY.

In the absence of a statement of facts, an assignment of error to the ruling, withdrawing from the jury the issue raised by defendant's plea of limitations, must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

### 2. LIMITATION OF ACTIONS (§ 127\*)—AMENDMENT—NEW CAUSE OF ACTION.

Where the original petition was based upon an agreement to divide a commission from a sale of property, an amendment merely stating more accurately and fully the facts relating to the contract originally declared on, and plainly relating to it, was a continuation of the original suit, and not the institution of a new one, so that the action was not barred, though the amended petition was filed after the period of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by D. B. Smith against H. M. Maple. Judgment for plaintiff, and defendant appeals. Affirmed.

F. G. Morris and Sam B. Gillett, both of El Paso, for appellant. Jno. L. Dyer and C. W. Croom, both of El Paso, for appellee.

HIGGINS, J. The only assignment presented is that the court erred in withdrawing from the jury the issue raised by defendant's plea of limitation; the contention being that the amended petition declared upon a different cause of action from that set up in the original petition, and was filed more than two years after the accrual of the cause of action.

[1] In the absence of a statement of facts, there are various reasons why this assignment of necessity must be overruled, but nevertheless we have examined the two petitions, and are unable to sustain the contention made.

[2] Both petitions are based upon an alleged agreement of Maple to divide with Smith a commission earned for effecting a sale of certain property owned by one German to L.

E. Booker. They plainly relate to the same transaction. The amendment is a mere amplification of the original pleading, stating more accurately and fully the facts relating to the contract originally declared upon. It must be regarded as a continuation of the original suit, and not the institution of a new one. Townes on Pleading (2d Ed.) 457; Thouvenin v. Lee, 26 Tex. 615; Burton-Lingo Co. v. Beyer, 34 Tex. Civ. App. 276, 78 S. W. 249; Mayes v. Magill, 48 Tex. Civ. App. 548, 107 S. W. 364; Schauer v. Von Schauer, 138 S. W. 147; Goodwin v. Simpson, 136 S. W. 1191; Ry. Co. v. Mitten, 13 Tex. Civ. App. 653, 36 S. W. 285; Bingham v. Talbot, 63 Tex. 273; Cotter v. Parks, 80 Tex. 542, 16 S. W. 307.

Affirmed.

# AUGUST v. GAMER CO. (No. 1327.)

(Court of Civil Appeals of Texas. Texarkana. May 7, 1914.)

## 1. MECHANICS' LIENS (§ 291\*)—FORECLOSURE—OWNERSHIP OF LAND—PLEADING.

Where, in a suit to foreclose a mechanic's lien, it was averred that the land was owned by "A. & L. August, by said A. August and by said L. August," a judgment foreclosing the lien on the land of "A. August" was proper.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.\*]

## 2. APPEAL AND ERROR (§ 544\*)—VARIANCE—RECORD—REVIEW.

An alleged fatal variance cannot be reviewed on appeal in the absence of the statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2423, 2428, 2478, 2479; Dec. Dig. § 544.\*]

## 3. TRIAL (§ 390\*)—CONCLUSIONS OF FACT AND LAW—FILING AFTER THE TERM.

Where the judge filed his conclusions of fact and law within ten days after the adjournment of the term as permitted by Vernon's Sayles' Ann. Civ. St. 1914, art. 2075, it was not material that they were not reduced to writing and filed during the term.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 918; Dec. Dig. § 390.\*]

## 4. APPEAL AND ERROR (§ 907\*)—OBJECTIONS—JUDGMENT—VERDICT—FINDINGS.

Where a judgment appealed from is supported by the findings of the court and jury, it will be assumed on appeal in the absence of the statement of facts that the findings are supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

Appeal from District Court, Tarrant County; Jas. W. Swayne, Judge.

Action by the Gamer Company against Burke & Reilly and A. & L. August. From a judgment for plaintiff foreclosing a materialman's lien on the land of A. August, he appeals. Affirmed.

Wray & Mayer, of Ft. Worth, for appellant. F. H. Haddix, of Ft. Worth, for appellee.

WILLSON, C. J. Charles Gamer, doing business as the "Gamer Company," sued Burke & Reilly, and A. & L. August, alleged to be a firm composed of L. August and appellant A. August. As against Burke & Reilly, appellee sought to recover \$1,949.86, which he alleged they owed to him for material he had furnished to them to enable them as sub-contractors to comply with their contract to furnish the material therefor and install a heating plant and certain plumbing in a building then being constructed by contractors H. L. Stevens & Co. for "A. & L. August and A. August and L. August" on a lot in Ft. Worth owned by "A. & L. August and said A. August and L. August." As against A. & L. August and A. August and L. August, appellee sought to establish and foreclose a materialman's lien he claimed against the building and lot owned by them to secure the payment of the sum due to him from Burke & Reilly. Other persons than those named above were parties to the suit, but as their rights are not involved in the appeal, which is prosecuted by appellant alone against appellee alone, it is not necessary to further refer to them. In the absence of a statement of facts, we assume that the findings in the record were supported by evidence. Those findings authorized the judgment rendered in appellee's favor against Burke & Reilly for \$2,115.61, and in his favor against appellant, establishing and foreclosing the lien asserted by appellee against the lot and improvements thereon owned by appellant, to satisfy \$2,061.86 of the sum found in appellee's favor against Burke & Reilly.

[1-4] The contentions made here are: (1) That "the court erred in rendering a judgment foreclosing a lien on the land of A. August, because the averment is that the land was owned by A. & L. August, by said A. August and by said L. August." Plainly, we think, this contention is without merit. (2) That there was a fatal variance between certain allegations in the petition and the proof made. As noted above, there is no statement of facts with the record sent to this court. Without such a statement, we of course cannot determine whether there was a variance between the allegations and the proof or not. (3) That the court failed during the term at which the cause was tried to reduce to writing and file his conclusions of fact and law with reference to certain issues submitted to him by agreement of the parties. But the court did file his conclusions within 10 days after the adjournment of the term. This was a compliance with the requirement of the law. Vernon's Stat. art. 2075. (4) That the judgment is "unsupported by the verdict of the jury, evidence, or findings." It is supported by the findings made by the court and jury, and, as stated above, we must assume in the absence of a statement of facts that those findings were supported by evidence.

The judgment is affirmed.

## MEMORANDUM DECISIONS

**CUNNINGHAM v. STATE.** (No. 3104.) (Court of Criminal Appeals of Texas. April 22, 1914.) Appeal from Hill County Court; Horton B. Porter, Judge. Pomp Cunningham was convicted of crime, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** In the record before us there is neither a statement of facts nor any bills of exception, and there is nothing in the motion for a new trial we can review in the absence of a statement of facts. The judgment is therefore affirmed.

**DAVIDSON, J.,** absent at consultation.

**DAVIS v. STATE.** (No. 3083.) (Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied May 6, 1914.) Appeal from Nacogdoches County Court; Geo. F. Ingraham, Judge. Henry Davis was convicted of aggravated assault, and he appeals. Affirmed. Russell & Spears, of Nacogdoches, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was prosecuted and convicted of committing an aggravated assault on Lee Walters by cutting him with a knife and inflicting serious bodily injuries. The complaint and information are not subject to the criticisms contained in appellant's motion in arrest of judgment, and succinctly charge the offense of which he was convicted. The record containing neither a statement of facts nor bills of exception, the judgment is affirmed.

**Ex parte GARDNER.** (No. 3129.) (Court of Criminal Appeals of Texas. April 29, 1914. Rehearing Denied May 20, 1914.) Appeal from District Court, Washington County; Ed R. Sinks, Judge. Application by Carl Gardner for admission to bail. Application denied. Mathis, Teague & Embrey, of Brenham, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** On appellant's application the district judge of Washington county granted a writ of habeas corpus, whereby he was seeking bail in a case wherein he was indicted for murder. The district judge on a full hearing denied bail; hence this appeal. We have carefully read and considered all the evidence shown by the statement of facts in this case. We have reached the conclusion that there is no error in the order of the district judge denying bail. We follow the uniform practice of this court in not stating or discussing the evidence, as it would be improper to do so in view of a trial that must be had. The judgment of the court below in denying bail is affirmed.

**Ex parte MYERS.** (No. 3110.) (Court of Criminal Appeals of Texas. April 15, 1914.) Appeal from District Court, Jefferson County; W. H. Davidson, Judge. Application by Harvey L. Myers for admission to bail. From the judgment fixing bail, relator appeals. Affirmed. Blain & Howth, of Beaumont, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**DAVIDSON, J.** Relator was arrested, charged with murder. Upon the trial under habeas corpus he was admitted to bail in the sum of \$7,500. Failing to give bond, he resorted to writ of habeas corpus for the reduction

of bail, among other things filing affidavit of newly discovered evidence, which was to the effect that he was very drunk at the time he committed the offense. This was hardly newly discovered, but in any event the second writ was awarded, and the bond reduced to \$6,000. It is the practice of this court not to indulge in a discussion of the facts as a basis for the conclusion reached on the question of bail. However, we are of opinion that the bail is not excessive. The judgment is affirmed.

**Ex parte PHELPS.** (No. 3117.) (Court of Criminal Appeals of Texas. April 22, 1914. Rehearing Denied May 13, 1914.) Appeal from Special District Court, Liberty County; J. Llewellyn, Judge. Habeas corpus by J. T. Phelps. Relator was remanded to custody, and appeals. Affirmed. Marshall & Harrison, of Liberty, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was indicted, charged with the murder of W. C. Tompkins. He sued out a writ of habeas corpus before Hon. J. Llewellyn, judge of the district court of Liberty county. A trial was had, and on the hearing Judge Llewellyn remanded relator to the custody of the sheriff. As this case is yet to be tried, it would be improper for us to recite or comment upon the testimony, or the weight of any portion of it; but after reading the record we cannot say that the trial judge erred in the premises, and the judgment is therefore affirmed.

**DAVIDSON, J.,** absent at consultation.

**RICHELIE v. STATE.** (No. 3082.) (Court of Criminal Appeals of Texas. April 8, 1914. Rehearing Denied May 6, 1914.) Appeal from Hunt County Court; Geo. B. Hall, Judge. R. R. Richlie was convicted of an offense, and appeals. Affirmed. A. H. Mount, of Royse City, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** There is no statement of facts in this case, and no question is raised which can be considered in the absence thereof. The judgment of the lower court, convicting appellant of aggravated assault, will therefore be affirmed.

**SNYDER v. STATE.** (No. 3115.) (Court of Criminal Appeals of Texas. April 29, 1914.) Appeal from Coke County Court; G. S. Arnold, Judge. Ben Snyder was convicted of wife desertion, and he appeals. Reversed, and cause remanded. D. I. Durham, of Robert Lee, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** Appellant was prosecuted under Act April 2, 1913, p. 188, for deserting his wife, and fined \$25. The only question necessary to pass upon is whether or not the evidence is sufficient to sustain the verdict. This point was clearly made in the court below and in this. We have carefully read the evidence, and have reached the conclusion that the evidence is not sufficient to sustain the verdict and judgment. We regard it as unnecessary to recite the evidence, as it would serve no useful purpose. No other question raised presents any error. The judgment is reversed, and the cause remanded.

Ex parte TAYLOR. (No. 8120.) (Court of Criminal Appeals of Texas. April 29, 1914.) Appeal from Special District Court, Liberty County; J. Llewellyn, Judge. Writ of habeas corpus by Vivian Taylor. From a judgment denying bail, relator appeals. Reversed, and bail granted. Marshall & Harrison, of Liberty, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Relator was arrested under a charge of murder, and resorted to a writ of habeas corpus for the purpose of obtaining bail. The court, upon hearing the evidence, held against relator, and remanded him to custody. In this we think the court was in error. We are of opinion that relator is entitled to bail. Therefore the judgment is reversed, and bail is granted in the sum of \$7,500. Upon the giving of bail in the above sum under the terms of the law, the sheriff will release relator.

JOHN CHRISTENSEN & CO. v. HANSEN. (No. 6508.) (Court of Civil Appeals of Texas. Galveston. March 4, 1914. Rehearing Denied April 23, 1914.) Appeal from Galveston County Court; George E. Mann, Judge. Action by Harold Hansen against John Christensen & Co. From a judgment for plaintiff, defendants appeal. Reversed and rendered. Macco & Minor Stewart, J. E. Quaid, and Louis Lobit, all of Galveston, for appellants. James B. & Charles J. Stubbs, of Galveston, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellants, John Christensen and J. Rasmussen, composing the firm of John Christensen & Co., to recover damages for personal injuries sustained while riding as passenger for hire in an automobile of defendants, and caused by the negligence of the driver of said automobile, who, it is alleged, was acting as the servant and agent of appellants in driving said automobile and conveying plaintiff as a passenger therein. Damages are claimed in the sum of \$1,000. Defendants presented general demurrer and various special exceptions to the petition, the nature of which it is unnecessary to state. They further answered by general denial, and specially pleaded the defenses of assumed risk and contributory negligence. The trial in the court below with a jury resulted in a verdict and judgment in fa-

vor of plaintiff. This is a companion case with that of Christensen v. Christiansen, decided by this court on April 24, 1913, and reported in 155 S. W. 995. The plaintiff in this case and plaintiff in the case cited were riding in the same automobile and were injured in the same accident, and the identical questions presented on that appeal are presented on this. The evidence sustains the finding of the jury that appellee was injured, as alleged in his petition, by the overturning of an automobile belonging to appellants, in which appellee was riding as a passenger, and that said injury was caused by the negligence of the driver of said automobile in the respects stated in the petition. The evidence further sustains the finding of the jury that appellee by reason of his injuries sustained damages in the amount stated in the verdict. Upon the issue of whether the driver of the car, in accepting appellee as a passenger and undertaking to convey him to his desired destination, was acting as the servant and agent of appellants, or by appellants' authority, the evidence is practically identical with the evidence in the case cited, and we refer to and adopt upon this issue our conclusions of fact in said case as our fact conclusions in this case. As held in the former case, in which a writ of error has been denied by our Supreme Court, the undisputed evidence shows that the driver of the car on the occasion in question was using the car without authority and without the knowledge of appellants, and was not using it in appellants' business, nor in the performance of the duties of his employment, and therefore appellants cannot be held liable for his negligence. This conclusion requires that the judgment of the court below be reversed, and judgment here rendered in favor of appellants; and it has been so ordered. Reversed and rendered.

McQUITTY et ux. v. MOSS. (No. 591.) (Court of Civil Appeals of Texas. Amarillo. March 28, 1914. Rehearing Denied April 25, 1914.) Appeal from District Court, Dallam County; D. B. Hill, Judge. Action between W. L. McQuitty and wife and C. L. Moss. From the judgment in favor of Moss, McQuitty and wife appeal. Affirmed. W. B. Chauncey and Clifford Braly, both of Dalhart, for appellants. R. E. Stalcup, of Dalhart, for appellee.

HALL, J. Affirmed.



# INDEX-DIGEST



## THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and  
Prior Reporter Volume Index-Digests

### ABANDONMENT.

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### ABATEMENT AND REVIVAL.

#### V. DEATH OF PARTY AND REVIVAL OF ACTION.

##### (A) Abatement or Survival of Action.

§ 61 (Tex.Civ.App.) Rev. St. 1911, arts. 1886, 1887, relative to prosecution of suit by executor, administrator, or heirs of deceased plaintiff and to scire facias to require them to appear and prosecute, apply only to cases in which there is only one plaintiff.—McAllen v. Crafts, 166 S. W. 3.

Under Rev. St. 1911, art. 1890, it was improper for the court to dismiss a suit instituted by two plaintiffs, one of whom died pending the suit, without giving the survivors any opportunity to appear and prosecute the suit.—Id.

##### (B) Continuance or Revival of Action.

§ 75 (Tex.Civ.App.) Under Rev. St. 1911, art. 1890, relative to death of one or more of several plaintiffs, the suggestion of such death and its entry upon the record are conditions upon which any action is permitted by the court.—McAllen v. Crafts, 166 S. W. 3.

### ABDUCTION.

See Seduction.

### ABETTERS.

See Criminal Law, § 59.

### ABUTTING OWNERS.

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### ACCEPTANCE.

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### ACCESSORIES.

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### ACCOMMODATION PAPER.

See Bills and Notes.

### ACCOMPLICES.

See Criminal Law, §§ 59, 507-511, 742, 780, 829.

### ACCORD AND SATISFACTION.

See Compromise and Settlement; Release.

§ 13 (Ark.) Where a landlord agreed to take, in lieu of cash rent, cotton delivered to him free of expenses of preparing it for market, and the tenant delivered the cotton, after preparing it for market, there was an accord and satisfaction which precluded the landlord from recovering rent under the lease.—Lamberton v. Harris, 166 S. W. 554.

### ACCOUNT.

See Sales, § 397.

### ACCOUNT BOOKS.

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### ACCOUNT STATED.

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§ 1 (Mo.App.) An account stated is the settlement of an account between the parties, with the balance struck in favor of one of them, upon the debtor or his agent admitting to the creditor or his agent the latter's right to payment of the balance.—Adam Roth Grocery Co. v. Hotel Monticello Co., 166 S. W. 1125.

§ 5 (Mo.App.) Entries in a debtor's books will not alone constitute an account stated.—Adam Roth Grocery Co. v. Hotel Monticello Co., 166 S. W. 1125.

§ 6 (Mo.App.) A receiver being a mere representative of the court, his failure to object to the disallowance of interest by a trust company with whom receivership funds were deposited upon the striking of balances held not to render such balances accounts stated.—Stone v. St. Louis Union Trust Co., 166 S. W. 1091.

§ 20 (Mo.App.) In an action on an account stated, where the facts are undisputed, the question whether they constitute an account stated is for the court.—Adam Roth Grocery Co. v. Hotel Monticello Co., 166 S. W. 1125.

### ACCRETION.

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### ACKNOWLEDGMENT.

See Criminal Law, §§ 406-421; Evidence, §§ 213-265; Homestead, § 119; Wills, § 108.

#### IV. PLEADING AND EVIDENCE.

§ 62 (Ky.) Under Ky. St. § 3760, a wife, in absence of allegations of fraud or mistake, could not, in an action against her to foreclose a mortgage, show by parol evidence that she never signed or acknowledged the mortgage; the no-

tary's certificate stating that she did.—Byers v. First State Bank of Middlesboro, 166 S. W. 790.

§ 62 (Tex.Civ.App.) Where a deed executed by husband and wife was acknowledged in proper form, and the notary who took the wife's acknowledgment testified that he acquainted her with the contents of the deed, evidence that the wife, who was Polish, could not talk much English, and that the notary could not talk Polish, did not justify setting aside the deed.—Ryman v. Petruka, 166 S. W. 711.

## ACTION.

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### II. NATURE AND FORM.

§ 27 (Mo.App.) While a carrier could be sued for a loss of baggage either ex delicto or ex contractu, the action will be regarded as ex delicto, notwithstanding the use of such words as "agreed" by way of inducement, yet where the essential elements of the contract, including the consideration, were set forth, and the loss averred as a breach of it, it was an action ex contractu.—Meade v. Missouri, K. & T. Ry. Co., 166 S. W. 1116.

## ADEQUATE CAUSE.

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## ADOPTION.

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§ 1 (Tex.Civ.App.) Adoption was unknown at common law.—Harle v. Harle, 166 S. W. 674.

§ 3 (Tex.Civ.App.) The legislative intention in enacting the adoption statutes should be determined by giving to the words therein their ordinary meaning.—Harle v. Harle, 166 S. W. 674.

Since adoption did not exist at common law, the adoption statutes (Rev. St. 1911, arts. 1-8) ingrafted upon the law of the state the provisions of the civil law on the subject, as well as its construction of the law thereon.—Id.

§ 14 (Ky.) Where a petition for adoption was filed in a proper court, and the parties were before the court, and it acted, the mere failure of the petition to name the court will not render the judgment of adoption void.—Chester v. Graves, 166 S. W. 998.

The failure of a petition in the circuit court of a county for the adoption of infants to allege that plaintiffs were residents in the county did not render a judgment of adoption void.—Id.

§ 23 (Tex.Civ.App.) In view of Rev. St. 1911, arts. 1, 2, 5, relating to the adoption of children and giving the adopted child all the rights and privileges in law and equity of a legal heir, etc., held that the children of an adopted child may take the same as natural children under article 2469, providing that upon the death of either spouse intestate, the community property shall go one-half to the survivor and one-half to surviving children or their descendants.—Harle v. Harle, 166 S. W. 674.

## ADULTERY.

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## ADVANCEMENTS.

See Descent and Distribution, § 82.

## ADVERSE POSSESSION.

See Infants, § 24.

### I. NATURE AND REQUISITES.

(B) Duration and Continuity of Possession.

§ 40 (Mo.App.) An action in equity for the cancellation of a deed to land on the ground that it was a mortgage executed by plaintiff's grantor as surety for the payment of the debt of another, and that plaintiff's grantor had been discharged, can only be barred by ten years' adverse possession by the mortgagee.—Hardwicke v. Barnes, 166 S. W. 826.

§ 43 (Ky.) Plaintiff could tack the adverse possession of her husband before his death to her own adverse possession.—Tippenhauer v. Tippenhauer, 166 S. W. 225.

§ 46 (Tex.Civ.App.) Under Rev. St. 1911, art. 5711, providing that, when limitations begin to run, it shall continue notwithstanding supervening disability of the party entitled to sue, the appointment of a receiver of the owner of land did not stop the running of limitations in favor of an adverse claimant.—Houston Oil Co. of Texas v. Griffin, 166 S. W. 902.

(F) Hostile Character of Possession.

§ 60 (Ky.) One entering possession of property by consent of the owner cannot claim title by adverse possession, unless the intention to claim adversely is actually brought home to the donor by such acts or conduct as would put a reasonable person on notice that a hostile claim was being asserted.—Tippenhauer v. Tippenhauer, 166 S. W. 225.

One entering upon land under an express unconditional gift or a parol purchase need not, in order to claim the property, openly assert his right thereto adversely or in a notorious way, provided he exercises ordinary acts of ownership, such as payment of taxes, etc.—Id.

§ 60 (Tex.Civ.App.) One who enters upon land which he is entitled to acquire conditionally in acknowledgment of the superior right of another cannot claim by adverse possession unless he meanwhile obtains a superior outstanding title, or repudiates the title under which he entered, and gives its owner notice that he is claiming adversely to him.—Harle v. Harle, 166 S. W. 674.

§ 62 (Tex.Civ.App.) Where the widow had a right of homestead, her possession was not adverse to the brother and sole heir of decedent; he having no right to possession, and hence he was not required to sue within ten years after knowledge of defendant's claim to prevent it from ripening into a title.—Perkins v. Perkins, 166 S. W. 915.

### II. OPERATION AND EFFECT.

(A) Extent of Possession.

§ 100 (Tex.Civ.App.) A grantee who takes actual possession of a part of the land conveyed by his deed duly recorded, acquires thereby constructive possession to the limits of the boundaries specified in the deed, though the deed includes land in a prior grant to another, who has not taken actual possession.—Stevens v. Crosby, 166 S. W. 62.

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 110 (Tex.Civ.App.) Where, in trespass to try title, defendant, relying on the defense of limitations, showed possession under a duly



recorded deed for 19 years, and that the actual occupancy was on land within the boundaries of the grant under which plaintiff claimed, defendant could not be deprived of the defense of limitations by plaintiff's amended petition disclaiming title to the land actually occupied.—*Stevens v. Crosby*, 166 S. W. 62.

§ 112 (Ky.) In an action involving the title to property claimed by plaintiff through a gift by her father-in-law to her husband, and by a subsequent adverse holding by herself and husband, the burden was on plaintiff to prove acquisition of title as alleged.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

§ 113 (Ky.) In an action for land, in which plaintiff claimed that her father-in-law gave the property to her husband, and that she and her husband acquired title by subsequent adverse possession, evidence of conversations between plaintiff's mother-in-law and her own husband, during her father-in-law's lifetime, as well as declarations by a daughter of plaintiff's father-in-law, were irrelevant; the mother-in-law and daughter not then owning the property.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

§ 114 (Ky.) Evidence in an action involving property, which plaintiff claims was given to her husband by her father-in-law, and held adversely by herself and husband, held not to show that plaintiff or her husband ever asserted title to the property adversely.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

§ 115 (Tex.Civ.App.) In trespass to try title in which defendant claimed by adverse possession, evidence held at most to raise the issue of a conditional parcel gift to such defendant from his father, and not to raise the issue of adverse possession by defendant.—*Harle v. Harle*, 166 S. W. 674.

§ 115 (Tex.Civ.App.) Whether the inclosure and cultivation of 1 acre on a tract of 160 was notice to the owner that the possessor was claiming the 160-acre tract, or any larger portion than that actually inclosed, was for the jury.—*Houston Oil Co. of Texas v. Griffin*, 166 S. W. 902.

## ADVICE OF COUNSEL.

See Malicious Prosecution, § 21.

## AFFIDAVITS.

See Appeal and Error, § 389; Attorney and Client, § 167; Continuance, § 44; Depositions; New Trial, § 150.

## AGENCY.

See Principal and Agent.

## AGREEMENT.

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## ALTERATION.

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## ALTERATION OF INSTRUMENTS.

See Bills and Notes, § 378; Execution, § 171; Reformation of Instruments.

## AMBIGUITIES.

See Wills, § 488.

## AMENDMENT.

See Judgment, §§ 310-334; Mandamus, § 160; Pleading, § 237; Statutes, § 141; Wills, §§ 221-400.

## AMOUNT IN CONTROVERSY.

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## ANCILLARY ADMINISTRATION.

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## ANIMALS.

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## ANNEXATION.

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## ANONYMOUS LETTERS.

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## APPEAL AND ERROR.

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## III. DECISIONS REVIEWABLE.

### (C) Amount or Value in Controversy.

§ 47 (Ky.) That the damages claimed in the petition were \$200 could not give the Court of Appeals jurisdiction, where all the evidence at the trial clearly showed that the damage actually sustained was less than \$200.—*Chenault v. Bank of Arlington*, 166 S. W. 789.

§ 47 (Ky.) A bank's liability for retaining checks an unreasonable length of time and then refusing payment could not exceed the amount of the checks, with interest, and, this being less than \$200, the Court of Appeals had no jurisdiction, though plaintiff alleged that he was damaged in addition to the amount of the checks.—*W. S. Wilson & Co. v. Dickenson County Bank*, 166 S. W. 790.

### (D) Finality of Determination.

§ 77 (Ark.) An order of the county court in proceedings to establish a drainage district, which directs the payment of warrants, for services by attorneys for the district and by the engineer making the preliminary survey, out of the funds of the district, is final, and, under Kirby's Dig. § 1487, appealable within six months.—*Callaway v. Harley*, 166 S. W. 546.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS FOR REVIEW.

### (A) Issues and Questions in Lower Court.

§ 171 (Mo.App.) Where a case was tried on the theory that the fact that the walk on which plaintiff fell and was injured was in defendant city and was a city sidewalk was not a disputed issue, judgment for plaintiff would not be reversed for failure to prove such fact affirmatively.—*Best v. City of St. Joseph*, 166 S. W. 817.

§ 173 (Tex.Civ.App.) An objection to the validity of a deed which was not raised in the pleadings, nor in any matter brought to the attention of the trial court, cannot be urged for the first time on appeal.—*Cooper v. Marek*, 166 S. W. 58.

§ 173 (Tex.Civ.App.) The statute of frauds is not available as a defense when not invoked in the trial court.—*Larrabee v. Porter*, 166 S. W. 395.

§ 173 (Tex.Civ.App.) Where the statute of frauds was not urged below until in the motion for new trial, it could not be relied on, on appeal.—*Savage v. Mowery*, 166 S. W. 905.

§ 179 (Mo.) Though the trial court struck out appellant's amended answer attacking the constitutionality of a statute, such question was open to review on appeal, as appellant preserved an exception and stood upon its answer without pleading further.—*McGrew v. Missouri Pac. Ry. Co.*, 166 S. W. 1033.

**(B) Objections and Motions, and Rulings Thereon.**

§ 186 (Mo.) Where an order granting change of venue recited that the venue of the "court" instead of the "cause" should be changed, defendant cannot on appeal complain that the second court was without jurisdiction because of that clerical mistake, where that ground of objection was not raised below.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 197 (Mo.App.) Where advantage was not taken in the trial court of a variance between the pleadings and the proof, the defeated party cannot complain thereof on appeal.—*S. Viviano & Bros. v. Columbia Can Co.*, 166 S. W. 1082.

§ 215 (Tex.Civ.App.) Under Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59, the error in a charge is waived, where no objection was presented to the trial court.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 215 (Tex.Civ.App.) Where no objection was made and no exception taken to a charge, as required by Acts 33d Leg. c. 59, the giving of the charge must, as required by Rev. St. 1911, art. 2061, as amended by such act, be regarded as approved, and appellant cannot complain thereof.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

§ 216 (Ky.) Where plaintiff charged defendant with negligence in operating a boiler and also in maintaining it, but did not offer a written instruction on the latter ground of negligence, he could not complain of the failure of the court to instruct the jury on that issue.—*Branham's Adm'r v. Buckley*, 166 S. W. 618.

Where plaintiff requests no instruction on the doctrine of *res ipsa loquitur*, he cannot complain of the failure of the court to give such instruction.—*Id.*

§ 216 (Mo.App.) Where the instruction on the measure of damages was correct in its general scope, and did not authorize a recovery on any element of damage not authorized, defendant must request limiting instructions, or he cannot complain on appeal.—*Bell v. United Rys. Co. of St. Louis*, 166 S. W. 1100.

§ 216 (Tex.Civ.App.) Where the court fails to submit a defensive matter to the jury, defendant must request a charge thereon, or he cannot complain on appeal.—*Houston & T. C. R. Co. v. Coleman*, 166 S. W. 685.

§ 219 (Tex.Civ.App.) Where findings of fact and conclusions of law are filed and there are no exceptions or request for additional findings, the only question reviewable on appeal is whether the pleadings justify the judgment.—*Pugh v. Werner*, 166 S. W. 698.

§ 231 (Ky.) The objection of appellant, sued as surety on an executor's bond, that from the executor's testimony that he paid certain claims against the estate, and that the burden was on appellees to show they were not just, is too general.—*Costigan v. Kraus*, 166 S. W. 755.

§ 231 (Tex.Civ.App.) Error in admitting a letter in evidence will not be reviewed, where the bill of exceptions shows that no reason was given for objection to its introduction.—*Draughon's Practical Business College v. Dorsett*, 166 S. W. 495.

§ 237 (Tex.Civ.App.) Where a party did not challenge the sufficiency of the evidence to raise an issue by asking a peremptory instruction, he could not, on appeal, complain of a charge submitting the issue.—*Lackenbach v. Thomas*, 166 S. W. 99.

§ 242 (Mo.App.) An assignment of error as to argument of counsel cannot be considered, in the absence of any ruling of the court or exceptions saved to the action or nonaction of the court.—*Connelly v. Illinois Cent. R. Co.*, 166 S. W. 1077.

**(C) Exceptions.**

§ 261 (Mo.App.) An assignment of error as to argument of counsel cannot be considered, in the absence of any ruling of the court or exceptions saved to the action or nonaction of the court.—*Connelly v. Illinois Cent. R. Co.*, 166 S. W. 1077.

§ 263 (Tex.Civ.App.) Where no objection was made and no exception taken to charge as required by Acts 33d Leg. c. 59, the giving of the charge must be required by Rev. St. 1911, art. 2061, as amended by such act, be regarded as approved, and appellant cannot complain thereof.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

§ 264 (Tex.Civ.App.) Where no exception was taken to the special verdict, the court on appeal may not consider the sufficiency of the evidence to support it.—*Weinstein v. Acme Laundry*, 166 S. W. 126.

§ 266 (Ky.) An appeal by complainant from a judgment overruling defendants' exceptions to a report of sale pursuant to a judgment directing a sale is unavailable, where complainant filed no exceptions to the report of sale.—*Guest v. Foster*, 166 S. W. 620.

**(D) Motions for New Trial.**

§ 282 (Tex.Civ.App.) Acts 33d Leg. c. 136, making the assignments of error in the motion for a new trial the assignments on appeal, does not change the rule that no motion for a new trial need be filed in cases tried to the court, in which findings of fact and conclusions of law are filed.—*Dees v. Thompson*, 166 S. W. 56.

§ 301 (Tex.Civ.App.) The only errors which can be considered by the Court of Appeals, other than those which may be passed upon without assignment, are those called to the attention of the trial court in the motion for a new trial, and the appellate court will not attempt to construe reconstructed assignments in the briefs to determine whether the errors are the same as those assigned in the motion.—*Dees v. Thompson*, 166 S. W. 56.

**VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**

**(A) Time of Taking Proceedings.**

§ 338 (Tex.) It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing.—*Vinson v. W. T. Carter & Bro.*, 166 S. W. 363.

§ 345 (Tex.) The Supreme Court will not refuse a petition for a writ of error because of the failure of the Court of Civil Appeals to act directly upon the motion for the rehearing, which was not filed in time, where the Supreme Court has jurisdiction and it is sufficiently shown that the failure to file a motion for a rehearing was due to accident or some cause other than the negligence of the applicant.—*Vinson v. W. T. Carter & Bro.*, 166 S. W. 363.

The overruling by the Court of Civil Appeals of a motion for leave to file a motion for rehearing, which was not filed within the time specified, is equivalent to an overruling of the motion for rehearing, and fixes the time from which the period for filing the petition and writ of error begins to run.—*Id.*

§ 345 (Tex.Civ.App.) Rev. St. 1911, art. 2086, requiring petition for writ of error to be filed within 12 months from the time final judgment is rendered, means 12 months from the time the judgment was rendered, and not from the time the motion for a new trial was overruled.—*Evans v. San Antonio Traction Co.*, 166 S. W. 408.

§ 345 (Tex.Civ.App.) A notice of appeal, given in the term in connection with the order overruling a motion for new trial, after notice of appeal had been given when judgment was rendered, was valid; the trial court having control of the judgment during the term.—*Robson v. Moore*, 166 S. W. 908.

§ 356 (Tex.Civ.App.) Where a petition for a writ of error was not filed within 12 months from the time final judgment was rendered, as required by Rev. St. 1911, art. 2086, the writ will be dismissed, since the requirement is jurisdictional.—*Evans v. San Antonio Traction Co.*, 166 S. W. 408.

**(C) Payment of Fees or Costs, and Bonds or Other Securities.**

§ 387 (Tex.Civ.App.) Where the appeal bond was not filed within 20 days after adjournment, as required by Rev. St. 1911, art. 2084, the appellate court acquired no jurisdiction.—*Underwood v. Midland Furniture & Hardware Co.*, 166 S. W. 86.

§ 387 (Tex.Civ.App.) Under Rev. St. 1911, art. 2084, requiring an appeal bond to be filed within 20 days after the term where motion for new trial after judgment was overruled April 4th and the term ended April 5th, but no appeal bond was filed until June 12th, the appeal will be dismissed.—*Bolton v. United States Fidelity & Guaranty Co.*, 166 S. W. 1194.

§ 389 (Tex.Civ.App.) Affidavit of appellant's inability to pay costs on appeal, made by her attorney before a notary public, held insufficient, under Rev. St. 1911, art. 2098.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 29.

Rev. St. 1911, art. 2104, relative to amending appeal bond, does not authorize the filing of a new affidavit in lieu of an appeal bond, where the one filed with the petition in error is defective.—Id.

§ 395 (Tex.Civ.App.) A writ of error will be dismissed, where plaintiff in error neither filed an appeal bond nor made proof of her inability to pay the costs on appeal, as authorized by Rev. St. 1911, art. 2098.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 29.

**VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.**

**(A) Powers and Proceedings of Lower Court.**

§ 440 (Mo.App.) In view of Rev. St. 1909, § 1851, the trial court could, after appeal and the filing of the transcript in an action against receivers of a railroad company, amend a judgment which was rendered against them individually, so as to run against them as receivers.—*Smith v. Delano*, 166 S. W. 852.

**X. RECORD AND PROCEEDINGS NOT IN RECORD.**

**(A) Matters to be Shown by Record.**

§ 499 (Tex.Civ.App.) Under Rev. St. 1911, art. 1971, and article 2061, as amended by Acts 1913, p. 113, relating to the manner of giving instructions and the making of objections thereto at trial, only such objections can be considered on appeal as were made at the trial in the manner specified, and then only when preserved by bill of exceptions.—*St. Louis Southwestern Ry. Co. of Texas v. Wadsack*, 166 S. W. 42.

Under Rev. St. 1911, art. 1973, as amended by Acts 1913, p. 113, the refusal of a special

charge cannot be reviewed on appeal, unless the complaining party shows by bill of exceptions that the particular charge was requested and refused, and that the court's action was excepted to at the time.—Id.

§ 500 (Mo.App.) Where before trial defendant was required to elect between a general denial and pleas of contributory negligence and assumed risk, an exception to the ruling was properly saved by a term bill carried over into the final bill of exceptions and preserved in the motion for new trial.—*McDonald v. Central Illinois Const. Co.*, 166 S. W. 1087.

§ 500 (Tex.Civ.App.) An assignment to the overruling of a plea setting up the pendency of a suit in another county on the same cause cannot be sustained, where it does not appear that any action was taken by the trial court on the plea, and the transcript does not show any exception with relation thereto.—*United Benevolent Ass'n of Texas v. Lawson*, 166 S. W. 718.

§ 500 (Tex.Civ.App.) Where the appeal record fails to show any ruling on the pleadings, error in alleged rulings thereon will not be reviewed, except where the petition is fatally defective.—*Savage v. Mowery*, 166 S. W. 905.

**(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.**

§ 544 (Ky.) Where a case is in the Court of Appeals without a bill of exceptions, the court will review only the sufficiency of the pleadings.—*Tyler v. Woerner*, 166 S. W. 178.

§ 544 (Mo.) Where a motion to strike out parts of a petition pleading the institution, pendency, and dismissal of a prior suit to avoid the bar of limitations, and a demurrer to the remainder of the petition, based on the two and five year statute of limitations, were filed on the same day and considered together, and the decision on both was included in a single entry, the action of the court in sustaining the demurrer and the motion to strike were reviewable on the record proper, without any bill of exceptions.—*Knisely v. Leathe*, 166 S. W. 257.

§ 544 (Mo.) Where the record proper shows the rendition of a valid judgment at a term of court and the setting aside thereof at a subsequent term when the court had lost jurisdiction, the action of the court in setting aside the judgment was reviewable on the record proper.—*Jeude v. Sims*, 166 S. W. 1048.

A motion in the nature of an application for a writ of error coram nobis to set aside a default judgment is in the nature of a petition, and is a part of the record proper, and need not be preserved by bill of exceptions to require the court on appeal to review the setting aside of the judgment.—Id.

§ 544 (Tex.Civ.App.) An order overruling a plea of privilege, though noting an exception, is not reviewable in the absence of a bill of exceptions disclosing the facts on which the court acted.—*United Benevolent Ass'n of Texas v. Lawson*, 166 S. W. 718.

§ 544 (Tex.Civ.App.) In the absence of a statement of facts, it cannot be determined whether error was committed in the refusal to instruct a verdict for defendants, failure to submit the issue of any consideration for the contract sued on, and that a paragraph of the charge did not correctly state the issues raised and was on the weight of the evidence.—*C. A. Elmen & Co. v. Godsey*, 166 S. W. 1178.

Even if a charge submitted a theory of plaintiff's case not authorized by the allegations of the petition, it cannot, in the absence of a statement of facts, be held this was "reasonably calculated to cause and probably did cause the rendition of an improper judgment," so as, under Court of Civil Appeals Rule 62 (149 S. W. x), to authorize a reversal.—Id.

§ 544 (Tex.Civ.App.) In the absence of a statement of facts, an assignment of error to the rul-

ing, withdrawing from the jury the issue raised by defendant's plea of limitations, must be overruled.—*Maple v. Smith*, 166 S. W. 1196.

§ 544 (Tex.Civ.App.) An alleged fatal variance cannot be reviewed in the absence of the statement of facts.—*August v. Gamer Co.*, 166 S. W. 1197.

§ 547 (Tex.Civ.App.) Findings of jury and additional findings of court held conclusive, in the absence of a statement of facts.—*Castleberry v. Bussey*, 166 S. W. 14.

§ 547 (Tex.Civ.App.) An assignment of error that the judgment appealed from was void because a judge was disqualified could not be sustained where there was no bill of exceptions in the record showing disqualifying facts.—*Waggoner v. Briggs*, 166 S. W. 50.

**(D) Contents, Making, and Settlement of Case or Statement of Facts.**

§ 562 (Tex.Civ.App.) Under Rev. St. 1911, arts. 2068, 2070, and district court rules 72-74 (167 S. W. xxv), prescribing the manner of preparing statements of facts, instruments or parts of them bearing on a question presented should be copied into the statement of facts, and the original instrument should not be attached to it.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

§ 564 (Tex.Civ.App.) A statement of facts, filed in the trial court September 10, 1913, and in the Court of Civil Appeals on September 17, 1913, was too late, and will not be considered, where judgment was rendered May 24, 1913, and the order overruling the motion for new trial was made on May 30, 1913.—*Robson v. Moore*, 166 S. W. 908.

§ 569 (Tex.Civ.App.) It was not necessary for certain defendants to sign the statement of facts, where their interest was not affected by the appeal, and appellant does not complain of the judgment as to them.—*Amicable Life Ins. Co. v. Kenner*, 166 S. W. 462.

**(H) Transmission, Filing, Printing, and Service of Copies.**

§ 622 (Tex.Civ.App.) The 90 days from the time of giving notice of appeal, within which the transcript must be filed, should be computed from the giving of the notice of appeal recited in the order overruling the motion for new trial, instead of from the notice recited in the judgment theretofore entered.—*Robson v. Moore*, 166 S. W. 908.

§ 628 (Tex.Civ.App.) Where appellee received notice of the filing of the transcript pursuant to Court of Civil Appeals rule 7b (142 S. W. xi), and did not move to dismiss the appeal because the transcript was filed too late until more than seven months thereafter, he waived the delay in filing the transcript, and cannot excuse his own delay on the ground that he called attention to the time of filing the transcript as soon as he could after appellant's brief had been filed.—*Robson v. Moore*, 166 S. W. 908.

**(I) Defects, Objections, Amendment, and Correction.**

§ 635 (Tex.Civ.App.) Under Rev. St. 1911, art. 2078, authorizing appeals from final judgments, an appeal must be dismissed, where the transcript contains no judgment entered on the verdict, because of want of jurisdiction of the appeal.—*Southwestern Traction Co. v. Melton*, 166 S. W. 363.

**(J) Conclusiveness and Effect, Impeaching and Contradicting.**

§ 665 (Mo.App.) Under Rev. St. 1909, § 2048, a respondent who failed to challenge the correctness of the instructions in appellant's abstract by her additional abstract could not object that they were not the instructions given.—*Goode v. Central Coal & Coke Co.*, 166 S. W. 844.

**(K) Questions Presented for Review.**

§ 671 (Mo.App.) The court, on appeal from a judgment taken without motions for new trial

or arrest of judgment, is confined to the record proper.—*Kansas City Masonic Temple Co. v. Young*, 166 S. W. 838.

§ 688 (Ky.) Complaints of improper argument of counsel cannot be reviewed on appeal when not made part of the bill of exceptions.—*United Furniture Co. v. Wills*, 166 S. W. 600.

§ 690 (Tex.Civ.App.) Error could not be predicated upon the admission of the testimony of witnesses claimed to be inadmissible under the pleadings, where neither the brief nor the bill of exceptions showed what the witnesses testified.—*Underwood v. Jordan*, 166 S. W. 88.

§ 690 (Tex.Civ.App.) Where the record on appeal does not show the materiality of excluded evidence, its admissibility cannot be passed on by the appellate court.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

§ 692 (Mo.App.) The exclusion of a mechanic's lien statement, when offered in evidence for alleged insufficiency on its face to support the lien, could not be reviewed, where the instrument was not contained in the bill of exceptions, and there was no call in the bill therefor.—*Lintzenich v. Sanguinet*, 166 S. W. 1076.

§ 699 (Tex.Civ.App.) Where the record does not show any requested peremptory instructions for appellant, an assignment of error to the refusal to give a requested peremptory instruction must be overruled.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

§ 699 (Tex.Civ.App.) Where appellees' charge No. 12 was indorsed by the judge as given, while the indorsement on No. 13 recited that it was refused after charge No. 12 was refused, held that any alleged error in No. 12 would not be reviewed.—*Good v. Texas & P. Ry. Co.*, 166 S. W. 670.

§ 703 (Tex.Civ.App.) Where the record showed that appellant requested only one instruction that was refused, his assignment of error complaining of the refusal of several requested instructions cannot be reviewed.—*International & G. N. Ry. Co. v. Owens*, 166 S. W. 412.

§ 708 (Tex.Civ.App.) Where the transcript did not show that any default judgment was ever rendered, the Court of Appeals cannot review an assignment complaining of an order vacating the default.—*Johnson v. Conger*, 166 S. W. 405.

**XL ASSIGNMENT OF ERRORS.**

§ 719 (Tex.Civ.App.) The correctness of a charge will not be considered on appeal, where no assignment of error relating thereto was filed in the trial court.—*Stevens v. Crosby*, 166 S. W. 62.

§ 719 (Tex.Civ.App.) The error arising from an award of excessive damages based on a mathematical computation is fundamental, and will be considered on appeal, though there is no assignment of error.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

§ 719 (Tex.Civ.App.) Error in rendering judgment in a negligence case upon a verdict which failed to find upon special issues of contributory negligence and assumption of risk submitted being fundamental, an assignment of errors was unnecessary.—*Cisco Oil Mill v. Van Geem*, 166 S. W. 439.

§ 719 (Tex.Civ.App.) A want of evidence or an insufficiency of evidence to sustain the judgment is not such a fundamental error as to require consideration without a proper assignment of error.—*Maris v. Adams*, 166 S. W. 475.

§ 722 (Tex.Civ.App.) The provision of Acts 33d Leg. c. 136, that assignments contained in a motion for a new trial shall constitute the assignments upon which the cause is presented on appeal, is mandatory, where a motion for a new trial was filed.—*Dees v. Thompson*, 166 S. W. 56.

Acts 33d Leg. c. 136, relating to assignments of error, does not change the former rule that

reconstructed assignments are not permitted.—Id.

As to errors arising subsequent to a motion for a new trial, and which cannot be raised in the motion, probably the proper practice is to file distinct assignments in relation thereto with the clerk of the lower court.—Id.

In cases tried by the court where no motion for new trial is necessary, Acts 33d Leg. c. 136, does not change the requirement that assignments are to be filed with the clerk of the court below.—Id.

§ 724 (Tex.Civ.App.) Assignments of error that the verdict of the jury is unsupported by the evidence, that it is contrary to law, and that the court erred in instructing a verdict in favor of defendants, are too general for consideration.—Ross v. Blunt, 166 S. W. 913.

§ 731 (Tex.Civ.App.) An assignment of error that one finding by the trial court was in conflict with two other findings, which does not point out in what respect the findings conflict, is too general.—Cope v. Pitzer, 166 S. W. 447.

§ 742 (Tex.Civ.App.) Assignments of error, not supported by propositions and statements, as the rules require, need not be considered.—Dees v. Thompson, 166 S. W. 56.

§ 742 (Tex.Civ.App.) Where the statement under an assignment complaining of an instruction on the measure of damages for delay in the transportation of live stock consisted of the instruction, but did not point out anything to indicate that the jury awarded excessive damages, the record did not show that the error, if any, in the instruction was prejudicial.—St. Louis, S. F. & T. Ry. Co. v. Armstrong, 166 S. W. 366.

§ 742 (Tex.Civ.App.) Under Court of Civil Appeals Rule 30 (132 S. W. xiii), requiring that each point under each assignment shall be stated as a proposition unless the assignment sufficiently discloses the same, assignments that the verdict is contrary to law and the verdict and judgment not supported by the evidence, without subjoined propositions, present no question for review.—United Benevolent Ass'n of Texas v. Lawson, 166 S. W. 713.

§ 742 (Tex.Civ.App.) A proposition under an assignment of error to the giving of a charge that the charge was on the weight of the evidence, failing however to point out in what respect, would not be considered on appeal.—Savage v. Mowery, 166 S. W. 905.

§ 742 (Tex.Civ.App.) An assignment of error complaining of the refusal on default judgment against defendants to file findings of fact and conclusions of law must be overruled where the statement did not show the ground of the motion for new trial, excuse defendants' default, or show that they had a good defense; it not appearing defendants were in any way harmed.—White v. Lowry, 166 S. W. 1193.

§ 750 (Tex.Civ.App.) Where the court sustained an exception to allegations of the answer, but error was not assigned to the ruling, assignments of error could not be based on the refusal of a special charge submitting the defense presented by the allegations.—St. Louis, S. F. & T. Ry. Co. v. Armstrong, 166 S. W. 366.

## XII. BRIEFS.

§ 757 (Tex.Civ.App.) Error could not be predicated upon the admission of the testimony of witnesses claimed to be inadmissible under the pleadings, where neither the brief nor the bill of exceptions showed what the witnesses testified.—Underwood v. Jordan, 166 S. W. 88.

§ 757 (Tex.Civ.App.) Where defendant's brief did not set out plaintiff's petition or even its substance, defendant's contention that its general demurrer was improperly overruled cannot be reviewed.—International & G. N. Ry. Co. v. Owens, 166 S. W. 412.

§ 758 (Tex.Civ.App.) Acts 33d Leg. c. 136, relating to assignments of error, does not change the former rule that assignments in the motion for a new trial must be correctly copied in the briefs.—Dees v. Thompson, 166 S. W. 56.

§ 773 (Tex.Civ.App.) Under Court of Civil Appeals rule 39 (142 S. W. xiii), where appellant failed to file briefs in trial court, as required by Rev. St. 1911, art. 2115, did not file briefs in appellate court until two days before the day for submission, and withdrew and retained transcript until day for submission, on motion, appeal must be dismissed.—Pagach v. First Nat. Bank of Rosebud, 166 S. W. 50.

§ 773 (Tex.Civ.App.) The judgment will be affirmed if appellant files no brief; there being no fundamental error.—Alderete v. Moore, 166 S. W. 453.

## XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Ark.) Where, pending preparations for an appeal from a judgment vacating a prohibitory order, Acts 1913, p. 116, prohibiting the sale of liquor within the district in question, was passed the appeal would not be determined merely to decide the question of costs.—Pearson v. Quinn, 166 S. W. 746.

Exceptions to the general rule that the Supreme Court will not decide a case on the mere question of costs are where the question at issue is the legality of a particular item of costs, the liability of prosecutor in a criminal case for costs, and taking the case as properly decided, whether the costs have been adjudged against the proper party.—Id.

§ 782 (Ky.) Under Ky. St. § 950, an appeal will be dismissed where the record shows that the principal sum claimed to be due from an administratrix is less than \$200; the appellant's remedy being an action to enforce the award or to set it aside.—Thompson v. McAttee's Adm'x, 166 S. W. 210.

§ 792 (Mo.App.) Where there are no abstracts or briefs on file in the court on appeal at the time set for hearing, the case may be dismissed on the court's own motion, under Court rule 21 (123 S. W. vii).—Massey v. Security Trust Co., 166 S. W. 640.

§ 794 (Mo.App.) Where there are no abstracts or briefs on file in the court on appeal at the time set for hearing, the case may be dismissed on the court's own motion, under Court rule 21 (123 S. W. vii), and not by rule 25, relating to motions to affirm or dismiss on five days' notice to the adverse party.—Massey v. Security Trust Co., 166 S. W. 640.

## XV. HEARING AND REHEARING.

§ 818 (Mo.App.) The court on appeal, which has once continued and reset a case for hearing on the certificate of the trial judge, under Rev. St. 1909, § 2029, as amended by Laws 1911, p. 139, has discretionary power whether to grant a second continuance on a similar certificate of the trial judge.—Massey v. Security Trust Co., 166 S. W. 640.

## XVI. REVIEW.

### (A) Scope and Extent in General.

§ 837 (Mo.App.) In determining whether there was any evidence which would justify a verdict for plaintiff, defendant's evidence should be considered as well as that of plaintiff.—Speaks v. Metropolitan St. Ry. Co., 166 S. W. 804.

§ 837 (Tex.Civ.App.) Opinion evidence on a subject not requiring expert testimony, the admission of which was held harmless, could not be considered by the appellate court in passing on the sufficiency of the evidence.—Kansas City Southern Ry. Co. v. Carter, 166 S. W. 115.

§ 837 (Tex.Civ.App.) In determining the propriety of the overruling of defendant's general demurrer, the evidence cannot be considered.—*International & G. N. Ry. Co. v. Owens*, 166 S. W. 412.

§ 854 (Mo.) A decree generally finding the issues in favor of defendant will be affirmed, where any one of the many defenses raised warranted it.—*Phoenix Brick & Construction Co. v. Gentry County*, 166 S. W. 1034.

§ 854 (Mo.App.) A party relying on some valid ground for sustaining a motion for a new trial other than that specified by the trial court must point out such ground.—*Gabbert v. Evans*, 166 S. W. 635.

§ 854 (Mo.App.) Where the trial court granted a new trial solely on the ground of newly discovered evidence, and refused it on the ground that the verdict was against the weight of the evidence, the appellate court cannot, to sustain the order granting the new trial, weigh the evidence to determine whether the lower court's order could be upheld on the latter ground.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

**(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.**

§ 876 (Mo.) A plaintiff who treats an application by defendant to vacate a default judgment as a motion, and who challenges the sufficiency thereof by objection to evidence, is not thereby precluded from questioning the sufficiency of the motion on appeal from a judgment setting aside the judgment.—*Jeude v. Sims*, 166 S. W. 1048.

**(C) Parties Entitled to Allege Error.**

§ 877 (Mo.App.) On defendant's appeal from an order granting plaintiff a new trial on the ground of newly discovered evidence, the appellate court will not review the action of the trial court in denying plaintiff's motion on the ground of surprise; the decision being against plaintiff, who did not appeal, and depending on a question of fact.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

§ 882 (Ky.) To error in the answers brought out by him on cross-examination, plaintiff could not object.—*Reid v. Sun Pub. Co.*, 166 S. W. 245.

§ 882 (Mo.) In condemnation proceedings to acquire land for railroad terminals, defendant cannot complain of an instruction that in assessing damages the increased danger from fires, increased noise, and smoke, etc., could not be considered, where defendant's own instruction charged that damages common to other landowners of the neighborhood whose property was not taken could not be considered.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 882 (Mo.) Defendant, having procured an instruction that the value of property sought to be condemned should be determined as of the date when the commissioners made and returned their assessment of damages, could not object to the refusal of an instruction that the value should be determined as of the date of the filing of the suit.—*Kansas City Southern Ry. Co. v. Second Street Improvement Co.*, 166 S. W. 296.

§ 882 (Mo.App.) A party, procuring by his objection the exclusion of competent evidence proving a fact, cannot on appeal complain of the insufficiency of the evidence, received without objection, to establish the fact.—*Minor v. Woodward*, 166 S. W. 855.

§ 882 (Tex.Civ.App.) A party who requested the court to submit a special charge on a point thereby waived error, if any, in admitting, over his objection testimony establishing the same fact.—*Watson v. Rice*, 166 S. W. 106.

§ 883 (Tex.Civ.App.) Where the court intimated that it would not allow a verdict to stand

for defendant, and a consultation with attorneys resulted in the suggestion that a peremptory instruction should be given, and defendant's counsel consulted with defendant and announced that they had no objection, defendant consented to a peremptory instruction, and could not complain thereof.—*Pope v. Commonwealth Bonding & Casualty Co.*, 166 S. W. 1195.

**(E) Presumptions.**

§ 901 (Tex.Civ.App.) A party appealing from the judgment has the burden of showing that it is erroneous.—*Burlington State Bank v. Marlinton Nat. Bank*, 166 S. W. 499.

§ 907 (Ky.) Where defendant, appealing from a judgment for injuries to a servant, prepared the record, the servant might insist that a diagram omitted therefrom would strengthen his theory.—*Job Iron & Steel Co. v. Layne*, 166 S. W. 978.

§ 907 (Tex.Civ.App.) Where a judgment appealed from is supported by the findings of the court and jury, it will be assumed on appeal, in the absence of the statement of facts, that the findings are supported by evidence.—*August v. Gamer Co.*, 166 S. W. 1197.

§ 909 (Tex.Civ.App.) Where the court found plaintiff's full claim to be a laborer's lien upon property in the possession of defendant, notwithstanding plaintiff had extended the time of payment of a part, it cannot be presumed that the legal process by which defendant acquired possession, or the lien it asserted, was valid.—*Carthage Ice & Light Co. v. Roberts*, 166 S. W. 12.

§ 917 (Tex.Civ.App.) Where the record shows no ruling on defendant's general demurrer, or that any was requested, it will be presumed that the demurrer was waived.—*International & G. N. Ry. Co. v. Owens*, 166 S. W. 412.

§ 927 (Tex.Civ.App.) On appeal from a judgment sustaining exceptions to a motion to reinstate a cause dismissed for want of prosecution, it could not be presumed that all of the defendants were given notice of the motion, where the judgment recited that certain defendants were not served with notice.—*McAllen v. Crafts*, 166 S. W. 3.

§ 933 (Mo.App.) On appeal from an order granting a new trial, it could not be assumed that it was granted on the ground that the verdict was against the weight of the evidence to apply the rule that the court's discretion as to the weight of the evidence will rarely be interfered with.—*Gabbert v. Evans*, 166 S. W. 635.

§ 934 (Mo.App.) Where, in an action tried to the court, no declarations of law were asked or given, a judgment for plaintiff must be regarded on appeal as a final adjudication in his favor of every controverted issue of fact.—*Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889.

§ 934 (Mo.App.) Where the court acts or proposes to act on a motion at a subsequent term, it will be presumed by an appellate court, in the absence of anything to the contrary, that the motion has been continued from term to term.—*State ex rel. Lynch v. Taylor*, 166 S. W. 1071.

§ 934 (Tex.Civ.App.) Where the trial court found that a life insurance company was ready to issue stock, forming a part of an increase of the capital stock of the company to a subscriber upon his paying the note given for the purchase price thereof, it must be presumed, in aid of the judgment against the subscriber, that the company had complied, or was ready to comply, with the statutory requirements for increasing its capital stock.—*Cope v. Pitzer*, 166 S. W. 447.

§ 937 (Tex.Civ.App.) Where a transcript was filed during vacation, it cannot be presumed that the clerk filed it by order of the court.—*Robson v. Moore*, 166 S. W. 908.

**(F) Discretion of Lower Court.**

§ 959 (Ky.) A trial judge's discretion in allowing or rejecting pleadings will not be disturbed when the ends of justice have been promoted and the parties have had a fair trial.—*Aylor v. Aylor*, 166 S. W. 216.

§ 966 (Tex.Civ.App.) Application for a continuance for absence of a nonresident witness not being a statutory application under Rev. St. 1911, arts. 1918, 3649, the discretion of the court will not be disturbed in the absence of abuse.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 969 (Tex.Civ.App.) The exercise of the trial court's discretion as to the position in the argument of counsel for an intervener is not subject to review unless abused.—*Cooper v. Marek*, 166 S. W. 58.

§ 977 (Mo.App.) While the appellate court will pay great deference to the granting of a new trial by the lower court, that tribunal's order is not conclusive.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

§ 978 (Mo.App.) Whether a verdict was in disregard of the instructions was for the trial court, and not open to consideration on appeal.—*Criss v. United Rys. Co. of St. Louis*, 166 S. W. 834.

§ 978 (Tex.Civ.App.) Since Rev. St. 1911, art. 2021, providing that the court may in its discretion grant a new trial for misconduct of the jury, etc., changes the common-law rule, the appellate court will not disturb the discretion of the trial court in denying a new trial asked on that ground, unless there was clearly an abuse of discretion.—*City of Ft. Worth v. Charbonneau*, 166 S. W. 387.

§ 981 (Mo.App.) The action of the trial court upon a motion for new trial on the ground of newly discovered evidence is not to be disturbed, unless it is clear that its discretion has been abused.—*Stahlman v. United Rys. Co. of St. Louis*, 166 S. W. 812.

**(G) Questions of Fact, Verdicts, and Findings.**

§ 987 (Mo.App.) The appellate court cannot weigh the evidence.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

§ 999 (Ky.) In actions against a city for injuries caused by a defective sidewalk, the Court of Appeals will give great weight to the finding of the jury as to the safety of the walk, and, when there is reasonable ground for a difference of opinion on that issue, will not interfere with their verdict or say that the case should not have been submitted to them, but this rule does not make the finding of the jury on such issue conclusive in all cases.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 1001 (Tex.Civ.App.) Where the issues of negligence and contributory negligence were fully and fairly submitted, and it could not be said that the jury's findings in relation thereto were without substantial evidence to support them, the appellate court was not warranted in disturbing the verdict.—*St. Louis Southwestern Ry. Co. of Texas v. Evans*, 166 S. W. 702.

§ 1002. A verdict on conflicting evidence, rendered under proper instructions, is conclusive on appeal.

—(Mo. App.) *Love v. Scott*, 166 S. W. 859; (Tex. Civ. App.) *Watson v. Rice*, 166 S. W. 106.

§ 1002 (Ark.) A verdict upon conflicting evidence cannot be disturbed on appeal, though the preponderance of the evidence be against it, as the jury are the sole judges of the credibility of the witnesses and the weight to be given their testimony.—*Williams v. Williams*, 166 S. W. 552.

§ 1002 (Mo.App.) A verdict upon conflicting evidence cannot be held against the weight of

evidence.—*Johnston v. United Rys. Co. of City of St. Louis*, 166 S. W. 1105.

§ 1002 (Tex.Civ.App.) A verdict on conflicting evidence will not be disturbed on appeal.—*Camp v. Smith*, 166 S. W. 22; *Stevens v. Crosby*, Id. 62.

§ 1004 (Tex.Civ.App.) The right to interfere with a verdict on the ground that excessive damages are awarded is controlled by the rules governing the right to disturb any other issue of fact found by the jury.—*Houston & T. C. R. Co. v. Coleman*, 166 S. W. 685.

§ 1005 (Mo.App.) Whether a verdict was against the weight of the evidence was for the trial court, and not open to consideration on appeal.—*Criss v. United Rys. Co. of St. Louis*, 166 S. W. 834.

§ 1006 (Ky.) Where two juries rendered the same verdict on the same evidence, which was conflicting, the last verdict would not be disturbed on appeal.—*Hiram Blow Stave Co.'s Trustee v. Paducah Cooperage Co.*, 166 S. W. 615.

§ 1008 (Mo.App.) The finding of facts by the trial court on conflicting evidence was conclusive upon appeal, though no request appeared to have been made therefor.—*Skinner & Kennedy Stationery Co. v. Lammert Furniture Co.*, 166 S. W. 1079.

§ 1010 (Mo.App.) The appellate court is bound to accept findings by the court, with substantial evidence to support them.—*Montgomery v. Schwald*, 166 S. W. 831.

§ 1010 (Mo.App.) A finding embodied in the statement of facts found by the court is as binding on appeal as is a general finding if supported by substantial testimony.—*Fexler v. Gibson*, 166 S. W. 1096.

§ 1011 (Ark.) A finding on conflicting evidence not contrary to the preponderance will not be disturbed.—*Cost v. Shinault*, 166 S. W. 740.

§ 1011 (Mo.App.) In an action tried to the court, a finding on conflicting evidence resolves the conflict in favor of the successful party, and must be so accepted on appeal.—*Wittenberg v. Fisher*, 166 S. W. 1106.

§ 1012 (Tex.Civ.App.) A finding by the trial judge on the weight of the evidence will not be reversed.—*Holbrook v. Thornton*, 166 S. W. 7.

**(H) Harmless Error.**

§ 1030 (Ky.) Any error in refusing to transfer a case to the jury in an action to recover realty, and in overruling the exceptions to depositions taken for defendant, is not material, where the court would have been required under the evidence to have directed a verdict for defendant, at the close of plaintiff's evidence.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

§ 1032 (Tex.Civ.App.) Though questions to witnesses be improper, as calling for conclusions on a mixed question of law and fact, allowing them is, under Court of Civil Appeals rule 62a (149 S. W. x), not ground for reversal; the witnesses testifying to facts from which their conclusions necessarily followed.—*Henson v. Barter*, 166 S. W. 460.

§ 1033 (Ky.) An error prejudicial to appellee, who does not complain thereof, will not be considered.—*Larkin v. Heilman Mach. Co.*, 166 S. W. 183.

§ 1033 (Mo.App.) In action against city and others for constructing a sewer on plaintiffs' premises, in which defendants pleaded the condemnation of a right of way, the refusal of an instruction that the burden of proving condemnation was on plaintiff was not ground for reversing a judgment for defendants.—*Ewen v. Hart*, 166 S. W. 315.

§ 1033 (Tex.Civ.App.) One who sues for actual and punitive damages and recovers judgment for punitive damages only cannot on appeal raise the question that the jury could



not allow punitive damages without also allowing actual damages.—*Dees v. Thompson*, 166 S. W. 56.

§ 1033 (Tex.Civ.App.) In an action by beneficiaries under a will to recover property devised, a charge that certain evidence was not to be considered as proof of the quantum of estate of plaintiff's mother, one of the devisors, held not prejudicial to defendant.—*Larrabee v. Porter*, 166 S. W. 395.

§ 1033 (Tex.Civ.App.) A contention that an instruction improperly cast too great a burden on defendant cannot be sustained where it was in appellant's favor and did not authorize a verdict for plaintiff under any circumstances.—*Johnson v. Conger*, 166 S. W. 405.

§ 1033 (Tex.Civ.App.) Where the facts pleaded and proved, on which plaintiff relied for a recovery, were grouped in a charge submitting the issues, defendant could not complain because it was not necessary for plaintiff to prove all the facts pleaded to obtain a verdict.—*Dallas Consol. Electric St. Ry. Co. v. Stone*, 166 S. W. 708.

§ 1036 (Ark.) A judgment will only be reversed for errors prejudicial to the appellant, and the fact that, in an action for the possession of mules, one having no interest therein was joined with the owner as plaintiff, was not prejudicial to the defendant.—*Williams v. Williams*, 166 S. W. 552.

§ 1039 (Ark.) The refusal to compel an election between causes of action for false imprisonment and for damages for unlawfully shackling a convict laborer is not prejudicial in view of Acts 1905, p. 798, providing that the court may consolidate causes of like nature when it appears reasonable to do so.—*Weigel v. McCloskey*, 166 S. W. 944.

§ 1040 (Tex.Civ.App.) Where, in an action for injuries to a brakeman by defendant's violation of the safety appliance acts, the court submitted all the issues that could arise under the federal or state statutes, which are practically the same, defendant was not prejudiced by the sustaining of exceptions to the part of its answer pleading the federal law.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 1040 (Tex.Civ.App.) Error in overruling exceptions to a defense of failure of consideration for a note sued on by a bona fide holder, and in receiving evidence in support of such plea, was cured by peremptory withdrawal of such defense from the jury.—*First Nat. Bank of Iowa City, Iowa, v. Dorsey*, 166 S. W. 54.

§ 1040 (Tex.Civ.App.) The error in overruling exceptions to the petition in an action against a railroad company for injuries to animals frightened by a train, for failure to specify the date of the injury or identify the train, held not prejudicial, where the company procured the testimony of its engineers running trains on the date of the accident proved by plaintiff.—*Chicago, R. I. & G. Ry. Co. v. Clark*, 166 S. W. 129.

§ 1042 (Ky.) In an action for libel, it was not error to permit to remain in the answer pleas that the report had been current in the neighborhood, that it published it in good faith and without malice, and that plaintiff had never requested a retraction or explanation thereof, not covered by the instructions.—*Reid v. Sun Pub. Co.*, 166 S. W. 245.

§ 1043 (Tex.Civ.App.) If the court abused its discretion in refusing a nonstatutory application for a continuance, it was not ground for reversal, where the application was based on the absence of a witness, who testified fully on a former trial, which testimony was admitted by agreement, and was to the same effect that the application stated he would testify.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 1046 (Ark.) Where the decision in a suit to apportion accretion among several landowners, which was transferred to equity on the ground

of multiplicity of suits, was correct under the undisputed evidence, the appellant cannot complain of the transfer.—*Yuttermann v. Grier*, 166 S. W. 749.

§ 1046 (Tex.Civ.App.) Error cannot be predicated on the refusal to permit counsel for interveners to open and close where there was no injury therefrom.—*Cooper v. Marek*, 166 S. W. 58.

§ 1048 (Ky.) Exclusion of question asked witness as to cost and selling price of nearby property held not prejudicial error, where the time of the purchase or sale was not fixed by the question, and it did not appear what the witness would have answered.—*David v. Louisville & I. R. Co.*, 166 S. W. 230.

§ 1048 (Ky.) Defendant may not complain of plaintiff having been permitted to testify from a written memorandum, having itself been permitted to examine it, and offered it in evidence.—*Illinois Cent. R. Co. v. Doss*, 166 S. W. 785.

§ 1048 (Ky.) Where witness testified that person seemed to be suffering, incidental remark that he said he was suffering, not called for by the question, held not reversible error.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 800.

§ 1048 (Tex.Civ.App.) While an answer to an interrogatory not calling for expert opinion should be stricken on motion if the answers to the cross-interrogatories show it to have been based on opinion and not knowledge, where the facts on which such an opinion was based were brought out on oral cross-examination at the trial, error, if any, in overruling a motion to strike the answer was harmless.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 1050 (Ark.) In an action against a railroad for personal injuries to plaintiff, a logger, operating a hand car on defendant's track, testimony of one witness as to the custom of loggers to use hand cars to haul feed to the log camps, which did not tend to establish such a custom on defendant's road, held not prejudicial to defendant.—*Jonesboro, L. C. & E. R. Co. v. Gainer*, 166 S. W. 571.

Admission of evidence for plaintiff that, if there was any light at or any one on the flat cars in front of the engine, the witness did not see him or it held not prejudicial.—*Id.*

§ 1050 (Tex.) Where proof of the accident and injuries received by plaintiff's wife while a passenger on defendant's train rested upon the wife's testimony alone, the admission of hearsay statement by the husband which corroborated the wife's testimony was prejudicial.—*Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693.

§ 1050 (Tex.Civ.App.) The erroneous admission of evidence was not ground for reversal, where any finding of fact or conclusion of law based thereon was immaterial to the legal rights of the parties.—*Castleberry v. Bussey*, 166 S. W. 14.

§ 1050 (Tex.Civ.App.) Error in admitting evidence is not reversible, where it is apparent that it could not have had any effect on any issue in the case.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 1050 (Tex.Civ.App.) Where, in an action for pasturing cattle, defendant reconvened for the conversion of cattle, and it was shown without objection that two of the cattle had died and that the others had escaped through the fault of third persons, the error, if any, in admitting evidence of custom that parties taking cattle for pasturage were not responsible for the loss thereof, was not prejudicial.—*Barnard & Moran v. Williams*, 166 S. W. 910.

§ 1050 (Tex.Civ.App.) Though testimony was objectionable because irrelevant, etc., its admission was not ground for reversal, where testimony to the same effect was admitted without objection.—*Sockwell v. Sockwell*, 166 S. W. 1188.



§ 1051 (Tex.Civ.App.) Where facts are proved without objection, the admission of improper testimony to prove the same facts cannot form the basis for an assignment of error.—*Watson v. Rice*, 166 S. W. 106.

§ 1051 (Tex.Civ.App.) In an action to recover a commission, where defendant admitted a telephone conversation with the broker, the admission of evidence of the broker's version of the conversation and his *ex parte* statement that he was talking to defendant, if erroneous, is harmless.—*Spire v. McElroy*, 166 S. W. 457.

§ 1051 (Tex.Civ.App.) Error in admitting evidence of a telephone conversation between a witness and decedent was harmless, where another witness testified for appellant that the former witness told him the same thing after decedent's death.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

§ 1054 (Mo.App.) Where evidence was admissible on one cause of action alleged in the petition, but the court trying the case ignored the evidence in determining the other cause of action alleged, the admission of the evidence was not prejudicial.—*Lindsay v. Smith*, 166 S. W. 820.

§ 1056 (Ark.) Where the case presented a close question of fact as to whether the grading of a street caused any damage to an abutting owner by impeding the flow of water, the exclusion of competent evidence that ditches and tiling to carry off surface water had been put in was reversible error.—*City of Jonesboro v. Pribble*, 166 S. W. 576.

§ 1056 (Mo.App.) Where plaintiff, seeking to recover on the theory that defendants were partners, testified that the transactions relied on were had with only two of the several defendants and the jury found that the two were not liable, error in excluding evidence that the other defendants were partners was not prejudicial.—*Smith v. Cain*, 166 S. W. 653.

§ 1056 (Tex.Civ.App.) Where practically all of defendants' witnesses testified to receiving compensation for time and expense, exclusion of testimony that an expert witness not so interrogated was paid for testifying was not prejudicial.—*Good v. Texas & P. Ry. Co.*, 166 S. W. 670.

§ 1057 (Ark.) Rejection of evidence, in an action for death of a white man, that the negro woman who was accompanying him was a strumpet was harmless; other evidence admitted tending as fully to show his dissolute character and depraved disposition.—*Chicago, R. I. & P. Ry. Co. v. Gunn*, 166 S. W. 568.

§ 1060 (Ark.) Improper argument of counsel, the only injurious effect of which would be to enhance damages, will be deemed harmless; the verdict not being complained of as excessive.—*Chicago, R. I. & P. Ry. Co. v. Gunn*, 166 S. W. 568.

§ 1060 (Mo.App.) Where a surety company was local, and had a large number of stockholders and employees in and about the place where a personal injury action was tried, it was not reversible error to permit plaintiff's counsel to ask the jurors on their examination whether they were interested in the company.—*Burrows v. Likes*, 166 S. W. 643.

§ 1060 (Tex.Civ.App.) Remarks by plaintiff's counsel in his argument to the jury, which he withdrew upon objection, were not prejudicial, where the verdict did not indicate that they in any way affected the jury.—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 1062 (Ky.) Error in submitting the question of damages for loss to plaintiff's business in an action for breach of contract, was not prejudicial to defendant where the jury did not allow anything for loss to his business.—*O'Hara v. Graham*, 166 S. W. 233.

§ 1062 (Ky.) Defendant cannot complain of the submission of an issue of defense unsupported by the testimony.—*Keeton v. Smith*, 166 S. W. 610.

§ 1064 (Ark.) An instruction on the measure of damages, erroneous because not telling the jury that their finding must be based on evidence, is not prejudicial error, as the oath of the juror is sufficient to compel him to conform his finding to the evidence.—*Weigel v. McCloskey*, 166 S. W. 944.

§ 1064 (Ky.) In a civil action for the killing of plaintiff's husband, an instruction on self-defense held not prejudicial as leading the jury to believe the defendant would have been justified in killing deceased to protect himself from a slight or inconsequential injury.—*Shields v. Neal*, 166 S. W. 211.

§ 1064 (Mo.App.) An instruction long and verbose, tending to obscure the real issues, held not prejudicial error, where there was no inaccuracy or vagueness in the application of the legal rules to the ultimate evidentiary facts clearly and succinctly stated.—*Roberts v. Trunk*, 166 S. W. 841.

§ 1064 (Tex.Civ.App.) An instruction allowing plaintiff to recover for damages "suffered" by himself and wife by reason of injuries to the wife is not prejudicial because of the use of the word "suffered" instead of "sustained".—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 1064 (Tex.Civ.App.) Where a charge submitting the question of a railroad company's negligence in suddenly moving its train, which had stopped to allow passengers to alight, could not have misled the jury, its inexact use of language was harmless.—*St. Louis Southwestern Ry. Co. of Texas v. Farris*, 166 S. W. 463.

§ 1066 (Ky.) In an action for injuries to a car cleaner, caused by the coach on which he was riding colliding with a car while being placed on a siding, the error in an instruction on contributory negligence held not prejudicial, in view of the issues.—*Louisville, H. & St. L. Ry. Co. v. Armes*, 166 S. W. 190.

§ 1066 (Mo.App.) Error in including, in an instruction on the measure of damages in an action for negligence in the operation of a private automobile, the penal features of Rev. St. 1909, § 5435, providing for penalty and damages in cases where one is injured by a public conveyance, and by section 8523, made applicable, as to damages, to injuries by an automobile was prejudicial.—*Roberts v. Trunk*, 166 S. W. 841.

§ 1066 (Tex.Civ.App.) In an action for injuries to a railroad construction employé, an instruction which required warning to be given by ringing the bell or blowing the whistle before a train was started, was not prejudicial, where there was no evidence that a warning was given in any other manner.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 1067 (Tex.Civ.App.) The verdict for a shipper held to raise a presumption that the jury found that the verbal contract, as claimed by the shipper, and not the written one governed, and hence the failure of the charge to submit issues presented by a written contract limiting the carrier's liability was harmless.—*St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson*, 166 S. W. 706.

§ 1068 (Ark.) It being impossible to tell whether the verdict was based on an erroneous instruction, the giving of it requires a reversal.—*Martin v. Monger*, 166 S. W. 568.

§ 1068 (Tex.Civ.App.) Where the jury found that a purchaser was entitled to rescind on the ground of the vendor's fraud, the failure to submit any measure of damages for fraudulent representations, in the event the purchaser had delayed for an unreasonable time before complaining of the fraud, or had approved the purchase

after knowledge of the fraud, was not reversible error.—Luckenbach v. Thomas, 166 S. W. 99.

§ 1063 (Tex.Civ.App.) An instruction in an action on a life policy that the jury should find as "attorney's fees \$—" was harmless to defendant, though irregular, in absence of a showing that the jury found improperly on the item of attorneys' fees.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

§ 1068 (Tex.Civ.App.) A judgment would not be reversed for error in the instructions rendered harmless by the verdict.—Good v. Texas & P. Ry. Co., 166 S. W. 670.

§ 1068 (Tex.Civ.App.) Where a verdict for plaintiff raised a presumption that the rights of the parties were fixed by a verbal contract of shipment and not a written contract, limiting the carrier's liability, a statement by the trial court, that some of the provisions of the written contract were without consideration, while improper, is harmless.—St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson, 166 S. W. 708.

§ 1074 (Ark.) That the judgment of the circuit court, on appeal from the county court, was in form one of dismissal of appeal is harmless; it appearing it tried the issue de novo, and, in effect, rendered the same judgment as the county court, dismissal of the petition.—Henson v. Hargraves, 166 S. W. 743.

#### (J) Decisions of Intermediate Courts.

§ 1091 (Tex.Civ.App.) Where a case was appealed from the county court to the district court, and on appeal from the district court the proceedings in the county court were not made a part of the record, every presumption must be indulged in favor of the validity of the judgment of the district court.—Maris v. Adams, 166 S. W. 475.

#### (K) Subsequent Appeals.

§ 1097 (Ark.) Opinions on former appeals are the law of the case on a subsequent appeal.—St. Louis, I. M. & S. Ry. Co. v. Wirbel, 166 S. W. 573.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (B) Affirmance.

§ 1127 (Tex.Civ.App.) A motion to affirm on certificate must be denied where the transcript accompanying the motion does not contain a copy of the judgment which the motion seeks to have affirmed.—Brightman v. Brightman, 166 S. W. 415.

§ 1140 (Ark.) Where no error has occurred except that judgment is excessive, it may be cured by reducing the judgment to such an amount as is warranted by the evidence; but, if improper evidence is admitted or competent evidence excluded, that error can be cured only by placing a recovery limit so low that a jury of average judgment on proper evidence could not have allowed plaintiff a less sum, or by granting a new trial.—Triangle Lumber Co. v. Acree, 166 S. W. 958.

Where, in an action for injuries to a servant by the breaking of both bones of one leg above the ankle, he was awarded \$10,000, but testimony of physicians on an issue as to whether there had been union of the bones was erroneously excluded, the judgment would be affirmed for \$2,000 or a new trial granted.—Id.

#### (D) Reversal.

§ 1170 (Mo.App.) Where, in an action for personal injuries, there was evidence supporting a substantial recovery on every element of damage submitted in the instruction on the measure of damages, the error, if any, in the instruction, because not prescribing a limit of recovery on each separate item, must, as required by Rev. St. 1909, § 2082, be disregarded on appeal.—Bell v. United Rys. Co. of St. Louis, 166 S. W. 1100.

§ 1172 (Tex.Civ.App.) Under rule 62a (149 S. W. x), a judgment in a suit to quiet title and to reform plaintiff's conveyance, where the court improperly directed a verdict of reformation, will be reversed only as to that issue; that error not affecting a judgment in plaintiff's favor for the land included in her conveyance.—Johnson v. Conger, 166 S. W. 405.

§ 1175 (Tex.Civ.App.) Where the court erroneously rendered judgment for the defendant on a cross-action in an amount equal to plaintiff's judgment, the case need not be remanded for new trial, but judgment will be rendered for the plaintiff, under Rev. St. 1911, art. 1626, authorizing the Court of Civil Appeals to render proper judgment.—Dees v. Thompson, 166 S. W. 56.

§ 1175 (Tex.Civ.App.) Where plaintiff proved his case in the lower court and the defendant failed to establish any defense whatever, judgment will be rendered for plaintiff on appeal from a judgment for the defendant.—Bixler v. Rinn, 166 S. W. 96.

§ 1177 (Tex.Civ.App.) Where the record on appeal from a judgment shows that it was rendered on admissions made for purposes only of hearing a motion for judgment, the court reversing the judgment must remand it because the case had not been fully developed in the trial court.—State Exchange Bank v. Smith, 166 S. W. 666.

§ 1178 (Ky.) Where separate actions were instituted by a city and by the commonwealth and a county in separate counties to tax the same property, and neither plaintiff was made a party to the other action, the judgments in both actions taxing the property will be reversed and remanded, with directions to transfer one case to the other county and to consolidate it with the other case.—Ewald's Ex'r v. City of Louisville, 166 S. W. 997.

#### (G) Jurisdiction and Proceedings of Appellate Court After Remand.

§ 1221 (Ky.) Entry in the judgment of costs against defendant in prohibition, a judge, having been a clerical error, not having been directed in the opinion of the court on appeal, such part of the judgment will be set aside.—Chesapeake & O. Ry. Co. v. Harmon, 166 S. W. 786.

### APPEARANCE.

See Ball, §§ 59, 75; Eminent Domain, § 185.

### APPLIANCES.

See Master and Servant, §§ 101, 102-125, 264, 278.

### APPLICATION.

See Payment, § 42.

### APPOINTMENT.

See Principal and Agent, § 8.

### APPROPRIATION.

See Waters and Water Courses, §§ 152, 240.

### ARGUMENT OF COUNSEL.

See Appeal and Error, § 1060; Criminal Law, §§ 699-730, 1087; Trial, §§ 108½-133.

### ARREST.

See Ball; False Imprisonment; Malicious Prosecution, §§ 71, 72.

### ARREST OF JUDGMENT.

See Criminal Law, § 971; Judgment, § 259.

### ARTICLES.

See Corporations, § 18.

## ASSAULT AND BATTERY.

See Carriers, §§ 318, 319; Criminal Law, §§ 1169, 1173; Homicide, § 300.

### II. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

§ 54 (Tex.Cr.App.) Under Pen. Code 1895, art. 601, subd. 9, defining an aggravated assault, the assault must be committed with a fixed purpose and not upon an inconsiderate impulse, but the real injury is immaterial except as showing that the means were calculated to inflict serious bodily injury.—Hodges v. State, 166 S. W. 512.

#### (B) Prosecution and Punishment.

§ 92 (Tex.Cr.App.) In a prosecution under Pen. Code 1895, art. 601, subd. 9, for aggravated assault, evidence as to whether defendant had a bottle of whisky in his store, or had taken a drink or two that day, without any contention that the fight occurred in the store or that he was then intoxicated, held inadmissible.—Hodges v. State, 166 S. W. 512.

In a prosecution for aggravated assault, that another person struck the person alleged to have been assaulted by defendant held immaterial, unless it was expected to show an acting together in the assault.—Id.

## ASSESSMENT.

See Drains; Eminent Domain, §§ 169-261; Highways, § 122; Insurance, §§ 719, 755; Municipal Corporations, §§ 414-486.

## ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 544, 547, 719-750.

## ASSIGNMENTS.

See Fraudulent Conveyances; Insane Persons, § 61; Public Lands, § 61; Subrogation, § 31; Vendor and Purchaser, §§ 214, 261.

### I. REQUISITES AND VALIDITY.

#### (B) Mode and Sufficiency of Assignment.

§ 48 (Tex.Civ.App.) An agreement between plaintiff, an attorney, and the owners of notes by which plaintiff was authorized to bring suit on the notes in consideration of the 10 per cent. attorney's fees stipulated for therein operated as an equitable assignment of such attorney's fees to plaintiff.—Caldwell v. Stalcup, 166 S. W. 110.

## III. RIGHTS AND LIABILITIES OF PARTIES.

§ 92 (Tex.Civ.App.) Defendant is liable to plaintiff for half the sum it paid H. in settlement; it settling and paying the amount of settlement after notice of assignment to plaintiff of a half interest in the claim for damages and in any compromise, settlement, or recovery.—Gulf, C. & S. F. Ry. Co. v. James B. & Charles J. Stubbs, 166 S. W. 699.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

## ASSOCIATIONS.

See Insurance, § 695.

§ 15 (Tex.Civ.App.) A lease to an unincorporated association which could not own a leasehold estate would not, for that reason, fail for want of a grantee, as the title would vest in its members.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

§ 24 (Tex.Civ.App.) While the incorporation of a voluntary association does not of itself constitute the corporation the owner of the association's property, yet, when such property is paid for with money derived from the sale of stock in, and is held in trust for, the contemplated corporation, delivery of possession to it when formed vests it with at least the equitable title to the property.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

## ASSUMPSIT, ACTION OF.

See Work and Labor.

§ 6 (Mo.App.) Plaintiff cannot recover in indebitatus assumpsit on the quantum meruit, where there is an express contract yet open; but, where such contract has been fully performed by him, and nothing remains except for defendant to pay money in consideration thereof, plaintiff need not declare specially on the contract, but may recover on an indebitatus assumpsit count as for the reasonable value.—American Surety Co. of New York v. Fruin-Bambrick Const. Co., 166 S. W. 333.

§ 25 (Ky.) Where plaintiff declared in assumpsit for goods sold and delivered, and not upon a written contract, a written order for the goods, signed by the defendant, is admissible.—Simons v. American Box Ball Co., 166 S. W. 224.

§ 25 (Mo.App.) In indebitatus assumpsit as for a quantum meruit, brought after plaintiff's performance of its surety contract, held that it was competent to look to the contract between the parties to determine the time the several installments of premiums sued for were due.—American Surety Co. of New York v. Fruin-Bambrick Const. Co., 166 S. W. 333.

§ 26 (Mo.App.) Contract for payment of reasonable compensation to a surety company by way of premiums, in an action of assumpsit thereon after full performance of its surety contract, held controlling, so that recovery would be measured by its terms but for the reasonable value, not exceeding the contract price.—American Surety Co. of New York v. Fruin-Bambrick Const. Co., 166 S. W. 333.

## ASSUMPTION.

Of risk, see Master and Servant, §§ 203-218, 264, 288.

## ATTACHMENT.

See Execution; Exemptions; Garnishment; Homestead.

### I. NATURE AND GROUNDS.

#### (A) Nature of Remedy, Causes of Action, and Parties.

§ 4 (Ark.) Under Kirby's Dig. § 344, subd. 8, providing that an attachment shall not be granted because defendant is a nonresident for any claim other than a "debt or demand arising upon contract," an attachment was improper in a suit by the state on relation of the Attorney General against a nonresident to recover penalties for violating the anti-trust laws.—State v. Ehle, 166 S. W. 535.

## ATTESTATION.

See Wills, § 114.

## ATTORNEY AND CLIENT.

See Appeal and Error, § 1060; Assignments, § 48; Bills and Notes, § 160; Contracts, § 5; Costs, § 173; Courts, § 169; Criminal Law, §§ 699-730, 1037, 1055, 1093, 1154; District and Prosecuting Attorneys; Evidence, § 508; Justices of the Peace, § 44; Malicious Prosecution, § 21; Trial, §§ 108½-133; Trusts, § 380.

**I. THE OFFICE OF ATTORNEY.****(C) Suspension and Disbarment.**

§ 49 (Mo.App.) A proceeding to disbar an attorney is neither a civil nor a criminal action, but is a proceeding sui generis, the object of which is not the punishment of the offender but the protection of the court.—*In re Davis*, 166 S. W. 341.

§ 51 (Mo.App.) Where an attorney has been guilty of professional misconduct, it is not only the right but the duty of another attorney to institute disbarment proceedings.—*In re Davis*, 166 S. W. 341.

§ 59 (Mo.App.) Where an attorney, in instituting disbarment proceedings, acts in good faith, he is not liable for costs, though accused be acquitted.—*In re Davis*, 166 S. W. 341.

Attorney prosecuted for a criminal offense who instituted disbarment proceedings against the prosecuting attorney and another attorney to aid his own position as an accused person, and to have revenge against his prosecutor, *held* properly taxed with the costs of the unsuccessful proceedings.—*Id.*

**II. RETAINER AND AUTHORITY.**

§ 86 (Mo.App.) In attorneys' action for compensation, defended on the ground of negligence, defendant was bound by the statement of her counsel during the trial that the only negligence complained of was the failure of such attorneys to perfect an appeal in the action in which they appeared for her.—*Gabbert v. Evans*, 166 S. W. 635.

**III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.**

§ 107 (Mo.App.) Attorneys were bound to use, in the trial of a cause in which they were employed, the professional knowledge and diligence which members of the legal profession ordinarily possess, and were liable for lack of ordinary skill and diligence.—*Gabbert v. Evans*, 166 S. W. 635.

§ 129 (Mo.App.) Whether attorneys for a defendant were negligent in failing to introduce evidence *held* not determinable, where all the facts and the whole situation as it presented itself to the attorneys were not before the court.—*Gabbert v. Evans*, 166 S. W. 635.

§ 129 (Tex.Civ.App.) Where an attorney contracted to collect notes transferred to his client to secure a judgment in her favor, and divide the proceeds between his client and plaintiffs after deducting his compensation, but failed to pay to plaintiffs their share of the proceeds, an action by the plaintiffs was properly brought against the attorney and not against his client.—*Botsford, Deatherage, Young & Creason v. Hamner*, 166 S. W. 378.

**IV. COMPENSATION AND LIEN OF ATTORNEY.**

§ 145 (Tex.Civ.App.) Where an attorney contracted to prosecute an action on notes, and after deducting his compensation pay the balance to plaintiffs and a judgment creditor of the payee, the refusal of plaintiffs to serve process in the action on the notes *held* not to authorize the attorney to forfeit the rights of plaintiffs under the contract.—*Botsford, Deatherage, Young & Creason v. Hamner*, 166 S. W. 378.

§ 161 (Mo.App.) An attorney cannot recover for services which are of no value to his client because of his lack of ordinary skill or diligence.—*Gabbert v. Evans*, 166 S. W. 635.

To render an attorney liable for damages or defeat a recovery for his services on the ground of negligence or want of professional skill, the alleged act of negligence must work injury and loss to the client.—*Id.*

The filing by attorneys of an insufficient affidavit for an appeal did not defeat a recovery

for their services, where the client consulted and employed a new attorney, and had abundant time thereafter to have the judgment reviewed by writ of error, but, instead, compromised it.—*Id.*

§ 166 (Mo.App.) In attorneys' action for compensation, defended on the ground of negligence, it was incumbent on the client to establish the fact that the attorneys' negligence worked injury and loss to her.—*Gabbert v. Evans*, 166 S. W. 635.

§ 167 (Mo.App.) In attorneys' action for compensation, defended on the ground of negligence, where the only question was as to the sufficiency of an affidavit for appeal prepared by such attorneys, the question of negligence or want of skill was one of law.—*Gabbert v. Evans*, 166 S. W. 635.

**AUTHORITY.**

See Brokers, § 10; Principal and Agent, §§ 106-137.

**AUTOMATIC COUPLERS.**

See Master and Servant, §§ 256, 258.

**AUTOMOBILES.**

See Appeal and Error, § 1066; Carriers, §§ 235, 280; Death, § 93; Highways, § 181; Licenses, § 11; Lotteries, § 3; Master and Servant, § 301; Negligence, § 22; Railroads, § 340.

**BAGGAGE.**

See Carriers, § 405.

**BAIL.**

See Garnishment, § 29.

**II. IN CRIMINAL PROSECUTIONS.**

§ 59 (Tex.Cr.App.) A bond on appeal from the justice court conditioned upon the defendant making "her appearance before the county court" is in substantial conformity with the statutory requirement that it be conditioned to "make her personal appearance."—*Anderson v. State*, 166 S. W. 1164.

§ 65 (Tex.Cr.App.) Where the recognizance fails to specify the punishment imposed the appeal must be dismissed.—*Martoni v. State*, 166 S. W. 1169.

§ 75 (Tex.Cr.App.) Under Pen. Code 1911, art. 921, requiring a bond on appeal from a justice to be conditioned to the appearance of defendant, a bond may be forfeited if the defendant fails to appear, though her attorney did appear and announce ready for trial.—*Anderson v. State*, 166 S. W. 1164.

§ 94 (Tex.Cr.App.) On an appeal from a judgment forfeiting a bail bond, an appeal bond reciting that notice of appeal was given to the "Supreme Criminal Court of Appeals," and conditioned for payment of costs in the "Supreme Criminal Court," was insufficient to confer jurisdiction upon the Court of Criminal Appeals.—*Anderson v. State*, 166 S. W. 1164.

Where an appeal from the forfeiture of a bail bond is dismissed for a defect in the appeal bond, the appellants may still prosecute their appeal by filing a proper bond.—*Id.*

An objection that a bond on appeal from a conviction in a justice court was invalid where it was not in an amount double the fine and costs, which objection was not supported by proof, and was first made in the amended motion for a new trial, will not be considered on appeal from the forfeiture of the bond.—*Id.*

**BAILMENT.**

See Banks and Banking, §§ 147-150; Carriers, §§ 62-194; Chattel Mortgages, §§ 147, 170, 173; Depositories; Embezzlement.

**BALLOTS.**

See Elections, § 299.

**BANKRUPTCY.**

See Evidence, § 461; Judgment, § 701.

**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.****(E) Actions by or Against Trustee.**

§ 303 (Ky.) In an action by the trustee in bankruptcy of a corporation on a draft by a debtor of a firm under the same management and also adjudged a bankrupt, evidence *held* to show a settlement between the trustee in bankruptcy of the firm and the debtor, which settlement included the draft, defeating a recovery thereon.—Hiram Blow Stave Co.'s Trustee v. Paducah Cooperage Co., 166 S. W. 615.

**BANKS AND BANKING.**

See Appeal and Error, § 47; Depositaries, § 6; Interpleader, §§ 8, 9; Limitation of Actions, § 66; Receivers, § 101.

**III. FUNCTIONS AND DEALINGS.****(C) Deposits.**

§ 147 (Ky.) To the general rule that money paid under a mistake of fact may be recovered, there is an exception that money paid by the drawee of a forged check cannot be recovered.—Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville, 166 S. W. 986.

If a bank pays a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid or from any party who endorsed it subsequent to the forgery.—Id.

§ 148 (Ky.) A bank is bound to know the signature of its depositor, and, if it pays the check of a depositor, it thereby admits the genuineness of his signature, and is estopped to afterwards deny it, to the detriment of an innocent third party.—Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville, 166 S. W. 986.

§ 149 (Ky.) When a bank cashed a forged check without inquiry or question and without any identification of the holder, the indorsement also being forged, and indorsed it and sent it for payment to the drawee bank, the latter bank, upon discovering the forgery after having paid the check, could recover the amount thereof from the former, under the general rule which permits a recovery of money paid under mistake of fact.—Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville, 166 S. W. 986.

§ 150 (Tex.Civ.App.) An agreement by a bank to permit a depositor to make an overdraft on the bank was equivalent to a loan to the depositor, so as to place the depositor in the position of having a credit with the bank.—Sagerton Hardware & Furniture Co. v. Gamer Co., 166 S. W. 428.

**(D) Collections.**

§ 171 (Tex.) Where a bank to which drafts had been transmitted for collection sent them to the drawee bank, which marked them paid, but did not remit any funds, it was guilty of negligence in failing to make inquiries during a period of more than a month.—First Nat. Bank v. City Nat. Bank, 166 S. W. 689.

Where a bank notified a depositor for whom it made collections that it would not be liable for the negligence of correspondent banks, it is not liable for a loss from a correspondent's negligence, where it used due diligence in selection; that being the custom among banks.—Id.

Where a bank holding drafts for collection transmitted them to its correspondent, who

gave the sender credit for their amount, the sender was not guilty of negligence in failing to make inquiry whether the drawer had paid them, where the correspondent bank had been notified to protest the drafts in case of nonpayment.—Id.

Where a bank was directed to protest drafts in case of nonpayment, and the drawee was the only bank in the town, it was not negligence to send the drafts to the drawee, which was then in good standing; it being the local custom for the drawee itself to make the protest in case of nonpayment, and it appearing that express companies would not handle protest collections.—Id.

§ 171 (Tex.Civ.App.) Where plaintiff deposited a check with a bank for collection without any instructions as to the manner of collection, and received credit on the books of the bank therefor, *held* that the bank was an independent contractor for collecting the check, so that it was liable for any defalcation or failure to remit by the bank selected by it to make collection.—Sagerton Hardware & Furniture Co. v. Gamer Co., 166 S. W. 428.

Where a bank which received a check for collection from another bank stipulated on receiving it that all items not payable in the city, received for collection, were taken upon condition that it should not be liable for the acts or omissions of other banks or collectors, *held* that the receiving bank was not liable to the bank from which it received the check, on failure of the bank making collection to remit.—Id.

**VI. LOAN, TRUST, AND INVESTMENT COMPANIES.**

§ 315 (Mo.App.) A petition seeking recovery for interest upon deposits made by plaintiff as receiver with defendant trust company *held* to state a cause of action upon an implied contract.—Stone v. St. Louis Union Trust Co., 166 S. W. 1091.

A trust company which was surety on the bond of a receiver cannot escape liability for payment of interest, under R. S. 1909, § 1124, upon an open account kept by the receiver, because, without the receiver's knowledge, it kept the account in a ledger in which were kept indemnity deposits.—Id.

As Rev. St. 1909, § 1124, requires trust companies to allow interest upon general deposits, a trust company cannot contract to receive current deposits, subject to check, without allowing interest thereon.—Id.

**BAR.**

See Judgment, § 570.

**BASTARDS.****IV. PROPERTY.**

§ 104 (Tex.Civ.App.) Under the express provision of Rev. St. 1911, art. 2473, children of the same mother inherit from each other without regard to whether their parents were legally married.—Perkins v. Perkins, 166 S. W. 915.

**BATTERY.**

See Assault and Battery.

**BAWDYHOUSE.**

See Disorderly House.

**BENEFICIAL ASSOCIATIONS.**

See Associations; Injunction, §§ 26, 118; Insurance, §§ 695-810; Trial, § 25.

**BEQUESTS.**

See Wills.

**BEST AND SECONDARY EVIDENCE.**

See Evidence, §§ 157-178.

**BIAS.**

See Witnesses, § 373.

**BIGAMY.**

See Criminal Law, § 814; Witnesses, § 268.

§ 9 (Tex.Cr.App.) An original marriage license, with the return thereon, showing the marriage, having been filed and recorded in the county clerk's office, according to law, is admissible on a prosecution for bigamy; it having been filed with the papers in the case and a copy thereof served on defendant at the previous term.—*Edwards v. State*, 166 S. W. 517.

**BILL OF EXCEPTIONS.**

See Exceptions, Bill of.

**BILL OF EXCHANGE.**

See Bills and Notes.

**BILLS AND NOTES.**

See Assignments, § 48; Attorney and Client, §§ 129, 145; Banks and Banking, §§ 148, 149; Cancellation of Instruments, § 4; Contracts, § 5; Corporations, §§ 76, 327, 368, 513; Estoppel, § 74; Evidence, §§ 35, 417, 423, 441, 444, 445; Guaranty, § 78; Husband and Wife, §§ 235, 239; Interpleader, §§ 8, 9; Justices of the Peace, § 44; Partnership, § 173; Payment, § 42; Subrogation, § 31; Trial, §§ 25, 251, 252; Vendor and Purchaser, §§ 180, 318; Witnesses, § 161.

**I. REQUISITES AND VALIDITY.****(E) Consideration.**

§ 92 (Mo.App.) Where defendants, sureties on the note of a corporation, executed to plaintiff, a judgment creditor of the corporation, their individual notes for the amount of his judgment, so that the note upon which they were sureties could be paid, there was a good consideration for the notes.—*Montgomery v. Schwald*, 166 S. W. 831.

§ 92 (Tex.Civ.App.) Where a note is taken as collateral security for a debt then created, the debt is sufficient consideration to support the note.—*First Nat. Bank of Iowa City, Iowa, v. Humphreys*, 166 S. W. 53.

**II. CONSTRUCTION AND OPERATION.**

§ 117 (Mo.App.) Notes made and payable in Iowa are Iowa contracts.—*Davis v. McColl*, 166 S. W. 1113.

**IV. NEGOTIABILITY AND TRANSFER.****(A) Instruments Negotiable.**

§ 155 (Mo.App.) Under Rev. St. 1909, §§ 9972, 9973, notes held negotiable, though authorizing an extension of time of payment without notice to indorsers.—*Davis v. McColl*, 166 S. W. 1113.

Notes which provided that the time of payment might be extended without notice to indorsers, etc., were nonnegotiable, under the common law.—*Id.*

§ 160 (Mo.App.) Under Rev. St. 1909, §§ 9972, 9973, notes held negotiable, though providing for payment of attorney's fees and expenses of collection.—*Davis v. McColl*, 166 S. W. 1113.

Notes which provided for the payment of attorney's fees and expenses of collection upon default in payment were nonnegotiable, under the common law.—*Id.*

**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.****(A) Indorsement Before Delivery to or Transfer by Payee.**

§ 243 (Mo.App.) Under Rev. St. 1909, § 10,033, a person who placed his name on the back of a negotiable note before delivery was an indorser, where there was nothing to indicate that he intended to be bound in any other capacity.—*Phenix Nat. Bank of New York v. Hanlon*, 166 S. W. 830.

§ 245 (Tex.Civ.App.) Where a principal debtor promised his comaker of a note that he would procure the signature of K. and give him security, but failed to give any security, and K. not knowing of the agreement refused to sign except as indorser, held, that K. was a surety for the comaker and entitled to judgment over against him.—*Shepherd v. Mott*, 166 S. W. 128.

§ 256 (Mo.App.) Under Rev. St. 1909, § 10,090, indorser held released by discharge of maker on receipt of part payment, though he indorsed on the note a consent to the maker's release.—*Phenix Nat. Bank of New York v. Hanlon*, 166 S. W. 830.

**(B) Indorsement for Transfer.**

§ 296 (Ky.) An indorser of a check guarantees all prior indorsements.—*Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville*, 166 S. W. 986.

**(D) Bona Fide Purchasers.**

§ 348 (Tex.Civ.App.) A note payable to the order of B. and A., "15 after date," could not be revoked by the maker on the ground that it was a testamentary gift, if delivered and transferred within a reasonable time to a bona fide holder before demand.—*Maris v. Adams*, 166 S. W. 475.

§ 369 (Ark.) In action by bona fide purchaser on certain notes given for the price of a horse, evidence of the agreement not to sell another similar horse in the county and breach thereof to defendants' damage held inadmissible.—*Keathley v. Holland Banking Co.*, 166 S. W. 953.

§ 370 (Tex.Civ.App.) Where the payee fraudulently refused to give the full consideration for a note, the maker cannot set up that fraud against a bona fide purchaser for value without notice.—*First Nat. Bank of Iowa City, Iowa, v. Humphreys*, 166 S. W. 53.

§ 377 (Tex.Civ.App.) Where the apparent maker of a note accompanied by the payee thereof represented to a bank that the note was good, and the bank on the payee's indorsement discounted the note, such maker was estopped from defeating a recovery by the bank on the note on the ground that it was a forgery.—*Tardio v. First Nat. Bank of Bryan*, 166 S. W. 1180.

§ 378 (Tex.Civ.App.) Fraudulent alteration of the time of payment and the amount of principal of a note and extracting a material condition therefrom held to avoid the note, even in the hands of a bona fide purchaser for value without notice.—*First Nat. Bank of Iowa City, Iowa, v. Dorsey*, 166 S. W. 54.

**VII. PAYMENT AND DISCHARGE.**

§ 427 (Ky.) The deposit of the amount of a note in a bank by the maker to the payee's order without the payee's authority was not a payment thereof.—*Morgan v. Perkins*, 166 S. W. 799.

Where maker of note deposited amount in a bank which appropriated it for the debt of another, who subsequently paid a part to the payee, the amount so paid should be credited on the note.—*Id.*

**VIII. ACTIONS.**

§ 453 (Ky.) Where a note, by the direction of a husband, was made payable to his wife who

understood that it was to be paid by legal services to be rendered by the makers, she was estopped to recover on the note.—*Bennett v. Miller*, 166 S. W. 806.

§ 459 (Tex.Civ.App.) The maker of a note is the proper party defendant in an action thereon, and, if he desires that the payee shall be made a party, he must request it.—*Tardio v. First Nat. Bank of Bryan*, 166 S. W. 1180.

§ 497 (Ark.) Evidence that plaintiff purchased the note sued on for value before maturity and in the usual course of business showed prima facie that it was a bona fide purchaser for value and shifted to defendants the burden of proving the contrary.—*Keathley v. Holland Banking Co.*, 166 S. W. 963.

§ 520 (Ky.) In an action on notes given to the president of a bank for a part of the price of the bank's shares, and transferred to it, evidence held to warrant a finding that the sale was induced by the president's fraud, and that he was liable over to the maker for the latter's liability to the bank on the notes.—*Bassett v. Allison*, 166 S. W. 204.

§ 523 (Mo.App.) In an action against the indorser of a nonnegotiable note, placing the note in evidence with proof of the indorser's signature is not sufficient, but there must be proof of the actual agreement under which the indorsement was made and that it was for a sufficient consideration.—*Davis v. McColl*, 166 S. W. 1113.

§ 525 (Ark.) Evidence held to show that person suing on note was bona fide holder for value, without notice of any infirmity.—*Pinson v. Cobb*, 166 S. W. 943.

§ 525 (Ark.) Evidence that the payee of notes was vice president of the bank to which the notes were indorsed before maturity for value, that he was the brother-in-law of the cashier, and that the bank was owned by members of his family, held insufficient to show that it was not a bona fide purchaser for value.—*Keathley v. Holland Banking Co.*, 166 S. W. 953.

§ 537 (Tex.Civ.App.) Where there was nothing in any way to impeach the testimony of the cashier of a bank which held the note in suit that it was purchased before maturity for value and without notice of the payee's fraud, it was proper to direct a verdict in favor of the bank.—*First Nat. Bank of Iowa City, Iowa, v. Humphreys*, 166 S. W. 53.

## BOARDS.

See Levees, § 2; Public Lands, § 61.

## BONA FIDE PURCHASERS.

See Bills and Notes, §§ 348-378, 497, 525; Chattel Mortgages, § 153; Landlord and Tenant, § 328.

## BONDS.

See Appeal and Error, §§ 387, 389, 395; Bail; Counties, § 183; Estoppel, § 22; Execution, § 171; Executors and Administrators, §§ 523, 528, 530; Garnishment, § 29; Judgment, §§ 21, 495, 504; Mandamus, § 115; Mechanics' Liens, § 313; Municipal Corporations, § 868; Principal and Surety; Replevin, § 123; Subrogation, § 1; Trusts, §§ 380, 385.

## II. CONSTRUCTION AND OPERATION.

§ 62 (Mo.App.) Where a lease of a building to a corporation bound the corporation to pay the cost of changing a floor not in excess of \$2,500, and thereafter individuals executed a bond, binding themselves to pay for the cost of the work not in excess of \$2,500, in consideration of the lessor releasing a lien, the individuals were liable on an original undertaking, and liable to the lessor incurring expenses to that amount in

changing only part of the floor.—*Minor v. Woodward*, 166 S. W. 855.

## V. ACTIONS.

§ 117 (Mo.App.) Where a lease of a building to a corporation bound the lessee to pay the cost of changing a floor not exceeding a specified sum, and thereafter individuals executed a bond conditioned on the performance of the obligations imposed by the lease, the liability on the bond was not dependent on the lessor changing the floor.—*Minor v. Woodward*, 166 S. W. 855.

## BOUNDARIES.

See Adverse Possession, § 100; Fences.

### I. DESCRIPTION.

§ 3 (Ky.) Compass courses must yield to fixed objects, and this is especially true when a line controlled by fixed objects was agreed to and has been acquiesced in for over 30 years.—*Campbell v. Thompson*, 166 S. W. 206.

§ 3 (Tex.Civ.App.) Where a description of a survey called for well-established surrounding surveys on all sides, such calls controlled the courses and distances, and the mere fact that by running courses and distances there was an excess was immaterial.—*Baker v. Heney*, 166 S. W. 19.

In locating land, recourse will be had: First, to natural objects; second, to artificial objects; and, third, to courses and distances.—*Id.*

§ 3 (Tex.Civ.App.) Where there is a conflict between calls for course and distance in grants of adjacent lands and calls therein for the bank of an old bed of a river as the boundary between the grants, the latter must prevail.—*Stevens v. Crosby*, 166 S. W. 62.

§ 6 (Tex.Civ.App.) In determining the boundary of a survey, the calls may be reversed only when the survey was actually made.—*Baker v. Heney*, 166 S. W. 19.

§ 8 (Tex.Civ.App.) In fixing a disputed boundary between a patent and a railroad survey, which called for another survey, which in turn called for another, etc., where only two of the original corners of such surveys could be definitely located, court held to have properly constructed the survey from one of such corners, rather than from the other, which was more remote.—*Clarke v. Klein*, 166 S. W. 1179.

### II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 32 (Tex.Civ.App.) Where, in trespass to try title, the controlling issue was the location of an old bed of a river, with reference to the land in controversy, and not with reference to calls for course and distance, failure of plaintiff to prove that the course of the old bed was along the calls for course and distance in his pleadings was not a variance between the pleadings and the proof.—*Stevens v. Crosby*, 166 S. W. 62.

The fact that plaintiff, by an amended petition, demanded less land than he was lawfully entitled to recover did not prevent him from proving the true boundaries of his grant, as determined by the location of the bed.—*Id.*

§ 35 (Mo.App.) A witness may base his testimony on measurements he has made on the ground and along a boundary between adjacent parcels of land, where the boundary was marked by crosses by surveyors.—*Fezler v. Gibson*, 166 S. W. 1096.

§ 37 (Mo.App.) In an action for damages for trespass, where the boundary between the respective tracts of plaintiff and defendant was in dispute, evidence held sufficient to support a judgment for plaintiff.—*Watson v. Matson*, 166 S. W. 828.

§ 37 (Tex.Civ.App.) In trespass to try title involving the location of a boundary between adjacent grants, evidence *held* to sustain a verdict fixing the boundary.—*Stevens v. Crosby*, 166 S. W. 62.

§ 54 (Mo.App.) Surveys by the county surveyor are *prima facie* correct, and, when they show that a landowner's boundary begins at a given point, it cannot be declared as a matter of law in an action as to the boundary that there is nothing in the landowner's chain of title authorizing commencement at that point.—*Watson v. Matson*, 166 S. W. 828.

### BREACH.

See Contracts, §§ 275-353; Covenants, §§ 96, 130; Sales, §§ 150, 168; Vendor and Purchaser, §§ 176, 180.

### BRIBERY.

See Elections, § 230.

### BRIDGES.

See Navigable Waters, § 20.

### BRIEFS.

See Appeal and Error, §§ 628, 757-778, 792, 794.

### BROKERS.

See Appeal and Error, § 1051; Contracts, § 47; Costs, § 42; Frauds, Statute of, § 129; Insurance, §§ 87-109; Pleading, § 165; Principal and Agent, §§ 34, 189; Trial, §§ 194, 252, 260.

## II. EMPLOYMENT AND AUTHORITY.

§ 10 (Ark.) Subsequent contracts by which plaintiff was given the exclusive agency to sell realty on commissions *held* to supersede a prior contract between plaintiff and the owner, by which plaintiff was authorized to sell the land on commission at any time until he was "notified in writing to the contrary," so as to revoke plaintiff's agency under the contract last referred to.—*Murray v. Miller*, 166 S. W. 536.

### IV. COMPENSATION AND LIEN.

§ 40 (Tex.Civ.App.) Where the owner told a broker "to look around and find a purchaser," and the owner sold to a purchaser, with whom she came in touch through the broker, knowing he had shown the land to such purchaser, the law implies a promise to pay the broker's commission.—*Wilson v. Sears*, 166 S. W. 38.

§ 48 (Mo.App.) Where an owner employing an agent to procure a purchaser had an opportunity to procure a binding contract with a purchaser, the agent was entitled to compensation.—*Hammack v. Friend*, 166 S. W. 647.

§ 50 (Ark.) If the broker fails to find a purchaser for land within the time limited by his contract with the owner, he is not entitled to a commission, though a sale is subsequently made to a purchaser who negotiated with the broker within such time, provided the owner acted in good faith, and did not interfere with the agent's effort to make the sale within a specific time.—*Murray v. Miller*, 166 S. W. 536.

§ 52 (Mo.) Where a broker employed to procure a purchaser procures a purchaser who enters into a written contract with the owner to purchase, the owner becomes at once liable to the broker, in the absence of any special provision to the contrary.—*Knisely v. Leathe*, 166 S. W. 257.

Where a broker procured a purchaser, who entered into a contract in writing with the owner, which provided for a conveyance of the property for a specified consideration, on the owner furnishing an abstract of title showing good title, the broker had earned his commissions, in the absence of some agreement in the contract of employment to the contrary.—*Id.*

§ 53 (Tex.Civ.App.) Where a broker was the procuring cause of a sale of real estate, it is immaterial to his right to a commission that he did not personally conduct the negotiations, was not present when the bargain was closed, or that the principal at the time did not know that the purchaser was found by the broker.—*McKinney v. Thedford*, 166 S. W. 443.

§ 54 (Mo.App.) A broker who procures a purchaser, ready, willing, and able to purchase on the owner's terms, has earned his commission.—*Hammack v. Friend*, 166 S. W. 647.

§ 55 (Ark.) If the owner, during the life of a contract with a broker authorizing the sale of realty, sold the property to a purchaser procured through the broker's efforts, the broker would be entitled to commission, but, if the sale was made through another broker, whose efforts had equally contributed to procuring the purchaser, the agent who finally secured the purchaser would be entitled to the commission, provided the owner did not interfere with the efforts of either broker.—*Murray v. Miller*, 166 S. W. 536.

The owner of land, who authorized several agents to secure a purchaser therefor, must exercise strict neutrality between them.—*Id.*

The fact that plaintiff first began negotiations with the purchasers of land did not give him the right to continue the negotiations exclusive of other agents who were also authorized to procure a purchaser.—*Id.*

§ 61 (Ark.) Where an owner of land employs a broker to sell it, there is an implied obligation on his part, not only to furnish a good, but a marketable title, and, if the broker produces a purchaser ready, willing, and able to buy, he is entitled to his commission, though the sale is prevented by defect in the title.—*Reeder v. Epps*, 166 S. W. 747.

§ 63 (Ark.) A broker, employed to sell or find a purchaser for land, earns his commission when he produces a purchaser ready, willing, and able to buy upon the terms named, though no binding contract is made through some fault of his principal.—*Reeder v. Epps*, 166 S. W. 747.

§ 63 (Mo.) A broker employed to procure a purchaser of real estate for a specified compensation, payable out of the price in installments, *held* entitled to compensation, where he procured a purchaser who contracted with the owner to purchase, and who was ready and willing to perform, though the owner refused performance.—*Knisely v. Leathe*, 166 S. W. 257.

§ 64 (Ark.) Administrator's deed to land ordered sold by the probate court for payment of debts carries complete title, and so a broker, employed by one who traced his title through such administrator's deed, is not entitled to compensation for procuring a purchaser who would not buy unless the owner secured a quitclaim deed from the heir to whom the land had been allotted before sale.—*Reeder v. Epps*, 166 S. W. 747.

### V. ACTIONS FOR COMPENSATION.

§ 84 (Ark.) A broker, engaged to obtain a purchaser, who claims a commission, though the sale was prevented because of an alleged defect of title, has the burden of proving that his principal failed to discharge an obligation resting upon him with reference to making the title good.—*Reeder v. Epps*, 166 S. W. 747.

§ 86 (Tex.Civ.App.) Evidence, in an action for commissions for effecting an exchange of land, *held* not to show conclusively that the purchaser bought defendant's land solely upon his own information after negotiating with defendant, and was not influenced by plaintiff's efforts to bring about the sale.—*McKinney v. Thedford*, 166 S. W. 443.

Evidence, in an action by brokers for commissions for effecting an exchange of real estate, *held* sufficient to support a verdict for the plaintiffs.—*Id.*



§ 88 (Tex.Civ.App.) Evidence, in an action for commissions for effecting an exchange of land, *held* sufficient to go to the jury on the issue of plaintiffs' authority from defendant to make the exchange.—*McKinney v. Thedford*, 166 S. W. 443.

An instruction as to a broker's right to a commission, where he did not personally conduct the negotiations, was not present when the bargain was closed, and where his principal did not at the time know that he found the purchaser, was not inapplicable to the facts, where plaintiff did not personally negotiate the exchange and was not present when it was made.—*Id.*

An instruction that plaintiffs could recover if they procured a buyer themselves or through their agent R. was not objectionable on the ground that R. was the buyer's agent and that an agent cannot delegate his authority without his principal's consent and cannot represent both parties, where the evidence showed that R. represented the buyer only, and the brokers on both sides represented their respective principals in the negotiations.—*Id.*

An instruction that plaintiffs, suing for commission, were not partners of R., who represented the other party, and that they may recover, though R. got all of the commission from the other party, was not objectionable on the ground that an agent who receives a secret commission from the other party cannot recover, where the evidence showed that the brokers on both sides represented their respective principals only.—*Id.*

§ 88 (Tex.Civ.App.) In an action for the half of a real estate brokers' commission which he had agreed to waive, induced by defendant's false statement, the questions whether the false statement was a fraudulent misrepresentation, and whether the broker relied upon it, are immaterial, the action being for an amount due under contract.—*Spires v. McElroy*, 166 S. W. 457.

## BUILDING AND LOAN ASSOCIATIONS.

See Associations.

## BUILDING CONTRACTS.

See Contracts, §§ 176, 300, 345; Mechanics' Liens, §§ 312, 313.

## CALENDARS.

See Time.

## CANCELLATION OF INSTRUMENTS.

See Adverse Possession, § 40; Deeds, §§ 69, 70; Dower, § 49; Insurance, §§ 228, 233; Landlord and Tenant, § 193; Limitation of Actions, §§ 99, 103; Partnership, § 122½; Public Lands, § 61; Reformation of Instruments; Vendor and Purchaser, § 44.

## I. RIGHT OF ACTION AND DEFENSES.

§ 4 (Ky.) Purchaser from first purchaser, joined as defendant in an action to determine the order of liens against the land, on defect in his vendor's title, *held* entitled to a cancellation of his purchase-money notes.—*Hicks' Committee v. Smith*, 166 S. W. 248.

## II. PROCEEDINGS AND RELIEF.

§ 37 (Ark.) A complaint in a suit to rescind a party wall contract, which merely alleges that defendant induced plaintiff to execute the contract by misrepresentation as to the value of the wall and the nature of the contract, states no cause of action.—*Evans v. Pettus*, 166 S. W. 955.

§ 50 (Tex.Civ.App.) Whether one complaining of fraud inducing a contract repudiated the contract within a reasonable time after discovery of the fraud, so as to justify rescission, is frequently for the jury.—*Luckenbach v. Thomas*, 166 S. W. 90.

## CANVASS OF VOTES.

See Elections, § 255.

## CARNAL KNOWLEDGE.

See Rape.

## CARRIERS.

See Action, § 27; Appeal and Error, §§ 1050, 1067; Commerce, §§ 27, 69; Estoppel, § 58; Evidence, §§ 220, 235, 429, 491, 507, 539½; Intoxicating Liquors, §§ 147, 148; Limitation of Actions, § 21; Master and Servant, §§ 228, 287; Money Paid, § 9; Pleading, § 8; Trial, §§ 252, 253, 295.

## II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 62 (Tex.Civ.App.) Where the agent of a carrier verbally contracted with a shipper, the carrier is liable on such contract, though a written bill of lading was subsequently drawn up and accepted, unless the shipper at the time of making the verbal contract knew he would be required to sign the written contract.—*St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson*, 166 S. W. 706.

(D) Transportation and Delivery by Carrier.

§ 94 (Tex.Civ.App.) In an action for converting a car load of cotton seed, plaintiff was entitled to recover, where he showed a delivery to the railroad, unless it appeared that the shipment had been delivered to the consignee.—*Elias v. Missouri, K. & T. Ry. Co. of Texas*, 166 S. W. 417.

Evidence that cotton ginner had purchased 65,000 pounds of cotton seed in excess of that shipped out and sold, excluding a shipment for the conversion of which he was suing, *held* admissible to support his claim that such shipment of 63,478 pounds was delivered to the carrier.—*Id.*

(F) Loss of or Injury to Goods.

§ 134 (Mo.App.) In an action against a railroad company for injury to goods, evidence *held* to sustain a finding that the goods were damaged while in the possession and under the control of defendant.—*Connolly v. Illinois Cent. R. Co.*, 166 S. W. 1077.

§ 134 (Tex.Civ.App.) In an action against a railway company for injury to a shipment of cabbages on account of the improper icing of the car, evidence *held* to sustain a verdict against the carrier.—*Galveston, H. & S. A. Ry. Co. v. Foetche*, 166 S. W. 414.

(I) Connecting Carriers.

§ 177 (Tex.Civ.App.) The object of Rev. St. 1911, art. 1830, subd. 25, is to relieve a shipper of the burden of proving the damage accruing on each line, and the initial carrier is liable to him for all the damage, and an apportionment is necessary only as between the initial and connecting carriers.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

(J) Charges and Liens.

§ 194 (Tex.Civ.App.) One who is not the consignor or consignee of goods, and who does not receive the goods from the carrier at the point of destination, but who merely indorses the bill of lading, is not liable for the freight.—*St. Lou-*

is *Southwestern Ry. Co. v. Browne Grain Co.*, 166 S. W. 40.

Where a consignee in a bill of lading stipulating that the owner or consignee should pay the freight assigned the bill of lading before delivery, and the carrier made delivery to the assignee, who purchased the goods from the consignee, the consignee was not liable for the freight.—Id.

### III. CARRIAGE OF LIVE STOCK.

§ 213 (Tex.Civ.App.) An unreasonable delay in the transportation of live stock is not justified by the maintenance by the carrier of a schedule resulting in such delay.—*St. Louis, S. F. & T. Ry. Co. v. Armstrong*, 166 S. W. 366.

§ 218 (Tex.Civ.App.) A statement in a contract for the shipment of live stock that the condition of the cars and bedding was satisfactory did not relieve the carrier from liability for failure to properly bed the cars; a carrier not being permitted to limit its common-law liability.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

§ 228 (Tex.Civ.App.) Where, in an action for delay in the transportation of cattle for sale at stock markets, market reports covering the time involved were received in evidence without objection, and the shipper testified to the classes and condition of the cattle in the several shipments, and gave market prices at several periods, stating that the shipments would be included in the range of such prices, a prima facie case of market values was shown.—*St. Louis, S. F. & T. Ry. Co. v. Armstrong*, 166 S. W. 366.

§ 228 (Tex.Civ.App.) Where a shipper of live stock, required by the contract to accompany it, was not afforded an opportunity to do so, the rule that the burden of proof rested on him to show which of the connecting carriers inflicted the injury to the stock complained of did not apply.—*Texas & P. Ry. Co. v. Tomlinson*, 166 S. W. 446.

Where a carrier of live stock contracted to transport it to designated stockyards, but proceeded to take the stock by a belt line railway, the belt line was but an agency of the carrier, and the shipper, suing for injuries to stock, did not have the burden of proving which carrier inflicted the injuries.—Id.

§ 228 (Tex.Civ.App.) Where carriers claimed damages to shipment of cattle were due to plaintiff's negligence in unloading and dipping them under quarantine regulations, evidence that the same treatment was accorded other cattle which were not injured held properly excluded, in the absence of a showing that they were in the same physical condition.—*Good v. Texas & P. Ry. Co.*, 166 S. W. 670.

§ 230 (Tex.Civ.App.) In action for injuries to shipment of cattle accompanied by plaintiff, instruction that the damages need not become manifest on the line of the railway company causing the damages, it being sufficient if the damages were caused by negligence of the railway company, held properly refused.—*Good v. Texas & P. Ry. Co.*, 166 S. W. 670.

### IV. CARRIAGE OF PASSENGERS.

#### (A) Relation Between Carrier and Passenger.

§ 235 (Ark.) Those of whom one hires an automobile with a chauffeur to drive him and his guests where he directs become a private carrier for hire.—*Forbes v. Reinman & Wolfort*, 166 S. W. 563.

§ 247 (Mo.App.) One who, at an elevated station where the street railway company maintained a sign warning persons not to board moving cars, attempted to board a car in motion, the gates of which were partly shut, is not a passenger.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 247 (Tex.Civ.App.) By the common law the relation of carrier and passenger does not

terminate until after the passenger has alighted and has a reasonable time and opportunity to leave the depot, the question of what is a reasonable time and opportunity being one of fact, dependent on the circumstances of the particular case.—*Missouri, K. & T. Ry. Co. of Texas v. Cook*, 166 S. W. 453.

Rev. St. 1911, art. 6591, requiring railroads to keep their passenger depots open, lighted, and heated for one hour after the departure of passenger trains fixes the reasonable time within which a passenger may remain in the station, without losing his right to protection as such, at not less than one hour.—Id.

#### (B) Fares, Tickets, and Special Contracts.

§ 252 (Tex.Civ.App.) Where a carrier authorized its agent to place on sale two kinds of return trip tickets containing different date limits, and established rates for each class of tickets, the carrier could not discriminate against a passenger by refusing to sell a ticket of the class demanded.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

A ticket agent authorized to sell two kinds of return trip tickets, with different date limits for the return trip, must issue a ticket for the time limit demanded by a passenger, and, where he inserts, without the fault of the passenger, an erroneous date limit for return, the passenger may recover the damages sustained.—Id.

§ 258 (Tex.Civ.App.) Where a passenger ticket purports to be a contract ticket offered for a reduced rate, the passenger is bound by its lawful stipulations.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

#### (C) Performance of Contract of Transportation.

§ 277 (Tex.Civ.App.) Where a passenger demanding a return trip ticket good until October 31st received a ticket good only until September 15th, so that he was obliged to pay a specified sum for the fare home, he was entitled to recover the amount of the fare so paid, minus the sum which he failed to pay for the return trip ticket demanded.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

#### (D) Personal Injuries.

§ 280 (Ark.) Those of whom one hires an automobile with a chauffeur to drive him and his guests where he directs being a private carrier for hire, are required to use ordinary care and diligence in the performance of the duty imposed on them by the contract.—*Forbes v. Reinman & Wolfort*, 166 S. W. 563.

§ 282 (Mo.App.) One who boards a moving street car contrary to the street railway company's express rules is not a passenger, and, though he be in a position of danger, the street railway company's servants are bound only to use ordinary care to avoid injuring him after discovering his peril.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 287 (Mo.App.) For a motorman of a street car to suddenly accelerate its speed after leaving an elevated station is not negligence as to one who attempted to board the car while in motion and while the gates were being closed, unless the motorman knew, or had reason to believe, that a passenger had attempted to board the car.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 304 (Mo.App.) One waiting at defendant's station to meet a passenger was there by implied invitation, and defendant owed him the duty of exercising ordinary care to maintain its station buildings and platforms in reasonably safe condition for such use.—*Stark v. Chicago, R. I. & P. Ry. Co.*, 166 S. W. 850.

A railroad company was liable to a boy who, while awaiting the arrival of his father on a train, leaned against a loaded truck from which the support at one end had been broken off, and was injured by its coming down on his leg, as

it was bound to anticipate such actions, and the premises were not safe when necessary to guard against such traps.—*Id.*

§ 305 (Mo.App.) A street railroad's negligence in suddenly starting a car, concurring with the crowding of other passengers as the proximate cause of plaintiff's injury, made it liable as a joint tort-feasor.—*Stoltze v. United Rys. Co. of St. Louis*, 166 S. W. 1102.

§ 316 (Mo.App.) The burden was on the plaintiff, in an action for injuries received by him from leaning against a defective truck on defendant's station platform, where he was waiting to meet a passenger, to show that his injury was caused by defendant's negligence.—*Stark v. Chicago, R. I. & P. Ry. Co.*, 166 S. W. 850.

§ 317 (Tex.Civ.App.) In an action for injuries to a street car passenger falling from the car running on a curve, testimony of plaintiff that she never at any time got off the car at the place of the accident held admissible to contradict the testimony of the conductor that plaintiff deliberately walked to the car door and stepped off and fell.—*Dallas Consol. Electric St. Ry. Co. v. Stone*, 166 S. W. 708.

§ 318 (Mo.App.) Evidence, in an action by one who came to a railroad station to meet a passenger and was injured by leaning against a defective truck, held to support a verdict for plaintiff.—*Stark v. Chicago, R. I. & P. Ry. Co.*, 166 S. W. 850.

§ 318 (Mo.App.) Evidence in an action against receivers of a railroad company for assault by an employe upon a passenger held to sustain a finding for plaintiff.—*Smith v. Delano*, 166 S. W. 862.

§ 318 (Mo.App.) Evidence held insufficient to show that the motorman knew of or could have anticipated the presence of plaintiff's husband, attempting to board the car while it was in motion; hence the motorman was not guilty of negligence in suddenly accelerating the car's speed.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 318 (Tex.Civ.App.) Evidence, in an action for injury to one about to take passage on defendant's car at a flag station at a highway crossing, held to authorize a finding of negligence.—*Texas Traction Co. v. Sherron*, 166 S. W. 897.

And that such negligence was the proximate cause of the injury.—*Id.*

§ 319 (Mo.App.) Facts in a railroad passenger's action for personal injuries caused by an assault by the porter held not to show that an award of \$500 actual damages and \$500 punitive damages was excessive.—*Smith v. Delano*, 166 S. W. 862.

§ 320 (Tex.Civ.App.) In an action for injuries to plaintiff's wife, her testimony that she received serious and permanent internal injuries by being thrown against the arm of a seat of the coach in which she was riding was not physically impossible, so as to require a directed verdict for the defendant.—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 320 (Tex.Civ.App.) Whether a street railway company was negligent in permitting the exit door of a car to remain open so as to permit a passenger to fall from the car running on a curve held for the jury.—*Dallas Consol. Electric St. Ry. Co. v. Stone*, 166 S. W. 708.

§ 321 (Mo.App.) In an action for personal injuries from being thrown from a car by its sudden start, or by being pushed off by other passengers, instructions submitting the matter of plaintiff being pushed off by other passengers held not without support in the evidence.—*Stoltze v. United Rys. Co. of St. Louis*, 166 S. W. 1102.

In an action for personal injuries, where there was evidence that plaintiff was thrown from the

car by a sudden start, or was pushed off by other passengers, an instruction excluding defendant's liability for its negligence in suddenly starting the car held properly refused.—*Id.*

§ 321 (Tex.Civ.App.) In an action for injuries to plaintiff's wife caused by an unusual jar to the coach in which she was a passenger, where there was no evidence that she had warning that a coupling was about to be made between coaches, an instruction which predicated a verdict for the plaintiff upon a finding, among other things, that the collision was without notice or warning was not erroneous.—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 321 (Tex.Civ.App.) In an action for injuries caused by the failure of a railroad company to keep its station warmed and lighted for one hour after the departure of a passenger train, as required by Rev. St. 1911, art. 6591, a charge held not erroneous as assuming that the plaintiff was a passenger.—*Missouri, K. & T. Ry. Co. of Texas v. Cook*, 166 S. W. 453.

In an action for the failure of a railroad company to keep its depot warmed after the departure of a passenger train, as required by Rev. St. 1911, art. 6591, a special charge as to the duty of the company held misleading, as possibly denying the duty of the company to keep its depot warm.—*Id.*

§ 321 (Tex.Civ.App.) Where plaintiff testified that he was injured when the train, after stopping for passengers to alight, jerked in some way, throwing him against a seat, the use of the terms "suddenly moved, lurched, and jerked" in a charge on negligence, which were also used in the petition, held not erroneous.—*St. Louis Southwestern Ry. Co. of Texas v. Faris*, 166 S. W. 463.

§ 321 (Tex.Civ.App.) In an action for injuries to a street car passenger thrown from the car while running on a curve, a charge held to properly submit the issue of the negligence of the conductor in permitting the exit door to remain open.—*Dallas Consol. Electric St. Ry. Co. v. Stone*, 166 S. W. 708.

#### (E) Contributory Negligence of Person Injured.

§ 328 (Mo.App.) One who attempted at an elevated station to board a moving car, the gates of which were being drawn shut, held guilty of contributory negligence as a matter of law, where the step of the car was within a few feet of the guard rail at the end of the platform, at which point the company maintained a sign warning the public against boarding moving cars.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 333 (Tex.Civ.App.) One who remains in a railroad station for the full hour, during which Rev. St. 1911, art. 6591, requires it to be warmed and lighted, after he has reasonable time and opportunity to leave, and thereby submits himself to danger or discomfort, cannot recover for the consequences because his own negligence contributed to the result.—*Missouri, K. & T. Ry. Co. of Texas v. Cook*, 166 S. W. 453.

§ 334 (Mo.App.) The public are charged with notice of conspicuous warnings maintained by a street railway company at an elevated station without proof of actual knowledge.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 339 (Mo.App.) Where plaintiff's intestate negligently boarded a moving car which was just leaving an elevated station, and before he could get into a position of safety on the steps the jerk of an acceleration of speed threw him off and he was killed, his own contributory negligence was the proximate cause of the injury.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 346 (Tex.Civ.App.) In an action for injuries caused by the failure of a railroad company to keep its depot lighted and warmed for

one hour after the departure of a passenger train, as required by Rev. St. 1911, art. 6591, evidence *held* sufficient to warrant the jury in finding that the plaintiff was not negligent in remaining in the depot during the full hour.—*Missouri, K. & T. Ry. Co. of Texas v. Cook*, 166 S. W. 453.

§ 346 (Tex.Civ.App.) Evidence in an action for injury to one about to take passage at a railroad's flag station, at a highway crossing, *held* to authorize a finding of freedom from contributory negligence.—*Texas Traction Co. v. Sherron*, 166 S. W. 897.

#### (G) Passengers' Effects.

§ 405 (Mo.App.) The plaintiff, in an action for loss of baggage checked on a railroad, by declaring upon the contract for the carriage of herself and baggage, affirmed its validity, and was bound by a limitation of liability in her ticket, which she claimed to have signed without knowing its contents and because of misrepresentation.—*Meade v. Missouri, K. & T. Ry. Co.*, 166 S. W. 1116.

### CARRYING WEAPONS.

See Weapons.

### CAVEAT EMPTOR.

See Execution, § 275.

### CERTIFICATE.

See Appeal and Error, § 1127; Corporations, § 99; Physicians and Surgeons, § 2.

### CHALLENGE.

See Jury, § 103.

### CHANCERY.

See Equity.

### CHANGE OF VENUE.

See Venue, §§ 46, 75.

### CHARACTER.

See Criminal Law, § 369; Witnesses, §§ 337-352.

### CHARGE.

See Carriers, § 194.

To jury, see Criminal Law, §§ 14, 761-841, 1091, 1173; Trial, §§ 189, 191-296.

### CHATTEL MORTGAGES.

#### I. REQUISITES AND VALIDITY.

##### (B) Form and Contents of Instruments.

§ 48 (Tex.Civ.App.) A chattel mortgage of cotton described as 10 bales of crop of 1910 then being picked and to be ginned in F. county, owned by the mortgagor free from all liens, *held* not void for uncertainty, since it could be identified by showing what cotton the mortgagor was having picked when it was executed.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

§ 49 (Tex.Civ.App.) A chattel mortgage, mentioning seven horses and mules but not describing them except by color, age, and height, and not stating that the mortgagor was the owner of the property or where it was situated, *held* void for uncertainty as to two of the mortgagor's mules.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

#### II. FILING, RECORDING, AND REGISTRATION.

##### (A) Original.

§ 87 (Tex.Civ.App.) Rev. St. 1911, art. 5655, requiring chattel mortgages to be filed in the

office of the county clerk of the county where the property "shall then be situated," *held* to mean where it was situated when the mortgage was executed, and not when it was recorded.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

#### III. CONSTRUCTION AND OPERATION.

##### (B) Parties and Debts or Liabilities Secured.

§ 114 (Tex.Civ.App.) A chattel mortgage will secure a future debt of the mortgagor if that be the intention of the parties.—*Poulter v. Weatherford Hardware Co.*, 166 S. W. 364.

A chattel mortgage executed by a farmer to a hardware company to secure certain notes and "for all other amounts I may now be due or hereafter become due," as well as for the purpose of securing a line of credit from the mortgagee, *held* not to cover a judgment against mortgagor in favor of a third person which mortgagee purchased.—*Id.*

##### (C) Property Mortgaged, and Estates and Interests of Parties Therein.

§ 117 (Tex.Civ.App.) A chattel mortgage of 10 bales of cotton of the crop of 1910 then being picked and to be ginned in a certain county would not convey any specific bales, but in equity would be sufficient to convey an interest in the cotton described in the proportion of 10 bales to the entire amount then being picked by the mortgagor.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

##### (D) Lien and Priority.

§ 138 (Tex.Civ.App.) Where a tenant on October 7th mortgaged 10 bales of cotton of the crop of 1910 then being picked in a certain county, a showing by the landlord that he purchased 12 bales of the tenant after October 13th *held* not to support a judgment in favor of the mortgagee against the landlord for the excess over the landlord's lien.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

§ 147 (Tex.Civ.App.) Party to whom mortgaged pianos were delivered, without mortgagee's consent, for repairs and tuning *held* not entitled to retain possession until charges were paid as against the mortgagee, where it knew of the mortgage.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 29.

§ 150 (Tex.Civ.App.) Under Rev. St. 1911, art. 5655, declaring chattel mortgages without immediate delivery void as against creditors and subsequent mortgagees in good faith unless forthwith filed for record, *held* that a mortgage filed seven days after execution was not filed "forthwith," and was void as against mortgages subsequent to its filing.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

§ 153 (Tex.Civ.App.) Under Rev. St. 1911, art. 5655, declaring every chattel mortgage without immediate delivery absolutely void against subsequent mortgagees in good faith unless filed in the proper county office, *held* that "good faith" was synonymous with conscience and embraced those obligations imposed upon one dealing with property by the circumstances surrounding it at the time.—*Burlington State Bank v. Marlin Nat. Bank*, 166 S. W. 499.

#### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 161 (Mo.App.) Where a chattel mortgage authorized the mortgagee to take possession on default, and the mortgagee acquired possession peaceably to repair the chattel when the last installment of the price had been overdue for more than a year, it could refuse to return the chattel until the balance was paid.—*Thompson v. White Sewing Mach. Co.*, 166 S. W. 895.

§ 161 (Tex.Civ.App.) Chattel mortgage, authorizing mortgagee to take possession upon de-

fault or if he felt unsafe, *held* valid and to entitle him to take possession without the mortgagor's consent, if he could do so peaceably.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 20.

§ 161 (Tex.Civ.App.) A chattel mortgage which provides that on default in the payment of the notes at maturity, or in case the mortgagor shall violate any of the conditions of the mortgage, etc., the mortgagee shall have the right to immediate possession, gives the mortgagee the right to immediate possession for non-payment of the notes at maturity.—*State Exchange Bank v. Smith*, 166 S. W. 666.

§ 170 (Tex.Civ.App.) Party who acquired possession of mortgaged pianos without the consent of either the mortgagor or mortgagee *held* to have converted them by refusing to deliver them to the mortgagee, unless its charges for storage, tuning, and repairs were paid, and unless the mortgagor consented to such delivery.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 29.

§ 173 (Tex.Civ.App.) In action for conversion against party claiming right to hold mortgaged pianos until its charges for storage, tuning, and repairs were paid, evidence *held* insufficient to show that it was given possession by the mortgagor.—*Jesse French Piano & Organ Co. v. Elliott*, 166 S. W. 29.

§ 173 (Tex.Civ.App.) A chattel mortgagee out of possession, but entitled to possession at the time of the levy of an attachment in an action by a third person against the mortgagor, may maintain the statutory action for the trial of the right of property.—*State Exchange Bank v. Smith*, 166 S. W. 666.

A chattel mortgagee out of possession but entitled to possession at the time of the levy of an attachment of the mortgaged chattels in an action by a third person against the mortgagor may maintain, though a nonresident, the statutory action for the trial of the right of the property.—*Id.*

A chattel mortgagee failing to take immediate possession of the chattels on the nonpayment of the debt at maturity and accepting partial payments or written consent, on a compromise with the mortgagor of the indebtedness after the levy of the attachment, to take possession of the property in controversy when released from the levy, is not thereby estopped from maintaining the statutory action for the trial of the right of property.—*Id.*

## VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 240 (Mo.App.) Where a chattel mortgagor and mortgagee agreed to immediate sale, the mortgagee to look to the proceeds for immediate payment, and a sale was made by a third person by agreement who obtained the proceeds, the mortgage lien was terminated, and the mortgagee could alone look to the proceeds.—*Love v. Scott*, 166 S. W. 859.

## IX. FORECLOSURE.

§ 252 (Mo.App.) Where a chattel mortgagee obtained peaceable possession of the mortgaged property, its refusal to redeliver to the mortgagor unless the balance of the debt which was then overdue was paid was a sufficient demand.—*Thompson v. White Sewing Mach. Co.*, 166 S. W. 895.

## CHEAT.

See Fraud.

## CHECKS.

See Bills and Notes.

## CHILDREN.

See Bastards; Guardian and Ward; Infants.

## CHOSE IN ACTION.

See Assignments.

## CITIZENS.

See Constitutional Law, §§ 205-208.

## CIVIL RIGHTS.

See Constitutional Law, §§ 205-208.

## CLAIM AND DELIVERY.

See Replevin.

## CLAIMS.

See States, § 171.

## CLASS LEGISLATION.

See Constitutional Law, §§ 205-208.

## CLUBS.

See Associations.

## COLLATERAL AGREEMENT.

See Frauds, Statute of, §§ 17, 23.

## COLLATERAL ATTACK.

See Judgment, §§ 495, 504.

## COLLATERAL UNDERTAKINGS.

See Guaranty.

## COLLECTION.

See Banks and Banking, § 171.

## COMMERCE.

See Carriers; Master and Servant, §§ 256-264; Telegraphs and Telephones, § 33.

## II. SUBJECTS OF REGULATION.

§ 27 (Tex.Civ.App.) Terminal railway company *held* engaged in interstate commerce, though it did not participate in through rates, was not a party to the bills of lading, and though its charges did not come from the shipper, but were made directly against the companies using its terminal facilities on a wheelage basis.—*State v. Houston Belt & Terminal Ry. Co.*, 166 S. W. 83.

## III. MEANS AND METHODS OF REGULATION.

§ 69 (Tex.Civ.App.) Rev. St. 1911, art. 7384, imposing a tax on terminal railway companies equal to 1 per cent. of their gross receipts, *held* to impose an occupation tax, and not invalid as imposing a burden on interstate commerce, as applied to a terminal company doing domestic and interstate business.—*State v. Houston Belt & Terminal Ry. Co.*, 166 S. W. 83.

The state has power to levy a valid occupation tax upon the domestic business of a company owning and operating a terminal railway within the state and transacting both interstate and domestic business.—*Id.*

## COMMERCIAL PAPER.

See Bills and Notes.

## COMMISSION.

See Depositions.

## COMMISSIONS.

See Brokers, §§ 40-64.

## COMMON CARRIERS.

See Carriers.

**COMMON COUNTS.**

See Assumpsit, Action of.

**COMMON LAW.**

See Adoption, § 1; Bills and Notes, §§ 155, 160; Carriers, § 247; Costs, § 3; Death, § 11; Evidence, § 80; Infants, § 16.

**COMMON SCHOOLS.**

See Schools and School Districts.

**COMPENSATION.**

See Attorney and Client, §§ 86, 145-167; Brokers, §§ 40-64; Eminent Domain, §§ 101-164; Master and Servant, §§ 59-82.

**COMPETENCY.**

See Criminal Law, § 396; Evidence, §§ 536-546; Witnesses, §§ 161-208, 390.

**COMPETITION.**

See Trade-Marks and Trade-Names, §§ 3-99.

**COMPLAINT.**

See Indictment and Information.

**COMPOSITIONS WITH CREDITORS.**

See Compromise and Settlement.

**COMPROMISE AND SETTLEMENT.**

See Release.

§ 6 (Tex.Civ.App.) Where plaintiff and defendant, two claimants for a tract of land, entered into a compromise agreement, whereby they agreed to sell the disputed tract and divide the proceeds, plaintiff could recover under the agreement, though it was afterwards determined that the tract belonged to defendant.—*Baker v. Heney*, 166 S. W. 19.

§ 17 (Tex.Civ.App.) Where, in action involving title to land, one of the heirs of the deceased defendant, with authority from the others, entered into a written agreement settling the controversy, which was acquiesced in by all of the heirs, held, that they were estopped thereby, whether or not the agreed judgment settling the suit was valid.—*Castleberry v. Bussey*, 166 S. W. 14.

**COMPUTATION.**

See Time.

**CONCEALED WEAPONS.**

See Weapons.

**CONCLUSION.**

See Evidence, §§ 471-491; Pleading, § 8.

**CONDEMNATION.**

See Eminent Domain.

**CONFESSION.**

See Criminal Law, §§ 519-538.

**CONFIRMATION.**

See Judicial Sales, § 31.

**CONFLICT OF LAWS.**

See Bills and Notes, § 117; Contracts, § 2.

**CONGRESS.**

See Evidence, § 34.

**CONNECTING CARRIERS.**

See Carriers, § 177.

**CONSIDERATION.**

See Bills and Notes, § 92; Contracts, §§ 47-71.

**CONSPIRACY.**

See Homicide, § 305.

**CONSTITUTIONAL LAW.**

See Corporations, § 99; Costs, § 322; Counties, §§ 2, 12, 155, 183, 190; Courts, §§ 169, 231; Drains, § 67; Elections, § 11; Eminent Domain, §§ 2, 101; Highways, §§ 95, 122; Homestead, §§ 119, 134, 142; Infants, §§ 12, 16; Insurance, § 602; Intoxicating Liquors, §§ 14, 15, 31; Municipal Corporations, § 121; Schools and School Districts, § 167; Statutes, §§ 96, 105, 110½, 118, 122, 141.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

§ 12 (Ky.) The Constitution is not a technical instrument, and should not be so construed as to defeat the substantial purposes of its adoption.—*Board of Penitentiary Com'rs v. Spencer*, 166 S. W. 1017.

§ 26 (Ark.) The Legislature has power to make such laws as are not expressly or by necessary implication prohibited by the Constitution.—*McClure v. Topf & Wright*, 166 S. W. 174.

§ 43 (Tex.Civ.App.) Surviving parents of a deceased who are entitled to a right of action for his wrongful death cannot complain that, under Rev. St. 1911, art. 4699, which is part of the act providing for actions for wrongful death, the widow has brought an action for the benefit of all, on the ground that it would deprive them of their rights without due process, for they take the right subject to the remedy.—*Galveston, H. & S. A. Ry. Co. v. Pennington*, 166 S. W. 464.

§ 45 (Ky.) It is the duty of courts to prevent the ignoring of the Constitution by individuals or by other departments of the government, and, when the Constitution has been ignored or disregarded, the court should interpose its authority, which is as extensive as the case may require.—*Board of Penitentiary Com'rs v. Spencer*, 166 S. W. 1017.

§ 48 (Ark.) A statute must be plainly at variance with the Constitution before the court will so declare it.—*McClure v. Topf & Wright*, 166 S. W. 174.

§ 48 (Tex.) If a statute is not manifestly in conflict with some provision of the Constitution, it must be sustained by the courts.—*Glass v. Pool*, 166 S. W. 375.

In testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it be susceptible of such interpretation.—*Id.*

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.****(A) Legislative Powers and Delegation Thereof.**

§ 63 (Mo.) The Legislature may delegate the authority to create benefit districts and determine the percentage of the benefits to be assessed for a local improvement to officers of public corporations, and, so long as they act within their authority, their acts cannot be questioned because of want of notice to property owners before creating the districts and fixing the percentage of the benefits.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same, Id.* 291; *Klein v. Kingshighway Road Dist. of New Madrid County, Id.*

**(B) Judicial Powers and Functions.**

§ 70 (Ark.) The question whether a law is wise or not is for the Legislature, and its action in that respect is not reviewable by the courts.—*Eubanks v. Futrell*, 166 S. W. 172.

§ 70 (Ky.) Unless it appears that a particular statute is forbidden by, or conflicts with, some provision of the Constitution, the court will not attempt to control the legislative department, and will not pass on the propriety or wisdom of the laws that are enacted.—*Board of Penitentiary Com'rs v. Spencer*, 166 S. W. 1017.

§ 70 (Tex.) As Acts 33d Leg. c. 35, § 7, creating the Clifton independent school district, does not conflict with any provision of the Constitution, it is not invalid, though its passage was procured by fraud, and it is unfair.—*Glass v. Pool*, 166 S. W. 375.

§ 70 (Tex.Civ.App.) The Legislature is not the ultimate arbiter of the constitutionality of its acts, but such authority is lodged in the judicial branch of the government.—*Woods v. Ball*, 166 S. W. 4.

**IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.**

§ 205 (Ark.) Acts 1913, p. 180, relative to issuance of liquor license on petition of majority of adult white inhabitants of town or city, *held* not to violate Const. Ark. art. 2, § 18, as granting privileges or immunities to one class of citizens.—*McClure v. Topf & Wright*, 166 S. W. 174.

§ 206 (Ark.) Acts 1913, p. 180, regulating the issuance of liquor licenses, *held* not to violate Const. U. S. Amend. 14.—*McClure v. Topf & Wright*, 166 S. W. 174.

§ 208 (Mo.) A statute which embraces all persons and things that naturally belong to the same class and are similarly situated, and on whom it must operate uniformly and equally, is not invalid as class legislation.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same*, Id. 201; *Klein v. Kingshighway Road Dist. of New Madrid County*, Id.

Rev. St. 1909, §§ 10611-10625, authorizing special road districts and special taxes for benefits for road improvements, *held* not class legislation because authorizing taxation of real estate according to value exclusive of buildings thereon, but including orchards, vineyards, and other such betterments.—Id.

**XI. DUE PROCESS OF LAW.**

§ 272 (Tenn.) Workhouse Act (Shannon's Code, § 7423), providing that a prisoner, who escapes, when recaptured shall be made to work out the costs of the same, *held* unconstitutional as denying the due process of law guaranteed by Const. art. 1, § 8.—*Strong v. State*, 166 S. W. 967.

§ 274 (Mo.) Laws 1913, pp. 148-154, giving the probate court in counties of less than 50,000 population jurisdiction to provide for the care and control of children under 17 years of age who are delinquent, is not an invasion of personal right or a denial of due process of law in that it interferes with the parental right of control of children.—*State ex rel. Cave v. Tinch*, 166 S. W. 1028.

§ 290 (Mo.) Special taxes, levied under Rev. St. 1909, §§ 10611-10625, providing for special road districts and special taxes for benefits for road improvements, do not deprive an owner of his property without due process of law merely because they are levied without notice, when they can only be collected by suit, in which the owner may set up all his defenses.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same*, Id. 201; *Klein v. Kingshighway Road Dist. of New Madrid County*, Id.

Rev. St. 1909, § 10615, dividing special road districts into three beneficial zones, and assessing the lands in each at a different percentage, without notice to the property owners, does not deprive the owners of their property without due process of law, in violation of Const. art. 2, § 30.—Id.

Rev. St. 1909, § 10615, providing for the division of special road districts into three zones and the assessment of the lands in each at a different percentage, does not deprive the owners of their property without due process of law, though the valuation of the lands in each zone is made by the board of commissioners without notice, when the taxes can only be collected by suit.—Id.

§ 290 (Tex.Civ.App.) A paving assessment against the property of a street railway company, made under Rev. St. 1911, art. 1013, without any notice or opportunity for hearing to the company, on the question of the amount of the assessment or benefits is, despite Const. art. 1, § 17, void, as working a deprivation of property without due process, contrary to Const. art. 1, § 19, U. S. Const. Amend. 14.—*Texas Bitulithic Co. v. Abilene St. Ry. Co.*, 166 S. W. 433.

**CONSTRUCTION.**

See Chattel Mortgages, §§ 114-153; Constitutional Law, §§ 12-48; Contracts, §§ 143-212; Deeds, §§ 90-129; Evidence, §§ 450-461; Guaranty, § 46; Pleading, § 34; Statutes, §§ 178-267; Trusts, §§ 134-151; Vendor and Purchaser, § 50; Wills, §§ 439-675.

**CONSTRUCTIVE TRUSTS.**

See Trusts, §§ 92½, 96.

**CONTEMPT.**

See Grand Jury, § 36.

**CONTEST.**

See Elections, §§ 288-305.

**CONTINGENT REMAINDERS.**

See Wills, § 634.

**CONTINUANCE.**

See Appeal and Error, §§ 818, 966, 1043; Criminal Law, §§ 590-603, 1090.

§ 6 (Ky.) Defendants were not entitled to a continuance over the term to allow them to file defense after the overruling of their demurrer, though they should have been given a reasonable opportunity to tender an answer during the term.—*Baird v. Prewitt*, 166 S. W. 771.

§ 17 (Ky.) An application for continuance, in proceedings to remonstrate against the annexation of territory to a town, filed by plaintiff's attorneys on the ground that they did not have time to prepare the case for trial, *held* properly denied.—*Preston v. Town of Paintsville*, 166 S. W. 188.

§ 30 (Tex.Civ.App.) Allowing plaintiff to amend his petition after the case had gone to trial, without granting defendant a continuance, is largely a matter of discretion, where the amendment simply enlarges on the cause of action, and does not require of defendant any evidence not before required.—*Gulf, C. & S. F. Ry. Co. v. James B. & Charles J. Stubbs*, 166 S. W. 699.

§ 31 (Mo.App.) Where a petition for injuries to a servant by the caving in of a ditch charged negligence in ordering plaintiff into it without shoring up the sides, the admission of evidence that plaintiff was an inexperienced man and defendant was negligent in ordering him into the ditch to shore it up constituted a variance, which entitled defendant to a continuance

for surprise on a proper application.—*McDonald v. Central Illinois Const. Co.*, 166 S. W. 1087.

§ 44 (Ky.) The trial court did not err in overruling defendant's motion for a continuance upon the filing of an amended petition, where the motion was not supported by affidavit showing the grounds therefor.—*Phoenix-Jellico Coal Co. v. Grant*, 166 S. W. 812.

## CONTRACTS.

See Action, § 27; Assignments; Assumpsit, Action of; Attorney and Client, § 145; Banks and Banking, §§ 171, 315; Bills and Notes; Bonds; Brokers; Cancellation of Instruments; Carriers, §§ 62, 252, 258; Chattel Mortgages; Compromise and Settlement; Corporations, §§ 82, 426; Covenants; Damages, § 120; Deeds; Depositories; Descent and Distribution, § 82; Escrows, § 1; Evidence, §§ 165, 417-461; Exchange of Property; Frauds, Statute of; Guaranty; Husband and Wife, § 138; Insurance; Interest; Landlord and Tenant, § 34; Limitation of Actions, §§ 24, 127; Lotteries, § 3; Marriage; Master and Servant, §§ 3-44; Mechanics' Liens, §§ 312, 313; Mortgages; Municipal Corporations, §§ 340, 359; Novation; Partnership, §§ 20, 97, 279; Principal and Surety, § 100; Receivers, § 101; Reformation of Instruments; Release; Sales; Schools and School Districts, § 72; Specific Performance; Stipulations; Subrogation; Torts, § 12; Trial, §§ 192, 235, 240; Trusts, §§ 17, 18; Usury, § 130; Vendor and Purchaser; Waters and Water Courses, §§ 206, 247; Wills, § 100; Witnesses, § 161; Work and Labor.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials in General.

§ 2 (Mo.App.) In an action on an Iowa contract, where there is neither proof nor grounds for presumption as to the law of Iowa, the law of Missouri will be applied.—*Davis v. McColl*, 166 S. W. 1113.

§ 5 (Tex.Civ.App.) Where defendant took notes which were then being sued on by plaintiff under an agreement with former owners that he should receive the 10 per cent. attorney's fees stipulated therein, with knowledge of such agreement, and that the suit was pending, held, that defendant was bound, as upon a constructive contract, to pay the attorney's fees to plaintiff upon the judgment being taken in defendant's name.—*Caldwell v. Stalcup*, 166 S. W. 110.

§ 10 (Tex.Civ.App.) Agreement by vendor also owning dam and water power to erect irrigation pump and furnish water for irrigation purposes held not unilateral and unenforceable; the purchaser having also assumed obligations to the vendor.—*Abney v. Roberts*, 166 S. W. 408.

#### (B) Parties, Proposals, and Acceptance.

§ 26 (Ark.) A valid contract may be entered into by negotiations carried on through the mail and by telegrams.—*Porter v. Gossell*, 166 S. W. 535.

When parties conduct negotiations through the mail, the contract is completed the moment a letter accepting the offer is mailed, provided it is done with due diligence after receipt of the proposal, and before any intimation that it is withdrawn.—*Id.*

§ 28 (Ky.) Stricter proof is required of a contract between near relatives to pay for personal services, etc., rendered in the family than is required to prove ordinary contracts.—*Allen v. Allen*, 166 S. W. 211.

#### (D) Consideration.

§ 47 (Ark.) A statement by the owner of land to one of several agents authorized to find a

purchaser that such agent was entitled to the commissions could not constitute a contract to pay him the commissions, if it was made after a sale had been consummated through another agent; there being no consideration therefor.—*Murray v. Miller*, 166 S. W. 536.

§ 54 (Mo.App.) An agreement by defendant, who misappropriated whisky sold and shipped by plaintiff to a third person, to pay plaintiff its claim against the third person, was not supported by a consideration unless plaintiff released the third person and he had released defendant on account of its wrongful misappropriation of the whisky.—*L. & A. Scharff Distilling Co. v. Springfield Coal, Ice & Transfer Co.*, 166 S. W. 654.

§ 71 (Tex.Civ.App.) A promise by a purchaser of merchandise from a dealer indebted to the seller of the merchandise to pay the debt if the dealer did not do so, made in consideration of the seller forbearing to attach the merchandise, was supported by a sufficient consideration.—*Williams v. City Nat. Bank*, 166 S. W. 130.

#### (E) Validity of Assent.

§ 94 (Tex.Civ.App.) Fraud is ground for rescinding a contract.—*South Texas Mortgage Co. v. Coe*, 166 S. W. 419; *Same v. Erwin*, *Id.* 422.

A verbal promise to do something in the future, which is a material inducement to the execution of a contract, and is relied upon by the promisee, is fraud, authorizing the rescission of the contract, if the promisor had no intention of fulfilling the promise when it was made.—*Id.*

§ 99 (Ky.) Evidence held to show that at the time of the execution of a contract one of the parties was in such a weak mental and physical condition as to be incapable of contracting.—*Volz v. Scully*, 166 S. W. 1015.

#### (F) Legality of Object and of Consideration.

§ 117 (Ky.) A contract for the manufacture and sale of railroad ties for a year, binding defendant not to purchase ties from any other person in the district, held not invalid as an unreasonable restraint of trade, or an effort to create a monopoly.—*Mitchell Taylor Tie Co. v. Whitaker*, 166 S. W. 193.

## II. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 143 (Tex.Civ.App.) The meaning of words in a contract is governed by the intent of the parties, and, though the terms are not ambiguous, the situation of the parties, the subject-matter, and other circumstances may be looked to, and a party will be bound by that meaning which he knew the other party supposed the words to bear.—*Dublin Electric & Gas Co. v. Thompson*, 166 S. W. 113.

§ 147 (Mo.App.) In construing a written contract, the court must give effect to the intention of the parties as expressed in the instrument.—*Ulrich v. Globe Surety Co. of Kansas City*, 166 S. W. 845.

§ 169 (Mo.App.) In ascertaining the intent of the parties, a contract should be read in the light of the circumstances of the parties at the time of its execution, where there is uncertainty or ambiguity in the language.—*Ulrich v. Globe Surety Co. of Kansas City*, 166 S. W. 845.

§ 174 (Tex.Civ.App.) An exception is intended to take out of the contract that which would have been included in it but for the exception.—*South Texas Mortgage Co. v. Coe*, 166 S. W. 419; *Same v. Erwin*, *Id.* 422.

§ 176 (Ky.) In an action on a building contract, evidence held sufficient to go to the jury on the question whether certain items were extras not included in the original contract.—*Thompson v. M. Boyd & Son*, 166 S. W. 215.



**(B) Parties.**

§ 187 (Mo.App.) A contract between two parties upon a valid consideration may be enforced by a third party when entered into for his direct benefit, though the third party is not named in the contract, and was not in privity to the consideration.—Uhrich v. Globe Surety Co. of Kansas City, 166 S. W. 845.

**(C) Subject-Matter.**

§ 192 (Ky.) A written instrument *held* to entitle complainant to share in the purchase of certain land for speculative purposes on contributing one-half of the purchase price and expenses, and not to entitle him to share in the land on his loaning his credit to raise the money to carry out the contract.—Bassett v. Bassett, 166 S. W. 763.

**(D) Place and Time.**

§ 212 (Tex.Civ.App.) Under an agreement whereby, in consideration that plaintiff would obtain land at a low price, defendant was to convey an interest to plaintiff and another for \$1,500 or to convey such interest when sales of timber and land equaled that amount, but not providing any time in which it should be performed, a reasonable time was implied, to be determined under all the facts and circumstances.—Johnson v. Mansfield, 166 S. W. 927.

**III. MODIFICATION AND MERGER.**

§ 245 (Ky.) A written instrument, granting to complainant an option to share equally with defendant in the purchase of land on his paying one-half of the price, expenses, interest, costs, and taxes *held* to merge all prior verbal negotiations.—Bassett v. Bassett, 166 S. W. 763.

**V. PERFORMANCE OR BREACH.**

§ 275 (Mo.App.) Where the plans required the contractor to install plate glass mirrors for the medicine cases in the bathrooms, and the contractor installed inferior mirrors, he was liable to the owner for his damages.—Hiller v. Daman, 166 S. W. 869.

§ 280 (Tex.Civ.App.) Plaintiff, who was contesting for a prize offered for the greatest amount of money paid in for scholarships in defendant's business college, was entitled to credit for certain tables which defendant accepted as part payment for a scholarship procured by plaintiff.—Draughon's Practical Business College v. Dorsett, 166 S. W. 495.

§ 300 (Mo.App.) A building contractor was not entitled to extension of time for completing work because of delay caused by others, where written claim for extension was not made as required by the contract.—Hiller v. Daman, 166 S. W. 869, following Ward v. Haren, 119 S. W. 446.

Delay in commencing work under building contract, due to third party having placed macadam on the lots, *held* such a delay as, under the contract, the contractor was required to make claim for in writing as a basis for an extension of time.—Id.

Doing of excavation work which building contract contemplated might be required, and for which it fixed prices, *held* not such extra work as entitled the contractor to an extension of time for completing the work.—Id.

§ 305 (Tex.Civ.App.) Where defendant, who offered a prize to the person procuring the greatest amount for scholarships in its business college, did not require that the money for the scholarship should be collected after the contest began, and accepted money paid by a contestant knowing that a small part of it had been collected before the contest he cannot complain, as against such contestant, that the collection was made before the contest.—Draughon's Practical Business College v. Dorsett, 166 S. W. 495.

§ 319 (Ark.) If an entire contract to drill a well for a stipulated price was not performed and the work was not accepted, no recovery can be had.—Brown v. Vestal, 166 S. W. 556.

**VI. ACTIONS FOR BREACH.**

§ 345 (Mo.App.) Where building contractor, sued for delay in completion, admitted the execution of the contract and pleaded waiver of the time limit, plaintiff *held* entitled to rely on provision of contract requiring claims for extension of time to be made in writing, though he did not allege it in his reply.—Hiller v. Daman, 166 S. W. 869.

§ 346 (Mo.App.) In an action for breach of a contract for the sale of a lively business, in that defendants had failed to procure the lessor's necessary assent to the assignment of a lease, evidence that defendants violated an agreement not to open a rival establishment in the same neighborhood *held* irrelevant.—Ordleheide v. Traube, 166 S. W. 1108.

§ 353 (Ark.) In an action on a contract to bore a well, an instruction that, if plaintiffs entered upon the contract, continued performance until they had reached water sufficient to make a flowing well and were then prevented by defendant from further performance, plaintiffs could recover the full contract price, less the cost of cutting off the pipe a proper distance from the ground and cementing it, *held* applicable to the evidence and proper.—Brown v. Vestal, 166 S. W. 556.

**CONTRADICTION.**

See Witnesses, §§ 380-414.

**CONTRIBUTION.**

See Corporations, § 368; Principal and Surety, § 194; Trial, § 252.

**CONVERSION.**

See Trover and Conversion.

**CONVEYANCES.**

See Assignments; Chattel Mortgages; Deeds; Fraudulent Conveyances; Insane Persons, § 61; Vendor and Purchaser.

**CONVICTS.**

See Constitutional Law, § 272; Costs, §§ 294, 322; False Imprisonment, § 8; Railroads, §§ 355, 397; Trial, § 125.

**CORAM NOBIS.**

See Appeal and Error, § 544; Judgment, § 334.

**CORPORATIONS.**

See Associations, § 24; Bankruptcy, § 303; Banks and Banking; Bills and Notes, § 92; Bonds, § 62; Carriers; Evidence, §§ 341, 461; Frauds, Statute of, § 56; Garnishment, § 196; Gas, § 14; Highways, § 90; Licenses, § 11; Municipal Corporations; Penalties, § 16; Railroads; Street Railroads; Telegraphs and Telephones; Waters and Water Courses, §§ 206-247.

**I. INCORPORATION AND ORGANIZATION.**

§ 18 (Ky.) Ky. St. § 539, subsec. 7, does not require that a corporation's articles shall state the authority of its officers with reference to the execution of writings and obligations of the corporation, which may be regulated by by-laws, under section 542.—Williamsburg Canning Co. v. De Laney, 166 S. W. 192.

§ 28 (Mo.App.) A corporation is a *de facto* corporation where there is a law authorizing such a corporation, and where it has attempted

to organize under it and is transacting business in a corporate name.—*Rialto Co. v. Miner*, 166 S. W. 628.

#### IV. CAPITAL, STOCK, AND DIVIDENDS.

##### (B) Subscription to Stock.

§ 76 (Tex.Civ.App.) A subscription contract for the purchase price of a portion of the capital stock of a corporation created by an increase in the amount of its authorized capital stock is, when not in violation of law, a valid and enforceable obligation.—*Cope v. Pitzer*, 166 S. W. 447.

§ 76 (Tex.Civ.App.) Where notes given for corporate stock were attached to and made a part of the subscription contract, the rejection of the notes, together with the failure to deliver the shares to the person contracting for them, justified him in concluding that the subscription contract had been rejected.—*Amicable Life Ins. Co. v. Kenner*, 166 S. W. 462.

§ 80 (Tex.Civ.App.) Statements by an agent in taking subscriptions for the increased capital stock of a life insurance company held mere puffing inducements or promises for future performance, and not fraudulent misrepresentations.—*Cope v. Pitzer*, 166 S. W. 447.

§ 82 (Tex.Civ.App.) Where defendant's agent received money for it on a stock subscription, defendant was liable for the money in its agent's hands, and hence was liable for its return if the contract under which the money was paid required its return in certain contingencies, which happened.—*Amicable Life Ins. Co. v. Kenner*, 166 S. W. 462.

§ 82 (Tex.Civ.App.) Under an agency contract whereby plaintiff was to purchase shares of the stock of defendant company, agreement that, on termination of the agency, the company would repurchase the stock at the price paid for it held valid, where the stock was not a part of the original unsubscribed stock.—*Hesse Envelope Co. of Texas v. Addison*, 166 S. W. 898.

§ 88 (Tex.Civ.App.) Where a stock subscription contract provided that \$5 a share should be paid in cash to the corporation's agents as compensation for services, the corporation could not object that they accepted a less sum from the purchaser, except that, upon rejection of the contract, it was bound to return the sum accepted by the agents under the provision requiring the return of the amount paid in case the contract was rejected.—*Amicable Life Ins. Co. v. Kenner*, 166 S. W. 462.

§ 90 (Tex.Civ.App.) A finding that representations by an agent for an insurance company in selling stock involved future contingencies and were speculative and conjectural held not inconsistent with other findings as to what the representations were.—*Cope v. Pitzer*, 166 S. W. 447.

##### (C) Issue of Certificates.

§ 99 (Tex.Civ.App.) Const. art. 12, § 6, and Rev. St. 1911, arts. 4725, subd. "e," 4733, and 1146, prohibiting the issuance of stock except for money received, labor done, or property received, held not to prevent a life insurance company from contracting to sell an increase of its capital stock and from taking notes of the subscribers in payment therefor, where the stock was not issued until the notes were fully paid.—*Cope v. Pitzer*, 166 S. W. 447.

#### VI. OFFICERS AND AGENTS.

##### (D) Liability for Corporate Debts and Acts.

§ 327 (Ky.) Where stockholders, who were guarantors or sureties on a note executed by the corporation, executed renewal notes and put up their stock as collateral, they were equally liable as between themselves, though the amount of stock each held was unequal.—*Crawford v. Wiedemann*, 166 S. W. 595.

§ 357 (Ky.) An action by a creditor of a bankrupt corporation which incurred indebtedness in excess of the charter limit permitted by Ky. Stat. § 539, subsec. 8, brought against the directors under section 550, is not an equitable action in which all creditors need join, but is an individual action and may be maintained by each creditor.—*Nuckels v. Robinson-Pettett Co.*, 166 S. W. 972.

§ 360 (Ky.) In an action under Ky. St. § 550, by a creditor against directors of a corporation on the ground that they had permitted the corporation to exceed the charter limit of indebtedness permitted by section 539, subsec. 8, the petition need not allege that the creditor did not know that the corporation had exceeded its limit of indebtedness; that being a matter of defense.—*Nuckels v. Robinson-Pettett Co.*, 166 S. W. 972.

§ 368 (Ky.) Where defendant and other directors executed a note to obtain a loan for the corporation, and the corporation defaulted, defendant cannot escape his liability for contribution, where the other directors deposited to the credit of the corporation an amount sufficient to pay the note which was discharged with the corporation's check.—*Hall v. Gleason*, 166 S. W. 608.

#### VII. CORPORATE POWERS AND LIABILITIES.

##### (B) Representation of Corporation by Officers and Agents.

§ 426 (Tex.Civ.App.) Where the officers and directors of defendant corporation paid \$75 a month for five months under an employment contract for a year, made by its president without authority, such acts constituted a ratification of the contract for the entire term.—*Miller v. Sealy Oil Mill & Mfg. Co.*, 166 S. W. 1182.

§ 428 (Mo.App.) Notice to a corporation of matters affecting its rights will be deemed communicated to it if reported to any agent having authority to act for it in the particular matter, or whose duty it is to convey the information to the board of directors.—*Griffith v. Supreme Council of Royal Arcanum*, 166 S. W. 324.

Corporations will be taken to have been advised as to facts within the knowledge of its officers, especially with respect to that part of the corporate business over which the officer has some control.—Id.

##### (F) Civil Actions.

§ 513 (Ky.) In an action on a corporate note and mortgage, the fact that the officer who executed the instruments was authorized to do so need not be pleaded by plaintiff; the want of authority being matter of defense.—*Williamsburg Canning Co. v. De Laney*, 166 S. W. 192.

§ 514 (Mo.App.) A plea that plaintiff corporation is not a corporation either de jure or de facto, and consequently not entitled to sue, held not a plea of ultra vires but a plea of null corporation.—*Rialto Co. v. Miner*, 166 S. W. 629.

§ 519 (Ky.) In an action for the price of goods sold on a written order which was signed by the defendant personally, a finding that the goods were sold to the defendant, and not to a corporation represented by him as he claimed, held not flagrantly against the evidence.—*Simons v. American Box Ball Co.*, 166 S. W. 224.

#### XII. FOREIGN CORPORATIONS.

§ 633 (Mo.App.) In an action by an Illinois corporation formed in compliance with Hurd's Rev. St. Ill. 1909, §§ 1-5, 50, 51, as shown by certificates of the secretary of state, held, in view of decisions and evidence as to the Illinois Law, that its specification of its object to acquire a building and carry on a storage business therein sufficiently stated an object for

which a corporation might be legally formed under such law.—*Rialto Co. v. Miner*, 166 S. W. 29.

§ 659 (Mo.App.) A lessee dealing with his lessor as a foreign corporation and exhibiting a counterclaim or demand against it, when sued in this state for arrears of rent, may not challenge the lessor's corporate existence.—*Rialto Co. v. Miner*, 166 S. W. 629.

§ 661 (Mo.App.) An Illinois corporation, authorized as such to make a lease of offices in a building in Chicago on breach of the terms hereof, *held* entitled to maintain its action in this state against the lessee, a citizen of, and bound in, the state.—*Rialto Co. v. Miner*, 166 S. W. 629.

## COSTS.

See Appeal and Error, §§ 395, 781, 1221; Attorney and Client, § 59; Drains, § 91; Injunction, § 26; Municipal Corporations, § 1040.

## NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 3 (Mo.App.) Costs were not recoverable at common law, and are peculiarly a statutory creature, and none may be taxed unless authorized by statute.—*In re Davis*, 166 S. W. 341.

§ 42 (Ark.) Where, in an action by a broker or commission, the owner admitted his liability for a commission either to plaintiff or to an intervening broker, it was error to tax the owner with the costs of the action, upon awarding judgment in favor of the intervening broker; plaintiff being liable for the costs.—*Murray v. Miller*, 166 S. W. 536.

## III. PERSONS, PROPERTY, AND FUNDS LIABLE.

§ 96 (Ky.) A police judge, in issuing warrants for violation of an ordinance, having acted within his jurisdiction and in good faith, costs should not be awarded against him, on his being prohibited, because of invalidity of the ordinance, from enforcing it by the warrants.—*Chesapeake & O. Ry. Co. v. Harmon*, 166 S. W. 786.

## V. AMOUNT, RATE, AND ITEMS.

§ 173 (Tex.Civ.App.) Plaintiff in garnishment *held* not entitled to recover attorney's fees against the garnishees; the only attorney's fees allowable being those authorized by statute to the garnishee.—*Waggoner v. Briggs*, 166 S. W. 50.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 260 (Ark.) Where there is no contention as to the facts, and all questions of law had been passed upon by the state and United States Supreme Courts, the court will impose damages upon the appellant for delay; the judgment having been superseded.—*Cairo, T. & S. R. Co. v. Brooks*, 166 S. W. 167.

§ 260 (Mo.App.) Where defendant had many times admitted his indebtedness and implored plaintiff for extensions of time, and did not deny it until suit was instituted, 10 per cent. damages must be awarded, under Rev. St. 1909, § 2084, for vexatious appeal, upon affirmance, on defendant's appeal, of judgment for plaintiff.—*Wittenberg v. Fisher*, 166 S. W. 1106.

## VIII. PAYMENT AND REMEDIES FOR COLLECTION.

§ 273 (Mo.App.) An injunction will not lie to restrain a sheriff from enforcing a fee bill alleged to be void.—*Farris v. Smithpeter*, 166 S. W. 655.

A "fee bill" is the proper process to collect fees due to officers and witnesses against the party for whom services are rendered.—*Id.*

A motion to quash a fee bill or levy thereunder may be filed in vacation as well as in term time, in view of Rev. St. 1909, § 2244.—*Id.*

## IX. IN CRIMINAL PROSECUTIONS.

§ 294 (Tenn.) Under Shannon's Code, §§ 7606, 7619-7622, the state is liable for costs for confining in the county jail one convicted of a felony; the commutation in the sentence not changing the grade of the offense.—*Woolen v. State*, 166 S. W. 594.

Acts 1891, c. 123, § 11, covers the safe-keeping in a workhouse before and after conviction, on commutation from penitentiary confinement.—*Id.*

§ 317 (Tex.Cr.App.) On affirmance of a conviction defendant's sureties were liable on the recognizance on appeal for costs.—*Tafolla v. State*, 166 S. W. 508.

§ 322 (Tenn.) Workhouse Act (Shannon's Code, § 7423), providing that a prisoner, who escapes, when recaptured shall be made to work out the costs of the same, *held* unconstitutional.—*Strong v. State*, 166 S. W. 967.

## COTENANCY.

See Tenancy in Common.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTIES.

See Appeal and Error, § 77; Depositaries, § 6; District and Prosecuting Attorneys; Highways, § 72; Intoxicating Liquors, §§ 14, 31, 40; Levees, § 2; Limitation of Actions, §§ 11, 102; Mandamus, §§ 14, 72, 73.

## I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 1 (Tex.Civ.App.) A county is by Rev. St. 1911, art. 1365, a body corporate and politic.—*Comanche County v. Burks*, 166 S. W. 470.

§ 2 (Tex.Civ.App.) Acts 33d Leg. (1st Called Sess.) c. 35, creating Dunn county out of a portion of Duval county, *held* unconstitutional, in violation of Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to approach nearer than 12 miles to the county seat of a county from which it may be, in whole or in part taken.—*Woods v. Ball*, 166 S. W. 4.

§ 12 (Tex.Civ.App.) Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to approach nearer than 12 miles to the county seat of the county from which it may be taken, means that the distance from the new county to the county seat of the mother county shall be measured in a straight line.—*Woods v. Ball*, 166 S. W. 4.

## II. GOVERNMENT AND OFFICERS.

### (B) County Seat.

§ 29 (Ky.) A court of equity *held* not to have jurisdiction of the contest of the election provided for by Acts 1912, c. 46, § 7, to determine the location of a county seat for the new county of McCreary.—*Wilson v. Town of Whitley*, 166 S. W. 775.

### (C) County Board.

§ 47 (Tex.Civ.App.) A county is by Rev. St. 1911, art. 1365, a body corporate and politic, and acts by the commissioners' court, and the acts of the court, made in good faith within the scope or apparent scope of its authority, are the acts of the county.—*Comanche County v. Burks*, 166 S. W. 470.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (D) Torts.

§ 141 (Tex.Civ.App.) Where a county in its corporate capacity commits a wrong in relation to property in which others are interested, the county is liable.—Comanche County v. Burks, 166 S. W. 470.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 155 (Tex.Civ.App.) Under Const. art. 7, § 6, providing for the investment of proceeds on a sale of county school lands, the commissioners' court of a county, in investing proceeds, acts in a judicial or quasi judicial capacity, and the county is responsible for such investments.—Comanche County v. Burks, 166 S. W. 470.

Under Const. art. 7, § 6, making a county responsible for all investments of proceeds of a sale of its school lands, a county is responsible for the proceeds, regardless of the form or legality of the investment, attempted to be made by the commissioners' court.—Id.

§ 161 (Tex.Civ.App.) A county diverting the proceeds on a sale of its school lands is properly chargeable with interest on the misappropriated fund.—Comanche County v. Burks, 166 S. W. 470.

§ 183 (Tex.Civ.App.) The proceeds of a sale of school land of a county, required by Const. art. 7, § 6, to be invested in specified classes of bonds, may not be diverted to the general purposes of the county, and bonds issued by the county therefor, and bonds so issued are invalid.—Comanche County v. Burks, 166 S. W. 470.

§ 190 (Ky.) A tax in excess of the 50 cents on the \$100, authorized by Const. § 157, cannot be justified because numerous citizens of the county requested it and pledged themselves not to resist collection.—Hammond v. Lester, 166 S. W. 976.

A tax levied by the fiscal court of a county in excess of the 50-cent limit prescribed by Const. § 157, is void, though the order directed its collection for each magisterial district and its expenditure for the building and improving of the roads of each district.—Id.

Const. § 157, fixing the maximum tax rate for counties at 50 cents on the \$100, is mandatory, and any tax in excess of that rate is void.—Id.

§ 195 (Tex.Civ.App.) A county which has wrongfully diverted and appropriated proceeds of a sale of school lands of the county is liable for the misappropriation.—Comanche County v. Burks, 166 S. W. 470.

§ 196 (Tex.Civ.App.) In the absence of any statute on the subject, an action by the treasurer and superintendent of schools of a county, and officers of independent school district of the county, and citizens in their individual right, against the county and the commissioners' court to ascertain the amount of proceeds of school lands which have been diverted and to enforce the trust imposed on the county, is maintainable.—Comanche County v. Burks, 166 S. W. 470.

### VI. ACTIONS.

§ 213 (Tex.Civ.App.) Rev. St. 1911, art. 1366, does not apply to an action to enforce the trust imposed on a county to hold county school lands and the proceeds on a sale thereof in trust for the public schools.—Comanche County v. Burks, 166 S. W. 470.

Where the demand sued on was presented to the commissioners' court, but it refused to grant the relief, the mere failure of the clerk to enter the proceedings on his minutes did not prevent an action against the county on the demand, notwithstanding Rev. St. 1911, art. 1366.—Id.

### COUNTY BOARDS.

See Counties, § 47.

### COUNTY SEATS.

See Counties, § 29.

### COUPLERS.

See Master and Servant, §§ 256, 258.

### COURTS.

See Appeal and Error, §§ 47, 338, 387, 544, 562, 628, 742, 773, 792, 794, 1032, 1172; Bail, § 94; Constitutional Law, §§ 45, 70, 274; Counties, § 29; Criminal Law, §§ 575, 1019-1022, 1070½; Dismissal and Nonsuit, § 81; Divorce, § 332; Dower, § 69; Eminent Domain, §§ 172, 185; Equity, §§ 3, 39, 46; Evidence, § 41; Highways, §§ 72, 77; Infants, § 12; Judgment; Justices of the Peace; Mandamus, §§ 172, 73; Prohibition; Statutes, § 93; Trial, §§ 191-194, 390; Venue, § 75.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 1 (Mo.) Where the jurisdiction of the court is defined by the Constitution, the Legislature cannot ordinarily diminish, enlarge, or interfere with such jurisdiction.—State ex rel. Cave v. Tinscher, 166 S. W. 1028.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89 (Mo.) Where a prior decision as to the validity of an act of the Legislature did not rule on or refer to the ground of attack made in a subsequent case, the former decision is without authority in the decision of the later case.—Rourke v. Holmes St. Ry. Co., 166 S. W. 272.

§ 91 (Tex.Civ.App.) The Courts of Civil Appeals must follow the decisions of the Supreme Court.—Campbell v. Honaker's Heirs, 166 S. W. 74.

§ 91 (Tex.Civ.App.) Where the decisions of the Supreme Court are conflicting, the Court of Civil Appeals is bound by the last one.—Texas Bitulithic Co. v. Abilene St. Ry. Co., 166 S. W. 438.

### III. COURTS OF GENERAL ORIGINAL JURISDICTION.

#### (A) Grounds of Jurisdiction in General.

§ 120 (Tex.Civ.App.) The county court had no jurisdiction to determine the validity of a justice court judgment for less than \$200 in a suit to enjoin its collection.—Eppler v. Hilley, 166 S. W. 87.

### IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169 (Tex.Civ.App.) Where a justice court judgment in a garnishment case, including costs and attorney's fees, exceeded \$200, and was less than \$500, the county court had jurisdiction to determine its validity in a suit to enjoin its collection.—Eppler v. Hilley, 166 S. W. 87.

§ 169 (Tex.Civ.App.) The county court, under Const. art. 5, § 16, is without jurisdiction of an action for damages for the destruction of cattle, where their value plus the interest which accrued between the date of the destruction and the bringing of the suit exceeded \$1,000.—Ft. Worth Stockyards Co. v. Witherspoon, 166 S. W. 502.

§ 170 (Tex.Civ.App.) The allegations of the petition as to the amount in controversy determine the jurisdiction of the court unless the defendant specially plead and show by evidence that such amount so alleged was for the fraudulent purpose of giving the court jurisdiction, and the time to file such a plea is prior to the

beginning of the trial.—*Clisco Oil Mill v. Van Geem*, 166 S. W. 439.

## V. COURTS OF PROBATE JURISDICTION.

§ 199 (Mo.) Notwithstanding that the powers of the probate courts are defined by the Constitution, the Legislature may add to such powers, provided the additional powers conferred apply alike to all probate courts in the state.—*State ex rel. Cave v. Tinch*, 166 S. W. 1028.

## VI. COURTS OF APPELLATE JURISDICTION.

### (B) Courts of Particular States.

§ 231 (Mo.) Const. Amend. 1884, § 3, giving the Legislature power to increase or diminish the pecuniary limits of jurisdiction of the Courts of Appeals, did not authorize the Legislature to amend Rev. St. 1909, § 3937, which set such limits by adding, by Laws 1911, p. 190, a proviso that the Supreme Court should retain jurisdiction in any case pending in which it had made any decision or ruling.—*Rourke v. Holmes St. Ry. Co.*, 166 S. W. 272.

The effect of Const. Amend. 1884, § 4, creating new Courts of Appeals and providing for the jurisdiction of such courts and of the Supreme Court, was to give the Supreme Court exclusive and direct power to review all cases from which an appeal might have been taken to it from the St. Louis Court of Appeals, by Const. art. 6, § 12.—*Id.*

Since the appellate jurisdiction of the Supreme and appellate courts is constitutional, the Legislature can alter that jurisdiction only as permitted by the Constitution.—*Id.*

The fact that Rev. St. 1909, § 3937, required the transfer to the Court of Appeals of cases pending in the Supreme Court, but not submitted, and which were below the new pecuniary limit thereby fixed, and that the courts had obeyed such provision, does not show that the Legislature had power to classify cases for jurisdictional purposes, since such provision was expressly made by Const. Amend. 1884, § 7, and was of continuing force.—*Id.*

The fact that the Supreme Court had followed an unconstitutional law prescribing its jurisdiction does not establish the validity of such law.—*Id.*

The provision of Rev. St. 1909, § 3937, requiring the transfer to the Courts of Appeals, of "cases which have not been submitted" which were below the new jurisdictional amount fixed for the Supreme Court, is not a classification of cases for jurisdictional purposes, but merely fixes the time when the law dividing the jurisdiction should take effect.—*Id.*

The transfer by the Court of Appeals to the Supreme Court, under the authority of Rev. St. 1909, § 3937, as amended by Laws 1911, p. 190, of a case in which the Supreme Court had rendered a decision on a previous appeal has no persuasive value on the Supreme Court as to the constitutionality of that amendment.—*Id.*

§ 231 (Mo.App.) The Court of Appeals was not deprived of jurisdiction of a suit for mandamus to compel the district court to allow relator to appear as prosecuting attorney in a mandamus suit against the judges of the county court of such county, because a constitutional question was raised in the return of such judges, as the merits of the mandamus suit against the judges was not involved.—*State ex rel. Lashly v. Wurdemann*, 166 S. W. 348.

Where county judges, in making return in mandamus, excluded the prosecuting attorney, who was the proper officer to set forth the county's interests, a constitutional question raised therein is not deemed within the record in a suit for mandamus to enforce the prosecuting attorney's right to appear in and control such suit, so as to deprive the Court of Appeals of jurisdiction thereof.—*Id.*

§ 231 (Mo.App.) Appeals from convictions under the local option law are within the jurisdiction of the Courts of Appeals, notwithstanding an attack on the validity of the statute which has been established.—*State v. Johnson*, 166 S. W. 853.

§ 247 (Tex.) A fact not disclosed by the statements and opinions of the Court of Civil Appeals certifying a question to the Supreme Court cannot be considered by the Supreme Court as a basis for its answer.—*American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132.

## COVENANTS.

### III. PERFORMANCE OR BREACH.

§ 96 (Ky.) A covenant in a deed "of general warranty against all incumbrances whatsoever except taxes for 1908, which the purchaser assumes to pay," applied only to existing incumbrances, and not to liens for street improvements made many years thereafter.—*Lindenberger v. Rowland*, 166 S. W. 242.

### IV. ACTIONS FOR BREACH.

§ 130 (Tex.Civ.App.) The rule that the measure of damages which a purchaser may recover is the difference between the consideration given for the land and the value thereof does not apply in cases of breach by the vendor of a warranty.—*Luckenbach v. Thomas*, 166 S. W. 99.

## CREDIBILITY.

See Witnesses, §§ 317-414.

## CREDITORS.

See Attachment; Bankruptcy; Descent and Distribution, § 156; Fraudulent Conveyances; Garnishment; Novation; Subrogation; Trusts, § 151.

## CRIMINAL LAW.

See Assault and Battery; Bail; Bigamy; Costs, §§ 294-322; Disorderly House; District and Prosecuting Attorneys; Embezzlement; Grand Jury; Homicide; Husband and Wife, §§ 304-313; Indictment and Information; Infants, § 66; Intoxicating Liquors, §§ 146-238; Larceny; Libel and Slander, § 155; Pardon; Perjury; Rape; Seduction; Threats; Vagrancy; Weapons.

### I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 14 (Tex.Cr.App.) Under Pen. Code 1911, arts. 15-19, prescribing the effect of the enactment of a subsequent law upon a prior offense, where defendant was charged with committing a murder before Pen. Code 1911, arts. 1140, 1141, defining murder, were amended by Act April 8, 1913 (Acts 33d Leg. c. 132), the court should charge the jury as to the definition of murder under the former law.—*Robbins v. State*, 166 S. W. 528.

### III. PARTIES TO OFFENSES.

§ 59 (Tex.Cr.App.) In order to make one guilty as an accomplice, it is not necessary that he and the principal should have entered into an agreement to commit the offense, but only that, before the act was done, he advised, commanded, or encouraged the principal to commit the offense.—*Bragg v. State*, 166 S. W. 162.

## V. VENUE.

### (B) Change of Venue.

§ 134 (Ky.) Where a petition for a change of venue on the ground of prejudice of the people and the supporting affidavits of disinterested residents were denied by the commonwealth's

attorney and by affidavits of citizens, a denial of the petition was not an abuse of discretion.—*Saylor v. Commonwealth*, 166 S. W. 254.

## VII. FORMER JEOPARDY.

§ 189 (Tex.Cr.App.) One who obtains on habeas corpus his discharge under a judgment and sentence adjudged absolutely void cannot, on a subsequent prosecution for the same offense, rely on the judgment and sentence in support of a plea of former jeopardy.—*Marshall v. State*, 166 S. W. 722.

## X. EVIDENCE.

### (A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304 (Ark.) The court will take judicial notice that Texarkana is not situated in Little River county, Ark.—*Lemuels v. State*, 166 S. W. 741.

### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 361 (Tex.Cr.App.) In a prosecution for seduction under promise of marriage, defendant having testified that prosecutrix wrote to him, requesting his return, and told him why she did so, she was entitled to testify concerning her reason for desiring his return.—*Gillespie v. State*, 166 S. W. 135.

§ 364 (Tex.Cr.App.) Where accused left the place where he killed decedent, and later in the night went to the home of a third person and telephoned to a justice of the peace, his statements to the third person and the justice were self-serving, and were not a part of the res gestæ.—*Chant v. State*, 166 S. W. 513.

§ 366 (Tex.Cr.App.) A statement by decedent, made a few minutes after he was shot, is admissible as a part of the res gestæ.—*Lopez v. State*, 166 S. W. 154.

§ 366 (Tex.Cr.App.) Where the defendant killed his wife and another at the same time, declarations by the wife, just after the shooting, which were part of the res gestæ, were admissible in a prosecution for the killing of the other.—*Robbins v. State*, 166 S. W. 528.

§ 368 (Mo.App.) In prosecution for violation of local option law, testimony that prosecuting witness said, out of defendant's hearing, that he had bought or was going to buy some whiskey from defendant held not a part of the res gestæ and hearsay.—*State v. Johnson*, 166 S. W. 853.

### (C) Other Offenses, and Character of Accused.

§ 369 (Tex.Cr.App.) Where defendant killed his wife and another at the same time, evidence, in a prosecution for the killing of the other, that the defendant had been indicted for an assault with intent to murder his wife was admissible; the state's contention being that defendant killed his wife to prevent her from testifying in the other prosecution.—*Robbins v. State*, 166 S. W. 523.

Where defendant killed his wife and another, evidence, in a prosecution for the killing of the other, that defendant had previously assaulted and seriously injured his wife, which occasioned an indictment in another county, was admissible to support the state's contention that defendant killed his wife to prevent her from testifying in the other prosecution.—*Id.*

### (D) Materiality and Competency in General.

§ 396 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 811, as to giving in evidence all of a conversation, part of which has been given, defendant in an effort to show that B., also indicted, did the killing, having elicited from a state's witness that B. told him deceased's head was in the water, where he afterwards found it,

the state could show that when B. told witness where the head was he said defendant threw it there.—*Wyres v. State*, 166 S. W. 1150.

### (F) Admissions, Declarations, and Hearsay.

§ 406 (Tex.Cr.App.) Statements by accused to a third person, who had been requested by the sheriff to look out for accused, are admissible where the third person did no act to lead accused to believe that he had authority to arrest him.—*Tores v. State*, 166 S. W. 523.

§ 418 (Tex.Cr.App.) On trial for stealing horse and buggy, statement in accused's presence by person with whom he traveled in the stolen buggy, and with whom he was arrested, as to where the buggy could be found held admissible.—*Moran v. State*, 166 S. W. 161.

§§ 419, 420 (Ark.) Declarations or confessions of guilt by third persons are excluded under the hearsay rule.—*Tillman v. State*, 166 S. W. 582.

§§ 419, 420 (Tex.Cr.App.) In a prosecution for seduction, evidence that O., having been discovered riding with prosecutrix, on the next day requested those who saw him not to say anything about seeing him with prosecutrix held hearsay and inadmissible.—*Gillespie v. State*, 166 S. W. 135.

§§ 419, 420 (Tex.Cr.App.) Dying declarations of the deceased to the effect that defendant's wife had appealed to deceased for protection early in the evening, and that defendant had threatened to kill her, were hearsay evidence of statements by the defendant's wife and were inadmissible.—*Robbins v. State*, 166 S. W. 528.

§§ 419, 420 (Tex.Cr.App.) Declarations of accused's infant children, made on coming alone to the home of witness, that their parents had declared before the children left home that they were going to kill decedent, were inadmissible as hearsay.—*Williams v. State*, 166 S. W. 1170.

§ 421 (Tex.Cr.App.) On a trial for violating the local option law, it is error to permit a witness to state that he had heard people say that they believed accused was selling whisky.—*Sasser v. State*, 166 S. W. 1160.

### (H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 429 (Mo.App.) The county court speaks only by its records, and its proceedings cannot be proved by parol.—*State v. Faith*, 166 S. W. 649.

§ 444 (Tex.Cr.App.) A county map made by the land office is properly received in evidence, though it had been torn in half and put together again.—*Tores v. State*, 166 S. W. 523.

### (J) Testimony of Accomplices and Codefendants.

§ 507 (Tex.Cr.App.) An "accomplice," within the rule of evidence, is one connected with the crime charged as principal, accomplice, or accessory, and includes all persons connected with the crime by unlawful act or omission, whether or not they were present and participated in its commission.—*Goldstein v. State*, 166 S. W. 149.

§ 510 (Tex.Cr.App.) Testimony of accomplice, or of witness, as to whom jury had a reasonable doubt, must be corroborated.—*Goldstein v. State*, 166 S. W. 149.

§ 511 (Tex.Cr.App.) Testimony may be sufficient to corroborate an accomplice, though it is not of itself sufficient to show defendant's guilt, exclusive of the accomplice's testimony.—*Gillespie v. State*, 166 S. W. 135.

§ 511 (Tex.Cr.App.) Where the prosecuting witness testified that accused was the only person who had the opportunity to steal his watch and that accused's accomplice had none, there is sufficient corroboration to support a conviction on the accomplice's testimony that accused took the watch and delivered it to him to pawn.—*Forward v. State*, 166 S. W. 725.

## (K) Confessions.

§ 519 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 810, where persons arrested for stealing horse and buggy told the owner where to find the buggy, and it was found there, such statement *held* admissible, though made while in jail and not in writing.—*Moran v. State*, 166 S. W. 161.

§ 528 (Tex.Cr.App.) Under Code Cr. Proc. 1911, § 791, declaring one indicted for the same offense an incompetent witness for defendant, his statement, made while in jail, under indictment, that he alone had anything to do with the crime, is inadmissible for defendant.—*Wyres v. State*, 166 S. W. 1150.

§ 534 (Ark.) Proof that a city collector failed, at the expiration of his term, to pay over to the proper parties certain money collected by him, and that the city clerk audited his books and ascertained that he was short an amount which corresponded to that stated by the defendant, is sufficient corroboration of defendant's extrajudicial confession to sustain a conviction.—*Russell v. State*, 166 S. W. 540.

§ 538 (Ark.) Under Kirby's Dig. § 2385, providing that an extrajudicial confession will not warrant a conviction, unless accompanied with other proof that the offense was committed, such a confession is evidence tending to prove the crime, although not of itself sufficient to do so.—*Russell v. State*, 166 S. W. 540.

## (M) Weight and Sufficiency.

§ 561 (Ky.) The guilt of accused must be established by evidence to the exclusion of a reasonable doubt.—*Saylor v. Commonwealth*, 166 S. W. 254.

## XI. TIME OF TRIAL AND CONTINUANCE.

§ 575 (Tex.Cr.App.) The district court, under Rev. St. 1911, arts. 1718-1726, has authority to call a special term for the trial of a murder case.—*Chant v. State*, 166 S. W. 513.

§ 590 (Tex.Cr.App.) Continuance of trial for homicide after denial of writ of habeas corpus because attorneys had not had time to investigate the facts, and because the witnesses refused to tell the attorneys what their testimony would be, *held* properly denied.—*Muldrew v. State*, 166 S. W. 166.

§ 595 (Tex.Cr.App.) Continuance of trial for seduction because of absence of witness claimed to have had sexual intercourse with prosecutrix before the offense *held* improperly denied, though evidence was introduced that he would not testify as claimed.—*Creacy v. State*, 166 S. W. 162.

§ 596 (Ark.) It was within the court's discretion to refuse to suspend trial to enable accused to procure another witness to contradict prosecuting witness concerning her testimony in the examining court, where accused had produced several other witnesses to testify to the same contradictory statements.—*Benson v. State*, 166 S. W. 549.

§ 598 (Tex.Cr.App.) There is no error in refusing a continuance for absence of witnesses; the case having been long pending, it not appearing process had issued for them, and the court finding that diligence had not been used to secure their attendance.—*Havard v. State*, 166 S. W. 507.

§ 603 (Tex.Cr.App.) A continuance on the ground of the absence of a witness was properly denied, where accused did not state the facts the absent witness would prove, nor show the materiality of the testimony.—*Tores v. State*, 166 S. W. 523.

## XII. TRIAL.

## (C) Reception of Evidence.

§ 678 (Tex.Cr.App.) Where it appeared that defendant was separately indicted for assaults with intent to rape a girl under 15 years of age, alleged to have been committed on two different dates, and evidence of both offenses was admitted in the trial on the indictment charging the second offense, in connection with a statement that the state relied on the second offense, the defendant could be convicted only for the second offense.—*Scott v. State*, 166 S. W. 729.

## (D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 695 (Ark.) A general objection to testimony is sufficient to raise the issue of its relevancy and competency.—*Fakes v. State*, 166 S. W. 963.

## (E) Arguments and Conduct of Counsel.

§ 699 (Ark.) Control of the argument of counsel is within the discretion of the court.—*Lemuels v. State*, 166 S. W. 741.

§ 706 (Tex.Cr.App.) Action of the prosecutor in asking each of defendant's witnesses if they had not been drinking that day, and if they had not drunk with defendant, and, though they denied it, failing to follow it by affirmative testimony, *held* as an improper effort to prejudice the jury in a prohibition county.—*Hodges v. State*, 166 S. W. 512.

§ 720 (Ark.) The testimony, on a prosecution for carnal abuse of a girl, that defendant told witnesses his wife was jealous of the girl not tending to corroborate her testimony, which was that he had intercourse with her, the state's attorneys should not be permitted to argue to the jury that it does tend to corroborate it.—*Fakes v. State*, 166 S. W. 963.

§ 720 (Tex.Cr.App.) Where two defendants were indicted for the same offense, the action of the district attorney in stating in the presence of the jury, when calling as a witness one of the defendants on the trial of the codefendant, that he would dismiss the case as against the defendant because he was satisfied that he was not guilty was improper.—*Sasser v. State*, 166 S. W. 1160.

§ 721 (Tex.Cr.App.) It was improper to ask accused whether he had testified at a hearing on habeas corpus; since he had the right to testify or not at such hearing, as he saw proper, and his failure so to do was not a circumstance against him.—*Swilley v. State*, 166 S. W. 733.

§ 730 (Ark.) Statements in argument by the prosecuting attorney in a homicide case, in which there was evidence that accused had had improper relations with the girl, to the effect that he had seduced and debauched her, etc., *held* not prejudicial to accused in view of the instruction.—*Tillman v. State*, 166 S. W. 582.

§ 730 (Ark.) In a prosecution for carrying a pistol as a weapon, argument of counsel that accused had no right to carry a weapon where he was going only 20 miles from home, and to a town large enough to be well policed, *held* not error, in view of the instructions given by the court.—*Lemuels v. State*, 166 S. W. 741.

## (F) Province of Court and Jury in General.

§ 741 (Ky.) Where the evidence creates only a suspicion of guilt, the case must not be submitted to the jury.—*Saylor v. Commonwealth*, 166 S. W. 254.

Where the commonwealth's evidence does not incriminate accused or is wholly insufficient to show his guilt, the trial court must direct an



acquittal; but where there is any evidence of guilt the case must be submitted to the jury.—*Id.*

§ 742 (Tex.Cr.App.) On a trial for receiving stolen property, evidence held sufficient to require the submission of the question whether one of the state's witnesses was an accomplice.—*Goldstein v. State*, 166 S. W. 149.

§ 761 (Tex.Cr.App.) The charge that if the jury believe from the evidence that on a certain date defendant married G., and then and there had a former wife, Y., then living, and that said former marriage had been lawfully solemnized, does not assume as a fact the former marriage, leaving to the jury only the question of it having been lawfully solemnized.—*Edwards v. State*, 166 S. W. 517.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 780 (Tex.Cr.App.) In a prosecution for seduction, a charge upon the testimony of an accomplice, "that the corroborating evidence need not be direct and positive, independent of the testimony of [the accomplice], but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense," etc., was not erroneous.—*Capshaw v. State*, 166 S. W. 737.

§ 780 (Tex.Cr.App.) The alleged accomplice having refused to testify when called by the state, a charge on accomplice testimony is not called for, though defendant elicited from a witness for the state that the accomplice told him where the head of deceased was, and that at the same time the accomplice told him defendant had placed it there.—*Wyres v. State*, 166 S. W. 1150.

§ 783½ (Tex.Cr.App.) Where evidence as to two separate assaults to commit rape was admitted in a prosecution in which the state elected to rely on the second assault for conviction, the court should have instructed the jury that the defendant was not on trial for the first offense.—*Scott v. State*, 166 S. W. 729.

§ 784 (Tex.Cr.App.) In a prosecution for theft from the person, where the prosecuting witness testified that accused was the only person who had an opportunity to steal his watch and accused's accomplice testified that accused delivered it to him to pawn, the facts are in such close juxtaposition as to be equivalent to positive testimony, and a charge on circumstantial evidence is unnecessary.—*Forward v. State*, 166 S. W. 725.

§ 811 (Tex.Cr.App.) In a prosecution for seduction under promise of marriage, a requested charge as to the corroboration necessary, of the alleged promise of marriage, held properly refused, as singling out a particular fact and attempting to charge thereon.—*Gillespie v. State*, 166 S. W. 135.

§ 811 (Tex.Cr.App.) Instruction that accused could not be convicted because of the presence of certain persons for the purpose of sexual intercourse, unless she knew thereof, held properly refused as singling out a part of the testimony and charging thereon.—*Cunningham v. State*, 166 S. W. 519.

§ 814 (Tex.Cr.App.) A charge as to defendant in bigamy having been divorced from his first wife at the time of the second marriage is uncalled for; there being evidence only of divorce subsequent thereto.—*Edwards v. State*, 166 S. W. 517.

§ 815 (Tex.Cr.App.) The court did not fail to charge, on defendant's affirmative defense, his evidence raising only the issue that he did not kill deceased, but that B. and R. did so, and the court charging that if the jury believed deceased was killed by B. and R., or either of them, and that defendant had no connection therewith as principal, or have a reasonable doubt thereon, they will acquit; and then properly applying to

the case the law as to principals.—*Wyres v. State*, 166 S. W. 1150.

§ 822 (Tex.Cr.App.) Where the defendant claimed justifiable homicide in resisting robbery, and also self-defense, a charge, one paragraph of which seemed to require the jury to believe both grounds of justification existed before they could acquit, was not erroneous, where the charge, considered as a whole, was not susceptible of that meaning.—*Swilley v. State*, 166 S. W. 733.

§ 823 (Ark.) An instruction in a homicide case, calling the jury's attention to accused's improper relations with the girl as a motive for killing her was not erroneous as on the weight of the evidence, where the court also instructed that all of the evidence should be considered in determining guilt.—*Tillman v. State*, 166 S. W. 582.

§ 823 (Tex.Cr.App.) Instruction, though standing alone, subject to the objection that it authorized a conviction for manslaughter, though accused did not intend to kill or acted in self-defense, held not erroneous, in connection with other instructions.—*Muldrew v. State*, 166 S. W. 156.

**(H) Requests for Instructions.**

§ 824 (Tex.Cr.App.) While the statute requiring the charge to be submitted to the attorneys, and requiring the attorneys to make their objections thereto before it is read to the jury, does not require special charges to be asked, the requesting of special charges is the better practice.—*Goldstein v. State*, 166 S. W. 149.

§ 825 (Tex.Cr.App.) An instruction that a credible witness was one who, being competent to give testimony, is worthy of belief was sufficient, in the absence of a requested charge further defining the words "credible witness."—*Hart v. State*, 166 S. W. 152.

§ 826 (Tex.Cr.App.) Under Act April 5, 1913 (Acts 33d Leg. c. 138), amending Code Cr. Proc. 1911, art. 743, where no objection was made when the charge was submitted to accused's counsel before argument, a request to charge on circumstantial evidence, made during the closing argument for the state, comes too late.—*Forward v. State*, 166 S. W. 725.

§ 829 (Ark.) The refusal of requested instructions, in a prosecution for assault with intent to rape, held not reversible error, where the same idea was conveyed by other instructions.—*Benson v. State*, 166 S. W. 549.

§ 829 (Tex.Cr.App.) It is not error to refuse a requested charge substantially covered by instructions given.—*Gillespie v. State*, 166 S. W. 135.

§ 829 (Tex.Cr.App.) In a prosecution of an accomplice, it was not error to fail to charge specially that to convict, the evidence must be sufficient to convict the principal as principal, where the main charge required them to believe beyond a reasonable doubt everything essential to show the principal's guilt.—*Bragg v. State*, 166 S. W. 162.

§ 829 (Tex.Cr.App.) Any error in refusing requested charges by accused, or in particular expressions in the charges given, was harmless, where the charges given were substantially correct upon every issue.—*Hunter v. State*, 166 S. W. 164.

§ 829 (Tex.Cr.App.) It was not error to refuse special charges which, so far as necessary and proper, were embraced in the main charge.—*Brown v. State*, 166 S. W. 508.

§ 829 (Tex.Cr.App.) An instruction that accused could not be convicted, unless the jury believed, beyond a reasonable doubt, that she knowingly permitted prostitutes to resort to or reside in such house for the purpose of plying their vocation, or kept such house for the purpose of prostitution, held sufficiently covered by those given.—*Cunningham v. State*, 166 S. W. 519.



§ 829 (Tex.Cr.App.) Where the issues raised were correctly submitted by the court in the charges given, it was not error to refuse special charges requested by accused.—Herrington v. State, 166 S. W. 721.

§ 830 (Ark.) An instruction, requested by a defendant charged with embezzlement that his confession could not be considered by the jury in determining his guilt; that is, it would not be sufficient to justify a conviction, unless corroborated, was properly refused, although the latter part was correct; the instruction as a whole being misleading.—Russell v. State, 166 S. W. 40.

A defendant charged with a crime, who has not asked a proper instruction on the subject, cannot complain of the refusal of the court to give an improper one.—Id.

§ 830 (Ark.) Though defendant made too narrow a request for instruction, it was the court's duty to instruct.—Fakes v. State, 166 S. W. 633.

§ 830 (Tex.Cr.App.) Where the evidence suggests a defense, the court may refuse to give accused a special charge on the subject where it does not correctly state the law.—Herrington v. State, 166 S. W. 721.

§ 834 (Tex.Cr.App.) Where one paragraph of a requested instruction was improper, the court was under no obligation to modify it by striking out such paragraph, and giving the other, even if the other paragraph was proper.—Cunningham v. State, 166 S. W. 519.

#### (I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 841 (Tex.Cr.App.) Under the present law, objections to the charge must be made at the trial, when it is submitted to counsel, and cannot be made for the first time in the motion for new trial.—Edwards v. State, 166 S. W. 517.

#### (J) Custody, Conduct, and Deliberations of Jury.

§ 854 (Tex.Cr.App.) Where, during the trial, a juror became sick and was placed on a cot in the court room while the other jurors were in the jury room, and, while there, relatives visited him in the presence of the officer, there was no such separation of the jury as to justify the setting aside of conviction.—Chant v. State, 166 S. W. 513.

#### (K) Verdict.

§ 875 (Tex.Cr.App.) The misspelling of the word "guilty" in a verdict does not vitiate it.—Tores v. State, 166 S. W. 523.

§ 884 (Tex.Cr.App.) In view of the invalidity of the Suspended Sentence Act, the court may direct the jury to assess the penalty instead of merely finding accused guilty, and the court may then afterwards impose the punishment.—Lopez v. State, 166 S. W. 154.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 915 (Tex.Cr.App.) An objection that the information was not filed by the clerk could not be first raised in the motion for new trial.—Landreth v. State, 166 S. W. 503.

§ 927 (Tex.Cr.App.) In a felony case, where a juror slipped off and went two or three blocks, got his horse and took him to a livery stable, the streets being full of people, and he spoke to two, defendant should have been granted a new trial, the state not showing that nothing improper took place during the separation.—Somers v. State, 166 S. W. 1156.

§ 928 (Tex.Cr.App.) That a juror talked over the telephone before the verdict was returned into court, but after agreement, is not ground for new trial, where the officer in charge of the jury was present and heard what the juror said.—Tores v. State, 166 S. W. 523.

§ 951 (Tex.Cr.App.) Accused, who on the overruling of his motion for new trial gave notice in open court of an appeal, could not, without withdrawing the notice of appeal and without leave of court, file an amended motion for new trial.—Tores v. State, 166 S. W. 523.

Whether an amended motion for a new trial would be permitted after the time for the filing of a motion for new trial is within the sound discretion of the trial court.—Id.

§ 954 (Tex.Cr.App.) A motion for a new trial complaining of the giving and refusing of instructions which merely quoted them, without stating why the refused instructions should have been given, or pointing out any objection in the instructions given, was too general to require consideration.—Muldrew v. State, 166 S. W. 156.

§ 957 (Tex.Cr.App.) A juror may not impeach the verdict after it has been accepted by the court and the jury discharged.—Chant v. State, 166 S. W. 513.

§ 971 (Tex.Cr.App.) A verdict, "We the jury find the Defenda— Guilty of Man Slaughter and Assess his punishment at two years in the State Penitentiary," signed by a juror, followed by the word, "Fourman," is sufficient as against a motion in arrest.—Lopez v. State, 166 S. W. 154.

### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 1001 (Tex.Cr.App.) Accused, having entered pleas of guilty to two felonies on the same day, was not entitled to a suspension of either sentence under Suspended Sentence Law, § 4.—Weatherford v. State, 166 S. W. 149.

§ 1001 (Tex.Cr.App.) Plea to take advantage of the suspended sentence law held too late, and the court not required to submit it, where it was filed after the motion for a continuance was overruled, and the selection of the jury had commenced.—Muldrew v. State, 166 S. W. 156.

### XV. APPEAL AND ERROR, AND CERTIORARI.

#### (A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1004 (Ky.) The right of appeal from a conviction of a statutory offense is purely statutory.—Commonwealth v. Yungblut, 166 S. W. 808.

§ 1019 (Mo.App.) Where an indictment for a felony includes a misdemeanor, the grade of the offense of which accused is convicted determines whether an appeal is within the jurisdiction of the Court of Appeals, having jurisdiction in misdemeanor cases, or within the jurisdiction of the Supreme Court, having jurisdiction in felony cases.—State v. Sparks, 166 S. W. 642.

§ 1020 (Mo.App.) One charged with a violation of Rev. St. 1909, § 4382, by breaking the lawful custody of an officer having him in charge before conviction for grand larceny, is charged with a felony, and the jurisdiction of an appeal from a conviction, followed by a sentence of six months in the county jail, is in the Supreme Court.—State v. Sparks, 166 S. W. 642.

§ 1020½ (Mo.App.) The Court of Appeals must determine the question of its jurisdiction on appeal, though the prosecuting attorney and accused's counsel both request the transfer of the case to the Supreme Court.—State v. Sparks, 166 S. W. 642.

§ 1022 (Ky.) The act in force in March, 1910 (Laws 1910, c. 76), providing for the punishment of persons contributing to the delinquency of infants, gives the county court exclusive jurisdiction of offenses under the act, and no appeal lies from a conviction.—Commonwealth v. Yungblut, 166 S. W. 808.

§ 1022 (Tex.Cr.App.) Under the statutes, one convicted in the recorder's court of violating an ordinance, and on appeal to the county court again convicted, and fined \$20, cannot appeal to the Court of Criminal Appeals.—Holman v. State, 166 S. W. 506.

**(B) Presentation and Reservation in Lower Court of Grounds of Review.**

§ 1037 (Mo.App.) To preserve for review statements of the prosecuting attorney alleged to be unwarranted by the evidence, a party must object to such remarks when made, call the attention of the court thereto, and, if the court fails to rebuke counsel, save an exception to such failure.—State v. Humfeld, 166 S. W. 331.

§ 1043 (Tex.Cr.App.) Where a bill of exceptions, complaining of a remark of the court that testimony was proper to impeach a witness of accused, was qualified to show that accused objected to the testimony on the ground of irrelevancy, and insisted on knowing the rule under which it could be admitted, the bill as modified presented no error.—Tores v. State, 166 S. W. 523.

§ 1048 (Tex.Cr.App.) Rulings on motions and pleas cannot be reviewed, where accused reserved no exception to them.—Tores v. State, 166 S. W. 523.

§ 1055 (Tex.Cr.App.) Where there was no exception showing that the state's counsel made remarks in regard to which special charges were asked, the fact that such remarks were made was not verified so as to bring the matter before the court for review.—Tores v. State, 166 S. W. 523.

§ 1059 (Tex.Cr.App.) An exception that the court erred in failing to submit the law of manslaughter is too general to call for review of the question whether the evidence raised the issue.—Chant v. State, 166 S. W. 513.

§ 1064 (Tex.Cr.App.) A motion for new trial held to sufficiently raise the contention that the evidence made an issue as to whether a witness was an accomplice, and that the court erred in refusing to submit such issue.—Goldstein v. State, 166 S. W. 149.

**(C) Proceedings for Transfer of Cause, and Effect Thereof.**

§ 1070½ [New, vol. 11 Key-No. Series] (Tex. Cr.App.) Under Code Cr. Proc. 1911, arts. 915, 916, a notice of appeal, given in open court and entered of record, perfects the appeal, and the jurisdiction of the Court of Criminal Appeals attaches.—Tores v. State, 166 S. W. 523.

**(D) Record and Proceedings Not in Record.**

§ 1087 (Mo.App.) A criminal case can only be brought up by a full transcript of the record, as required by Rev. -St. 1909, §§ 5308, 5309, and not be a short form under section 2048.—State v. Faith, 166 S. W. 649.

§ 1087 (Tex.Cr.App.) An appeal will be dismissed if the record does not contain a notice of appeal.—Modwell v. State, 166 S. W. 504.

§ 1090 (Tex.Cr.App.) In a felony case, it is not necessary to preserve a refused instruction by a bill of exception, where the record shows its presentation and request in ample time.—Goldstein v. State, 166 S. W. 149.

§ 1090 (Tex.Cr.App.) The appellate court cannot review an exception shown only in the motion for a new trial.—Bragg v. State, 166 S. W. 162.

§ 1090 (Tex.Cr.App.) Under Old Code Cr. Proc. 1895, arts. 717, 719, 723, in a misdemeanor case, the giving and refusal of instructions cannot be considered unless bills of exception are taken at the time in which the specific reasons why the court erred are given.—Brown v. State, 166 S. W. 508.

§ 1090 (Tex.Cr.App.) Where no bill of exceptions was reserved to the overruling of ac-

cused's motion for continuance, such ruling cannot be reviewed.—Swiley v. State, 166 S. W. 733.

§ 1091 (Tex.Cr.App.) A bill of exceptions to improper argument by the district attorney was insufficient, where it did not state the objections made to the argument, or the circumstances under which it was made.—Hunter v. State, 166 S. W. 164.

§ 1091 (Tex.Cr.App.) Where neither the motion for new trial nor the bills of exception give any reasons why charges requested and refused were requested, or show how they were applicable to any state of facts, error in refusing the requests cannot be considered.—Bain v. State, 166 S. W. 505.

§ 1091 (Tex.Cr.App.) The overruling of a plea in abatement to the indictment for discrimination in the organization of the grand jury, and the overruling of a motion to quash the special venire on the ground of discrimination in the selection of jurors to prevent a fair trial, cannot be reviewed on appeal, unless exceptions are reserved, and the evidence on the hearing included in the bills of exception.—Tores v. State, 166 S. W. 523.

Where the record of the election of a special judge was regular, the overruling of a plea in abatement to the indictment, on the ground that lawyers not practicing in the court participated in the election of the special judge, who was a nonresident of the district, not supported by any evidence contained in the bill of exceptions, cannot be considered on appeal.—Id.

A bill of exceptions complaining of the testimony of a witness testifying without questions being propounded to him, must disclose the testimony, especially the part deemed objectionable.—Id.

§ 1092 (Tex.Cr.App.) Bills of exception containing the evidence on accused's motion for new trial must be filed during the term.—Bain v. State, 166 S. W. 505.

§ 1092 (Tex.Cr.App.) By express provision of Code Cr. Proc. 1911, art. 634, refusal of change of venue is not reviewable unless bills of exceptions be filed at the term at which the order was made.—Wyres v. State, 166 S. W. 1150.

§ 1092 (Tex.Cr.App.) Bills of exceptions not properly filed within the time allowed by law cannot be considered.—Willis v. State, 166 S. W. 1172.

§ 1093 (Tex.Cr.App.) A bill of exceptions complaining of the admission of testimony of certain witnesses, some of whose testimony was competent, must point out the particular portion of the testimony claimed to be inadmissible.—Lopez v. State, 166 S. W. 164.

§ 1098 (Tex.Cr.App.) If the alleged libelous article is not contained in the statement of facts in a prosecution for libel, the judgment of conviction will not be affirmed.—Samper v. State, 166 S. W. 511.

§ 1106 (Mo.App.) Where an appeal stays proceedings, delay of clerk of circuit court in making and filing transcript as required by Rev. St. 1909, § 5308, held not ground for dismissal of appeal.—State v. Johnson, 166 S. W. 853.

§ 1109 (Tex.Cr.App.) Appellant, having accepted a bill of exceptions as modified by the court, is bound by the modification.—Gillespie v. State, 166 S. W. 135.

§ 1111 (Tex.Cr.App.) Accused, accepting and filing a bill of exceptions qualified by the court without excepting to the qualification, is bound thereby.—Tores v. State, 166 S. W. 523.

§ 1111 (Tex.Cr.App.) Where one accepts a bill of exceptions as qualified by the court in approving it, he is bound thereby.—Wyres v. State, 166 S. W. 1150.

§ 1120 (Tex.Cr.App.) Testimony that officer said there was something crooked about accused's place held not ground for reversing conviction for keeping a disorderly house, where it could not be determined from the bill of excep-

tions whether or not it was admissible.—Cunningham v. State, 166 S. W. 519.

§ 1122 (Tex.Cr.App.) A bill of exceptions, complaining of the refusal to give a special charge, must show that it was presented to the court before the argument was begun, or the question will not be considered.—Lopez v. State, 166 S. W. 154.

§ 1124 (Tex.Cr.App.) The refusal of a motion for new trial on the ground of misconduct of the jury cannot be reviewed; the evidence heard on the motion not being included in the record.—Havard v. State, 166 S. W. 507.

#### (G) Review.

§ 1134 (Mo.App.) Though no argument has been made in the case for either party, and though no brief has been submitted, the court on appeal must examine the record and ascertain whether there is any reversible error.—State v. Fitch, 166 S. W. 639.

§ 1137 (Tex.Cr.App.) Accused could not complain of the answers of a witness in direct response to her own questions on his cross-examination.—Cunningham v. State, 166 S. W. 519.

§ 1139 (Tex.Cr.App.) On appeal to the county court from a conviction in the corporation court, the judgment rendered in the corporation court is inadmissible, as accused is entitled to a trial de novo.—Martoni v. State, 166 S. W. 1169.

§ 1144 (Tex.Cr.App.) Where the record does not show that the court did not submit its charge to the attorneys for both sides after the evidence was concluded and before the argument began, as required by law, the court on appeal will presume that the law was complied with.—Lopez v. State, 166 S. W. 154.

§ 1150 (Ky.) Where a petition for a change of venue on the ground of prejudice of the people and the supporting affidavits of disinterested residents were denied by the commonwealth's attorney and by affidavits of citizens, denial of the petition, being discretionary, would not be disturbed on appeal.—Saylor v. Commonwealth, 166 S. W. 254.

§ 1154 (Ark.) The discretion of the court as to argument of counsel will not be interfered with unless abused.—Lemuels v. State, 166 S. W. 741.

§ 1156 (Tex.Cr.App.) The discretion of the trial court as to allowing an amended motion for new trial after the time for the filing of a motion for new trial will not be disturbed in the absence of abuse.—Tores v. State, 166 S. W. 523.

§ 1159 (Ky.) A conviction will not be reversed on the ground that the evidence is not sufficient to support it, but a reversal is proper when there is no evidence to support it.—Saylor v. Commonwealth, 166 S. W. 254.

§ 1165 (Tex.Cr.App.) In the prosecution of an accomplice for swindling, defendant could not complain of a failure to charge as to a higher penalty, since such, if error, was in defendant's favor.—Bragg v. State, 166 S. W. 162.

§ 1166½ (Ark.) The action of the court in admonishing the jury that prosecuting witness must "just testify," and confine herself to answering questions, after prosecuting witness, while on the stand, had referred to accused by using an epithet, was not reversible error.—Benson v. State, 166 S. W. 549.

§ 1166½ (Tex.Cr.App.) Prejudice from the serving of any juror not being shown, the overruling of a challenge for cause to a juror, who was subsequently peremptorily challenged and did not serve, presents no error.—Havard v. State, 166 S. W. 507.

§ 1169 (Ark.) Any prejudicial effect from testimony of an officer that, when he went to arrest accused, he found him and his wife together, and recognized accused because his wife

had been to police headquarters looking for him, claiming that he was drunk, was cured by an instruction not to consider such statement.—Benson v. State, 166 S. W. 549.

§ 1169 (Tex.Cr.App.) In a prosecution in a prohibition county for aggravated assault, error in the admission of evidence as to defendant's possession of whisky, and as to whether or not he had been drinking, *held* prejudicial.—Hodges v. State, 166 S. W. 512.

§ 1169 (Tex.Cr.App.) The erroneous admission of testimony is not cause for reversal where other testimony to the same effect is not objected to.—Cunningham v. State, 166 S. W. 519.

§ 1169 (Tex.Cr.App.) Where a witness testified to facts within his own personal knowledge, error in permitting him to testify to the contents of a letter disclosing the same facts, without first proving the loss of the letter, was not reversible.—Tores v. State, 166 S. W. 523.

§ 1170½ (Tex.Cr.App.) Sustaining the claim of privilege of one indicted for the same offense as defendant, when called as a witness for the state, was not prejudicial to defendant, who claimed such witness was alone guilty.—Wyres v. State, 166 S. W. 1150.

Though the fact, which the state attempted to elicit by a question to defendant, was inadmissible against him, allowing the question, which in and of itself was not of a harmful nature, was not prejudicial; he having answered against the existence of the fact.—Id.

§ 1171 (Tex.Cr.App.) Where the jury were charged to disregard it, a reference by the district attorney in argument, to marks of guilt on accused's face, is harmless.—Forward v. State, 166 S. W. 725.

§ 1173 (Tex.Cr.App.) The refusal to charge that the confession of accused must be disregarded if not voluntarily made, or without a full understanding of the nature of it, *held* not prejudicial, in view of the evidence.—Lopez v. State, 166 S. W. 154.

§ 1173 (Tex.Cr.App.) In a prosecution under Pen. Code 1895, art. 601, subd. 9, for aggravated assault, where both simple and aggravated assault were submitted, a failure to instruct upon the reasonable doubt in favor of defendant as between the two degrees *held* reversible error, where, had it been given, error in failing to give defendant's requested charge on provocation would have been cured.—Hodges v. State, 166 S. W. 512.

#### (H) Determination and Disposition of Cause.

§ 1184 (Ark.) Under Kirby's Dig. § 2434, authorizing the court to disregard the excess of punishment fixed by the jury, a sentence, imposing a fine as well as imprisonment upon one convicted of embezzlement, the punishment for which is imprisonment only, erroneously imposed under the authority of Acts 1809, p. 223, imposing a fine and imprisonment upon a different but similar offense, will be modified on appeal by striking out the provision for the fine.—Russell v. State, 166 S. W. 540.

### XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1206 (Tex.Cr.App.) Under Pen. Code 1911, arts. 15-19, prescribing the effect of the enactment of a subsequent law upon a prior offense, where defendant was charged with committing a murder before Pen. Code 1911, arts. 1140, 1141, defining murder, were amended by Act April 3, 1913 (Act 33d Leg. c. 132), the court should charge the jury as to the penalty under the subsequent law.—Robbins v. State, 166 S. W. 528.

§ 1208 (Tex.Cr.App.) Pen. Code 1911, art. 84, providing that if the accomplice stands in the relation of parent, etc., to the principal offender, he shall receive the highest punishment affixed to the offense, was not applicable where the in-

dictment did not allege that the defendant stood in such relation.—*Bragg v. State*, 166 S. W. 162.

## CROPS.

See Homicide, § 182; Landlord and Tenant, §§ 828-831; Waters and Water Courses, § 126.

## CROSS-EXAMINATION.

See Witnesses, § 268.

## CROSSINGS.

See Railroads, §§ 95, 303-351.

## CURE BY VERDICT.

See Pleading, § 433.

## CURTESY.

See Dower.

## CUSTODY.

See Criminal Law, § 854; Infants, §§ 12, 16.

## CUSTOMS AND USAGES.

See Appeal and Error, § 1050.

## DAMAGES.

See Appeal and Error, §§ 47, 216, 719, 742, 1004, 1033, 1062, 1064, 1066, 1068, 1140, 1170; Carriers, § 819; Costs, § 260; Covenants, § 130; Death, §§ 11, 88, 93; Eminent Domain, §§ 101-164; Evidence, § 14; False Imprisonment, § 36; Fraud, § 59; Libel and Slander, § 120; Limitation of Actions, § 55; Master and Servant, § 41; Partnership, § 122½; Party Walls, § 8; Railroads, § 259; Sales, §§ 370, 384, 418; Torts, §§ 5, 12; Trespass, § 60; Trover and Conversion, § 54; Vendor and Purchaser, §§ 342-351.

### V. EXEMPLARY DAMAGES.

§ 87 (Tex.Civ.App.) A verdict allowing punitive damages without also allowing actual damages is contrary to law.—*Dees v. Thompson*, 166 S. W. 56.

### VI. MEASURE OF DAMAGES.

#### (A) Injuries to the Person.

§ 100 (Mo.App.) It is proper, in an action by a single woman or a widow for permanent personal injuries, for the jury to consider both plaintiff's age and condition in life in ascertaining the extent of her loss.—*McKenzie v. United Ry. Co. of St. Louis*, 166 S. W. 1098.

#### (B) Injuries to Property.

§ 111 (Tex.Civ.App.) An instruction allowing recovery for the value of a building destroyed by fire on a lot owned by the plaintiff, instead of for the difference in the value of the lot before and after the destruction of the building, held not erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, 166 S. W. 126.

§ 113 (Tex.Civ.App.) Where animals negligently injured have a market value after the injury, the measure of damages is the difference between their value immediately before and immediately after the injury.—*Chicago, R. I. & G. Ry. Co. v. Clark*, 166 S. W. 129.

One suing for injuries to animals dying soon after the accident held entitled to recover the full market value of the animals before the injury, though he testified that at the time of the injury he thought the animals had some value, but did not estimate it.—Id.

§ 116 (Tex.Civ.App.) One negligently injuring animals, resulting in their death soon afterwards, is properly charged with the cost of hay and medicine used by the owner in a good-faith effort to prevent their death.—*Chicago, R. I. & G. Ry. Co. v. Clark*, 166 S. W. 129.

### (C) Breach of Contract.

§ 120 (Mo.App.) In an action for breach of a contract to procure a lessor's assent to an assignment of the lease to plaintiff, plaintiff's measure of damages was the difference between the rent reserved and the rental value of the premises.—*Ordelheide v. Trauba*, 166 S. W. 1108.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Ky.) Verdict of \$850 for injuries to a boy 17 years old, confining him to his bed for three weeks, and permanently injuring his leg, held not excessive.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 800.

§ 132 (Ky.) An award of \$1,000 in favor of plaintiff whose leg was broken, where he was confined for a month, and by reason of the break one leg was rendered shorter than the other, is not excessive.—*Big Branch Coal Co. v. Sanders*, 166 S. W. 813.

§ 132 (Ky.) Verdict of \$2,000 for injury to leg of a servant 16 years of age, resulting in a serious and permanent deformity, held not excessive.—*Job Iron & Steel Co. v. Layne*, 166 S. W. 978.

§ 132 (Mo.App.) Verdict of \$6,000 for personal injuries to a stout healthy boy 18 years old, by which his hip was broken, and he was incapacitated from doing heavy work, etc., held not excessive.—*Boten v. Sheffield Ice Co.*, 166 S. W. 883.

§ 132 (Mo.App.) A verdict of \$8,500 was not excessive, where a seamstress aged 45 was disabled from following her occupation, and still suffered, and physicians testified that her injuries were liable to be permanent.—*Johnston v. United Ry. Co. of City of St. Louis*, 166 S. W. 1105.

§ 132 (Tex.Civ.App.) Where a railroad brakeman lost the toes on one foot, and received other painful and permanent injuries, a verdict for more than \$10,000 was excessive.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 132 (Tex.Civ.App.) A verdict of \$1,500 for internal injuries to plaintiff's wife, which resulted in a permanent displacement of her internal organs and in a miscarriage and permanent disability, was not excessive.—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 132 (Tex.Civ.App.) A verdict for \$2,875 for the impairment of the health of a woman 54 years old, who previously had been able to support herself, which resulted in disability continuing to the time of the trial, and where no objection was made to the submission of the issue of permanent injury to the jury, held not excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Cook*, 166 S. W. 453.

§ 132 (Tex.Civ.App.) A verdict for \$15,000 for damages sustained by a minor whose foot was so severely injured by a railway locomotive that its amputation was necessary is not so excessive as to justify the belief that the jury were moved by passion or prejudice, or by some improper influence.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 134 (Ky.) Where an injury to a car cleaner impaired his earning capacity about one-half, a verdict for \$1,750 would not be disturbed as excessive.—*Louisville, H. & St. L. Ry. Co. v. Armes*, 166 S. W. 190.

### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

#### (A) Pleading.

§ 143 (Tex.Civ.App.) Under the general allegation of damages in a personal injury action by breaking plaintiff's arm, etc., plaintiff could recover for physical suffering.—*Pecos & N. T. Ry. Co. v. Huskey*, 166 S. W. 493.

Petition in a personal injury action, which alleged that because of defendant's negligence

plaintiff was thrown to the ground while riding a horse and injured his nose, arm, etc., held not objectionable as failing to state of what his damages consisted.—Id.

§ 149 (Tex.Civ.App.) Under the general allegation of damages in a personal injury action by breaking plaintiff's arm, etc., plaintiff could recover for mental suffering.—Pecos & N. T. Ry. Co. v. Huakey, 166 S. W. 493.

§ 153 (Mo.App.) A petition in an action for personal injuries, which alleges that plaintiff has been put to great expense, "more than \$500, in procuring medical and surgical services and in the loss of about one year's time from his business," does not limit the amount of loss to \$500.—Bell v. United Rys. Co. of St. Louis, 166 S. W. 1100.

§ 153 (Tex.Civ.App.) A petition in a personal injury action was subject to special exception for failure to itemize the amount of damages claimed so as to show the amount claimed for loss of time, doctor's bills, drug bills, etc.—Cisco Oil Mill v. Van Geem, 166 S. W. 439.

#### (B) Evidence.

§ 163 (Tex.) Mental suffering from personal injuries will be presumed in the case of an insane person, as well as a sane person, until such abnormal mental condition as prevents the party from experiencing mental suffering is proved.—Tweed v. Western Union Telegraph Co., 166 S. W. 696.

§ 166 (Tex.) The admission of testimony by a witness for the defendant on cross-examination that it was conceivable that plaintiff's wife had received the injuries of which she complained, although he found no such injuries when he examined her for life insurance after the accident, was erroneous as permitting plaintiff to show a possibility of injury as a basis for recovery.—Houston & T. C. Ry. Co. v. Fox, 166 S. W. 693.

§ 188 (Tex.Civ.App.) In an action against a railroad company for the destruction of plaintiff's building and the fixtures therein by fire, evidence held to support a verdict for \$1,050, even though the plaintiff had rendered the lot and the improvements thereon for taxation at \$150.—Missouri, K. & T. Ry. Co. of Texas v. Mitchell, 166 S. W. 126.

#### (C) Proceedings for Assessment.

§ 210 (Ark.) An instruction on the measure of damages which does not tell the jury that their finding must be based on the evidence is erroneous.—Weigel v. McCloskey, 166 S. W. 944.

§ 216 (Mo.App.) An instruction that a married woman could recover for impairment of "ability to work or earn money on and for her separate account and use, independent of her husband, and of the performance of her household duties," did not allow compensation for performance of household duties.—Johnston v. United Rys. Co. of City of St. Louis, 166 S. W. 1105.

### DAMS.

See Liens, § 10.

### DEATH.

See Abatement and Revival, §§ 61, 75; Appeal and Error, § 1064; Constitutional Law, § 43; Evidence, § 157; Master and Servant, §§ 264, 285, 286, 291, 293; Parties, § 75; Railroads, §§ 344, 346, 350; Steam, § 6; Trial, §§ 191, 296.

## II. ACTIONS FOR CAUSING DEATH.

#### (A) Right of Action and Defenses.

§ 9 (Tex.Civ.App.) Surviving parents of a deceased who are entitled to a right of action for his wrongful death cannot complain that, under Rev. St. 1911, art. 4699, which is part of the act providing for actions for wrongful death,

the widow has brought an action for the benefit of all, for they take the right subject to the remedy.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 11 (Tex.) Under the common law, in force until changed by Rev. St. 1911, art. 4694, damages were not recoverable for death by wrongful act.—Elliott v. City of Brownwood, 166 S. W. 1129.

§ 21 (Ky.) One is not justified in taking human life in order to defend himself against slight violence, but there must be a reasonable apprehension of death or great bodily harm.—Shields v. Neal, 166 S. W. 211.

§ 33 (Tex.) Under Rev. St. 1911, art. 4694, a municipal corporation is not liable for the death of a person caused by its negligent failure to maintain its streets.—Elliott v. City of Brownwood, 166 S. W. 1129.

§ 33 (Tex.Civ.App.) Under the statute authorizing an action for death by negligent act, a municipal corporation is not liable for the death of a person caused by its negligence in maintaining its streets.—Elliott v. City of Brownwood, 166 S. W. 932.

#### (D) Pleading and Evidence.

§ 69 (Ark.) Though the action is only for pecuniary loss to decedent's children from his death, evidence of his attention to their instruction is admissible to show his affection for and interest in them, and so the likelihood that he would have contributed to their future support.—Chicago, R. I. & P. Ry. Co. v. Gunn, 166 S. W. 568.

#### (E) Damages, Forfeiture, or Fine.

§ 83 (Tenn.) Under Shannon's Code, §§ 4025-4028, a widow, suing for the death of her husband, may recover the damages she has sustained, and also such damages as decedent might have recovered had he survived.—Union Ry. Co. v. Carter, 166 S. W. 592.

§ 86 (Tex.Civ.App.) In an action under the statute by the surviving wife, parents, etc., there can be no recovery, unless plaintiffs had reasonable expectation of pecuniary benefit from deceased.—Gulf, C. & S. F. Ry. Co. v. Hicks, 166 S. W. 1190.

§ 93 (Mo.App.) Under Rev. St. § 8523, providing that on death from automobile accident damages may be recovered as provided by section 5425, a recovery of the penalty of not less than \$2,000, nor more than \$10,000, provided by the latter section, may not be had, but recovery may be had only for the damages recoverable under section 5425.—Roberts v. Trunk, 166 S. W. 841.

§ 93 (Tenn.) In an action under Shannon's Code, §§ 4025-4028, for death by wrongful act, exemplary damages are recoverable.—Union Ry. Co. v. Carter, 166 S. W. 592.

§ 99 (Tenn.) Where the declaration, in an action for death by wrongful act, demanded exemplary damages, and the court found that decedent was shot by an employé of defendant while attempting to arrest decedent for stealing a ride on a train of defendant, a judgment for \$2,000 would not be disturbed as excessive.—Union Ry. Co. v. Carter, 166 S. W. 592.

§ 99 (Tex.Civ.App.) An award of \$20,000 for the wrongful death of a husband and father, who at times earned as much as \$60 a week, less expenses, in hauling freight, which earnings were devoted to the upkeep of his family, consisting of his wife and four minor children, was not excessive.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 99 (Tex.Civ.App.) Verdict of \$5,500 for plaintiffs, in an action for the death of their son, in which a jury, under Rev. St. 1911, art. 4704, might allow damages proportionate to the resulting injury, held excessive, unless a remit-

titor of \$4,400 was filed.—*Gulf, C. & S. F. Ry. Co. v. Hicks*, 166 S. W. 1190.

(F) Trial, Judgment, and Review.

§ 103 (Tex.Civ.App.) On evidence in an action by the parents of a young man of 23 killed in a wreck due to defendant's negligence, *held*, on evidence, that the question whether plaintiffs had any reasonable expectation of pecuniary benefit from him was for the jury.—*Gulf, C. & S. F. Ry. Co. v. Hicks*, 166 S. W. 1190.

§ 104 (Ky.) In a civil action for the wrongful killing of plaintiff's husband, evidence *held* to require the giving of an instruction on the right of self-defense.—*Shields v. Neal*, 166 S. W. 211.

## DEBTOR AND CREDITOR.

See Attachment; Bankruptcy; Fraudulent Conveyances; Garnishment; Novation; Subrogation; Trusts, § 151.

## DECEDENTS.

See Descent and Distribution; Executors and Administrators; Witnesses, §§ 161-177.

## DECEIT.

See Fraud.

## DECLARATIONS.

See Criminal Law, §§ 406-421.

## DEDICATION.

### I. NATURE AND REQUISITES.

§ 19 (Mo.) Where commissioners in partition, as shown by their report and accompanying plat, which after confirmation and approval by the city engineer as conforming to the official city plat of streets, was duly filed, reserved a strip for street purposes which purchasers understood was a public street, *held* that there was a dedication as a street whenever accepted by the city by user or formal acceptance.—*City of St. Louis v. Barthel*, 166 S. W. 267.

## DEEDS.

See Acknowledgment, § 62; Adverse Possession, § 100; Appeal and Error, § 173; Cancellation of Instruments; Covenants; Dower, § 49; Evidence, §§ 353, 355, 417-461; Frauds, Statute of, § 129; Fraudulent Conveyances; Homestead, § 119; Mortgages; Partition, § 5; Quieting Title, § 12; Reformation of Instruments, § 16; Trespass to Try Title, § 44; Trusts, § 202.

### I. REQUISITES AND VALIDITY.

#### (B) Validity.

§ 69 (Tex.Civ.App.) Where the mutual mistake of a vendor and purchaser did not constitute a material inducement to the purchase, the mistake did not justify the setting aside of the deed.—*Camp v. Smith*, 166 S. W. 22.

§ 70 (Tex.Civ.App.) Where the false representations of a vendor did not constitute a material inducement to the purchaser, nor influence him at the time of the purchase, the representations did not justify the setting aside of the deed.—*Camp v. Smith*, 166 S. W. 22.

## III. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 90 (Ark.) The court, in construing a deed, must ascertain and give effect to the intention of the parties by giving to all parts of the deed such construction, if possible, that they may stand together.—*Mt. Olive Stave Co. v. Handford*, 166 S. W. 532.

§ 90 (Tex.Civ.App.) A deed will be construed against the grantor and in favor of the grantees.—*Beaton v. Fussell*, 166 S. W. 458.

§ 97 (Ark.) Where there is a repugnancy between the granting and habendum clauses of a deed, the former controls.—*Mt. Olive Stave Co. v. Handford*, 166 S. W. 532.

### (B) Property Conveyed.

§ 112 (Mo.App.) A reference to a map or plat in the description of a lot conveyed incorporates the map or plat in the deed.—*Lindsay v. Smith*, 166 S. W. 820.

§ 114 (Tex.Civ.App.) Where plaintiff, in addition to the ordinary count of trespass to try title, prayed reformation of her deed, which, while reciting a conveyance of 160 acres, described only 80, it was improper for the court to direct a verdict in her favor on the ground that the deed on its face showed a conveyance of 160 acres, for a particular description will govern a general one.—*Johnson v. Conger*, 166 S. W. 405.

### (C) Estates and Interests Created.

§ 124 (Ark.) A deed which recites that the grantor conveys to the grantees a strip of land described, to have and to hold the same to their use for a public railroad or other public roadway, to be kept open and free to the public, grants the land in fee, and the right of the grantees to use the same as a way remains, though the public has abandoned the way.—*Mt. Olive Stave Co. v. Handford*, 166 S. W. 532.

§ 129 (Ark.) A deed to one and the heirs of her body only conveyed a life estate to the grantee.—*Hawkins v. Reeves*, 166 S. W. 562.

## DE FACTO CORPORATIONS.

See Corporations, § 28.

## DEFAULT.

See Judgment, §§ 98-153.

## DELAY.

See Carriers, §§ 213, 228; Costs, § 200; Telegraphs and Telephones, § 78.

## DELIVERY.

See Gifts, § 32; Insurance, § 136; Pardon, § 9; Sales, § 358; Telegraphs and Telephones, §§ 74, 78.

## DEMAND.

See Mandamus, § 14.

## DEMURRER.

See Pleading, §§ 193-216; Trial, § 153.

## DEPOSITARIES.

See Escrows.

§ 6 (Ark.) A bid by a bank to become a depositary of public funds of a county under Sp. Acts 1911, p. 929, to pay a specified per cent. per annum more than any other bidder, is not valid.—*Grant County Bank v. McClellan*, 166 S. W. 550.

Sp. Acts 1911, p. 929, requires the selection for depositary of public funds of the highest bidder in response to an advertisement for bids, and the county court may not select a bank which has not presented a valid bid.—*Id.*

§ 6 (Ark.) Act April 12, 1911 (Sp. Acts 1911, p. 473) § 1. *held* to impose on the county judge of certain counties, as distinguished from the county court, the duty to order publication of notice of the receipt of bids for deposit of public funds and to require publication of such notice by the clerk.—*Robertson v. Derrick*, 166 S. W. 936.

The duties imposed on the county judge of certain counties to order, and the clerk to publish, notice of the receipt of bids from banks for deposit of public funds by Act April 12, 1911 (Sp. Acts 1911, p. 473), are mandatory,

and the officers are required to perform the same of their own motion.—Id.

## DEPOSITIONS.

See New Trial, § 150.

§ 83 (Tex.Civ.App.) Defendant cannot object to depositions taken and used on behalf of plaintiff, on the ground that defendant had not been legally served with citation when the depositions were taken, in that it was served in the wrong name.—Missouri, O. & G. Ry. Co. of Texas v. Browning, 166 S. W. 34.

Under Rev. St. 1911, art. 3676, a motion to suppress depositions on the ground that notice of the filing of interrogatories for the purpose of taking depositions was not served with the citation could be denied, where not made until the second term after the depositions were filed.—Id.

§ 99 (Tex.Civ.App.) A deposition taken in a suit was not admissible in a suit other than the one in which it was taken.—Castleberry v. Bussey, 166 S. W. 14.

## DEPOSITS.

See Banks and Banking, §§ 147-150.

## DEPOTS.

See Carriers, §§ 821, 846.

## DESCENT AND DISTRIBUTION.

See Adoption, § 28; Dower; Equity, § 297; Executors and Administrators; Homestead, §§ 184-145; Wills.

### III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

#### (A) Nature and Establishment of Rights in General.

§ 82 (Ky.) The repudiation by two children of their agreement made with the widow and the other children for the settlement of the estate of the deceased father and husband, and which fixed the advances to the two children, did not invalidate the agreement, and in a distribution of the estate in court the two could not be charged with greater advancements in the absence of evidence thereof.—Aylor v. Aylor, 166 S. W. 216.

Where, in a suit in equity to adjust the rights of the heirs of a decedent, it appeared that two of the heirs, to whom land had been conveyed, pursuant to a private settlement between the heirs, had mortgaged the same, the mortgagees were necessary parties to a supplementary proceeding to enforce the judgment establishing the rights of the parties and subject the land conveyed to the payment of debts due the estate.—Id.

#### (D) Rights and Remedies of Creditors of Heirs and Distributees.

§ 156 (Ky.) Where a wife received \$3,500 from her husband's estate in excess of what the laws entitled her to take as widow, she was liable in an action by a creditor to the extent of the excess received.—Bennett v. Miller, 166 S. W. 805.

## DESCRIPTION.

See Boundaries, §§ 3-8; Chattel Mortgages, § 49; Frauds, Statute of, § 110; Vendor and Purchaser, §§ 22, 280; Wills, § 493.

## DEVISES.

See Wills.

## DILIGENCE.

See New Trial, §§ 99, 102, 150; Specific Performance, § 97.

## DIRECTING VERDICT.

See Trial, § 178.

## DISABILITIES.

See Insane Persons, § 2.

## DISBARMENT.

See Attorney and Client, §§ 49-59.

## DISCHARGE.

See Compromise and Settlement; Garnishment, § 196; Master and Servant, §§ 37-44; Mortgages, § 308; Principal and Surety, § 100; Release.

## DISCOVERED PERIL.

See Trial, § 191.

## DISCRETION OF COURT.

See Appeal and Error, §§ 818, 933, 959-981; Continuance, § 30; Criminal Law, §§ 184, 596, 699, 951, 1154, 1156; Mandamus, §§ 7, 72; Pleading, § 236; Trial, §§ 68, 91.

## DISMISSAL AND NONSUIT.

See Abatement and Revival, § 61; Appeal and Error, §§ 628, 635, 773, 782, 792, 794; Criminal Law, §§ 1087, 1106; Highways, § 72.

## II. INVOLUNTARY.

§ 55 (Tex.Civ.App.) Where a suit to enjoin the execution of a judgment was not brought in the county in which the judgment was rendered, as required by Rev. St. 1911, art. 4653, and article 1830, subd. 17, the objection is one of venue, and not of jurisdiction, and it was proper to transfer a suit to the proper county, instead of dismissing it.—Lester v. Gatewood, 166 S. W. 389.

§ 81 (Tex.Civ.App.) Where a final judgment was rendered dismissing a cause for want of prosecution, and the term at which it was rendered had ended, the court had no authority to render a judgment denying or granting a motion to reinstate it without reasonable notice of the motion to all of the defendants.—McAllen v. Crafts, 166 S. W. 3.

## DISORDERLY HOUSE.

§ 16 (Tex.Cr.App.) Evidence that some time before the date of the alleged offense accused had beer in an ice box in such house, and that parties were drinking beer there, was admissible.—Cunningham v. State, 166 S. W. 519.

§ 29 (Tex.Cr.App.) Instruction requiring that accused should know the character of the women plying their vocation in such house, or should knowingly keep a house for the purpose of prostitution, held properly refused.—Cunningham v. State, 166 S. W. 519.

## DISSOLUTION.

See Garnishment, § 196; Partnership, § 279.

## DISTRIBUTION.

See Descent and Distribution.

## DISTRICT AND PROSECUTING ATTORNEYS.

See Courts, § 231; Criminal Law, §§ 706, 720, 730, 1037, 1055, 1171.

§ 8 (Mo.App.) Under Rev. St. 1909, § 1007, it is a prosecuting attorney's duty to prosecute and defend actions by or against the county, and under the statutes his office and that of judge of the county court are separate, and

neither is subservient to the other, and therefore the prosecuting attorney's right to appear in and control such actions cannot be superseded or ignored by the county court.—*State ex rel. Lashly v. Wurdemann*, 166 S. W. 348.

Under Rev. St. 1909, § 1008, providing that the prosecuting attorney shall prosecute or defend "all civil suits in which the county is interested," the county was interested in a mandamus suit against the judges of the county court to compel them to hear and determine an application for a dramshop license, so as to entitle the prosecuting attorney to appear in and control such suit.—*Id.*

Rev. St. 1909, §§ 1007, 1008, both pertaining to the duties of prosecuting attorneys, being *in pari materia*, are to be read together in determining the duties and rights of prosecuting attorneys.—*Id.*

A writ of mandamus to compel the judges of the county court to hear and determine an application for a dramshop license is not purely personal, but reaches the office, so that a county had an interest in a suit for such a writ, which under Rev. St. 1909, § 1008, entitled the prosecuting attorney to appear in and control such suit in behalf of the county.—*Id.*

§ 9 (Mo.App.) A civil action to recover a penalty under Rev. St. 1909, § 3040, providing that proceedings to collect the same shall be instituted by the prosecuting attorney of the county, may, by virtue of sections 975 and 1007, be brought by the circuit attorney in the city of St. Louis.—*State ex rel. Jones v. Howe Scale Co. of Illinois*, 166 S. W. 328.

## DITCHES.

See Drains.

## DIVERSION.

See Waters and Water Courses, §§ 109, 114.

## DIVORCE.

See Husband and Wife, § 43; Insurance, § 813; Marriage, § 50.

## VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 332 (Mo.App.) A petition in an action by a wife, obtaining in a sister state a judgment of divorce, *held* to confer on the court jurisdiction to inquire into the duty of the husband under the laws of the sister state to support his children.—*Gould v. Gibson*, 166 S. W. 648.

A provision in a foreign judgment of divorce that the allowance for the support of the children awarded to the wife shall be paid to the clerk of the court does not deprive the wife of a right to judgment for the amount due her, where the husband left the sister state and did not provide for the children.—*Id.*

## DOCKETS.

See Trial, § 11.

## DOCUMENTS.

See Criminal Law, §§ 429, 444; Evidence, §§ 341-383.

## DOMICILE.

See Venue, § 22.

## DONATIONS.

See Gifts.

## DOWER.

### II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

§ 49 (Ky.) In a suit to set aside a deed of a widow's dower for fraud, the burden is on her to establish the fraud by very substantial proof.—*Teater v. Teater*, 166 S. W. 797.

In a suit to set aside a conveyance of a widow's dower, evidence *held* to warrant a finding that she had been led to execute the deed on the belief, induced by the grantee's fraud, that it provided a consideration of \$1,200, instead of \$300.—*Id.*

## III. RIGHTS AND REMEDIES OF WIDOW.

§ 69 (Ark.) A petition by a widow for allotment of dower, which alleges that her husband died a citizen of the county, possessed of personal property described, that she is entitled to a third thereof, and that the executors have refused to assign dower, states facts vesting jurisdiction in the probate court to allot dower under Kirby's Dig. § 1840.—*Carter v. Younger*, 166 S. W. 547.

The jurisdiction of the probate court to assign dower cannot be defeated by a denial that the widow is entitled thereto, nor by an allegation that she has relinquished her dower by agreement of separation.—*Id.*

Where, in proceedings in the probate court by a widow for the allotment of dower, the answer alleged that the widow and her husband entered into an agreement of separation, the probate court had jurisdiction only to determine whether the separation agreement had been abrogated, and, if abrogated, it could award dower, but it could not determine whether the separation agreement was fair and just.—*Id.*

## DRAINS.

See Appeal and Error, § 77.

## II. ASSESSMENTS AND SPECIAL TAXES.

§ 67 (Ark.) Act March 13, 1913, p. 756, repealing Special Act 1911, p. 814, which created the Chicot county drainage district, and expressly validating assessments theretofore levied and collected, *held* not to violate any constitutional requirement that such assessments shall be in proportion to the benefits.—*Davies v. Chicot County Drainage Dist.*, 166 S. W. 170.

§ 76 (Ark.) The failure of the board of directors of the Chicot county drainage district to give notice of an assessment, as provided by Sp. Act 1911, p. 823, § 12, creating the district, would not make the assessment invalid, in view of Act March 13, 1913, p. 756, expressly validating all assessments, and repealing the act creating the district.—*Davies v. Chicot County Drainage Dist.*, 166 S. W. 170.

§ 86 (Ark.) Since Act March 13, 1913, p. 756, repealed Sp. Act 1911, p. 814, creating the Chicot county drainage district, though it ratified assessments already made, a property owner would not be liable for the penalty imposed by the repealed act; the repealing act only authorizing the collection of the assessment.—*Davies v. Chicot County Drainage Dist.*, 166 S. W. 170.

§ 91 (Ark.) Where plaintiff, who sued to restrain the collection of an assessment levied by the Chicot county drainage district, filed his complaint before Act March 13, 1913, p. 756, which abolished the district, but ratified assessments made, was enacted, and was entitled to the relief prayed before its enactment, he was not liable for any costs incurred before that time.—*Davies v. Chicot County Drainage Dist.*, 166 S. W. 170.

## DRAMSHOPS.

See Intoxicating Liquors.

## DUE PROCESS OF LAW.

See Constitutional Law, §§ 272-290.

## DYING DECLARATIONS.

See Criminal Law, §§ 366, 419, 420.



## EASEMENTS.

See Dedication; Frauds, Statute of, §§ 60, 139; Highways; Party Walls, § 1; Tenancy in Common, § 41.

### I. CREATION, EXISTENCE, AND TERMINATION.

§ 1 (Tex.Civ.App.) An easement over the land of another may be acquired by verbal agreement in the nature of estoppel.—Bowington v. Williams, 166 S. W. 719.

§ 18 (Tex.Civ.App.) An easement over the land of another may be acquired when it is necessary for an outlet to the county road.—Bowington v. Williams, 166 S. W. 719.

§ 35 (Tex.Civ.App.) A pleading that defendant acquired a way by parol agreement upon the conveyance to plaintiff of the land over which he asserted it is not good as a plea of an easement by estoppel, because alleging no fact showing the injustice of a revocation of the way.—Bowington v. Williams, 166 S. W. 719.

### II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 61 (Tex.Civ.App.) A party claiming an easement against the owner of the fee is bound to plead and prove it.—Bowington v. Williams, 166 S. W. 719.

The way of necessity reserved to a vendor who sells land surrounding other land which he retains, and to which he can have access only through the granted premises, cannot be asserted by the vendor for the benefit of subsequent grantees to whom he sold the inaccessible tract.—Id.

Where an owner of land verbally reserved a way over the land conveyed so as to have access to a parcel retained, the right is personal to him, and cannot inure to the benefit of subsequent grantees to whom he conveyed his remaining parcel.—Id.

## EJECTMENT.

See Trespass to Try Title.

## ELECTION.

See Appeal and Error, § 1039; Pleading, §§ 93, 428.

## ELECTIONS.

See Counties, § 29; Intoxicating Liquors, §§ 30, 31, 33, 34, 36, 40; Municipal Corporations, § 867.

### I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 11 (Ark.) Acts 1913, p. 180, providing for issuance of liquor license on petition of a majority of the adult white inhabitants of a town or city held not to violate Const. U. S. Amend. 15, which is intended to secure the right to vote only in the elections contemplated by amendment 14.—McClure v. Topf & Wright, 166 S. W. 174.

### VIII. CONDUCT OF ELECTION.

§ 198 (Ky.) Substantial compliance by election officers with the requirements of the statute regulating elections is all that is necessary.—Hackney v. Justice, 166 S. W. 760.

§ 230 (Ky.) Where contestant received a majority of the legal votes cast at an election for justice of the peace in a magisterial district, the election could not be declared void because it was proved that many votes cast for contestee had been obtained by bribery.—Hackney v. Justice, 166 S. W. 760.

### IX. COUNT OF VOTES, RETURNS, AND CANVASS.

§ 255 (Ky.) Where ballots were strung, bound, sealed, and securely locked with the tally sheet and ballot stubs in the ballot box as provided by Ky. St. § 1482, that none of the ballots except five doubtful ones were inclosed in an envelope did not show that they had not been properly preserved.—Hackney v. Justice, 166 S. W. 760.

### X. CONTESTS.

§ 288 (Ky.) Under Ky. St. § 1596a, subsec. 12, providing that no grounds of election contest can be relied on except those set up in the petition, an amendment to the petition, setting forth the names of voters who were shown by the evidence to have voted illegally in the same manner as other voters were alleged by the petition to have voted, sets up new grounds of contest, and is improper.—Clark v. Robinson, 166 S. W. 801.

An amendment of a petition for an election contest by the addition of an allegation that the voters who were alleged in the original petition to have voted openly did not take the oath which would authorize them to so vote did not set forth additional grounds of contest, but only perfected the grounds set up in the original petition, and was properly allowed.—Id.

§ 298 (Ky.) Where there was evidence that illegal votes were cast in various precincts of a county, but the names of the illegal voters and the person for whom they voted were established so that the votes could be eliminated, and there was no evidence of fraud or crime on the part of the officers, but only such irregularity as comes from honest mistakes, the election in such precincts will not be disregarded.—Clark v. Robinson, 166 S. W. 801.

§ 299 (Ky.) Where ballots voted at an election have been preserved so that their identity is assured, they may be recounted during a contest, and are better evidence of the vote cast than the returns.—Hackney v. Justice, 166 S. W. 760.

§ 299 (Ky.) Under Ky. St. § 1596a, subsec. 12, providing that all ballots, etc., concerning which there is any ground for contest may be removed to the court in which the contest is pending, the court could order the county clerk to transfer the ballot boxes and contents to the master commissioner of the court.—Clark v. Robinson, 166 S. W. 801.

§ 305 (Ky.) A contestee in an election contest cannot complain of a holding by the trial court that there was no election in a certain precinct, where the recount of the ballots showed that the contestant received a majority of the votes cast, even if those of the disregarded precinct be counted.—Clark v. Robinson, 166 S. W. 801.

Where a judgment sustaining the contest by a candidate for school superintendent was affirmed a few days before the time for the examination of school teachers and the issuance of certificates to them, and the public interests require that the decision of the case be not delayed, the mandate will be issued immediately, and not stayed for 30 days, as ordinarily.—Id.

## ELECTRICITY.

See Evidence, § 481; Trial, § 296.

## ELEVATORS.

See Master and Servant, § 133; Trial, § 253.

## EMBEZZLEMENT.

§ 4 (Tex.Cr.App.) Where defendant induced prosecutrix to deliver to him certain certificates of stock and a note, to be exchanged for shares in another company, but he sold her shares ar

converted the proceeds, he was guilty of embezzlement.—*Landrum v. State*, 166 S. W. 726.

§ 5 (Ark.) Where the defendant embezzled money which was in his lawful custody, but which he was not entitled to use, any use of it by him was a conversion, notwithstanding an intention on his part to return it, and the state need not prove a specific intent to deprive the owner permanently of his property.—*Russell v. State*, 166 S. W. 540.

§ 11 (Ark.) A city collector, who had invested funds belonging to an improvement district in a certain corporation, was guilty of embezzlement, whether he became personally interested in the corporation, or loaned the money to others who became interested, or to the corporation itself.—*Russell v. State*, 166 S. W. 540.

§ 23 (Ark.) It is no defense to a prosecution for embezzlement that the amount of the shortage had been repaid after the finding of the indictment.—*Russell v. State*, 166 S. W. 540.

It is no defense to a charge of embezzlement by a city collector of funds collected by him that he made no attempt to conceal the shortage and did not falsify his accounts.—*Id.*

§ 35 (Tex.Cr.App.) Where, after defendant induced prosecutrix to deliver to him certain stock certificates and a note, to be exchanged for other stock, he sold the stock and converted the proceeds, he was properly charged with embezzling the proceeds and not the stock.—*Landrum v. State*, 166 S. W. 726.

## EMINENT DOMAIN.

See Appeal and Error, § 882; Evidence, § 142; Jury, § 19; New Trial, § 102; Pleading, §§ 36, 93; Trial, §§ 192, 296; Witnesses, § 255.

### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Mo.) Special taxes for benefits, levied under Rev. St. 1909, §§ 10611-10625, authorizing special road districts and special taxes to pay for road improvements, are not taxes, within the Constitution, but are merely compensation for the enhancement of value of the land due to road improvements, so that no property is taken without compensation, within the prohibition of Const. art. 2, § 21.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stapp v. Same*, *Id.* 291; *Klein v. Kingshighway Road Dist. of New Madrid County*, *Id.*

§ 10 (Mo.) An electric railway incorporated under the steam railroad act is entitled to condemn land for railroad purposes, and, if it is an interurban railroad it has the same right conferred by Laws 1907, p. 174.—*St. Louis Electric Terminal Ry. Co. v. MacAdaras*, 166 S. W. 307.

### II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 101 (Ky.) When a public highway is taken into a city, it becomes a street of the city; but the construction of a street upon it is not a reconstruction of a street, but an original construction.—*Town of Erlanger v. Cody*, 166 S. W. 202.

While a city is not liable to an abutting owner for damages resulting from the establishment of the original grade of a street, yet under Const. § 242, prohibiting injury of private property without compensation, it is liable for damages caused by a change in the established grade.—*Id.*

Where a macadamized road was taken into a city, the city, by requiring the construction of sidewalks in accordance with the grade of the road, established the old grade of the road as that of the street, so as to entitle abutting owners injured by a change of grade to damages.—*Id.*

### (C) Measure and Amount.

§ 124 (Mo.) The value of land sought to be condemned is to be determined as of the date the commissioners make their report of damages and the condemning party pays the award into court for the benefit of the landowner.—*Kansas City Southern Ry. Co. v. Second Street Improvement Co.*, 166 S. W. 296.

§ 133 (Mo.) Where, during the term of a lease of land for railroad purposes, the lessee constructed certain railroad improvements thereon, they did not constitute real estate; and hence, though not removed during the term, could not be considered as part of the value of the land in subsequent condemnation proceedings.—*Kansas City Southern Ry. Co. v. Second Street Improvement Co.*, 166 S. W. 296.

Where, during the term of a lease of certain property for railroad purposes, the president of the road constructed a house on the land, with his own funds, for the use of railroad employes, the house did not become a part of the realty, and its value should not be considered as such in subsequent condemnation proceedings.—*Id.*

§ 141 (Mo.) In assessing damages for land taken for a railroad terminal, defendant is not entitled to damages for injuries to his remaining property which he suffers in common with adjoining landowners whose property was not taken.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 145 (Mo.) Where condemnation of defendants' property for a railroad depot was part of a general plan of railroad construction, adopted prior to the improvement of certain adjoining property by the railroad company, defendants were not entitled to have the increase in value of their property by reason of such improvement considered in determining their damages.—*St. Louis Electric Terminal Ry. Co. v. MacAdaras*, 166 S. W. 307.

### (D) Persons Entitled and Payment.

§ 164 (Mo.) Under Rev. St. 1909, §§ 2361, 2362, 2364, contemplating two distinct hearings in condemnation, one upon the question of the propriety of the condemnation and the other damages, a defendant who accepts the sum awarded by the commissioners and deposited with the clerk estops himself from attacking the judgment authorizing the condemnation.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 164 (Mo.) Defendant in a condemnation proceeding, while retaining the amount awarded by the commissioners, was estopped, in further proceedings, to deny plaintiff's right to condemn.—*Kansas City Southern Ry. Co. v. Second Street Improvement Co.*, 166 S. W. 296.

### III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 169 (Tex.Civ.App.) The right of an irrigation corporation to condemn land, under Rev. St. 1911, art. 5004, for a right of way is not dependent on the filing of a water appropriation under articles 4996, 4998, and in proceedings to condemn it is not error to exclude a certified copy of a water appropriation made by the corporation.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 172 (Mo.) The filing of the petition and service of the notice provided for by Rev. St. 1909, § 2361, in condemnation cases, gives the court jurisdiction of the subject-matter and of the person.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 185 (Mo.) A voluntary appearance by the defendant in a condemnation suit gives the court jurisdiction without service of notice.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 196 (Tex.Civ.App.) The testimony of an agent of a corporation, seeking to condemn land for a right of way, that he had asked the

owner what he would settle for, and that the owner asked such a price that it was impossible to agree to it, and that no agreement was made, showed an effort by the company to reach an agreement, entitling it to condemn.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 202 (Tex.Civ.App.) In condemnation proceedings, where, upon the issue of damages, the owner had testified as to the quality and character of the land condemned and given his opinion of its value, the jury could properly consider the fact of plaintiff's long residence upon the land as bearing upon the weight of the testimony.—*City of Ft. Worth v. Charbonneau*, 166 S. W. 387.

In condemnation proceedings, upon the issue of the value and character of the property condemned, the jury could properly consider the fact that the owner had raised his family upon the land as showing its adaptability to homestead uses.—*Id.*

§ 203 (Mo.) Where part of one farm was taken, testimony concerning the use of another parcel three-quarters of a mile distant is inadmissible on the question of damages, without proof that the two tracts were especially adapted to one use and had a peculiar value because of that adaptability.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 204 (Mo.) In proceedings to condemn land for railroad purposes, evidence of a contract for the sale of the land to plaintiffs, made by defendants' agent, without authority, prior to the construction of improvements by plaintiffs on adjoining property, *held* admissible to show a pre-existing plan of improvement including defendants' property, so that defendants were not entitled to the increased value of their property therefrom.—*St. Louis Electric Terminal Ry. Co. v. MacAdaraa*, 166 S. W. 307.

§ 222 (Ky.) Instruction in condemnation proceeding to award such sum as the land and improvements would bring when offered by one not obliged to sell, and bought by one under no necessity of buying, *held* not erroneous, though it failed to mention the purchaser's desire to buy.—*David v. Louisville & I. R. Co.*, 166 S. W. 230.

Though, in condemnation proceeding, evidence of adaptability of property for other uses than its present use is admissible, the jury should not be told to consider such adaptability.—*Id.*

§ 261 (Ky.) Under Ky. St. §§ 835-839, on appeal to the circuit court, the confirmation of the commissioner's report is not the sole question to be tried, but the whole question of assessment of damages may be gone into.—*David v. Louisville & I. R. Co.*, 166 S. W. 230.

Under Ky. St. §§ 835, 839, on appeal to the circuit court, evidence of the value of the property should be confined to its value at the time of the trial.—*Id.*

On trial of condemnation proceeding in circuit court, jury's finding within the range of the testimony and fixing the same value as that fixed by the commissioners in the county court *held* not flagrantly against the evidence.—*Id.*

#### IV. REMEDIES OF OWNERS OF PROPERTY.

§ 293 (Ky.) In an action for damages for the elevation of the grade of a street in front of plaintiff's property, evidence of damages caused by water cast on plaintiff's land, which ran into his cellars, is inadmissible, unless specially pleaded.—*Town of Erlanger v. Cody*, 166 S. W. 202.

#### ENTRY.

See Judgment, § 273.

#### ENTRY, WRIT OF.

See Criminal Law, § 830.

#### EQUITY.

See Adverse Possession, § 40; Cancellation of Instruments; Chattel Mortgages, § 117; Counties, § 29; Estoppel, §§ 58-75; Fraudulent Conveyances; Injunction; Interpleader; Judgment, §§ 403, 455; Partition; Quieting Title; Receivers; Reformation of Instruments; Remainders, § 17; Set-Off and Counterclaim; Specific Performance; Subrogation.

#### I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 3 (Tex.Civ.App.) Equity will take jurisdiction when necessary to administer a preventive remedy, or when the ordinary courts are made instruments of injustice, or the legal remedy is inadequate to meet the demands of justice.—*Supreme Lodge of Fraternal Union of America v. Ray*, 166 S. W. 46.

§ 39 (Ark.) Where equity obtains jurisdiction to prevent encroachment on a wall by an adjacent owner, erecting a building thereon, it will retain jurisdiction and award damages.—*Evans v. Pettus*, 166 S. W. 955.

(B) Remedy at Law and Multiplicity of Suits.

§ 46 (Tex.Civ.App.) A legal remedy is not adequate, so as to prevent equity from taking jurisdiction, unless it is as practical and efficient to secure the administration of justice as is the equitable remedy.—*Supreme Lodge of Fraternal Union of America v. Ray*, 166 S. W. 46.

#### II. LACHES AND STALE DEMANDS.

§ 71 (Ark.) A plaintiff, coming into a court of equity to invoke its peculiar jurisdiction, must show that it has proceeded with diligence, as nothing can call the court into activity but conscience, good faith, and reasonable diligence.—*Board of Levee Inspectors of Chicot County v. Southwestern Land & Timber Co.*, 166 S. W. 589.

§ 85 (Ark.) A levee board or other governmental agency is not exempt from the doctrine of laches any more than from the statute of limitations.—*Board of Levee Inspectors of Chicot County v. Southwestern Land & Timber Co.*, 166 S. W. 589.

#### IV. PLEADING.

(A) Original Bill.

§ 148 (Mo.App.) A petition, in an action by a company constructing a Masonic lodge building and the members of the lodge, to restrain a publication and stop untruthful representations by defendant *held* not multifarious.—*Kansas City Masonic Temple Co. v. Young*, 166 S. W. 838.

(E) Demurrer, Exceptions, and Motions.

§ 241 (Ark.) A court of equity, in testing the sufficiency of a complaint on demurrer, may look to the exhibits filed with the complaint.—*Evans v. Pettus*, 166 S. W. 955.

(F) Amended and Supplemental Pleadings and Revivor.

§ 297 (Ky.) In a suit in equity to adjust the rights of the heirs of a decedent, the chancellor may in his discretion allow an amended and supplemental petition to enforce the judgment rendered on the original petition instead of requiring a new suit for that purpose.—*Aylor v. Aylor*, 166 S. W. 216.

#### ERROR, WRIT OF.

See Appeal and Error.

## ESCROWS.

§ 1 (Tex.Civ.App.) Before an instrument can become an escrow, the contracting parties must actually agree thereto, and an agreement between the grantors as to the distribution of the purchase price was not binding on the grantee, who was not a party thereto.—*Cooper v. Marek*, 166 S. W. 58.

## ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Remainders; Tenancy in Common; Wills.

§ 10 (Ky.) Where property of an insolvent was purchased by a representative for the joint benefit of plaintiff and defendant who were creditors, and, after being conveyed to plaintiff, defendant instituted suit to establish his interest, in which the property was sold to him, the conveyance to plaintiff did not merge his right to an interest in the unpaid portion of the price on the original sale as a creditor of the insolvent.—*Wiedemann v. Crawford*, 166 S. W. 185.

There can be no merger of estate where there is an outstanding or intervening interest or equity.—Id.

## ESTOPPEL

See Banks and Banking, § 148; Bills and Notes, §§ 377, 453; Chattel Mortgages, § 173; Compromise and Settlement, § 17; Easements, § 1, 35; Eminent Domain, § 164; Frauds, Statute of, § 139; Insurance, §§ 141, 392, 724, 756; Pleading, § 36; Principal and Agent, § 137; Principal and Surety, § 194; Sales, § 202; Stipulations, § 18; Trusts, § 92½; Vendor and Purchaser, § 114; Wills, § 100.

## II. BY DEED.

(A) Creation and Operation in General.

§ 22 (Mo.App.) Parties who sign a bond conditioned on a lessee performing the obligations imposed by the lease are estopped from denying the facts recited in the bond as to the terms and obligations of the lease.—*Minor v. Woodward*, 166 S. W. 855.

## III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

§ 58 (Tex.Civ.App.) A carrier, not misled nor induced to refrain from doing any act, the performance of which would have placed it in a better condition, cannot rely on estoppel to bind a shipper of live stock to condition reports signed by him.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

(B) Grounds of Estoppel.

§ 74 (Ky.) A surety on notes given in renewal of purchase-money notes, whose negligence in not possessing himself of the original notes, and in not causing the record to show that the vendor no longer owned the lien enabled the purchaser to obtain such original notes and obtain a loan secured by mortgage on the land conveyed, held estopped to claim a lien superior to such mortgage lien.—*Hicks' Committee v. Smith*, 166 S. W. 248.

Surety on notes given in renewal of purchase-money notes, whose negligence in not possessing himself of the original notes, enabled the purchaser to obtain them and to obtain a loan secured by mortgage on the land conveyed, held estopped from claiming a lien superior to such mortgage lien to the full amount of the loan, made on the faith of the purchaser's apparent title.—Id.

Surety on notes given in renewal of purchase-money notes, whose negligence in not possessing himself of the original notes enabled the purchaser to obtain them and a release of the lien, held estopped to assert a lien superior to that of

a purchaser from his principal, to the extent of the purchase price paid in cash.—Id.

§ 75 (Mo.App.) The conduct of the seller of goods for cash in permitting the buyer to remain in possession for a considerable time before reclaiming them for nonpayment, though it might have estopped it as against an innocent purchaser for value, did not estop it as against a mortgagee, who knew when the mortgage was executed that the seller had not been paid and claimed the property.—*Skinner & Kennedy Stationery Co. v. Lammert Furniture Co.*, 166 S. W. 1079.

## EVIDENCE.

See Adverse Possession, §§ 112-114; Appeal and Error, §§ 231, 237, 690, 692, 719, 724, 837, 876, 877, 882, 901-937, 987, 1001, 1002, 1005, 1006, 1008, 1010-1012, 1032, 1050, 1051, 1054, 1057, 1091, 1170; Assault and Battery, § 92; Assumpsit, Action of, § 25; Bankruptcy, § 303; Bigamy, § 9; Bills and Notes, §§ 389, 497, 520, 523, 525; Boundaries, §§ 32-54; Brokers, §§ 84, 86; Carriers, §§ 94, 134, 228, 316-318; Chattel Mortgages, § 173; Continuance, § 31; Contracts, §§ 2, 99, 346; Criminal Law, §§ 304-561, 635, 1091, 1137, 1139, 1169; Damages, §§ 163-188; Death, § 69; Depositions; Disorderly House, § 16; Dower, § 49; Eminent Domain, §§ 196, 203, 204, 261, 293; Exchange of Property, § 8; Execution, § 171; Fraud, §§ 50, 52; Frauds, Statute of, § 156; Fraudulent Conveyances, § 295; Gifts, §§ 45, 49; Highways, §§ 68, 164; Homicide, §§ 142, 158-255, 338, 339; Husband and Wife, §§ 281, 313; Indictment and Information, § 137; Insane Persons, § 2; Insurance, §§ 136, 654½, 665, 819; Intoxicating Liquors, § 227; Judicial Sales, § 31; Landlord and Tenant, §§ 95, 186, 331; Libel and Slander, §§ 101-111, 155; Marriage, § 50; Master and Servant, §§ 265-281; Municipal Corporations, §§ 33, 819; Negligence, §§ 121-134; New Trial, §§ 99-105; Novation, §§ 12; Parent and Child, 17; Partnership, §§ 53, 122½; Perjury, §§ 29, 33; Public Lands, §§ 61, 210; Railroads, §§ 348, 348, 397, 398, 411, 441, 443; Rape, § 38; Replevin, § 72; Sales, §§ 52, 358, 397, 416, 417, 441; Seduction, §§ 40, 42, 46; Specific Performance, § 121; Statutes, § 289; Steam, § 6; Trespass, §§ 44-46; Trial, §§ 25, 45-105, 139-145, 251-253, 296; Trusts, § 44; Vagrancy, § 3; Vendor and Purchaser, § 44; Waters and Water Courses, §§ 126, 152, 209; Weapons, § 17; Wills, §§ 134, 164, 165, 293, 297, 399, 400, 487, 488; Witnesses.

Reception of, see Criminal Law, § 678; Trial, §§ 45-105.

## I. JUDICIAL NOTICE.

§ 14 (Tex.Civ.App.) The court, in a negligence case, could not take judicial notice that plaintiff, a young man, had such a life expectancy that if \$10 per month be allowed for the remainder of his life for permanently diminished capacity to labor the amount so claimed would give an aggregate of more than \$1,000.—*Cisco Oil Mill v. Van Geem*, 166 S. W. 439.

§ 20 (Ky.) It is a matter of common knowledge that the emission of smoke from engines and the ringing of bells and blowing of whistles are necessary incidents to the operation of railroad trains.—*Louisville & N. R. Co. v. Commonwealth*, 166 S. W. 237.

§ 23 (Tex.Civ.App.) The Court of Civil Appeals takes judicial notice that the purchase of public free school land from the state is upon a condition of occupancy which is more or less onerous.—*Sears v. Ainsworth*, 166 S. W. 60.

§ 28 (Mo.App.) The courts of Missouri will take judicial notice of the territorial laws of Missouri.—*Davis v. McColl*, 166 S. W. 1113.

§ 29 (Tex.Civ.App.) Sp. Laws 1909, pp. 601-611, will not be considered by the courts, in the absence of proof of its existence; there being no provision therein making it a public act and requiring the courts to take judicial notice of it.—Galveston-Houston Electric Ry. Co. v. Staats, 166 S. W. 11.

§ 34 (Mo.App.) The courts of Missouri will take judicial notice of the acts of Congress of a public nature.—Davis v. McColl, 166 S. W. 1113.

§ 35 (Mo.App.) The courts of Missouri will not take judicial notice that the Negotiable Instruments Act has been passed and is in force in Iowa.—Davis v. McColl, 166 S. W. 1113.

§ 41 (Mo.App.) Appellate courts take judicial notice of the several terms of the courts of the state and assume that if the court was in session at a later day of the term it was in session on intermediate dates.—State ex rel. Lynch v. Taylor, 166 S. W. 1071.

§ 43 (Tex.Civ.App.) The Court of Civil Appeals will take judicial notice of the opinion and record on a former appeal of the same action.—Good v. Texas & P. Ry. Co., 166 S. W. 670.

## II. PRESUMPTIONS.

§ 80 (Mo.App.) Where the common law was in force in a state prior to its admission into the Union by force of statutes of which the courts of Missouri can take judicial notice, it will be presumed, in the absence of proof to the contrary, that it is still in force.—Davis v. McColl, 166 S. W. 1113.

Under Act Cong. June 4, 1812, § 14, Act Missouri Territorial Legislature Jan. 19, 1816, § 1, Act Cong. April 20, 1836, Ordinance of 1787, art. 2, and Act June 12, 1838, § 12, the common law was in force in Iowa prior to its admission and will be presumed, in the absence of proof to the contrary, to be still in force.—Id.

§ 83 (Mo.App.) In the absence of evidence to the contrary, it will be presumed that the mayor of a city, who consulted an engineer when making estimates for a street improvement, satisfied himself of the correctness of the engineer's estimate, so that it reflects his own judgment.—Gratz v. City of Kirkwood, 166 S. W. 319.

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### (B) Res Gestæ.

§ 118 (Tex.Civ.App.) A statement as a part of the res gestæ is not rendered inadmissible because it contains a profane expression.—Missouri, O. & G. Ry. Co. v. Boring, 166 S. W. 76.

§ 121 (Tex.Civ.App.) In a lessee's action for an injunction, statements of the lessor as to leasing the premises and delivering possession thereof in so far as res gestæ as to the delivery of possession held admissible.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

§ 123 (Tex.Civ.App.) A statement by one of the parties to an occurrence resulting in injury, made at the time of the occurrence, with reference to the cause of the injury or the conduct of the parties is admissible as a part of the res gestæ.—Missouri, O. & G. Ry. Co. v. Boring, 166 S. W. 76.

The statement of a section foreman, an instant after the happening of an accident to a section hand under his control, as to the cause of the accident was properly received as a part of the res gestæ when material on the issues as then disclosed by the pleadings and the evidence.—Id.

### (C) Similar Facts and Transactions.

§ 132 (Tex.) In an action for injuries claimed to have affected plaintiff's mind, evidence as to the abilities of patients in an insane asylum held improperly admitted, as it furnished no guide for determining plaintiff's mental capac-

ity.—Tweed v. Western Union Telegraph Co., 166 S. W. 696.

§ 142 (Mo.) In condemnation proceedings, it was error for the court to admit evidence of the value of dissimilar property as a standard by which to fix the value of the property in question.—St. Louis Electrical Terminal Ry. Co. v. MacAdaras, 166 S. W. 307.

§ 142 (Tex.Civ.App.) While it is permissible, on the issue of the value of lands sought to be condemned, to show sales of similar lands in the vicinity at about the time of the condemnation, the court properly rejected testimony of a witness that he had sold 139 acres for \$40 per acre, where no similarity of condition was shown.—City of Ft. Worth v. Charbonneau, 166 S. W. 387.

Upon the issue of the value of lands in condemnation proceedings, the court properly permitted a witness to testify as to the gross receipts from tracts of land which, though located at different points, was similar to the land in controversy.—Id.

## V. BEST AND SECONDARY EVIDENCE.

§ 157 (Tex.Civ.App.) A promise to execute a written lease which was drawn and delivered to the lessor, who promised to sign it, but who did not do so, held not the best evidence of the terms of a previous verbal lease.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

§ 157 (Tex.Civ.App.) In an action for wrongful death, a witness who had sufficient acquaintance with deceased to estimate his earning capacity may testify as to his estimates, where they were not based upon any books, and it did not appear that deceased kept any books showing his earnings.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 165 (Tex.Civ.App.) When the terms of an agreement are reduced to writing and signed by the parties, the writing is merely the evidence by which the contract can be proved, and, in the absence of fraud, accident, or mistake, is the best evidence.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

§ 171 (Tex.Civ.App.) A conveyance not forming the basis of plaintiff's cause of action, but which is merely a collateral matter, may be proved by parol notwithstanding the best evidence rule.—Larrabee v. Porter, 166 S. W. 395.

§ 178 (Tex.Civ.App.) A telegram received in response to a letter mailed to the adverse party is properly received in evidence as against the adverse party who purported to have signed the telegram, where the original telegrams had been destroyed.—Menefee v. Bering Mfg. Co., 166 S. W. 365.

## VII. ADMISSIONS.

### (A) Nature, Form, and Incidents in General.

§ 213 (Mo.App.) Admissions by a party during a controversy with the adverse party, but not in an effort at compromise, may be shown against the party.—Love v. Scott, 166 S. W. 850.

§ 220 (Tex.) In an action for injuries sustained by plaintiff's wife while a passenger on defendant's train, evidence that the plaintiff had made no demand for settlement before instituting suit is immaterial.—Houston & T. C. Ry. Co. v. Fox, 166 S. W. 693.

### (C) By Grantors, Former Owners, or Privies.

§ 229 (Tex.Civ.App.) In a lessee's action for an injunction, the lessor's declarations against interest held admissible against defendant, who claimed under him with full notice that plaintiff was in possession.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

§ 230 (Tex.Civ.App.) In an action for the conversion of cotton which a mortgagee claimed

under a mortgage made by a landowner before he conveyed to defendants, a letter written by the landowner, explaining that he had sold the land and was renting from his grantee, on shares, and that defendants were to take the first cotton, is admissible only against the writer.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 236 (Ky.) The statement of a parent, since deceased, who had executed an instrument reciting that he had permitted his son to occupy and improve a tract in his possession and that he intended to convey the same to the son, to the effect that the son was not paying any rent, made after the son had taken possession, was insufficient to charge the son with rent.—*Aylor v. Aylor*, 166 S. W. 216.

**(D) By Agents or Other Representatives.**

§ 237 (Tex.Civ.App.) Declarations by the children of the buyer of an automobile showing a delivery of the car to them as their mother's agents are inadmissible in an action against the buyer for the purchase price, in the absence of proof of the agency aside from the relationship and the declarations of the children.—*Lange v. Interstate Sales Co.*, 166 S. W. 900.

**(E) Proof and Effect.**

§ 265 (Tex.Civ.App.) Statements in stock condition reports signed by a shipper as an accommodation to the conductor, and without having been read, and only to indicate that the shipment had reached the terminus of the carrier's line, are not binding on the shipper.—*Texas Cent. R. Co. v. McCall*, 166 S. W. 925.

**IX. HEARSAY.**

§ 317 (Tex.) In an action for personal injuries to plaintiff's wife while a passenger on defendant's train, declarations by plaintiff to others that his wife had been injured on a trip were hearsay.—*Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693.

§ 317 (Tex.Civ.App.) The testimony of one as to what physicians had stated to him, or in his presence, as to the advisability of an operation on him, was inadmissible as hearsay.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

**X. DOCUMENTARY EVIDENCE.**

**(B) Exemplifications, Transcripts, and Certified Copies.**

§ 341 (Tex.Civ.App.) Articles of incorporation, under Rev. St. 1911, art. 5002, may be proved, as authorized by article 3707, by a copy certified by the secretary of state, and article 3700 has no application.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

**(C) Private Writings and Publications.**

§ 353 (Tex.Civ.App.) Where, in trespass to try title, the issue involved was the location of the old bed of a river, and defendant claimed under a town to which a grant was made, bounded by the old bed, a statement in a deed executed by the town with reference to the location of the old bed was admissible.—*Stevens v. Crosby*, 166 S. W. 62.

§ 354 (Tex.Civ.App.) Where it was shown that written slips, statements, and accounts constituted all the bookkeeping in plaintiff's business, and that they were regularly kept by himself and his clerk, it was error to exclude those made by the clerk.—*Elias v. Missouri, K. & T. Ry. Co. of Texas*, 166 S. W. 417.

**(D) Production, Authentication, and Effect.**

§ 383 (Tex.Civ.App.) A recital in conveyance by a husband that the land in question was not his homestead is competent evidence to show that at the time of the conveyance it had not been claimed by him as such.—*Johnson v. Conger*, 166 S. W. 405.

**XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**

**(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

§ 417 (Tex.Civ.App.) Where a grantor sues on notes given for the price and for a foreclosure of the vendor's lien retained in the deed, the notes and deed evidence a completed written contract, and all prior negotiations are merged therein, and they cannot be proved by parol.—*Luckenbach v. Thomas*, 166 S. W. 99.

§ 419 (Tex.Civ.App.) Where a guaranty of a vendor of water for irrigation was a part of the consideration for the purchase-money notes executed by the purchaser, the guaranty was a contractual one, and could not be proved by parol in a suit on the notes and for the foreclosure of the vendor's lien retained in the deed.—*Luckenbach v. Thomas*, 166 S. W. 99.

§ 419 (Tex.Civ.App.) Parol evidence to show the real consideration for a contract is admissible, though contradicting the recited consideration.—*Watson v. Rice*, 166 S. W. 106.

§ 423 (Tex.Civ.App.) Evidence contradicting a written agreement with respect to whether the liability thereunder was joint or several was properly excluded.—*Galveston-Houston Electric Ry. Co. v. Stautz*, 166 S. W. 11.

§ 423 (Tex.Civ.App.) Whatever the apparent relation of parties to a note, their true relation as between themselves may be shown by parol evidence.—*Shepherd v. Mott*, 166 S. W. 123.

**(B) Invalidating Written Instrument.**

§ 429 (Ark.) Evidence that, after the execution of the contract for the sale of a horse, a provision was added that agents of the seller were not permitted to change, modify, or sign contracts, was admissible.—*Keathley v. Holland Banking Co.*, 166 S. W. 953.

§ 429 (Tex.Civ.App.) Where, through mistake, fraud, or negligence, a ticket agent failed, without the knowledge or consent of a passenger, to incorporate into a ticket the real agreement between the parties, parol evidence was admissible to show the true contract.—*Chicago, R. I. & G. Ry. Co. v. Howell*, 166 S. W. 81.

§ 433 (Tex.Civ.App.) A map which is an archive of the land office may be shown by parol evidence to be incorrect.—*Stevens v. Crosby*, 166 S. W. 62.

§ 434 (Tex.Civ.App.) Fraudulent representations need not be embodied in the contract in order to be ground for rescission, notwithstanding the rule that oral evidence is not admissible to vary the terms of a writing.—*South Texas Mortgage Co. v. Coe*, 166 S. W. 419; *Same v. Erwin*, Id. 422.

**(C) Separate or Subsequent Oral Agreement.**

§ 441 (Mo.App.) In an action for breach of a written contract for the sale of a livery business and leasehold containing no stipulation binding defendants not to re-engage in the same business, evidence of a parol agreement to that effect was inadmissible.—*Ordelheide v. Traube*, 166 S. W. 1108.

§ 441 (Tex.Civ.App.) Parol evidence of the terms and conditions on which a negotiable instrument has been delivered to the payee and of the understanding between the parties is admissible.—*Watson v. Rice*, 166 S. W. 106.

§ 441 (Tex.Civ.App.) It is presumed that a written contract embodied the whole contract, and previous statements or representations of the parties cannot be brought into the contract by parol evidence, except where the contract consisted of distinct parts, only part of which was reduced to writing, or something was omitted by fraud, accident, or mistake, in which cases parol evidence is admissible.—*South Texas Mortgage Co. v. Coe*, 166 S. W. 419; *Same v. Erwin*, Id. 422.

§ 444 (Mo.App.) Where notes promise unconditionally to pay certain sums of money, the maker, in an action thereon, could not show by parol that they were conditioned upon the payee taking a trust deed; and, there being evidence of a consideration, it could not be done under the guise of showing a failure of consideration.—*Montgomery v. Schwald*, 166 S. W. 831.

§ 444 (Tex.Civ.App.) A buyer of an interest in a machine, who seeks to recover from the seller the sum paid to bona fide indorsees of purchase-money notes, may prove by parol the agreement under which the notes were given and show that the seller agreed to return the notes if the buyer within 90 days expressed dissatisfaction with his purchase.—*Watson v. Rice*, 166 S. W. 106.

§ 444 (Tex.Civ.App.) An obligation to convey lands, independent on its face, may be shown by parol evidence to be dependent upon a consideration not expressed in the obligation or instrument created on.—*Johnson v. Mansfield*, 166 S. W. 927.

§ 445 (Ark.) In an action on notes, an answer, alleging that a written contract under which the notes had become payable before their maturity had been modified by a subsequent oral contract between the parties, sets up a defense.—*Brickey v. Continental Gin Co.*, 166 S. W. 744.

§ 445 (Tex.Civ.App.) Where an action was founded on a written contract and on a subsequent oral contract, proof of the oral contract not contradicting the written contract was admissible.—*Barnard & Moran v. Williams*, 166 S. W. 910.

#### (D) Construction or Application of Language of Written Instrument.

§ 450 (Tex.Civ.App.) There was no ambiguity about a writing asking B. and A. to accept this, and a note to them, both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and B.'s name, the intention evidenced being to make a gift rather than a will, and it was improper to admit parol evidence to vary, contradict, or add to their expressed terms.—*Maris v. Adams*, 166 S. W. 475.

§ 459 (Tex.Civ.App.) Where a contract recited that it was executed by M. and others, acting for a bank, "and hereinafter called the second party," and it was evident that the term "second party" sometimes referred to the bank and sometimes the individuals signing for the bank, there was an ambiguity authorizing parol evidence as to which was intended in a certain provision.—*First State Bank of Archer City v. Power*, 166 S. W. 382.

§ 460 (Tex.Civ.App.) Where a vendor contracted to sell his place in a certain town, parol evidence was admissible to show that he owned but one place in that town, and also to show of what particular property that place consisted.—*Beaton v. Fussell*, 166 S. W. 458.

§ 461 (Ky.) Where a corporation and a firm under the same management became bankrupt, and the trustee in bankruptcy of the firm made a settlement with a debtor, including a draft, parol evidence that the settlement included the draft and that the assignment thereof to the corporation was fraudulent was admissible, in a suit on the draft by the trustee in bankruptcy of the corporation.—*Hiram Blow Stave Co.'s Trustee v. Paducah Cooperage Co.*, 166 S. W. 615.

## XII. OPINION EVIDENCE.

### (A) Conclusions and Opinions of Witnesses in General.

§ 471 (Mo.App.) The statement of a witness that it was the duty of the conductor in charge of a work train to know where his men were

before signaling the train to start was but a legal conclusion.—*Harris v. Missouri Pac. Ry. Co.*, 166 S. W. 335.

§ 471 (Tex.Civ.App.) Evidence that, in coupling an engine to a car, it was necessary to push the drawhead over so as to make the coupling by impact *held* not objectionable as a conclusion.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 471 (Tex.Civ.App.) Evidence that a railroad engine was throwing more sparks at a particular time than was usually thrown by other engines passing in that direction *held* not objectionable as a conclusion.—*Missouri, O. & G. Ry. Co. of Texas v. Browning*, 166 S. W. 34.

§ 477 (Ky.) In an action for personal injuries, witnesses could testify that plaintiff seemed to be suffering, judging from his general appearance when they visited him a few days after the injury.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 800.

§ 481 (Tex.) Testimony that there was no danger for a lineman to go upon a pole after hearing the foreman say that it was all right, or that this statement would satisfy witness that there was no danger, *held* inadmissible.—*Tweed v. Western Union Telegraph Co.*, 166 S. W. 696.

§ 491 (Tex.Civ.App.) In an action for delay of a shipment of cattle, testimony by a witness that he thought the run was a "very slow run" is not objectionable as opinion evidence.—*St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson*, 166 S. W. 706.

### (B) Subjects of Expert Testimony.

§ 507 (Tex.Civ.App.) The testimony of a brakeman that a car door came open because part of the lever used in fastening it had broken off, based on an inspection following an accident resulting from its being open, was a mere opinion upon a matter of which one man could judge as well as another, and did not call for the opinion of an expert.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 508 (Mo.App.) Whether an act, as the filing of an insufficient affidavit for appeal, shows want of ordinary professional skill is a question for the jury on expert evidence.—*Gabbert v. Evans*, 166 S. W. 635.

### (C) Competency of Experts.

§ 536 (Ark.) A witness who had taken various levels, and who in making plans for the grading of a street had undertaken to provide for the drainage of abutting property, was competent to state the result of the calculation which he had made to ascertain the size of ditches and tiling to carry off surface water.—*City of Jonesboro v. Pribble*, 166 S. W. 576.

§ 539½ (Mo.App.) In an action against a railroad for damages to a shipment of furniture, the court properly permitted experienced railroad men to testify that in their opinion the furniture could have been braced by the railroad, and the loss would not have occurred.—*Connelly v. Illinois Cent. R. Co.*, 166 S. W. 1077.

§ 539½ (Tex.Civ.App.) Plaintiff, a railroad brakeman, *held* qualified to testify, as an expert, that at the time of his injury, while coupling an engine to a car, it was necessary to push the drawhead over in order that the coupling might be made by impact.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 543½ (Tex.Civ.App.) A witness who knew the market value of cattle, and who was qualified by reason of his wide experience to give his opinion of the rate of decline in value of cattle because of their stale and drawn condition, caused by a delay in their transportation, was competent to give his opinion of the aggregate amount of damages to cattle delayed in trans-



portation.—*St. Louis, S. F. & T. Ry. Co. v. Armstrong*, 166 S. W. 366.

§ 545 (Tex.) Where a witness' capacity as an expert regarding insanity had not been attacked, evidence to prove him capable was irrelevant.—*Tweed v. Western Union Telegraph Co.*, 166 S. W. 696.

§ 546 (Tex.Civ.App.) A stenographer's transcript of the testimony of a physician in another case could not be used as a basis of the physician's competency to testify in the case on trial.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

#### (F) Effect of Opinion Evidence.

§ 568 (Mo.App.) Though a witness who has sufficient knowledge of the facts, and is so situated as to be able to form an opinion, may give that opinion, as to the distance an object could be seen, yet such evidence is of a weak character as compared to positive testimony on the subject.—*Osborn v. Wabash R. Co.*, 166 S. W. 1118.

#### XIV. WEIGHT AND SUFFICIENCY.

§ 589 (Tex.Civ.App.) The jury are not bound to accept the testimony of the parties to the cause.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 595 (Tex. Civ. App.) Where it could be equally inferred that a car door which struck a brakeman came open because of a defective latch or because it had not been fastened, the jury could not choose the inference that it was because of the defective latch, as an inference of negligence cannot be adopted unless it is more reasonable than the inference of its absence.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 598 (Ky.) In employe's action for injuries, testimony of plaintiff and others that no warning was given that the elevator was about to be started held to support a verdict for plaintiff, though contradicted by a large number of witnesses.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 815.

#### EXAMINATION.

See Witnesses, §§ 255-303.

#### EXCEPTIONS.

See Appeal and Error, §§ 261-266; Contracts, § 174.

#### EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 544, 547, 688, 692, 757; Criminal Law, §§ 695, 841, 1043, 1090-1093, 1109, 1111, 1122; Wills, § 399.

#### II. SETTLEMENT, SIGNING, AND FILING.

§ 32 (Mo.App.) Where a case was tried on change of venue in S. county when it was a part of the Second circuit, but, before the time for signing the bill of exceptions, S. county was made a part of the Thirty-Seventh circuit, to which the judge who tried the case was transferred, he was not competent to sign the bill of exceptions, which should have been signed by his successor, under Rev. St. 1909, § 2032.—*State ex rel. Schenk v. Flick*, 166 S. W. 893.

#### EXCESSIVE DAMAGES.

See Damages, §§ 132, 134.

#### EXCHANGE OF PROPERTY.

§ 3 (Ark.) Representations by a party to an exchange of land relating exclusively to the value thereof afford no ground for rescission

in the absence of fraud or imposition; such representations generally being matters of opinion.—*English v. North*, 166 S. W. 577.

Misrepresentations as to value of land exchanged, and the amount thereof tillable, with knowledge that the other party was relying thereon, held to justify a rescission; the other party having been injured by the exchange.—*Id.*

Where a party to an exchange of land who had special information as to its character from personal observation was told by the other party that he was relying upon his representations, it was his duty to make correct statements.—*Id.*

§ 8 (Ark.) In an action to rescind an exchange of lands, evidence held to show that plaintiff relied upon defendant's representations as to the land, though he also wrote another party for an opinion as to the value of the land.—*English v. North*, 166 S. W. 577.

#### EXECUTION.

See Exemptions; Homestead; Wills, §§ 108, 114.

#### V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 171 (Mo.App.) An injunction is not the proper remedy to enjoin a threatened sale of personalty under execution or other process, if there is no judgment on which to base the process; the legal remedy being adequate.—*Farris v. Smithpeter*, 166 S. W. 655.

§ 171 (Tex.Civ.App.) Where a judgment was rendered for "\$—", being the amount of a replevy bond, the filling in of the blank with the amount of the bond would not affect the rights of the parties to the judgment, and therefore would not be a material alteration which would authorize an injunction to restrain execution on the judgment.—*Lester v. Gatewood*, 166 S. W. 389.

Where a petition to enjoin the execution of a judgment alleged that the judgment originally read for "\$—", being the amount of a replevy bond, but had been altered by the insertion of the figures 15,000 in the space left blank, it will be presumed that the bond was for a fixed amount, and that the amount thereof was the same as that inserted in the judgment.—*Id.*

#### VII. SALE.

##### (B) Title and Rights of Purchaser.

§ 275 (Mo.App.) The rule of caveat emptor, applicable to execution sales provided no fraud is practiced, does not apply where the sale is void, because of the death of the execution creditor and a purchaser, acting under the mistaken belief of law that the sale is valid, may be relieved from his purchase by application to the court rendering the judgment and issuing the execution.—*Chilton v. Harris*, 166 S. W. 1064.

#### EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival, § 61; Appeal and Error, §§ 231, 782; Descent and Distribution: Frauds, Statute of, § 23; Judgment, §§ 545, 651, 712, 736; Limitation of Actions, §§ 24, 119; Trial, § 133; Wills.

#### III. ASSETS, APPRAISAL, AND INVENTORY.

§ 65 (Mo.App.) In a proceeding to compel an administrator to inventory certain bank stock under Rev. St. 1909, § 74, a judgment pursuant to a verdict awarding one half of the stock to complainant, and the other half to the administrator, instead of directing the inventory and



distribution in due course of administration, *held* erroneous.—Gray v. Doubikin, 166 S. W. 1070.

### X. ACTIONS.

§ 437 (Mo.) Though a suit against an executrix, brought within the period of limitations prescribed by the general and special statutes, was dismissed, the suit was an exhibition of the claim which removed the bar of the special statute leaving the claim subject thereafter only to the general statute of limitations.—Knisely v. Leathe, 166 S. W. 257.

### XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 523 (Ky.) The surety on the general bond of an executor is not liable for the proceeds of the sale of land of testator which came into the executor's hands, the will having given him no power of sale; but the sale having been made under the law of another state, where the land was, and where the executor, as such, had no power.—Costigan v. Kraus, 166 S. W. 755.

### XIII. LIABILITIES ON ADMINISTRATION BONDS.

§ 528 (Ky.) The surety on the bond of an executor is not chargeable with the amount of notes of the executor to testator, they being worthless and uncollectible throughout the term of the executorship.—Costigan v. Kraus, 166 S. W. 755.

§ 530 (Ky.) No recovery can be had on the bond of executor for a legatee, the surety pleading settlement, and proving that on the legatee demanding payment he offered her a certain sum in full of all claims, and, on her acceptance, paid it, taking her receipt therefor; fraud not being shown, and want of consideration not being pleaded.—Costigan v. Kraus, 166 S. W. 755.

### EXEMPLARY DAMAGES.

See Damages, § 87.

### EXEMPTIONS.

See Homestead; Taxation, § 244.

### I. NATURE AND EXTENT.

(A) Nature, Creation, Duration, and Effect in General.

§ 4 (Tex. Civ. App.) Exemption statutes must be liberally construed to affect their objects and promote justice.—Campbell v. Honaker's Heirs, 166 S. W. 74.

§ 13 (Tex. Civ. App.) That one who conducted a moving picture show in a leased building was removing his appliances therefrom at the expiration of the lease did not show an abandonment of the business so as to remove the appliance from the protection of the exemption statute. Rev. St. 1911, art. 3785, subd. 5.—Campbell v. Honaker's Heirs, 166 S. W. 74.

### (C) Property and Rights Exempt.

§ 45 (Tex. Civ. App.) One conducting a moving picture show is engaged in a trade or profession within Rev. St. 1911, art. 3785, subd. 5, exempting from execution tools and apparatus belonging to any trade or profession.—Campbell v. Honaker's Heirs, 166 S. W. 74.

Appliances producing moving pictures are exempt from execution as tools or apparatus within Rev. St. 1911, art. 3785, subd. 5, but chairs used by the audience are not exempt.—Id.

That one was operating an opera house and a moving picture show at the same time in different parts of rented premises did not prevent him from claiming the appliances used to produce the moving pictures as exempt within Rev. St. 1911, art. 3785, subd. 5.—Id.

### IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 108 (Mo. App.) Exemptions are allowed to a fee bill debtor the same as to an execution debtor.—Farris v. Smithpeter, 166 S. W. 655.

### EXPERT TESTIMONY.

See Evidence, §§ 471-568; Witnesses, § 873.

### EXPLOSIVES.

See Steam, § 6.

### FACTORS.

See Brokers.

### FALSE IMPRISONMENT.

#### I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 8 (Ark.) A warden in charge of convict laborers *held* bound, on delivery of a pardon to him, to himself examine the books to see if the pardon covers all the offenses for which the convict was committed, if he would escape liability for false imprisonment in holding the convict.—Weigel v. McCloskey, 166 S. W. 944.

§ 15 (Ark.) Where a warden appointed by a contractor for convict labor and confirmed by the court under the statute refuses, on the ground of lack of authority to release a convict laborer of whom he had charge, on delivery of a pardon to the warden, he is liable for false imprisonment.—Weigel v. McCloskey, 166 S. W. 944.

#### (B) Actions.

§ 36 (Ark.) In an action against a warden for the false imprisonment of a convict laborer after pardon had been delivered to the warden, *held*, that a verdict for \$1,000 was excessive, and that a verdict for \$25 would be affirmed.—Weigel v. McCloskey, 166 S. W. 944.

### FALSE SWEARING.

See Perjury.

### FEE BILLS.

See Costs, § 273.

### FELLOW SERVANTS.

See Master and Servant, §§ 179-202.

### FENCES.

See Railroads, § 412.

§ 25 (Mo. App.) Where a horse, turned loose in field separated from defendant's land by a partition fence, was injured on a strand of barbed wire stretched entirely on defendant's land, and nowhere near a highway, *held* that there could be no recovery.—Teague v. Clemmons, 166 S. W. 641.

The owner of an animal cannot recover damages from the owner of the land on which the animal strays and is injured by reason of fences, not so closely located to a highway that persons or animals might, by a misstep, be injured.—Id.

### FILING.

See Chattel Mortgages, §§ 87, 150; Indictment and Information, § 42.

### FINDINGS.

See Trial, § 390.

### FINES.

See Highways, § 164; Penalties, § 1.

**FIRES.**

See Damages, § 111; Railroads, § 479; Waters and Water Courses, §§ 206, 209.

**FIXTURES.**

See Eminent Domain, § 183.

§ 5 (Tex.Civ.App.) Under Rev. St. 1911, arts. 2822, 2844, 2845, 2847, 2849, where school building was erected with contributions from citizens of the community on land conveyed on condition that it should revert to the grantors when the land ceased to be used for school purposes, *held*, that the building did not so revert, though the contributors and trustees intended it to remain permanently on the land, and it could be removed by the trustees.—Allen v. Franks, 166 S. W. 884.

**FOOD.**

See Damages, § 188.

**FORCIBLE DEFILEMENT.**

See Rape.

**FORECLOSURE.**

See Chattel Mortgages, § 252; Mortgages, §§ 414-559.

**FOREIGN ADMINISTRATION.**

See Executors and Administrators, § 523.

**FORFEITURES.**

See Bail, §§ 75, 94; Insurance, §§ 141, 236, 245, 388, 668, 695, 755, 756; Penalties, § 1.

**FORGERY.**

See Banks and Banking, §§ 147, 149; Bills and Notes, § 377.

**FORMER JEOPARDY.**

See Criminal Law, § 189.

**FORNICATION.**

See Seduction.

**FRAUD.**

See Acknowledgment, § 62; Bills and Notes, §§ 370, 378, 520; Cancellation of Instruments, § 50; Contracts, § 94; Corporations, § 80; Criminal Law, § 1165; Deeds, § 70; Dower, § 49; Evidence, § 434; Exchange of Property, § 3; Frauds, Statute of; Fraudulent Conveyances; Guaranty, § 26; Insurance, §§ 236, 559, 723; Limitation of Actions, §§ 37, 99, 100; Principal and Agent, § 136; Release, § 59; Sales, §§ 53, 130; Trial, §§ 235, 240; Trusts, § 95; Vendor and Purchaser, §§ 33, 44, 127; Wills, §§ 155-165.

**I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

§ 16 (Ky.) Where the vendor of land conceals a hidden defect which the purchaser could not discover by ordinary examination, he is guilty of actionable fraud.—Adkins v. Stewart, 166 S. W. 984.

A vendor of land is not guilty of fraud in concealing defects, unless they must have been known to him, or the circumstances were such as to charge him with knowledge.—Id.

That vendor of land who did not long own it lost by overflow the only crop planted on a part is insufficient to charge him with knowledge that the fertility of the soil of that part had been destroyed thereby, and render his failure to disclose same fact to a purchaser fraudulent.—Id.

§ 23 (Tex.Civ.App.) A purchaser who could determine the facts equally as well as the vendor, and who made an investigation of the facts, *held* not to rely on the vendor's representations.—Luckenbach v. Thomas, 166 S. W. 99.

§ 30 (Tex.Civ.App.) One of several grantors was not entitled to object, as against the grantee, that she had been misinformed as to her liability on a mortgage on the land unless she was deceived and misled by the grantee.—Cooper v. Marek, 166 S. W. 58.

**II. ACTIONS.****(B) Parties and Pleading.**

§ 41 (Tex.Civ.App.) Petition *held* to sufficiently allege vendor's fraud in misrepresenting the acreage after having it surveyed as demanded by the purchaser, and an excuse for the purchaser's failure to discover the fraud.—Smalley v. Vogt, 166 S. W. 1.

**(C) Evidence.**

§ 50 (Ky.) Actual knowledge of a material fact concealed upon a sale of land need not be shown, if the facts proven warrant an inference of such knowledge.—Adkins v. Stewart, 166 S. W. 984.

There is a presumption of innocence and against fraud, which must be overcome by legal evidence.—Id.

§ 52 (Tex.Civ.App.) Where the issue of fraudulent representations made by a vendor to a purchaser could only be determined by virtue of the credit to be given to the testimony of the parties as to whether representations were made, and whether they were true or false, evidence of the general reputation of the vendor for truth and veracity was inadmissible.—Luckenbach v. Thomas, 166 S. W. 99.

**(D) Damages.**

§ 59 (Tex.Civ.App.) The measure of damages for a vendor's misrepresentation as to the number of acres in a tract of land sold at an agreed price per acre was the amount paid by the purchaser for the number of acres which he failed to get, regardless of the increased value of the other land.—Smalley v. Vogt, 166 S. W. 1.

**FRAUDS, STATUTE OF.**

See Appeal and Error, § 173; Trusts, §§ 17, 18, 92½.

**III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.**

§ 17 (Tex.Civ.App.) A parol promise by a purchaser of merchandise from a dealer indebted to the seller thereof for the price to pay the debt if the seller did not do so is a conditional promise to pay the debt of another, and is not enforceable within the statute of frauds.—Williams v. City Nat. Bank, 166 S. W. 130.

§ 23 (Mo.App.) Promise by executrix, who was also sole beneficiary, to pay attorneys individually employed by her to defend against claim *held* an original promise not required to be in writing by Rev. St. 1909, § 2733.—Gabbert v. Evans, 166 S. W. 635.

§ 23 (Mo.App.) That plaintiff or his bookkeeper erroneously charged a purchase made by defendant to another is not conclusive that the debt was that of a third person, so as to require a note or memorandum, under the statute of frauds, in order to render defendant liable.—Wittenberg v. Fisher, 166 S. W. 1106.

Where credit is extended only to defendant, and there is no liability but his, his promise to pay for goods, though they be delivered to a third person, is original, and not within the statute of frauds.—Id.

## V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 49 (Mo.App.) A parol contract of employment for no definite time is not within the statute of frauds (Rev. St. 1909, § 2783).—*Hammack v. Friend*, 166 S. W. 647.

§ 52 (Ark.) An oral contract by the seller of goods to carry insurance on the goods until the notes given for the price should mature, was not void under the statute of frauds, since the agreement to take out the insurance was to be performed immediately, although the insurance was to continue for more than one year.—*Brickey v. Continental Gin Co.*, 166 S. W. 744.

## VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Ky.) Breach of an oral agreement, whereby the mortgagee of property of a bankrupt corporation agreed to transfer the property to corporate stockholders after he bought in at foreclosure, *held* not to raise a constructive trust; the agreement being within the statute of frauds, Ky. St. § 470.—*Willis v. Lam*, 166 S. W. 251.

After a bankrupt corporation, whose affairs have been liquidated, has gone out of existence, stockholders cannot enforce a parol contract with reference to property formerly owned by it, made by them in their individual capacity with a third person.—*Id.*

§ 60 (Tex.Civ.App.) A perpetual easement in land liable to be divested only if the use of the dominant tenement be changed must be created by deed; parol license being insufficient.—*Bowington v. Williams*, 166 S. W. 719.

## VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 110 (Tex.Civ.App.) A contract to sell a place consisting of four lots in a certain town, it appearing that vendor owned only one place in that town which consisted of four lots, describes the property with sufficient certainty to comply with the statute of frauds.—*Beaton v. Fussell*, 166 S. W. 458.

## IX. OPERATION AND EFFECT OF STATUTE.

§ 125 (Tex.Civ.App.) A contract is not unlawful because not in compliance with the statute of frauds, as the statute presupposes its legality, the enforcement of which is only suspended until the provisions of the statute are satisfied.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

§ 129 (Mo.App.) Where an owner orally employed an agent to procure a purchaser and recognized the agent's relation to the transaction at the time of the consummation of the deal, the right of the agent to compensation could not be defeated under the statute of frauds (Rev. St. 1909, § 2783).—*Hammack v. Friend*, 166 S. W. 647.

§ 129 (Tex.Civ.App.) A joint and mutual will executed by husband and wife and a deed executed by them as part of the same transaction, in consummation of a parol contract between them for the equitable disposition of their property between their children, constitute part performance of the parol agreement as to take it out of the statute of frauds.—*Larrabee v. Porter*, 166 S. W. 395.

§ 129 (Tex.Civ.App.) Improvements begun by the lessee under a verbal lease during a few months between the lease and the death of the lessor *held* sufficient to take the lease out of the statute of frauds, even though no part of the improvement was completed in the lifetime of the lessor.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

In considering improvements which would take a verbal lease with delivery of possession out of the statute of frauds, a dam for the con-

struction of which the lessee had agreed to pay a part, and which, though not on the leased land, created a lake thereon, used for irrigation purposes, and a valuable and permanent improvement, was properly included.—*Id.*

§ 139 (Mo.App.) Where plaintiff fully performed a contract to purchase a livery and undertaking business, including the unexpired term of a lease extending for more than a year, the statute of frauds was no defense on defendant's failure to procure a valid transfer of the lease.—*Ordelheide v. Traube*, 166 S. W. 1108.

§ 139 (Tex.Civ.App.) Where a parol grant of a way has been acted upon by the expenditure of moneys which would be lost if the right of way be revoked, an easement arises by estoppel.—*Bowington v. Williams*, 166 S. W. 719.

§ 144 (Tex.Civ.App.) A widow of one entering into a verbal lease contract, who, after his death, allowed permanent and valuable improvements to be made thereon, and who accepted the agreed rent therefor, *held* to have thereby ratified such verbal lease.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

§ 144 (Tex.Civ.App.) Where an answer pleads a defense within the statute of frauds and a general demurrer filed thereto is waived, the answer is as effective as though no demurrer had been filed.—*Savage v. Mowery*, 166 S. W. 905.

## X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 149 (Tex.Civ.App.) In a lessee's action to enjoin interference with its exclusive and quiet enjoyment of the premises, allegation of payment to the lessor according to contract, delivery of possession, and permanent valuable improvements *held* all that was necessary to take the verbal lease out of the statute of frauds.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

§ 152 (Tex.Civ.App.) The statute of frauds must be pleaded when relied upon to defeat a contract.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

§ 158 (Tex.Civ.App.) Where an oral lease was made under which the lessee went into possession and made valuable improvements, the fact that it was agreed that the lease should be reduced to writing does not conclusively show that the improvements were made on the faith of the promised written lease, and not on the strength of the oral one.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

## FRAUDULENT CONVEYANCES.

### III. REMEDIES OF CREDITORS AND PURCHASERS.

#### (G) Evidence.

§ 295 (Mo.App.) Evidence *held* to justify a finding that a judgment debtor fraudulently conveyed his property to garnishees, so as to support a judgment against them in favor of the judgment creditor.—*Gould v. Gibson*, 166 S. W. 648.

## FREIGHT.

See Carriers, § 194.

## GARAGE.

See Licenses, § 11.

## GARNISHMENT.

See Costs, § 173; Courts, § 169; Fraudulent Conveyances, § 295; Justices of the Peace, § 87.

### II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 29 (Tex.Civ.App.) Whether money pledged with the sureties on a bail bond to secure them

is subject to garnishment depends on whether the pledgee's rights will be prejudiced thereby, and not on whether the property is in custodia legis.—*Waggoner v. Briggs*, 166 S. W. 50.

Where money was pledged to the sureties on a bail bond to secure them against liability, and at the time judgment was rendered against the sureties as garnishees the condition of the bond had been performed, the money was subject to garnishment under Rev. St. 1911, arts. 293, 294, 3744.—Id.

## VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 158 (Mo.App.) An answer by plaintiff, in garnishment *held* sufficient to advise the garnishee of the issues.—*Gould v. Gibson*, 166 S. W. 648.

## VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 196 (Tex.Civ.App.) Where the original suit in which a writ of garnishment was sued out was brought against an alleged corporation, and after service of the writ the petition was amended, so as to make the action one against an individual instead of a corporation, the garnishment proceedings were thereby discharged.—*Pickering Mfg. Co. v. Gordon*, 166 S. W. 899.

## GAS.

§ 14 (Ky.) Council of fifth class city *held* to have no authority to adopt an ordinance imposing fines on corporations for discriminating between patrons, notwithstanding a franchise granted by it to a gas company requiring the company not to discriminate in delivering gas.—*United Fuel & Gas Co. v. Commonwealth*, 166 S. W. 783.

## GIFTS.

See Adverse Possession, §§ 60, 112, 115.

## I. INTER VIVOS.

§ 32 (Tex.Civ.App.) Where V. executed a note to A. and B., which, with a paper asking them to accept it, was placed in an envelope and sealed, and the same was found in V.'s house after his death, there was no gift inter vivos, because of the absence of a delivery to A. and B. by V. during his lifetime.—*Maris v. Adams*, 166 S. W. 475.

§ 47 (Ky.) Where one permits another for accommodation to enter and occupy land without consideration, and under a verbal consent, no presumption of gift arises from the mere taking of possession.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

§ 48 (Tex.Civ.App.) Declarations made by a donor to a third party that she had that day given the land to the donee, and was going to deliver possession, *held* admissible to prove the gift.—*Sockwell v. Sockwell*, 166 S. W. 1188.

§ 49 (Ky.) Evidence in an action involving the right to realty, in which plaintiff claimed through a gift to her husband from her father-in-law and by adverse possession by herself and husband, *held* not to show an express or unqualified gift of the property to plaintiff's husband.—*Tippenhauer v. Tippenhauer*, 166 S. W. 225.

## GOOD FAITH.

See Bills and Notes, §§ 348-378, 497, 525; Chattel Mortgages, § 153; Specific Performance, § 97.

## GRAND JURY.

§ 36 (Tex.Cr.App.) One who, when summoned before the grand jury, refuses to be sworn, and who, when brought before the district judge, again refuses to be sworn, is guilty of contempt, in the absence of proof that her refusal was on account of any religious or other convictions.—*Ex parte Barnes*, 166 S. W. 728.

That a person summoned before the grand

jury refused to be sworn to testify because she presumed that she would be questioned about alleged incestuous relations between herself and her father did not excuse her for her refusal to be sworn, but, after being sworn, she would be justified in refusing to answer questions relating to the subject.—Id.

## GROUND RENTS.

See Vendor and Purchaser, §§ 176, 180, 274.

## GUARANTY.

See Evidence, § 419; Frauds, Statute of, §§ 17, 23.

## I. REQUISITES AND VALIDITY.

§ 26 (Ark.) Whether plaintiff induced defendant by fraud to enter into the contract of guaranty of payment of accounts turned over in payment *held*, under the evidence, a question for the jury.—*Martin v. Monger*, 166 S. W. 596.

## II. CONSTRUCTION AND OPERATION.

§ 46 (Ark.) The agreement of one turning over accounts in payment "to make them all good at collection time, all due August 11, 1913." \* \* \* I certify that the accounts are true and will make them all good, and will collect all I can free of costs"—is an absolute guaranty to pay at collection time, under which no attempt by the guarantee to collect is necessary.—*Martin v. Monger*, 166 S. W. 596.

## IV. REMEDIES OF CREDITORS.

§ 78 (Tex.Civ.App.) The fact that the note sued on was given by defendant to guarantee the payment by a contract purchaser of land of the consideration of the purchase, and not as a forfeit upon the purchaser's failure to perform, would not be a defense to an action on the note by vendor on the purchaser's failure to perform.—*Sears v. Ainsworth*, 166 S. W. 60.

## GUARDIAN AND WARD.

See Parent and Child, § 2.

## III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 62 (Ark.) A life tenant, holding under a conveyance of mortgaged lands to herself and the heirs of her body, could not have confirmed, as against the remainderman, her minor daughter, the title which she attempted to acquire at the mortgage foreclosure sale; Kirby's Dig. § 3757, making the mother the natural guardian of her daughter.—*Hawkins v. Reeves*, 166 S. W. 562.

## V. ACTIONS.

§ 130 (Ark.) A life tenant, holding under a conveyance to herself and her bodily heirs, who purchased the property at a mortgage foreclosure sale, cannot, in an action to confirm her title as against her minor daughter, assert her right to recover notwithstanding the insufficiency of the petition, on the ground that defendant should have offered contribution for the purchase price; plaintiff having declined to amend her petition so as to ask foreclosure of her lien.—*Hawkins v. Reeves*, 166 S. W. 562.

## HABEAS CORPUS.

See Criminal Law, § 189.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 50 (Tex.Cr.App.) A writ of habeas corpus, applied for on the morning of the day on which the indictment found some time before, and under which accused was imprisoned, was set for trial, *held* properly denied; no sufficient reason for his failure to apply sooner therefor appearing.—*Muldrew v. State*, 166 S. W. 156.

§ 85 (Tex.Cr.App.) An application for writ of habeas corpus for the discharge of relator is merely a pleading, and, in the absence of any evidence of the truth of the application, relator must be remanded.—*Ex parte Barnes*, 166 S. W. 728.

## HARMLESS ERROR.

See Appeal and Error, §§ 1030-1074.

## HEARSAY.

See Criminal Law, §§ 368, 406-421; Evidence, § 317.

## HEIRS.

See Descent and Distribution.

## HIGHWAYS.

See Constitutional Law, §§ 208, 290; Eminent Domain, § 101; Railroads, § 95.

### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 68 (Tex.Civ.App.) Proof that a road was indicated and named as a public road on a plat filed before the controversy arose, and that it was referred to several times in the testimony, is not sufficient to establish, as a matter of law, that it was a public road.—*Dees v. Thompson*, 166 S. W. 56.

(C) Alteration, Vacation, or Abandonment.

§ 72 (Mo.App.) In the absence of ten days' notice of appeal required by Rev. St. 1899, § 10347, a county court acquired no jurisdiction of an appeal from an order of a township board denying a petition to open and change a public road.—*State ex rel. Wiseman v. Urton*, 166 S. W. 895.

A motion to dismiss an appeal to the county court from an order of a township board is the proper remedy, where no notice of the appeal, as required by Rev. St. 1899, § 10347, has been given.—*Id.*

Where a motion to dismiss for want of proper notice was sustained, an order dismissing the "cause" must be construed to operate only as a dismissal of the appeal.—*Id.*

§ 76 (Mo.App.) The public has a vested interest in a public highway, and it cannot be vacated, except as prescribed by Rev. St. 1909, §§ 10444, 10445.—*State v. Faith*, 166 S. W. 649.

§ 77 (Mo.App.) Under Rev. St. 1909, § 10444, the county court, ordering the vacation of a part of a highway, may impose conditions and may provide what proof will satisfy it that the conditions have been complied with to make the order effective.—*State v. Faith*, 166 S. W. 649.

### II. HIGHWAY DISTRICTS AND OFFICERS.

§ 90 (Mo.) A road district created under Rev. St. 1909, §§ 10611-10625, is a public corporation.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same*, *Id.* 291; *Klein v. Kingshighway Road Dist. of New Madrid County*, *Id.*

§ 95 (Mo.) The assessments authorized by Rev. St. 1909, §§ 10611-10625, for the payment of road improvements in special road districts, are not an indebtedness, within Const. art. 10, § 12, limiting municipal indebtedness.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same*, *Id.* 291; *Klein v. Kingshighway Road Dist. of New Madrid County*, *Id.*

The bonded indebtedness of a special road district, created under Rev. St. 1909, §§ 10611-10625, *held* not an indebtedness, within Const. art. 10, § 12, limiting municipal indebtedness.—*Id.*

### IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 122 (Mo.) Rev. St. 1909, §§ 10611-10625, providing for special road districts and special taxes for benefits from road improvements, is not unconstitutional.—*Embree v. Kansas City-Liberty Boulevard Road Dist.*, 166 S. W. 282; *Stepp v. Same*, *Id.* 291; *Klein v. Kingshighway Road Dist. of New Madrid County*, *Id.*

Rev. St. 1909, § 10615, dividing special road districts into three beneficial zones, and assessing the lands in each at a different percentage without notice to the property owners, *held* not unconstitutional.—*Id.*

### V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

§ 163 (Mo.App.) One who obstructs a public road after petitioning for a change therein, but before the order of vacation has become effective, is guilty of obstructing a highway, in violation of Rev. St. 1909, § 10533.—*State v. Faith*, 166 S. W. 649.

The intention with which one obstructs a highway in violation of Rev. St. 1909, § 10533, is immaterial.—*Id.*

§ 163 (Tex.Cr.App.) Person who, against protests and objection of county authorities, undertook to determine that properly constructed road was not properly constructed, and to construct it differently to suit his own desires, *held* guilty of a violation of Penal Code 1911, art. 812, as amended by Acts 33d Leg. c. 128.—*Brown v. State*, 166 S. W. 508.

§ 164 (Tex.Cr.App.) On a trial for willfully obstructing and injuring a public road, and causing it to be done, evidence *held* sufficient to support a conviction.—*Brown v. State*, 166 S. W. 508.

Under Penal Code 1911, § 812, as amended by Acts 33d Leg. c. 128, fine of \$50 for cutting a smooth gravel road and putting in a wooden culvert and starting to cut it at another point *held* proper.—*Id.*

On trial for willfully injuring public road in violation of Penal Code 1911, art. 812, as amended by Acts 33d Leg. c. 128, evidence as to accused's remarks, on receipt of a message from the county commissioner, that the road was not the cause of backwater, and upon being told by a constable that he and those aiding him would be prosecuted, *held* admissible on the issue of willfulness.—*Id.*

(B) Use of Highway and Law of the Road.

§ 181 (Mo.App.) If an injury is the proximate cause of the violation of the provisions of Rev. St. § 8619, enjoining upon autoists the duties of running at reasonable speed, keeping vigilant watch for vehicles drawn by animals, the autoist is liable for all resultant damage.—*Roberts v. Trunk*, 166 S. W. 841.

"Vigilant watch," as used in Rev. St. 1909, § 8517, enjoining upon autoists the duty of keeping a vigilant watch for all vehicles drawn by animals, includes not only the looking ahead for animal-drawn vehicles, but, while approaching them, to keep a sharp lookout for any exhibitions by such animals of fright.—*Id.*

## HOLOGRAPHIC WILLS.

See Wills, §§ 132, 134.

## HOMESTEAD.

See Adverse Possession, § 62; Partition, § 74.

### II. TRANSFER OR INCUMBRANCE.

§ 119 (Tex.Civ.App.) In view of Const. art. 16, § 50, providing that a married man shall not sell the homestead without his wife's consent, given in the manner prescribed by law, title to the homestead could only pass by deed acknowledged by the wife apart from her husband, Rev. St. 1911, art. 1115, so requiring.—Harlie v. Harlie, 166 S. W. 674.

§ 125 (Tex.Civ.App.) The homestead exemption being limited to 200 acres, the owner of 320 acres cannot claim the whole tract, hence his conveyance of 160 acres passes good title though his wife did not join, where his homestead was upon the other half of the tract, and he had not claimed as part of his homestead any particular 40 acres out of the quarter section conveyed.—Johnson v. Conger, 166 S. W. 405.

### III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 134 (Tex.) The exemption provided for by Const. art. 16, § 50, applies to the homestead while the head of the family is living, but furnishes no rule for its distribution after his death.—American Bonding Co. of Baltimore v. Logan, 166 S. W. 1132.

§ 142 (Tex.) Const. art. 16, § 52, determines the disposition of a homestead after the death of the owner, and determines who shall take it and their respective interests, but not the conditions which may be imposed on the inheritance.—American Bonding Co. of Baltimore v. Logan, 166 S. W. 1132.

Under Const. art. 16, §§ 50, 52, and Rev. St. 1911, arts. 3235, 3422, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale.—Id.

§ 145 (Tex.Civ.App.) A widow's offer to sell the property was not an abandonment of her homestead rights therein.—Perkins v. Perkins, 166 S. W. 915.

The fact that a widow was not living on the property was not an abandonment of her homestead rights, where she had not acquired another home.—Id.

### IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 154 (Tex.Civ.App.) Where complainant on one portion of lot erected a house in which he and his family resided, the subsequent construction of another house on another portion of the lot and the building of a division fence did not constitute an abandonment of the homestead character of that portion of the property so as to render it subject to execution.—Turnbaugh v. Dickey, 166 S. W. 1194.

§ 162 (Tex.Civ. App.) Where the owner of a homestead sold part of the tract and removed to another locality, his mere intention to return at some indefinite time and take up his homestead upon the unimproved quarter section which he retained will not sustain a claim of a homestead exemption.—Johnson v. Conger, 166 S. W. 405.

### V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 216 (Tex.Civ.App.) Where the charge on defendant's claim that because the land was the grantor's homestead and his wife did not join, the conveyance to plaintiff did not pass title, directed a verdict for plaintiff in case the grantor

upon removing from the land to another residence intended to make his second residence his home, is not erroneous, in using the word home instead of homestead, for the jury must so have understood it.—Johnson v. Conger, 166 S. W. 405.

## HOMICIDE.

See Criminal Law, §§ 14, 364, 366, 369, 575, 730, 815, 822, 823, 1206.

### III. MANSLAUGHTER.

§ 42 (Tex.Cr.App.) A letter received by defendant from his wife just before a homicide stating that she was corresponding with deceased, etc., held not in itself statutory adequate cause for provocation, unless it led defendant to believe that deceased had committed adultery with his wife.—Willis v. State, 166 S. W. 1172.

§ 45 (Tex.Cr.App.) The statement of decedent that if accused did not leave, decedent would go for an officer to have accused arrested was not adequate cause to reduce a homicide to manslaughter.—Tores v. State, 166 S. W. 523.

§ 52 (Tex.Cr.App.) A love letter, written by deceased to defendant's wife, which unexpectedly came into defendant's possession a few days before the homicide, was not statutory adequate cause for provocation, where defendant, after receiving the letter, was with deceased on several occasions before the homicide.—Willis v. State, 166 S. W. 1172.

§ 62 (Tex.Cr.App.) Where accused engaged with another in the unlawful act of trying to take the wife away from the home of her husband by force or stealth, at night, and accused in furtherance of the unlawful purpose, while trying to force himself into the house, killed decedent, and accused claimed that his gun was accidentally discharged, he was guilty of negligent homicide, within Pen. Code 1911, arts. 1113-1127.—Chant v. State, 166 S. W. 513.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 118 (Tex.Cr.App.) A landlord who let farm land for crop rent, the tenant agreeing to work the crops, may, upon the tenant's failure, enter and work the crop for the benefit of both, and, where he peacefully acquired possession, he is not a trespasser, and, if the tenant attempts by display of force to drive him from the land, may defend himself.—Hillis v. State, 166 S. W. 1154.

### VI. INDICTMENT AND INFORMATION.

§ 142 (Ark.) It is sufficient that the evidence show that accused committed the murder in the vicinity of the place where it is claimed to have been committed, that being the county of the venue.—Tillman v. State, 166 S. W. 582.

### VII. EVIDENCE.

#### (B) Admissibility in General.

§ 158 (Tex.Cr.App.) Declarations by defendant's wife that he had made threats against her, and testimony that she had called upon a deputy sheriff for protection, were admissible, in a prosecution for the killing of another at the same time that defendant killed his wife, provided such statements were made in defendant's hearing or brought to his knowledge before the killing.—Robbins v. State, 166 S. W. 528.

Where defendant killed his wife and another at the same time, evidence that on the same evening a witness heard defendant cursing his wife was admissible, in a prosecution for the killing of the other.—Id.

§ 169 (Tex.Cr.App.) On a trial for homicide following a dispute and scuffle at a dance, after accused had cursed ladies who had declined to dance with him, evidence that he went upon the gallery and urinated, and as to his attempt

to take liberties with a lady who was dancing with him, *held* admissible.—*Muldrew v. State*, 166 S. W. 156.

§ 178 (Ark.) Accused, in a homicide case, could introduce evidence that the crime was committed by some other person, for the purpose of showing that he was not guilty.—*Tillman v. State*, 166 S. W. 582.

Evidence that the murdered girl's father stated, shortly before her body was found, in a well with a bullet hole in her forehead, that when the girl was found she would be south of a certain road, with a bullet hole in her forehead, and a rock tied around her neck, and in a well, was not admissible in evidence, as tending to show that the father committed the crime.—*Id.*

In a prosecution for murdering a girl with whom accused and others were shown to have had sexual intercourse, evidence as to statements by another as to his criminal intimacy with the girl *held* not admissible as substantive evidence of such other's intercourse with her, and of his guilt of the crime.—*Id.*

Accused, in a homicide case, could prove any fact tending to show another's guilt of the crime, except statements by such other amounting to confession.—*Id.*

In a homicide case, in which it appears that about two years before the death of the murdered girl she had become pregnant, evidence was not admissible as to acts of intercourse between the girl and another before the time of her pregnancy; such evidence being too remote.—*Id.*

§ 181 (Tex.Cr.App.) Though a letter written by deceased to defendant's wife a few days before a homicide was not statutory adequate cause for provocation, yet it could be considered by the jury in passing upon defendant's state of mind at the time of the killing.—*Willis v. State*, 166 S. W. 1172.

§ 182 (Tex.Cr.App.) Where accused, who leased his land for crop rent, killed deceased when he and the tenant attempted to drive accused from the land, upon which he entered to work the crop claiming that the tenant had abandoned it, evidence of the condition of the crop is admissible on the question of abandonment.—*Hillis v. State*, 166 S. W. 1154.

§ 182 (Tex.Cr.App.) Where accused, who had rented his land for crop rent, entered and commenced cultivation when the tenant abandoned the crop, and, upon the tenant and deceased attempting to drive him therefrom by display of force, killed deceased, evidence of the advice given by a justice of the peace whom accused consulted before he entered on the land is admissible to show that he had no intention of provoking any difficulty.—*Hillis v. State*, 166 S. W. 1154.

#### (E) Weight and Sufficiency.

§ 231 (Tex.Cr.App.) The state can show, by either direct or circumstantial evidence, that the defendant had heard, prior to the time of the killing, statements made by his wife which were offered in evidence against him.—*Robbins v. State*, 166 S. W. 528.

§ 234 (Ark.) Evidence in a homicide case *held* to sustain a finding that deceased was murdered by accused, who secreted her body in a well.—*Tillman v. State*, 166 S. W. 582.

§ 239 (Tex.Cr.App.) Though a letter from defendant's wife received by defendant just before a homicide stating that she was corresponding with deceased, etc., was not in itself statutory adequate cause for provocation, yet it might be when considered with all the antecedent conduct and acts of deceased.—*Willis v. State*, 166 S. W. 1172.

§ 255 (Ky.) Evidence *held* not to support a conviction of voluntary manslaughter.—*Saylor v. Commonwealth*, 166 S. W. 254.

## VIII. TRIAL.

### (B) Questions for Jury.

§ 276 (Tex.Cr.App.) Where accused claimed that he had entered upon his land to work the crop for the benefit of himself and his tenant who had abandoned it, and that, upon the tenant's attempting to drive him therefrom by display of force, he killed deceased in defending himself, he is entitled to have his theory of the case submitted.—*Hillis v. State*, 166 S. W. 1154.

### (C) Instructions.

§ 295 (Tex.Cr.App.) While the provocation must arise at the time of the commission of the offense, yet antecedent matters should be considered in passing upon the state of defendant's mind; but the court should not enumerate them, but tell the jury that they must look to all the facts and circumstances in the case.—*Willis v. State*, 166 S. W. 1172.

§ 300 (Ky.) An instruction directing acquittal if the jury believed that accused was in imminent danger and it was necessary for him to kill deceased to save himself is erroneous because permitting the jury instead of accused to judge of his peril.—*Hacker v. Commonwealth*, 166 S. W. 235.

An instruction on self-defense, which required the jury to find that accused did not seek or bring on the difficulty, is erroneous without further explanation, for the jury might have understood that accused provoked the difficulty merely by going to the place where deceased was or opening a conversation with him.—*Id.*

§ 300 (Ky.) An instruction on self-defense *held* erroneous for want of evidence to support it.—*Barker v. Commonwealth*, 166 S. W. 981.

An instruction on self-defense should permit accused to kill decedent and not merely shoot and wound him, where accused at the time believed and had reasonable grounds to believe that he was in danger of death or some great bodily harm and that it was necessary in the exercise of reasonable judgment to avert the danger real or apparent.—*Id.*

§ 300 (Tex.Cr.App.) Where accused testified that he stabbed deceased in self-defense, not intending to kill him, and there was evidence that the pocketknife used would not necessarily inflict a fatal wound, a charge on aggravated assault is necessary.—*Bolden v. State*, 166 S. W. 503.

§ 300 (Tex.Cr.App.) An instruction *held* to unduly limit the right of self-defense, in view of the facts.—*Williams v. State*, 166 S. W. 1170.

§ 305 (Tex.Cr.App.) The court in submitting the issue of negligent homicide, *held*, in view of the facts, to properly charge on conspiracy.—*Chant v. State*, 166 S. W. 513.

§ 309 (Tex.Cr.App.) Evidence *held* not to raise the issue of manslaughter, but merely to raise the issues of murder in the first or second degree, or accidental or negligent homicide.—*Chant v. State*, 166 S. W. 513.

## X. APPEAL AND ERROR.

§ 338 (Ark.) The admission in evidence, in a homicide case, of pictures of the murdered girl, and the place where her body was found, and where, according to the state's theory, she was murdered, was not prejudicial to accused, where she was fully described in the evidence, and her age and size, as well as the condition of the well in which she was found, were given.—*Tillman v. State*, 166 S. W. 582.

§ 339 (Ark.) The exclusion of evidence in a homicide case as to statements by the murdered girl's father that when she was found, her body would be found at a certain location, with a bullet hole in her head, etc., in which situation she actually was found, *held* not prejudicial to accused, when the evidence was considered as impeachment evidence; the father's evidence

having no substantive force.—*Tillman v. State*, 166 S. W. 582.

§ 340 (Tex.Cr.App.) Where accused was convicted of manslaughter, the error in a charge on murder in the second degree was immaterial.—*Lopez v. State*, 166 S. W. 154.

§ 340 (Tex.Cr.App.) Where accused was convicted of murder in the second degree, objections to charges of murder in the first degree will not be considered.—*Chant v. State*, 166 S. W. 513.

## HUMANITARIAN DOCTRINE.

See Trial, § 191.

## HUSBAND AND WIFE.

See Acknowledgment, § 62; Adverse Possession, § 43; Bigamy; Bills and Notes, § 453; Damages, §§ 100, 216; Death, §§ 83, 99, 104; Descent and Distribution, § 156; Divorce; Dower; Frauds, Statute of, §§ 129, 144; Homestead, §§ 119, 134-145; Homicide, § 158; Insurance, § 813; Libel and Slander, § 80; Marriage; Specific Performance, §§ 35, 106, 121; Tenancy in Common, § 3; Trespass, § 46; Wills, §§ 100, 108; Witnesses, § 414.

### I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 14 (Mo.App.) A husband could grant a license to lay a sewer on land owned by him and his wife by the entirety, which was good as against both during their joint lives, and absolute as against the husband if he survived.—*Ewen v. Hart*, 166 S. W. 315.

### II. MARRIAGE SETTLEMENTS.

§ 31 (Tex.Civ.App.) Where a joint and mutual will executed by husband and wife was probated by the husband surviving and he took possession of the property given him for life, with remainder to their daughters, a woman subsequently marrying him, under an agreement by him to convey to her his interest, was chargeable with notice of the will, and not an innocent purchaser for value.—*Larrabee v. Porter*, 166 S. W. 395.

### III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 43 (Ky.) A husband cannot recover from his wife, in a divorce action by her, for sums paid during marriage for the maintenance of the wife's small children by her first husband, and for medical attention and funeral expenses for one of them, and for the maintenance of the wife's live stock, in the absence of a contract by the wife to pay for such services.—*Allen v. Allen*, 166 S. W. 211.

### V. WIFE'S SEPARATE ESTATE.

#### (A) What Constitutes.

§ 119 (Tex.Civ.App.) A conveyance by a husband to his wife by a deed reciting a valuable consideration and duly recorded vested title in the wife as her separate property.—*Bird v. Lester*, 166 S. W. 112.

#### (B) Rights and Liabilities of Husband.

§ 138 (Ky.) A verbal agreement by a husband to keep in force a mortgage executed by his wife as security for a debt due from him is not binding on the wife, who may rely on limitations in defense of a suit to foreclose the mortgage.—*Bradley v. Bradley's Adm'r*, 166 S. W. 773.

A wife executing a mortgage to secure a surety of her husband is not bound by any agreement without her consent between the husband and the surety, whereby a co-surety is to have the benefit of the mortgage, and the agreement does not stop the running of limitations in her favor.—*Id.*

## VI. ACTIONS.

§ 235 (Tex.Civ.App.) Where the jury, in response to the question whether a husband gave to his wife a note as a gift or to reimburse her for money of hers that had been used, found that it was to reimburse her for her money and land used, the finding was a direct finding that the entire note was turned over to her to reimburse her, and not that she was to have only the amount needed to pay her for her property used.—*Larrabee v. Porter*, 166 S. W. 395.

§ 239 (Ky.) Where the purchaser's wife was made a defendant to the vendor's suit to enforce his lien, and judgment was rendered against the defendants for the balance of the purchase price, but the record failed to show that the wife signed the notes or was in any way liable, the judgment was erroneous as to her.—*Baird v. Prewitt*, 166 S. W. 771.

## VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 279 (Ark.) Where husband and wife, who made a valid separation agreement, subsequently reassumed the marital relation, the agreement was annulled, and their marital rights must be determined by statute.—*Carter v. Younger*, 166 S. W. 547.

§ 281 (Ark.) Where a widow, petitioning for allotment of dower, admitted the execution of a separation agreement adjusting her property rights, but alleged that the same had been abrogated by subsequent reassumption of marital relations, the burden of proof rested on her.—*Carter v. Younger*, 166 S. W. 547.

## IX. ABANDONMENT.

§ 304 (Tex.Cr.App.) The statute making punishable the abandonment of a wife and minor child by a husband and father does not impose a penalty for temporary separation, but implies a purpose not to support his family, where there is no excuse for his failure to do so.—*Irving v. State*, 166 S. W. 1166.

§ 312 (Tex.Cr.App.) An indictment which charged that the defendant abandoned his wife, but did not directly allege that he had a wife, or give her name, was insufficient.—*Irving v. State*, 166 S. W. 1166.

§ 313 (Tex.Cr.App.) In a prosecution under an indictment charging in separate counts the abandonment by defendant of his wife and of his minor child, evidence held to show that defendant had merely left his family temporarily to secure work and make a new home for them.—*Irving v. State*, 166 S. W. 1166.

## ICE.

See Municipal Corporations, § 822.

## ILLEGITIMATE CHILDREN.

See Bastards.

## IMPEACHMENT.

See Witnesses, §§ 317-414.

## IMPLIED CONTRACTS.

See Assumpsit, Action of; Work and Labor.

## IMPRISONMENT.

See Bail; False Imprisonment; Habeas Corpus.

## IMPROVEMENTS.

See Frauds, Statute of, § 129; Municipal Corporations, §§ 284-486; Partition, § 83; Street Railroads, § 37.

## INCOMPETENT PERSONS.

See Insane Persons.



**INCORPORATION.**

See Corporations, §§ 18, 28.

**INDEMNITY.**

See Guaranty; Receivers, § 101.

**INDICTMENT AND INFORMATION.**

See Criminal Law, § 1091; Grand Jury; Husband and Wife, § 312; Infants, § 16; Larceny, § 29; Parent and Child, § 17; Perjury, § 26; Threats, § 5; Vagrancy, § 8.

**IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.**

§ 42 (Tex.Cr.App.) While it would be too late to file the information, after announcement of ready for trial and the parties had gone before the jury, if it had been placed with the papers prior to the calling of the case, and the court's attention had been called thereto, it would be deemed filed as of the date on which it was placed with the clerk.—*Landreth v. State*, 166 S. W. 503.

**V. REQUISITES AND SUFFICIENCY OF ACCUSATION.**

§ 72 (Tex.Cr.App.) The indictment, in a prosecution for unlawfully carrying a pistol, which alleged that accused did unlawfully carry a pistol on "or" about his person was fatally defective for using the disjunctive.—*Hunter v. State*, 166 S. W. 164.

§ 81 (Tex.Cr.App.) A complaint and information, alleging that the Christian name of accused is unknown, support a conviction, if otherwise good, where accused does not, during the trial, suggest his name, and no motion in regard thereto is made.—*Sugarman v. State*, 166 S. W. 732.

§ 110 (Mo.App.) Indictment in the language of Rev. St. 1909, § 8315, forbidding the practice of medicine or surgery without a license, *held* sufficient, though it omitted the negative averment that defendant was not within a proviso that physicians registered on a certain date should be regarded as licentiates.—*State v. Humfeld*, 166 S. W. 331.

§ 111 (Mo.App.) When a statute creating and defining an offense contains an exception or proviso constituting part of its description, it is essential to negative such proviso in the information, since the offense may not be described without so doing.—*State v. Humfeld*, 166 S. W. 331.

**VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS. DUPLICITY, AND ELECTION.**

§ 125 (Tex.Cr.App.) A complaint and information which charge conjunctively the offense denounced by Pen. Code 1911, art. 755, do not charge separate and distinct offenses.—*Herrington v. State*, 166 S. W. 721.

Where a complaint and information distinctly charge the offense of treating or offering to treat any disease by any method in violation of Pen. Code 1911, art. 755, subd. 2, the allegations attempting to charge a violation of subdivision 1 will be treated as surplusage.—*Id.*

**VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.**

§ 137 (Tex.Cr.App.) The character of testimony or the quantum of proof had before the grand jury cannot be inquired into on motion to quash the indictment.—*Edwards v. State*, 166 S. W. 517.

**INDORSEMENT.**

See Bills and Notes, §§ 243-378.

**INFANTS.**

See Carriers, § 304; Constitutional Law, § 274; Criminal Law, § 1022; Evidence, § 237; Guardian and Ward; Husband and Wife, § 43; Limitation of Actions, §§ 73, 103; Master and Servant, § 185; Negligence, §§ 23, 24, 32, 56; Parent and Child; Statutes, §§ 93, 118; Wills, § 221.

**II. CUSTODY AND PROTECTION.**

§ 12 (Mo.) A state as *parens patriæ* may promote the well-being of persons of defective understanding, or delinquents, or others burdened with misfortunes or infirmities so as to be unable to care for themselves, and the constitutional limitations will be so construed, if possible, to permit such supervision by the state.—*State ex rel. Cave v. Tinch*, 166 S. W. 1028.

Laws 1913, pp. 148-154, giving the probate court in counties of less than 50,000 population jurisdiction to provide for the care and control of children under 17 years of age who are delinquent, *held* not an invasion of personal right in that it interferes with the parental right of control of children.—*Id.*

Laws 1913, pp. 148-154, §§ 2, 4, 5, 6, et seq., permitting one having information of a delinquent child to file with the probate clerk a verified petition stating the facts and providing for the commitment of such child, *held* invalid as attempting to give the probate court criminal jurisdiction without requiring the constitutional procedure in criminal cases, such as an information or indictment as required by Const. art. 2, § 12.—*Id.*

Laws 1913, pp. 148-154, defining a delinquent child as one "who violates any law of this state" not punishable by death or imprisonment in the penitentiary, and authorizing the probate court, in proceedings to commit a delinquent child, to hear the case in a summary manner and examine witnesses without the assistance of counsel, violates Const. art. 2, § 22.—*Id.*

§ 16 (Mo.) The indictment or information required by Const. art. 2, § 12, must be such as is contemplated by the common law, viz., an indictment found and presented by a grand jury or an information filed by a public officer authorized to prosecute criminals.—*State ex rel. Cave v. Tinch*, 166 S. W. 1028.

**III. PROPERTY AND CONVEYANCES.**

§ 24 (Tex.Civ.App.) A minor who, with the consent of his father claimed and occupied, as his own, land adjoining that of his father, the father at no time asserting any claim thereto, could not be regarded as holding under his father, and hence his minority did not prevent him from acquiring title by limitation.—*Houston Oil Co. of Texas v. Griffin*, 166 S. W. 902.

§ 37 (Ky.) Where a will gave a life interest to testator's wife in one-third of his realty, of which she then owned an undivided one-fourth interest, and devised the remainder in trust for testator's seven children, to pay one-seventh thereof to the sons at a certain age and the income from one-seventh to the daughters, the widow and trustees being in possession, and the land not being divisible, there was such a vested estate and joint ownership as to authorize the sale of an interest of four infant children under Civ. Code Prac. § 490.—*Eldridge v. Embry*, 166 S. W. 223.

**VI. CRIMES.**

§ 66 (Mo.) A child over 7 and under 14 years of age is *prima facie* incapable of crime.—*State ex rel. Cave v. Tinch*, 166 S. W. 1028.

**INFERIOR COURTS.**

See Courts, §§ 169, 170.

**INFORMATION.**

See Indictment and Information.

**INHERITANCE.**

See Descent and Distribution.

**INJUNCTION.**

See Costs, § 273; Courts, § 169; Dismissal and Nonsuit, § 55; Equity, § 148; Evidence, §§ 121, 229; Execution, § 171; Frauds, Statute of, § 149; Judgment, § 455; Pleading, § 8; Venue, § 46; Waters and Water Courses, §§ 114, 247; Witnesses, §§ 168, 255.

**II. SUBJECTS OF PROTECTION AND RELIEF.****(A) Actions and Other Legal Proceedings.**

§ 26 (Tex.Civ.App.) Equity will enjoin the prosecution of numerous suits at law where all of them arise from a common source, involve similar facts, and are governed by the same legal rules, so that the whole litigation may be settled in a single suit, and it appears that the maintenance of separate suits will materially injure the parties.—Supreme Lodge of Fraternal Union of America v. Ray, 166 S. W. 46.

Where separate actions in justice's court by 39 members of a fraternal benefit association were all brought solely to determine the right of the association to put in force an increased rate of assessment, equity will take jurisdiction to restrain the maintenance of the separate actions and to determine the whole matter in one suit.—Id.

One entitled to maintain a suit in equity to restrain the maintenance of 39 separate actions, brought against it in justice's court, involving the same question, will be required, as a condition to the assumption of jurisdiction by equity, to pay all costs accrued in the justice's court, but defendants may assert such right against complainant in their answer.—Id.

**III. ACTIONS FOR INJUNCTIONS.**

§ 118 (Mo.App.) A petition in an action by a company erecting a Masonic lodge building and the members of the lodge to restrain defendant from issuing a publication which alleges that defendant was about to issue a publication purporting to be an official publication authorized by the company, to be sold as a souvenir of the dedication of the building, and that defendant solicited subscriptions by false representations, held to state a cause of action for injunctive relief.—Kansas City Masonic Temple Co. v. Young, 166 S. W. 838.

**INNUENDO.**

See Libel and Slander, § 86.

**IN PAIS.**

See Estoppel, §§ 58-75.

**INSANE PERSONS.**

See Contracts, § 99; Damages, § 163; Evidence, §§ 132, 545; Insurance, § 819; Judgment, § 384.

**I. DISABILITIES IN GENERAL.**

§ 2 (Mo.App.) On an application for a writ of error coram nobis to set aside a judgment against an alleged insane defendant, not represented by guardian in the action resulting in the judgment, evidence held to sustain a finding that defendant was insane at the time of the trial.—Gibson v. Pollock, 166 S. W. 874.

**V. PROPERTY AND CONVEYANCES.**

§ 61 (Tex.Civ.App.) Though H., when assigning to plaintiff a half interest in a claim for

damages against defendant and in any settlement, was insane, the assignment being only voidable, defendant settling with and paying H. with knowledge of the assignment, though not of the ratification thereof, is liable to plaintiff.—Gulf C. & S. F. Ry. Co. v. James B. & Charles J. Stubbs, 166 S. W. 699.

**VII. TORTS.**

§ 80 (Mo.App.) An insane person is liable for his torts.—Gibson v. Pollock, 166 S. W. 874.

**IX. ACTIONS.**

§ 94 (Mo.App.) An insane person, when sued for a tort, must be given the benefit of a defense made by a sane person as guardian.—Gibson v. Pollock, 166 S. W. 874.

**INSOLVENCY.**

See Bankruptcy; Estates, § 10; Principal and Surety, § 194.

**INSPECTION.**

See Levees, § 2.

**INSTRUCTIONS.**

To jury, see Criminal Law, §§ 14, 761-841, 1091, 1173; Trial, §§ 139, 191-296.

**INSURANCE.**

See Appeal and Error, § 1068; Corporations, §§ 90, 99; Frauds, Statute of, § 52; Limitation of Actions, §§ 87, 100; New Trial, §§ 103, 104; Trial, §§ 25, 108½; Witnesses, § 177.

**III. INSURANCE AGENTS AND BROKERS.****(A) Agency for Insurer.**

§ 87 (Tex.Civ.App.) An insurance company is responsible for the acts and declarations of their local agents within the scope of their employment.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

§ 93 (Tex.Civ.App.) Though insurance agents violate the instructions of the company in taking policies, the company is liable if the act is within the apparent scope of the agent's authority.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

**(B) Agency for Applicant or Insured.**

§ 109 (Tex.Civ.App.) The local agent of a life insurance company could become the custodian of the policy for insured, notwithstanding his agency for the company.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

**V. THE CONTRACT IN GENERAL.****(A) Nature, Requisites, and Validity.**

§ 136 (Tex.Civ.App.) The retention of the policy by the local agent receiving it for delivery at insured's request was some evidence on the question of delivery to insured.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

§ 141 (Ark.) Where the soliciting agent of a life insurance company surrendered the notes given for the payment of the first premium by the insured, and took in exchange another note, which he forwarded to the general agents of the company, their acceptance of such note constituted a waiver of the right to forfeit the policy for nonpayment of the premium in money.—Pioneer Life Ins. Co. v. Cox, 166 S. W. 951.

§ 141 (Tex.Civ.App.) A life insurance company held estopped to claim that no application was made for the policy sued on, so that it was not a binding contract.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

**VI. PREMIUMS, DUES, AND ASSESSMENTS.**

§ 183 (Tex.Civ.App.) Under an employee's liability policy stating that the premium placed therein was estimated upon data in the schedule and that the premium would be subject to further adjustment if the compensation paid employees was greater or less than the estimated amount, *held*, that insurer could recover any additional amount shown to be due.—Fidelity & Casualty Co. of New York v. J. W. Crowder Drug Co., 166 S. W. 1186.

§ 187 (Tex.Civ.App.) Rev. St. 1911, art. 4741, requiring life policies to require all premiums to be paid in advance, and article 4954, prohibiting discrimination as to the premiums charged, *held* not to avoid a policy because the company extended credit for, and received another's obligation as, payment of the first premium.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

**VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.**

§ 228 (Tex.Civ.App.) Where a fire policy provided for an extension of time for the benefit of the mortgagee in case of cancellation, the mortgagee may waive that provision for his benefit.—Glens Falls Ins. Co. v. Walker, 166 S. W. 122.

§ 233 (Tex.Civ.App.) A cancellation of a fire policy upon mortgaged property *held* ineffective as to the mortgagee, who consented to the cancellation solely on faith of the unintentional misrepresentation by the agent of the insurer that the policy was avoided by the institution of foreclosure proceedings, under a clause which he incorrectly stated was in the policy.—Glens Falls Ins. Co. v. Walker, 166 S. W. 122.

§ 236 (Ark.) Where a life insurance company had a right to declare and enforce a forfeiture of the policy, and did declare it, there could be no recovery thereon, even though the company obtained possession of the policy through fraudulent misrepresentation.—Pioneer Life Ins. Co. v. Cox, 166 S. W. 951.

§ 245 (Ark.) Where the right to forfeit a life insurance policy for nonpayment of the premium had been waived by the acceptance of a note for the amount of the premium, the voluntary surrender of the policy by the insured before maturity of the note at the insistence of the company constituted, in the absence of fraud, an abandonment of the policy by mutual consent.—Pioneer Life Ins. Co. v. Cox, 166 S. W. 951.

**IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.****(C) Matters Relating to Person Insured.**

§ 291 (Tex.Civ.App.) If insured was given credit for the first premium before he became in bad health, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery on the policy.—Amarillo Nat. Life Ins. Co. v. Brown, 166 S. W. 658.

**X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.****(E) Nonpayment of Premiums or Assessments.**

§ 365 (Tex.Civ.App.) Where a life policy provided for reinstatement upon payment of back premiums, but that the insurer should not be liable for death occurring within five weeks from reinstatement, the beneficiary cannot re-

cover unless there was a waiver, where the insured died within five weeks after the payment of the back premiums.—American Nat. Ins. Co. v. Gallimore, 166 S. W. 17.

**XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

§ 388 (Ark.) Notwithstanding a custom of a life insurance company to charge its part of the first premium to the soliciting agent and to allow him to make his own arrangement for its collection, if the insured did not pay the premium at all, and it was paid to the company by the agent, the company could forfeit the policy under the clause giving such right of forfeiture, where the premiums or premium notes were not paid when due.—Pioneer Life Ins. Co. v. Cox, 166 S. W. 951.

§ 392 (Mo.App.) Where an insurer, upon discovering that the insured had understated his age, offered him the privilege of continuing the policy upon payment of the proper assessment and the deficiency, and this was accepted by the insured, there was a new contract, and the insurer could not thereafter defeat recovery because of the insured's misstatement, though it failed to collect the correct rate.—Lowenstein v. Old Colony Life Ins. Co., 166 S. W. 889.

Where a corporation which assumed liability on a certificate issued by a fraternal order, upon discovering that insured understated his age, required him to pay the deficiency in assessments, defendant, which assumed the obligations of the corporation, could not revive the original application as basis for assessments so as to take advantage of the misrepresentation, unless insured was notified.—Id.

**XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.****(D) Life Insurance.**

§ 523 (Mo.App.) Where an Illinois insurer, which assumed the liability of an association through mistake treated the insured's age as being less than it really was, it could not reduce the amount of recovery because the premiums were assessed on the incorrect age; neither Hurd's Rev. St. Ill. 1911, c. 73, § 208u, or the laws of the forum allowing a reduction in cases of the mistake of the insurer.—Lowenstein v. Old Colony Life Ins. Co., 166 S. W. 889.

**XIV. NOTICE AND PROOF OF LOSS.**

§ 536 (Tex.Civ.App.) Where a life policy required proofs of death as a condition precedent to recovery, there can be no recovery, where no proofs were made, and there was no waiver of the conditions.—American Nat. Ins. Co. v. Gallimore, 166 S. W. 17.

§ 552 (Mo.App.) A statement as to the age of the insured, made in the proofs of loss required by a life policy, is not binding on the beneficiary, where it showed that it was not based on family records, but on statements of the insured, who, by reason of his immigration to this country in early youth, was uncertain as to his own age.—Lowenstein v. Old Colony Life Ins. Co., 166 S. W. 889.

§ 559 (Ark.) The action of an agent of a life insurance company in wrongfully obtaining possession of a policy by means of fraudulent misrepresentation amounts to a denial of liability, which constitutes a waiver of the requirement of proof of loss.—Pioneer Life Ins. Co. v. Cox, 166 S. W. 951.

**XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.**

§ 602 (Tex.Civ.App.) The statute providing for damages and attorney's fees for refusal to

pay an insurance policy within the time specified in the statute, if liability thereon be established, is constitutional.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

### XVIII. ACTIONS ON POLICIES.

§ 608 (Mo.App.) In an action on a life policy issued in substitution of a certificate issued by a fraternal order, the policy will be treated as an ordinary life policy, in the absence of proof that the insurance contract was governed by the laws relating to fraternal beneficiary societies.—*Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889.

§ 654½ (Tex.Civ.App.) In an action on a life policy, claimed by the company not to have become effectual because of failure to pay the premium while insured was in good health, evidence that insured was a man of considerable wealth was material on the question whether the agent extended credit to him for the premium, as claimed by plaintiff.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

§ 665 (Ark.) Where a life insurance policy was surrendered by the insured before maturity of a note given for the first premium, the jury might infer from the fact that no request for a return of the policy was ever made, and that there was no offer to pay the note, that the surrender of the policy was voluntary, and not induced by fraud.—*Pioneer Life Ins. Co. v. Cox*, 166 S. W. 951.

§ 665 (Mo.App.) In an action on a life policy, the evidence held to warrant a finding that the age of insured was as determined by negotiations between himself and the insurer.—*Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889.

§ 665 (Tex.Civ.App.) In an action on a life policy, defended on the ground that the first premium was not paid, so as to put the policy into effect, evidence held to sustain a finding that the company intended to extend credit for the premium to its general agent and to permit him to extend credit therefor to insured.—*Amarillo Nat. Life Ins. Co. v. Brown*, 166 S. W. 658.

§ 668 (Ark.) In an action upon a life insurance policy, where it was undisputed that the insured had not paid the note given for the first premium, which fact gave the company the right to declare a forfeiture under the terms of the policy, evidence held to require the submission to the jury of the issue, whether the company had declared a forfeiture of the policy or had waived its right.—*Pioneer Life Ins. Co. v. Cox*, 166 S. W. 951.

### XX. MUTUAL BENEFIT INSURANCE.

#### (A) Corporations and Associations.

§ 695 (Mo.App.) Knowledge of the Supreme Treasurer of a fraternal benefit society of the custom in a local lodge of not forfeiting a member's rights for nonpayment of dues and assessments when due held imputable to the society so as to authorize a finding of waiver of such by-law.—*Griffith v. Supreme Council of Royal Arcanum*, 166 S. W. 324.

#### (B) The Contract in General.

§ 719 (Tex.Civ.App.) Under the constitution of a fraternal benefit association, providing that if the assessment provided for is inadequate, then "further assessment" should be made as might be necessary to fully meet the benefits due, the association may require payment of such increased rate of assessment as might be necessary to meet the benefits due, as by requiring an increased rate payable per month by each member.—*Supreme Lodge of Fraternal Union of America v. Ray*, 166 S. W. 46.

§ 723 (Tex.Civ.App.) False statements by the applicant for mutual benefit insurance as to the condition of her health held, under the provisions of the application and certificate, to

have been warranties and to preclude recovery by the beneficiary.—*The Homesteaders v. Briggs*, 166 S. W. 95.

§ 724 (Mo.App.) Where the by-laws of a fraternal benefit society prohibit the local organizations from waiving any provision thereof, no waiver or estoppel may be invoked against the society based upon the acts of the local organizations or their officers, unless it has, through its general officers, authorized or recognized such waiver.—*Griffith v. Supreme Council of Royal Arcanum*, 166 S. W. 324.

#### (D) Forfeiture or Suspension.

§ 755 (Mo.App.) A fraternal benefit society may waive its by-laws requiring prompt payment of assessments, and declaring a forfeiture for failure to make prompt payments.—*Griffith v. Supreme Council of Royal Arcanum*, 166 S. W. 324.

§ 756 (Mo.App.) If a fraternal benefit society by continued conduct induces a member to fall into the habit of delaying payment of dues until beyond the time at which the by-laws provide a member shall be suspended for nonpayment, it cannot, without warning to the member, suspend him and forfeit his rights for nonpayment at the time provided in the by-laws.—*Griffith v. Supreme Council of Royal Arcanum*, 166 S. W. 324.

A fraternal benefit society which had knowledge, through its Supreme Treasurer, of the custom of a local council of not forfeiting the rights of members for nonpayment of assessments when due, pursuant to the by-laws, is estopped from invoking the by-law to forfeit the rights of a member without first giving notice to him of an opportunity to pay the overdue assessment.—*Id.*

#### (E) Beneficiaries and Benefits.

§ 788 (Ky.) A provision avoiding a mutual benefit certificate if insured died by his own hand or act, whether sane or insane, will be enforced only when insured, at the time of his self-destruction, had mind enough to know that his act would probably result in death.—*Sovereign Camp Woodmen of the World v. Landrum*, 166 S. W. 598.

#### (F) Actions for Benefits.

§ 813 (Tex.Civ.App.) Where defendant issued a benefit certificate insuring the life of deceased in favor of her husband, and they were divorced, he was not a necessary or indispensable party in a suit by her children on the certificate.—*United Benevolent Ass'n of Texas v. Lawson*, 166 S. W. 713.

§ 819 (Ky.) Evidence, in an action on a mutual benefit certificate in which it was claimed that insured committed suicide, held to sustain a finding that decedent was mentally incompetent at the time, so as not to realize that his act would result in his death.—*Sovereign Camp Woodmen of the World v. Landrum*, 166 S. W. 598.

### INTENT.

See Adoption, § 1; Adverse Possession, § 60; Contracts, §§ 143, 147, 169; Deeds, § 90; Embezzlement, § 5; Highways, § 163; Homestead, § 162; Partnership, § 20; Statutes, §§ 158, 161, 211; Wills, §§ 293, 439.

### INTEREST.

See Account Stated, § 6; Banks and Banking, § 315; Counties, § 161; Payment, § 42; States, § 171; Stipulations, § 18; Usury: Wills, § 87; Witnesses, § 373.

### IV. RECOVERY.

§ 66 (Mo.App.) When interest is not asked in the petition, none should be assessed—not even from the date of the institution of the suit.—*Davis v. Creamer*, 166 S. W. 819.

**INTERMEDIATE COURTS.**

See Appeal and Error, § 1091.

**INTERPLEADER.**

See Trial, § 25.

**I. RIGHT TO INTERPLEADER.**

§ 8 (Mo.App.) The issuance of cashier's checks to the payee of a certified check, the proceeds of which were claimed by another, does not render the bank independently liable to the payee, thus defeating the right to demand that the claimant and the payee's indorsee without consideration, interplead.—*McGinn v. Interstate Nat. Bank*, 166 S. W. 345.

§ 9 (Mo.App.) Where a bank issued cashier's checks in exchange for a certified check, it may require the indorsee of the cashier's checks, who took without consideration, to interplead with a claimant of the cashier's check who asserted he was entitled to the proceeds of the certified check.—*McGinn v. Interstate Nat. Bank*, 166 S. W. 345.

**INTERROGATORIES.**

See Depositions.

**INTERSTATE COMMERCE.**

See Commerce.

**INTESTACY.**

See Descent and Distribution.

**INTOXICATING LIQUORS.**

See Appeal and Error, § 781; Constitutional Law, §§ 205, 206; Courts, § 231; Criminal Law, §§ 368, 421, 1169; District and Prosecuting Attorneys, § 8; Elections, § 11; Novation, § 6; Witnesses, § 337.

**I. POWER TO CONTROL TRAFFIC.**

§ 6 (Ark.) Legislature held to have authority to impose on business of retailing intoxicating liquors conditions so burdensome as to render the business unprofitable and amount in practical results to prohibition.—*McClure v. Topf & Wright*, 166 S. W. 174.

§ 6 (Mo.App.) The state may exercise its police power with respect to the sale of intoxicating liquors, because of its tendency to deprave public morals.—*State ex rel. Lashly v. Wurde-mann*, 166 S. W. 348.

**II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.**

§ 14 (Ky.) The County Unit Law, providing that, when an election is held in an entire county, and a majority of the votes cast are against the sale of intoxicants, it shall not be lawful to sell liquor in any part of the county, does not violate Const. § 61, requiring the General Assembly to provide a means for taking the census of the people of any county, city, precinct, etc., as to whether intoxicants shall be sold therein.—*Welch v. Irvine*, 166 S. W. 611.

§ 15 (Ark.) Acts 1913, p. 180, regulating the issuance of liquor license, held constitutional.—*McClure v. Topf & Wright*, 166 S. W. 174.

**III. LOCAL OPTION.**

§ 30 (Tex.Civ.App.) Rev. St. 1911, arts. 5715, 5726, held not to prohibit the holding of a local option election in a commissioners' precinct composing part of a justice's precinct, or in any other local option district once established.—*Holmgreen v. Perkins*, 166 S. W. 8.

§ 31 (Tex.Civ.App.) Under Const. art. 9, § 1, and Article 16, § 20, where a part of a justice's precinct in a county in which local option was

in force was included in a new county, and a part of the territory so separated was included in a new commissioners' precinct, a new local option election was properly held therein.—*Holmgreen v. Perkins*, 166 S. W. 8.

§ 33 (Mo.App.) Under Rev. St. 1909, §§ 7238, 7240, validity of local option election held not affected by failure to address notice of election to the qualified voters.—*State v. Johnson*, 166 S. W. 853.

§ 34 (Ky.) Though Ky. St. § 2555, requires the appointment of special officers to hold a local option election, the regular officers for the general elections may be appointed to hold a local option election.—*Hail v. Gragg*, 166 S. W. 792.

Ky. St. § 2555, does not require an equal division in sentiment of the election officers to hold a local option election.—*Id.*

Election officers, appointed by the county board having power to select officers, are de facto officers, and where they are not guilty of any fraud in conducting a local option election, and the vote as certified by them is correct, the election will not be disturbed.—*Id.*

§ 36 (Tex.Cr.App.) Under Rev. St. 1911, art. 5728, a local option election, alleged to have resulted in prohibition, cannot be attacked after 30 days after the declaration of the result, on the ground of irregularities in the order declaring the result and the publication thereof.—*Sasser v. State*, 166 S. W. 1160.

§ 40 (Ky.) Under the substantially direct provisions of the County Unit Law, enacted in 1906, when a majority of the votes in a county in a local option election are cast against the sale of liquor, elections previously held in any city, town, or other subdivision authorizing the sale of intoxicants are annulled, so as to put the entire county under the County Unit Law.—*Welch v. Irvine*, 166 S. W. 611.

**VI. OFFENSES.**

§ 146 (Tex.Cr.App.) Defendant, who, at the request of one who had ordered liquor, made affidavit that it was his and was not intended for any illegal purpose, paying the notary with money supplied by the party ordering, took the affidavit to the express office, signed for and received the liquor and delivered it to the party who had ordered it, was guilty of a sale in violation of the misdemeanor prohibition law.—*Coleman v. State*, 166 S. W. 164.

§ 147 (Ky.) A liquor dealer who filled an order sent by a resident of a county in which local option was in force, by delivering the liquor to a carrier in the county in which the dealer did business, made the sale in the county in which the delivery to the carrier took place, and not in the local option county, in violation of Ky. St. §§ 2557 and 2557a.—*Josselson Bros. v. Commonwealth*, 166 S. W. 234.

§ 148 (Ky.) A liquor dealer who delivered liquor to a carrier, consigned to a buyer who resided in local option territory, did not violate Acts 1912, c. 146, making it unlawful for one, either as the agent of the buyer or the seller, to purchase or procure intoxicating liquors in local option territory.—*Josselson Bros. v. Commonwealth*, 166 S. W. 234.

**VIII. CRIMINAL PROSECUTIONS.**

§ 227 (Tex.Cr.App.) On a trial for violating the local option law, a witness, knowing the reputation of accused as a bootlegger in prohibition territory, may testify as to whether the reputation is good or bad.—*Sasser v. State*, 166 S. W. 1160.

§ 238 (Mo.App.) On a trial for violating the local option law, evidence held sufficient to take the case to the jury, and hence a demurrer to the evidence was properly overruled.—*State v. Johnson*, 166 S. W. 853.

**INVENTORY.**

See Executors and Administrators, § 65.

**IRRIGATION.**

See Waters and Water Courses, §§ 240, 247.

**JEOPARDY.**

See Criminal Law, § 189.

**JOINT-STOCK COMPANIES.**

See Associations.

**JOINT TENANCY.**

See Tenancy in Common.

**JUDGES.**

See Courts; District and Prosecuting Attorneys, § 8; Justices of the Peace; Mandamus, §§ 14, 72, 73.

**JUDGMENT.**

See Adoption, § 14; Appeal and Error; Bills and Notes, § 245; Criminal Law, §§ 1001, 1139; Death, § 99; Dismissal and Nonsuit, § 55; Divorce, § 332; Elections, § 305; Eminent Domain, § 164; Execution; Executors and Administrators, § 65; Fraudulent Conveyances, § 295; Husband and Wife, § 239; Judicial Sales, § 36; Justices of the Peace, § 87; Mechanics' Liens, § 291; Mortgages, §§ 308, 559; Partition, § 74; Replevin, § 106; Sales, § 397; Trial, § 296; Trusts, § 385; Vendor and Purchaser, § 285; Venue, § 46.

**I. NATURE AND ESSENTIALS IN GENERAL.**

§ 21 (Tex.Civ.App.) A judgment for the "sum of \$—, being the amount of" a replevy bond, was not void for uncertainty, if the bond was in the record and the amount thereof was fixed, under the rule that a judgment is certain which can be made certain.—*Lester v. Gatewood*, 166 S. W. 389.

**IV. BY DEFAULT.****(A) Requisites and Validity.**

§ 98 (Tex.Civ.App.) Where one of the several defendants, though duly cited, made default, the court should have rendered judgment against him by default.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 101 (Ky.) A default judgment cannot be sustained if plaintiff's petition does not state a good cause of action, or lacks those averments necessary to show his right to recover.—*Davie's Ex'r v. City of Louisville*, 166 S. W. 969.

§ 102 (Ky.) Where, pending suit against life tenant's grantee to enforce tax lien, the life tenant died, amended petition bringing in the remainderman, but not reiterating the allegations of the original petition or stating facts showing that the property was still liable, held insufficient to support a default judgment against the remainderman.—*Davie's Ex'r v. City of Louisville*, 166 S. W. 969.

**(B) Opening or Setting Aside Default.**

§ 140 (Mo.) Rev. St. 1909, § 2101, authorizing the setting aside of default judgments, does not apply where defendant appeared and filed an answer to the original petition, though he subsequently failed to appear in the subsequent proceeding, resulting in an adverse judgment.—*Jeude v. Sims*, 166 S. W. 1048.

§ 153 (Mo.) A motion under Rev. St. 1909, § 2121, declaring that judgments shall not be set aside for irregularity on motion, unless the motion is made within three years after the term at which the judgment was rendered,

must be based on an irregularity patent on the record, and not depending on proof outside the record.—*Jeude v. Sims*, 166 S. W. 1048.

**VI. ON TRIAL OF ISSUES.**

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 251 (Mo.App.) Plaintiff may not recover for an act of negligence not included in the petition.—*Best v. City of St. Joseph*, 166 S. W. 817.

§ 252 (Tex.Civ.App.) Relief other than that specifically prayed for may be granted under the further prayer for general relief.—*Lakeside Irr. Co. v. Kirby*, 166 S. W. 715.

**(D) Arrest of Judgment.**

§ 259 (Mo.App.) The office of a motion in arrest of judgment is to call the attention of the court to error patent of record, and not outside the record, and the error must be one of substance and not of form.—*Kansas City Masonic Temple Co. v. Young*, 166 S. W. 838.

**VII. ENTRY, RECORD, AND DOCKETING.**

§ 273 (Ky.) The power of courts at law and in equity to make entries of judgments and decrees nunc pro tunc, when necessary to prevent injustice, is inherent in the courts.—*Chester v. Graves*, 166 S. W. 998.

The power of the court to make entries of judgments nunc pro tunc is exercised, not to correct judicial errors, but to supply matters of evidence.—Id.

Where a judgment has been pronounced, but not entered of record, because of accident or mistake, or the neglect or misprision of the clerk, the court may order the judgment rendered to be entered nunc pro tunc, provided there is satisfactory evidence of the rendition and terms of the judgment.—Id.

Where the papers on petition for nunc pro tunc entry of a judgment showed a complete judgment, with a notation thereon, "Let the above order be entered and of effect from this date," followed by a date and signed by the judge, there was a sufficient record to justify the court in entering the judgment nunc pro tunc.—Id.

Heirs of a deceased wife who, with her husband, adopted infant children are not innocent persons, within the rule that the entry of a judgment nunc pro tunc will not be allowed to injuriously affect the rights of innocent third persons, acquired without notice of the rendition of the judgment, and the court may enter the judgment of adoption nunc pro tunc.—Id.

**VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.**

§ 299 (Mo.) The court, except as authorized by statute, has no authority to disturb its judgment after the term.—*Jeude v. Sims*, 166 S. W. 1048.

§ 310 (Tex.Civ.App.) Where one of the several defendants, though duly cited, made default, the judgment for plaintiff was properly amended so as to include him though the verdict failed to mention him.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 314 (Tex.Civ.App.) Under the direct provisions of Rev. St. 1911, art. 2016, a judgment following the verdict may be amended in case of miscalculation, where it can be done by reference to the record.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 334 (Mo.) A writ of error coram nobis to vacate a default judgment is granted only to correct an error of fact pertinent to the issues in the case.—*Jeude v. Sims*, 166 S. W. 1048.

A motion to set aside a default judgment, on the ground that plaintiff fraudulently misled

counsel for defendant as to the time of the trial of the case, is not an application for writ of error coram nobis.—Id.

An application for a writ of error coram nobis to set aside a default judgment, based on a fact known to the party applying and to the court prior to the rendition of the judgment, is properly denied.—Id.

§ 334 (Mo.App.) Where the face of the proceedings against an insane person for tort does not show the fact of his insanity and his disability to defend, and the judgment against him is on its face valid, the remedy is to have the judgment set aside by writ of error coram nobis.—Gibson v. Pollock, 166 S. W. 874.

A petition for writ of error coram nobis to set aside a judgment against an insane defendant for a tort, which alleges that the allegations of the petition of plaintiff in the action were untrue, and that defendant had a good defense to the action, is sufficient after verdict, though subject to attack by demurrer.—Id.

The objection to a petition for a writ of error coram nobis to set aside a judgment against an insane defendant for a tort, based on the fact that the petition shows that the guardian of the insane defendant is plaintiff in the writ instead of the insane defendant, can only be raised by special demurrer or specifically set up in the answer, or it will be waived.—Id.

The court, on application for a writ of error coram nobis to set aside a judgment against an insane defendant, not represented by guardian in the action resulting in the judgment, will not try the merits of that action.—Id.

The statute of limitations does not apply to writs of error coram nobis to set aside judgments.—Id.

A delay of 5 years before bringing a writ of error coram nobis to set aside a judgment rendered against an alleged insane defendant not represented by guardian in the action resulting in the judgment does not amount to laches, where only about 18 months elapsed after the appointment of the guardian before application for the writ.—Id.

## X. EQUITABLE RELIEF.

### (A) Nature of Remedy and Grounds.

§ 403 (Mo.) The equitable remedy to set aside a judgment for fraud can only be invoked by an independent equitable action.—Jeude v. Sims, 166 S. W. 1048.

### (B) Jurisdiction and Proceedings.

§ 455 (Tex.Civ.App.) Rev. St. 1911, art. 4653, and article 1830, subd. 17, fixing the venue of suits to restrain the enforcement of judgments, do not apply where the judgment is void on its face or upon the record, but do apply where the alleged invalidity is an alteration which is not shown to be material.—Lester v. Gatewood, 166 S. W. 389.

## XI. COLLATERAL ATTACK.

### (B) Grounds.

§ 495 (Tex.Civ.App.) Where it was alleged that a certain judgment, execution upon which was sought to be restrained, was upon a replevy bond, and that it stated it was for the amount of the bond, it will be conclusively presumed that the bond was a record in the cause in which the judgment was rendered.—Lester v. Gatewood, 166 S. W. 389.

§ 504 (Tex.Civ.App.) In a collateral attack on a judgment for the amount of a replevy bond, the question whether the judgment should have been for the amount of the bond or for the value of the property replevied cannot be considered.—Lester v. Gatewood, 166 S. W. 389.

## XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

### (A) Judgments Operative as Bar.

§ 545 (Ky.) Where a claim against the estate of a decedent was disallowed by the circuit court, the judgment is final and conclusive, and his only remedy is to move to set it aside or appeal therefrom.—Wood v. Sharp's Adm'r, 166 S. W. 787.

§ 570 (Ky.) A judgment dismissing plaintiff's petition, in an action to enforce specific performance of a compromise agreement to convey certain minerals on the ground that there was no such agreement, was no bar to a subsequent action to cancel the deed under which defendant claimed.—Kentonia Corporation v. Boreing Land & Mining Co., 166 S. W. 780.

## XIV. CONCLUSIVENESS OF ADJUDICATION.

### (A) Judgments Conclusive in General.

§ 651 (Tex.Civ.App.) Where heirs of deceased defendant agreed upon settlement of controversy, and the administrator merely formally agreed to the judgment, heirs held bound by the judgment, whether or not the administrator had power to enter an agreed judgment.—Castleberry v. Bussey, 166 S. W. 14.

### (B) Persons Concluded.

§ 678 (Mo.App.) A judgment discharging a surety who had also given a mortgage for security is not res inter alios acta as to a second mortgage, for the second mortgagee was privy in representation with the surety, and could assert any defense against the first mortgage available to the surety.—Hardwicke v. Barnes, 166 S. W. 826.

§ 701 (Ky.) Where a claim for goods sold a bankrupt corporation was approved in a proceeding wherein it was adjudged a bankrupt, a director subsequently sued by the seller, on the ground that he had allowed the corporation to contract debts in excess of the limit fixed by the charter, cannot question the correctness of the claim.—Nuckels v. Robinson-Pettett Co., 166 S. W. 972.

§ 710 (Tex.) A judgment against one claiming land under a sale by the Mexican state of Tamaulipas, in special proceedings, brought under Act Aug. 16, 1870 (Acts 1870, c. 83 [Paschal's Dig. art. 7068, etc.]), is not conclusive against other claimants under the same sale, who were not parties to those proceedings or in privity with such parties.—State v. Gallardo, 166 S. W. 369.

§ 712 (Tex.Civ.App.) Even if the probate court had jurisdiction of the question of title to land and such title had been put in issue by pleadings therein, its judgment that the fee-simple title therein vested in decedent's widow would not be binding on a surviving brother and heir who was not a party to that suit.—Perkins v. Perkins, 166 S. W. 915.

### (C) Matters Concluded.

§ 736 (Ark.) Since the right of a life tenant, holding under a conveyance of mortgaged lands to herself and the heirs of her body, to purchase at mortgage foreclosure sale as against her daughter could not be raised in the foreclosure proceeding, the decree of foreclosure would not prevent the daughter from denying her right to purchase in a proceeding by the life tenant to confirm the sale.—Hawkins v. Reeves, 166 S. W. 562.

§ 736 (Ky.) A judgment adjudging the rights of the heirs of a decedent rendered in a suit by the administrator, the widow, and some of the heirs against other heirs, held not res judicata in proceedings by supplemental petition for the enforcement of the judgment against defend-

ants, who occupied real estate pursuant to a private settlement which they repudiated, since the matters set up in the petition were not required to be presented in the former suit.—*Aylor v. Aylor*, 166 S. W. 216.

#### (D) Judgments in Particular Classes of Actions and Proceedings.

§ 747 (Ky.) A judgment for plaintiff in trespass for cutting timber, where defendant admitted the cutting, but claimed title, is conclusive as to the title in a subsequent action to quiet title to the same tract between the same parties.—*Benge v. Martin*, 166 S. W. 1003.

### XXI. ACTIONS ON JUDGMENTS.

#### (B) Foreign Judgments.

§ 942 (Mo.App.) A plaintiff, suing on a foreign judgment rendered by a statutory court of limited jurisdiction, must, where defendant pleads the invalidity of the judgment, show that the court of the sister state had jurisdiction of the subject-matter and of the person, and until he does so, the judgment is not entitled to full faith and credit.—*Trimble v. Stamper*, 166 S. W. 820.

### JUDICIAL NOTICE.

See Criminal Law, § 304; Evidence, §§ 14-43.

### JUDICIAL POWER.

See Constitutional Law, § 70.

### JUDICIAL SALES.

See Appeal and Error, § 286; Execution, § 275; Infants, § 37.

§ 13 (Ky.) Under Civ. Code Prac. § 694, the court, directing a sale of land in bulk or in divisions, need not have before it an agreement of the parties, affidavits, or the report of commissioners, but may, from an inspection of the pleadings, determine how the land shall be sold.—*Guest v. Foster*, 166 S. W. 620.

Under Civ. Code Prac. § 694, it is not essential that the petition should expressly aver whether real estate sought to be sold is or is not divisible to authorize the court to order a sale as a whole or direct its division.—*Id.*

§ 13 (Ky.) Under the express terms of Civ. Code Prac. § 694, before ordering a sale of real property, the court must be satisfied by the pleadings or other specified means whether it can be divided without materially impairing its value, and, where the description does not show whether it is divisible, the better practice is to allege such facts in the petition.—*Baird v. Prewitt*, 166 S. W. 771.

§ 31 (Ky.) Evidence on exceptions to a report of sale of land under a judgment directing a sale held to justify a confirmation.—*Guest v. Foster*, 166 S. W. 620.

Where the court orders a sale of land as a whole and it appears on exceptions to the report that the land was susceptible of division and that the owner was prejudiced by the failure to order a division or a sale in different parcels, the exceptions to the report must be sustained, provided the property was sold at a grossly inadequate price.—*Id.*

§ 36 (Ky.) A provision, in a judgment directing a sale of land, that the sale shall be on credit and that the purchaser shall execute a bond for the price, or may pay the price in cash or before maturity, is not prejudicial to the owner.—*Guest v. Foster*, 166 S. W. 620.

§ 37 (Ky.) The error of the court in ordering a sale of land as a whole to satisfy a debt, when it should have been sold in parcels, may be cured, on the hearing of exceptions to the report of sale, by setting aside the sale, if made at a grossly inadequate price.—*Guest v. Foster*, 166 S. W. 620.

The error of the court in directing a sale of land as a whole to satisfy a debt, when it

should have been sold in parcels, is not ground for setting aside the sale, where the owner was not prejudiced.—*Id.*

The error in requiring a purchaser of land, ordered sold, to make a cash deposit at the time of purchase, while Civ. Code Prac. § 696, requires the court to fix reasonable credits, was harmless where the owner was not prejudiced thereby.—*Id.*

### JURISDICTION.

See Ball, § 94; Constitutional Law, § 274; Counties, § 29; Courts; Criminal Law, §§ 575, 1019-1022, 1070½; Dismissal and Nonsuit, § 81; Divorce, § 332; Dower, § 69; Eminent Domain, §§ 172, 185; Equity, §§ 3, 39, 46; Highways, § 72; Infants, § 12; Injunction, § 26; Justices of the Peace, §§ 36-44; Prohibition, §§ 5, 10, 18; Statutes, § 93; Venue, § 75.

### JURY.

See Criminal Law, §§ 741-884, 927, 928, 957, 1166½; Grand Jury; New Trial, § 47; Trial, §§ 108½, 139-356.

#### II. RIGHT TO TRIAL BY JURY.

§ 19 (Mo.) In a proceeding for the condemnation of land, the defendant is entitled to a jury trial only on the question of damages.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

§ 31 (Tenn.) Workhouse Act (Shannon's Code, § 7423), providing that a prisoner, who escapes, when recaptured shall be made to work out the costs of the same, held unconstitutional as denying a right to trial by jury guaranteed by Const. art. 1, § 8.—*Strong v. State*, 166 S. W. 967.

#### V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 103 (Tex. Cr. App.) Notwithstanding an opinion, one is a qualified juror; he stating his opinion was formed from hearsay, and not from discussion with any witness, and that he could and would entirely disregard it, and try the case as fairly and impartially as if he had heard nothing about it.—*Havard v. State*, 166 S. W. 507.

§ 103 (Tex. Cr. App.) Under Code Cr. Proc. 1911, art. 692, subd. 13, it is not error to overrule challenge for cause to jurors, though they say that from newspapers and report they have an opinion in the case, but not such as would influence their verdict, and that they had talked with no witness, and had seen none of the evidence.—*Wyres v. State*, 166 S. W. 1150.

§ 142 (Tex. Cr. App.) Stating merely that he is objectionable, without stating or showing why, is no statement of ground of objection to a juror.—*Wyres v. State*, 166 S. W. 1150.

### JUSTICES OF THE PEACE.

See Intoxicating Liquors, § 30.

#### III. CIVIL JURISDICTION AND AUTHORITY.

§ 36 (Mo.App.) An action by a vendee to recover a payment on the price according to a contract which the vendor had abandoned did not involve the title to real estate, and a justice court had jurisdiction.—*Davis v. Creamer*, 166 S. W. 819.

§ 42 (Tex. Civ. App.) That the amount in controversy was only \$1.61 over \$200, the jurisdictional amount of a justice court, cannot be considered in order to give it jurisdiction of the action.—*Wilson v. Ware*, 166 S. W. 705.

§ 44 (Tex. Civ. App.) Where the principal and interest of the note sued on, when added to the



10 per cent. attorney's fee provided for in the note, amounted to \$201.61, a justice's court did not have jurisdiction in the action.—*Wilson v. Ware*, 166 S. W. 705.

#### IV. PROCEDURE IN CIVIL CASES.

§ 87 (Tex.Civ.App.) A party to a garnishment proceeding in justice court, who appeared and controverted the truth of the garnishee's answer, was bound by the judgment, and could have errors reviewed only by appeal or writ of error, and not by a suit to enjoin collection of the judgment, where the judgment was not absolutely void.—*Eppler v. Hilley*, 166 S. W. 87.

A justice court judgment in a garnishment case was not void because of an alleged defect in the service of the citation in the original suit, since the validity of the judgment in that suit was in issue and determined in the garnishment case.—*Id.*

§ 91 (Mo.App.) A statement is sufficient if it fairly apprises defendant of the nature of the claim against him and is sufficiently definite to bar another action on the same demand.—*Elwood v. Heinz-Young Const. Co.*, 166 S. W. 1076.

A statement filed in justice court, which recited that plaintiff started to work for defendant at a certain monthly wage and gave the amount of credits allowed and the amount claimed, held to sufficiently inform defendant that the claim was for a balance due for services rendered.—*Id.*

§ 91 (Mo.App.) A statement of a cause of action in a justice's court alleging that plaintiff was lawfully entitled to possession of lithographic plates of specified value, that the plates had gone into the possession of defendant who refused to surrender them, notwithstanding repeated demands, held sufficient.—*S. Viviano & Bros. v. Columbia Can Co.*, 166 S. W. 1082.

§ 91 (Mo.App.) A statement filed in justice's court, which alleges that plaintiff was the owner of certain real estate, that defendant entered thereon and took up and carried away an ornamental hedge of a specified value, and that defendant had no interest or right to the hedge, states a cause of action for treble damages under Rev. St. 1909, § 5448.—*Fezler v. Gibson*, 166 S. W. 1096.

#### V. REVIEW OF PROCEEDINGS.

##### (A) Appeal and Error.

§ 174 (Tex.Civ.App.) A plaintiff suing in justice's court may on appeal to the county court amend his petition so as to conform to the evidence at the trial.—*Barnard & Moran v. Williams*, 166 S. W. 910.

A petition, in an action in justice's court, which states a cause of action on a written contract and in addition thereto a cause of action based on a subsequent oral contract, is not subject to exceptions in the county court on appeal.—*Id.*

§ 189 (Mo.App.) A motion to set aside the order of the circuit court affirming on appeal a justice's judgment may be filed at any time during the term and may be carried over to a subsequent term, and until acted on the cause is within the jurisdiction of the circuit court.—*State ex rel. Lynch v. Taylor*, 166 S. W. 1071.

Where a motion to set aside an affirmation by the circuit court of a judgment of a justice's court was overruled at a subsequent term to which the motion was continued, the refile of a motion at that term to set aside the judgment of affirmation was within the jurisdiction of the court.—*Id.*

#### JUSTIFIABLE HOMICIDE.

See Homicide, § 118.

#### KNOWLEDGE.

See Adverse Possession, § 62; Banks and Banking, § 148; Carriers, § 334; Corporations, § 428; Fraud, §§ 16, 50; Insurance, § 695; Receivers, § 98.

#### LACHES.

See Equity, §§ 71, 85; Judgment, § 334; Public Lands, § 61.

#### LAKES.

See Waters and Water Courses, §§ 109, 114.

#### LANDLORD AND TENANT.

See Accord and Satisfaction, § 18; Associations, § 15; Bonds, §§ 62, 117; Chattel Mortgages, § 138; Corporations, §§ 659, 661; Damages, § 120; Eminent Domain, § 133; Estoppel, § 22; Evidence, §§ 121, 157, 229; Frauds, Statute of, §§ 129, 139, 144, 149, 158; Homicide, §§ 118, 182, 276; Monopolies, § 12; Principal and Agent, §§ 8, 33; Railroads, § 259; Trial, § 253; Trover and Conversion, § 54; Witnesses, §§ 163, 255.

#### II. LEASES AND AGREEMENTS IN GENERAL.

##### (A) Requisites and Validity.

§ 34 (Tex.Civ.App.) A contract for the letting of land, a pumping plant, and canal having been modified to satisfy defendant, he was under no obligation to accept a rescission offered him by plaintiff on the ground that his failure to do so would constitute a ratification of the contract and preclude his enforcement of rights conferred by the modification.—*Savage v. Mowery*, 166 S. W. 905.

#### IV. TERMS FOR YEARS.

##### (D) Termination.

§ 95 (Ark.) Evidence held to support a finding that a lease of certain land in controversy to defendant was subject to the condition that it should terminate in case of a sale of the land by the landlord during the year.—*Jones v. Shibley*, 166 S. W. 937.

#### VII. PREMISES AND ENJOYMENT AND USE THEREOF.

##### (B) Possession, Enjoyment, and Use.

§ 136 (Tex.Civ.App.) Proof of the amount of cotton raised on the land during the year following that for which it was leased is properly admitted, in an action by lessors against the lessee for failure to properly cultivate, as agreed.—*Henson v. Baxter*, 166 S. W. 460.

##### (D) Repairs, Insurance, and Improvements.

§ 150 (Tex.Civ.App.) A lessee having removed portions of a windmill on the premises to prevent one of his employes using it, and an effort of some one to use it in that condition causing it to break, the lessee is liable to the lessors for the cost of repairing it.—*Henson v. Baxter*, 166 S. W. 460.

#### VIII. RENT AND ADVANCES.

##### (A) Rights and Liabilities.

§ 193 (Tex.Civ.App.) Where a lessor of certain land, pumping station, and canal agreed to rescind the contract and deliver up the rent notes if the water became sufficiently salt to injure the crops, and such event occurred in 1910, such fact released defendant from liability for a balance due on the rent for 1909 and also on the notes not due at the time the salt water appeared in 1910.—*Savage v. Mowery*, 166 S. W. 905.

## (B) Actions.

§ 233 (Mo.App.) In an action for rent, where the lessee counterclaimed for the value of furniture taken from the offices without its consent, *held*, on the evidence, that the trial court committed no error in directing a verdict against him on his counterclaim.—*Rialto Co. v. Miner*, 166 S. W. 629.

§ 233 (Tex.Civ.App.) Where defendant under a modification of a rent contract was authorized to and did cancel the rent notes sued on, an instruction that the jury should allow plaintiff for the three years during which defendant used the plaintiff's property without complaint was erroneous and properly refused.—*Savage v. Mowery*, 166 S. W. 905.

## X. RENTING ON SHARES.

§ 323 (Ark.) The relation of employer and employé existed where plaintiff agreed to furnish another with a team and tools to make a crop on plaintiff's land, which was to belong to plaintiff, but provided that, after he had reserved one-half of it for the use of his land, etc., and enough of the remainder to pay for supplies advanced, the balance should belong to the cropper, and hence title to the crop was in plaintiff.—*Valentine v. Edwards*, 166 S. W. 531.

§ 326 (Tex.Civ.App.) Where a farm lease on shares required the tenant to plant specified crops, and provided that, as soon as the crop was gathered, the land should revert to the possession of the landlord, the tenant is not, where the specified crop failed, entitled to the same share of a substitute crop.—*Jackson v. Taylor*, 166 S. W. 413.

§ 328 (Ark.) If a crop raised on plaintiff's land by the labor of another was raised under a contract making the other plaintiff's employé, so that title thereto was in plaintiff, a purchaser of the crop from the employé was not an innocent purchaser, though he did not know of plaintiff's interest therein.—*Valentine v. Edwards*, 166 S. W. 531.

§ 330 (Tex.Civ.App.) If a lease gave the landlord as rent, not one-fourth of the cotton raised, but one-fourth of the proceeds thereof, neither the landlord nor M., who, during the life of the lease, bought the land, has any claim against one buying the cotton of the tenant.—*Mason v. Ward*, 166 S. W. 456.

If a lease provided that the landlord should receive as rent one-fourth of the cotton raised, then title to such part when gathered vested in him, making liable to him one buying such part of the tenant, unless the tenant had an unrevoked agency to sell such share.—*Id.*

§ 331 (Tex.Civ.App.) Where a lessee of a farm on shares claimed part of the hay grown after the failure of a specified crop, evidence that landlords in the vicinity allowed their tenants to harvest hay, grown after the failure of usual crops, is admissible on the question whether the landlord agreed to allow the lessee to harvest such hay.—*Jackson v. Taylor*, 166 S. W. 413.

Where a landlord converted hay belonging to his tenant, the measure of damages is the market value of the hay, and so evidence that the tenant had agreed to sell the hay at an agreed price is inadmissible, where the landlord had no notice of such contract.—*Id.*

## LARCENY.

See Criminal Law, §§ 418, 519, 784; Embezzlement.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 8 (Tex.Cr.App.) Where no valid levy of personality of a debtor was made until a specified date, and possession was not taken by the sheriff until that date, an appropriation by the debtor

of the personality prior to that date was not larceny.—*Scott v. State*, 166 S. W. 732.

§ 14 (Ky.) One who induced a woman to whom he became engaged to convey to him her land, representing that he could sell it to better advantage if she did so, and thereafter sold the land and converted the proceeds to his own use, as he intended at all times to do, was guilty of larceny.—*Morton v. Commonwealth*, 166 S. W. 974.

## II. PROSECUTION AND PUNISHMENT.

## (A) Indictment and Information.

§ 29 (Tex.Cr.App.) An indictment for theft *held* fatally defective for failing to allege accused's intent to deprive the owner of the value of the property appropriated.—*Moore v. State*, 166 S. W. 1153.

## (C) Trial and Review.

§ 78 (Tex.Cr.App.) On trial for stealing horse and buggy, instruction *held* to have fairly submitted accused's defense that he was not a party to the original theft.—*Moran v. State*, 166 S. W. 161.

## LAST CLEAR CHANCE.

See Trial, § 191.

## LAW.

See Evidence, §§ 28, 34, 80; Statutes, §§ 281, 289.

## LAW OF THE CASE.

See Appeal and Error, § 1097.

## LEASE.

See Landlord and Tenant.

## LEGACIES.

See Wills.

## LEGISLATIVE POWER.

See Constitutional Law, § 63.

## LETTERS.

See Homicide, §§ 181, 239; Seduction, § 40; Threats, §§ 1, 5; Vendor and Purchaser, § 16; Wills, § 164.

## LEVEES.

See Limitation of Actions, § 11; Public Lands, § 61.

§ 2 (Ark.) The board of levee inspectors for Chicot county, under Act March 20, 1883, is the successor of, and succeeds to, any property rights of the swamp land commissioners for that county under Act June 10, 1861, and the board of levee inspectors under Act Jan. 7, 1857.—*Board of Levee Inspectors of Chicot County v. Southwestern Land & Timber Co.*, 166 S. W. 589.

## LIBEL AND SLANDER.

See Appeal and Error, § 1042; Criminal Law, § 1098.

## I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.

§ 7 (Ky.) A charge of murder is libelous per se.—*Reid v. Sun Pub. Co.*, 166 S. W. 245.

## IV. ACTIONS.

## (B) Parties, Preliminary Proceedings, and Pleading.

§ 80 (Ky.) A petition, in an action by a wife for slander, which alleges that at the time of the filing of the petition she was the wife of H., and that defendant stated of her and concerning

plaintiff, that J. said that he had cuckolded the said H., but which does not show that she was married at the time of which J. spoke, states no cause of action.—Hall v. Huffman, 166 S. W. 770.

§ 86 (Ky.) The natural and reasonable meaning of words alleged to be slanderous cannot be enlarged by an innuendo; and, where the words do not sound in slander, no meaning introduced by an innuendo will make them actionable.—Hall v. Huffman, 166 S. W. 770.

#### (C) Evidence.

§ 101 (Ky.) Where a publication is libelous per se, the law presumes malice.—Reid v. Sun Pub. Co., 166 S. W. 245.

§ 104 (Ky.) Under Civ. Code Prac. § 124, and Acts 1910, c. 104, providing that defendant, in a libel action, may plead truth and mitigating circumstances, it was competent, in an action for libel, to inquire of all witnesses whether the report about plaintiff was generally known in the neighborhood, to rebut malice.—Reid v. Sun Pub. Co., 166 S. W. 245.

§ 111 (Ky.) Under Civ. Code Prac. § 124, and Acts 1910, c. 104, providing that defendant, in a libel action, may plead truth and mitigating circumstances, it was competent, in an action for libel, to inquire of all witnesses whether the report about plaintiff was generally known in the neighborhood, to escape the infliction of punitive damages.—Reid v. Sun Pub. Co., 166 S. W. 245.

#### (D) Damages.

§ 120 (Ky.) Where the law presumes malice from the publication of words libelous per se, a recovery of punitive damages is authorized without requiring a showing of malice.—Reid v. Sun Pub. Co., 166 S. W. 245.

### VI. CRIMINAL RESPONSIBILITY.

#### (B) Prosecution and Punishment.

§ 155 (Tex.Cr.App.) It was not error, in a prosecution for libel, to permit proof of the meaning of the word "renegade," used in the libelous article, as the court could have legally defined the word in its charge.—Samper v. State, 166 S. W. 511.

### LICENSES.

See Carriers, § 304; Constitutional Law, §§ 205, 206; Elections, § 11; Husband and Wife, § 14; Intoxicating Liquors, § 15; Negligence, § 82; Pleading, § 93.

### I. FOR OCCUPATIONS AND PRIVILEGES.

§ 11 (Ky.) A domestic corporation, maintaining a place of business for the sale of automobiles and selling, in the course of a little over a year, four automobiles which it had stored in its garage, operates a garage within an ordinance imposing a license on keepers of garages in which automobiles are kept for sale.—Louisville Lozier Co. v. City of Louisville, 166 S. W. 767.

### LIENS.

See Brokers, §§ 40-64; Chattel Mortgages, §§ 138-153; Covenants, § 96; Estoppel, § 74; Master and Servant, § 82; Mechanics' Liens; Vendor and Purchaser, §§ 261-285; Wills, §§ 731, 744.

§ 10 (Tex.Civ.App.) Where owner of dam and water power in conveying other land agreed to erect and maintain irrigation pump and furnish water and subsequently conveyed the dam to parties who assumed performance of such contract, plaintiff held to have no lien on the dam property for his damages for nonperformance.—Abney v. Roberts, 166 S. W. 408.

§ 22 (Ky.) Under Civ. Code Prac. § 694, providing that the plaintiff, in an action to enforce

a lien on real property, shall state in his petition the liens, if any, held by others, the better practice, where there are no other liens known to plaintiff, is to state that fact in the petition.—Baird v. Prewitt, 166 S. W. 771.

### LIFE ESTATES.

See Deeds, § 129; Dower; Guardian and Ward, §§ 62, 130; Remainders.

### LIFE INSURANCE.

See Insurance, §§ 523, 608, 685.

### LIMITATION OF ACTIONS.

See Adverse Possession; Executors and Administrators, § 437; Husband and Wife, § 138; Judgment, § 834.

### I. STATUTES OF LIMITATION.

#### (A) Nature, Validity, and Construction in General.

§ 11 (Ark.) The maxim that time does not run against the sovereign applies only to the sovereign itself, and public corporations or other governmental agencies, such as a levee board, are barred by the statute of limitations.—Board of Levee Inspectors of Chicot County v. Southwestern Land & Timber Co., 166 S. W. 539.

Levee districts are merely governmental agencies, clothed with such powers as are expressly or impliedly conferred; but they are quasi corporations, having power to sue and be sued, and are barred by the statute of limitations or laches.—Id.

§ 11 (Tex.Civ.App.) The duty of a county to make proper investments of the proceeds on a sale of its school lands, as required by Const. art. 7, § 6, is of a public nature and pertains to governmental affairs, within the rule that limitations are not available in such cases.—Comanche County v. Burks, 166 S. W. 470.

#### (B) Limitations Applicable to Particular Actions.

§ 19 (Tex.Civ.App.) An answer seeking affirmative relief and indorsed as required for a suit in trespass to try title, but which relied upon mistake in the deed to plaintiff's grantor of which plaintiff had knowledge, held to allege a suit for the reformation of the deed, which was barred in four years by Rev. St. 1911, art. 5690, and not a suit to recover the land.—Hamilton v. Green, 166 S. W. 97.

§ 21 (Tex.) An action for the value of 30 bales of cotton delivered with other cotton for shipment is one for breach of contract where based upon a bill of lading covering the whole shipment, though plaintiff was advised shortly after the delivery of the rest the other bales were destroyed by fire; and hence the action is not barred by the two-year statute of limitations.—R. W. Williamson & Co. v. Texas & P. Ry. Co., 166 S. W. 692.

§ 24 (Mo.) Under Rev. St. 1899, § 4272, an action by an administratrix against an executor, founded on the theory that it was the duty of testator, under a contract in writing with intestate, pleaded in the petition, to pay money sued for, held founded on a writing.—Knisely v. Leathe, 166 S. W. 257.

A petition in an action by an administratrix against an executor, which alleges that testator contracted to convey property to a third person for a specified price and to pay the intestate a specified compensation for services in the event of a sale, and that testator refused to perform the contract, and that the estate of testator was indebted to the administratrix in the amount of the agreed compensation, held to state a cause of action on a contract, within the ten-year statute of limitations. Rev. St. 1909, § 4272.—Id.

§ 37 (Ky.) Under the substantially direct provisions of Ky. St. §§ 2515, 2519, a cause of action for relief from fraud is not barred until five years after the discovery of fraud; but in no case can suit be brought more than ten years from the time the fraud was perpetrated.—*Schoolfield v. Provident Savings Life Assur. Society*, 166 S. W. 207.

An action to rescind an insurance contract and recover the payments made, because of the agent's misrepresentations as to what insurer would receive under the policy, was barred within ten years after the alleged misrepresentations were made, under Ky. St. § 2515, providing that no action for relief from fraud shall be brought more than ten years after the perpetration of the fraud.—*Id.*

## II. COMPUTATION OF PERIOD OF LIMITATION.

### (A) Accrual of Right of Action or Defense.

§ 55 (Ark.) An action for damages, caused by the negligent construction of a building attached to a party wall, accrues at the time of the infliction of the damages, and is barred three years thereafter by the three-year statute of limitations; Kirby's Dig. § 5064, subd. 2.—*Evans v. Pettus*, 166 S. W. 955.

### (B) Performance of Condition, Demand, and Notice.

§ 66 (Mo.App.) Where a deposit is an indefinite one, limitations do not begin to run until demand.—*Stone v. St. Louis Union Trust Co.*, 166 S. W. 1091.

### (C) Personal Disabilities and Privileges.

§ 73 (Tex.Civ.App.) Where female children were married and of legal age when their brother obtained a deed from the parents and took possession and set up an adverse claim to common family property, limitations ran against the female children by the removal of disability of coverture.—*Ryman v. Petruka*, 166 S. W. 711.

### (F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 96 (Tex.Civ.App.) In case of mistake when the means of discovery are at hand, diligence must be exercised to discover the mistake, but the statute does not run until there is some circumstance or fact to arouse suspicion.—*Smalley v. Vogt*, 166 S. W. 1.

§ 99 (Tex.Civ.App.) Where a grantee went into possession and dealt with the property as his own, the right of the grantors to sue to set aside the deed for fraud was barred by limitations, where the grantors took no action during their lifetime, though they lived more than five years, in the absence of anything to show that they did not know of the fraud at the execution of the deed.—*Ryman v. Petruka*, 166 S. W. 711.

§ 100 (Ky.) The payment of annual premiums would not suspend the running of the statute of limitations against an action against an insurance company for rescission of contract of insurance on the ground of misrepresentations as to what insured would be entitled to receive under the policy, the misrepresentations, and not the payment or receipt of premiums, being the fraud complained of.—*Schoolfield v. Provident Savings Life Assur. Society*, 166 S. W. 207.

§ 100 (Tex.Civ.App.) In cases of fraud when the means of discovery are at hand, diligence must be exercised to discover the fraud, but the statute does not run until there is some circumstance or fact to arouse suspicion.—*Smalley v. Vogt*, 166 S. W. 1.

§ 102 (Tex.Civ.App.) An action against a county to enforce the trust imposed on it by Const. art. 7, § 6, is not barred by limitations, though the county wrongfully diverted the pro-

ceeds, but did not repudiate the trust.—*Comanche County v. Burks*, 166 S. W. 470.

§ 103 (Tex.Civ.App.) Where parents, holding property in trust as common family property of all the children, conveyed it to a son, and the deed was duly acknowledged, delivered, and recorded, and the son entered into possession and dealt with the property as his own, a suit by the other children to set aside the deed, brought over nine years after the execution and recording of the deed, and the taking of possession by the son, was barred by limitations.—*Ryman v. Petruka*, 166 S. W. 711.

### (H) Commencement of Action or Other Proceeding.

§ 119 (Mo.) Under Rev. St. 1909, §§ 190-195, service of process in a suit against an executor on a demand against testator, made within two years after letters testamentary, stops the running of limitations, provided the service of process was within the time prescribed by the general statute of limitations.—*Knisely v. Leathe*, 166 S. W. 257.

§ 127 (Tex.Civ.App.) In action on an agreement to divide a commission from a sale of property, amendment relating to the same transaction, and merely amplifying the original petition, held a continuation of the original suit.—*Maple v. Smith*, 166 S. W. 1196.

## IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 167 (Mo.App.) Acts 1891, p. 184 (Rev. St. 1909, § 1892), providing that there shall be no action to foreclose a mortgage after the debt is barred, does not apply to a mortgage executed before its enactment, where the note to secure which it was given was not due until after its enactment.—*Hardwicke v. Barnes*, 166 S. W. 826.

§ 170 (Tex.Civ.App.) While a suit to reform a deed and one in trespass to try title may be determined in one proceeding, yet, if the title depends upon the reformation of the deed, and the right to such reformation is barred by the statute of limitations, the right to proceed with the suit in trespass to try title also fails.—*Hamilton v. Green*, 166 S. W. 97.

## V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 180 (Ark.) The bar of limitations may be pleaded by demurrer in a suit in equity, where the complaint shows affirmatively that limitations have run since the accrual of the cause of action.—*Evans v. Pettus*, 166 S. W. 955.

§ 180 (Ky.) Limitations is a personal defense of which the party may or may not desire to avail himself, and cannot be raised by demurrer, but must be pleaded.—*Davie's Ex'r v. City of Louisville*, 166 S. W. 969.

§ 180 (Mo.) One seeking by demurrer to take advantage of the statute of limitations must plead the statute on which he relies.—*Knisely v. Leathe*, 166 S. W. 257.

## LIMITATION OF LIABILITY.

See Carriers, §§ 218, 405.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIVE STOCK.

See Carriers, §§ 218, 230.

## LOCAL ACTIONS.

See Venue, §§ 5, 17.

## LOCAL LAWS.

See Statutes, § 96.

**LOCAL OPTION.**

See Intoxicating Liquors, §§ 14, 30-40, 227-238.

**LOGS AND LOGGING.**

§ 3 (Ky.) Though a conveyance of land reserved to grantor all of the timber thereon, which included beech trees, with the right to remove it within seven years, mast which grew on the beech trees and ripened and fell to the ground within that time belonged to the grantees and not to the owner of the timber.—*Vincent v. Haycraft*, 166 S. W. 613.

A sale or reservation of timber to be cut and removed within a specified time conveys or reserves only so much thereof as may be cut and removed within that time.—*Id.*

**LOOKOUTS.**

See Railroads, §§ 367, 376, 443.

**LOTTERIES.****I. REGULATION AND PROHIBITION.**

§ 3 (Ky.) A popularity contest conducted by a newspaper, in which an automobile was to be given as a prize to the candidate receiving the highest number of votes, *held* not to be a lottery.—*Commonwealth v. Jenkins*, 166 S. W. 794.

An agreement between the newspaper proprietor, who was conducting a popularity contest, and an individual, whereby the latter paid for a 400-year subscription to the paper and secured the votes therefor, by means of which the prize was won by the individual's wife, did not make the popularity contest a lottery.—*Id.*

**LUNATICS.**

See Insane Persons.

**MACHINERY.**

See Master and Servant, §§ 121, 228, 286; Negligence, § 28; Steam.

**MALICE.**

See Libel and Slander, §§ 101, 120; Malicious Prosecution; Master and Servant, § 306.

**MALICIOUS PROSECUTION.**

See False Imprisonment.

**II. WANT OF PROBABLE CAUSE.**

§ 21 (Ky.) In a prosecution for maliciously causing the arrest of a purchaser of furniture who offered in payment an order on defendant drawn by a newspaper company with which defendant advertised, advice of counsel is no defense, where defendant did not inform them that there was any dispute over the account, or that the newspaper company claimed that defendant was indebted to it.—*United Furniture Co. v. Wills*, 166 S. W. 600.

**V. ACTIONS.**

§ 71 (Ky.) In an action for maliciously causing plaintiff's arrest for obtaining, under false pretenses, furniture in payment for which plaintiff tendered an order drawn on defendant by a newspaper company with which defendant advertised, evidence of defendant's indebtedness and the right of the newspaper company to draw such orders *held* sufficient to go to the jury.—*United Furniture Co. v. Wills*, 166 S. W. 600.

§ 72 (Ky.) In a prosecution for maliciously causing plaintiff's arrest for obtaining goods under false pretenses, a charge that probable cause means such cause as would induce a reasonable person to believe that plaintiff was

guilty of obtaining goods under false pretenses *held* sufficient.—*United Furniture Co. v. Wills*, 166 S. W. 600.

**MANDAMUS.**

See Courts, § 281; District and Prosecuting Attorneys, § 8.

**I. NATURE AND GROUNDS IN GENERAL.**

§ 4 (Ark.) A party who had a complete remedy by appeal from an adverse order of the county court must pursue that remedy, and mandamus does not lie, after the time to appeal has expired, to compel the court to grant the relief demanded.—*Callaway v. Harley*, 166 S. W. 546.

§ 7 (Mo.App.) Mandamus, being a discretionary writ, will not be granted if the record shows the relator is not entitled to it for any good reason.—*State ex rel. Wiseman v. Urton*, 166 S. W. 895.

§ 14 (Ark.) Failure of a county judge and clerk of certain counties to act under Act April 2, 1911 (Sp. Acts 1911, p. 473), requiring advertisement for bids from banks to become county depositories, such failure was tantamount to a refusal to perform a mandatory duty, and sufficient to justify mandamus.—*Robertson v. Derrick*, 166 S. W. 936.

Where a mandatory duty of a public nature affecting the people at large is imposed on a public officer, no demand of performance and refusal to perform is essential to the maintenance of mandamus to compel him to act; he having failed to act within the time prescribed.—*Id.*

**II. SUBJECTS AND PURPOSES OF RELIEF.**

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 72 (Ark.) While judicial discretion in matters committed to the county court will not be controlled by mandamus, yet, if the court fails or refuses to act at all, mandamus will issue to compel action.—*Robertson v. Derrick*, 166 S. W. 936.

§ 73 (Ark.) The duties imposed on the county judge of certain counties and on the clerk to publish notice of the receipt of bids from banks to act as depositories for public funds by Act April 12, 1911 (Sp. Acts 1911, p. 473), may be enforced by mandamus.—*Robertson v. Derrick*, 166 S. W. 936.

§ 115 (Ky.) The holders of city bonds could resort to mandamus to compel a council to levy an annual tax for the payment of interest and the creation of a sinking fund for the ultimate payment of the principal, if the council should fail to do so, as required by law.—*Fowler v. City of Oakdale*, 166 S. W. 195.

**III. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 160 (Mo.App.) Where an alternative writ of mandamus is broader than the law warrants, it may be amended, and the peremptory writ awarded for so much of the relief as is proper.—*State ex rel. Lashly v. Wurdemann*, 166 S. W. 348.

**MANSLAUGHTER.**

See Homicide, §§ 42-62, 255, 309.

**MAPS.**

See Criminal Law, § 444; Evidence, § 433.

**MARRIAGE.**

See Bigamy; Divorce; Husband and Wife.

§ 50 (Tex.Civ.App.) Where a woman, believing a man to be divorced, in good faith celebrated a marriage with him, slight evidence will

be sufficient to uphold the validity of the marriage after removal of the impediment.—Gorman v. Gorman, 166 S. W. 123.

Where a woman, mistakenly believing a man to be divorced, entered into a marriage without knowledge of the impediment, the continued cohabitation of the parties after removal of the impediment is sufficient to establish a good marriage.—Id.

## MARRIAGE SETTLEMENTS.

See Husband and Wife, § 81.

## MASTER AND SERVANT.

See Appeal and Error, §§ 907, 1040, 1066, 1140; Frauds, Statute of, § 49; Municipal Corporations, § 753; Trial, § 191; Work and Labor.

### I. THE RELATION.

#### (A) Creation and Existence.

§ 3 (Ky.) Where plaintiff, who could, under his contract with defendant, work whenever he desired, had a private arrangement with a third person, who acted as his substitute and looked alone to him for compensation, plaintiff, while at work, was an employé of defendant.—Louisville, H. & St. L. Ry. Co. v. Armes, 166 S. W. 190.

#### (C) Termination and Discharge.

§ 37 (Tex.Civ.App.) It was no defense to an employer's breach of an employment contract that the employé refused to accept a lower salary than that agreed on.—Miller v. Sealy Oil Mill & Mfg. Co., 166 S. W. 1182.

§ 41 (Tex.Civ.App.) In an action for an employer's breach of a contract of employment, the measure of damages is the compensation stipulated for in the absence of allegation and proof in mitigation that plaintiff could have obtained other employment.—Miller v. Sealy Oil Mill & Mfg. Co., 166 S. W. 1182.

Where, after an employé was wrongfully discharged, he was ill for a time, the period of such illness could not be deducted from the period for which he was entitled to recover damages for breach of contract.—Id.

§ 44 (Tex.Civ.App.) In an action for an employer's breach of a contract of employment, an instruction placing on plaintiff the burden of showing that he made diligent efforts to obtain other employment without success was error.—Miller v. Sealy Oil Mill & Mfg. Co., 166 S. W. 1182.

## II. SERVICES AND COMPENSATION.

### (A) Performance of Services.

§ 59 (Mo.App.) Where plaintiff was employed to serve defendant, the fact that a receiver was temporarily appointed for defendant because of a difference between defendant's officers did not excuse plaintiff from rendering services so as to require defendant, after plaintiff had quit work, to accept further services after the receivership was terminated.—Walden v. American Bankers' Assur. Co., 166 S. W. 1111.

### (B) Wages and Other Remuneration.

§ 73 (Mo.App.) Plaintiff, having ceased to work for defendant under a contract of employment without notice of election to terminate it as provided for thereunder, held not entitled to recover for a subsequent period during which defendant refused to accept a tender of plaintiff's further services.—Walden v. American Bankers' Assur. Co., 166 S. W. 1111.

§ 75 (Mo.App.) On a servant's abandonment of his contract for personal services, there can be no apportionment thereof, since to recover he must prove full performance or that performance has been prevented by act of God or unwarranted act of the employer.—Walden v. American Bankers' Assur. Co., 166 S. W. 1111.

§ 82 (Tex.Civ.App.) Where plaintiff contracted to perform personal services at a yearly wage and at the expiration of the first year agreed that payment of the balance due him should be deferred, that agreement did not preclude him from acquiring a laborer's lien for services performed during the second period of service.—Carthage Ice & Light Co. v. Roberts, 166 S. W. 12.

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

### (A) Nature and Extent in General.

§ 88 (Tex.Civ.App.) A railroad company is not liable for injuries to an employé of a lumber company resulting from the negligence of other employes of that company, which was engaged at the time in constructing a track to be later turned over to the railroad company upon payment of the cost of construction.—Angelina & N. R. R. Co. v. Due, 166 S. W. 918.

§ 89 (Ark.) Where an injured servant was occupying a dangerous position at the time of his injury merely for his own convenience and accommodation, his rights are no greater than those of a licensee.—Triangle Lumber Co. v. Acree, 166 S. W. 958.

§ 96 (Ark.) A railroad company was not liable for injuries to a mechanic engaged in testing on the track a motor car, which he was repairing, caused by a collision with a hand car, if the hand car operators were not its employes and not authorized to operate the car; the company not having given any general permission to the public to operate hand cars on its tracks.—St. Louis, I. M. & S. Ry. Co. v. De Lambert, 166 S. W. 544.

§ 97 (Tex.Civ.App.) Where plaintiff while assisting in moving a boiler by rolling it was injured by his glove catching on a bolt throwing him over and in front of the boiler, and he had prepared the boiler for moving, held, that his injuries were due to an inevitable accident and not to negligence; the danger not being such as should have been anticipated.—St. Louis Southwestern Ry. Co. of Texas v. Freles, 166 S. W. 91.

§ 97 (Tex.Civ.App.) Where the engineer and fireman of a work train started it without giving any warning, although they knew that there were a number of workmen around the train, they must have anticipated that such negligence might result in injury to a workman.—Angelina & N. R. R. Co. v. Due, 166 S. W. 918.

### (B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Ark.) A master's duty to furnish a safe place extends only to such parts of the premises as he has prepared for the servants' occupancy or as he knows they are accustomed to use.—Triangle Lumber Co. v. Acree, 166 S. W. 958.

§§ 101, 102 (Ky.) The rule that a master must exercise reasonable care to provide reasonably safe appliances for his servants does not apply where the appliances are of a simple nature, in which any defects can be readily observed by the servant.—Ohio Valley Ry. Co. v. Copley, 166 S. W. 625.

§§ 101, 102 (Tex.Civ.App.) The right of an employer to conduct his own business in his own way is limited by his duty to exercise reasonable care to furnish reasonably safe appliances and place in which to work.—Texas Power & Light Co. v. Burger, 166 S. W. 680.

§ 107 (Ky.) A bridge carpenter, who was required to assist in carrying ties to the place where they were fashioned, cannot recover for an injury received when a fellow worker stumbled over a post projecting out of the ground and threw a tie upon him, as the master is not an insurer as to the place to work.—Whitson v. American Bridge Co. of New York, 166 S. W. 603.

§ 107 (Ky.) A T-rail cutter used to cut rivets is a simple tool, and an employé versed in the use of ordinary tools may not recover for an injury by a sliver flying from the cutter.—Ohio Valley Ry. Co. v. Copley, 166 S. W. 625.

§ 107 (Mo.App.) Though employés were engaged in the more or less hazardous undertaking of tearing down a building, it was the employer's duty to furnish them with a place as reasonably safe as the nature of the work would permit.—Boten v. Sheffield Ice Co., 166 S. W. 883.

§ 111 (Tex.Civ.App.) Where couplers were so equipped that it was necessary for brakemen to go between the cars to adjust them, so that they would couple by impact, they were not a compliance with the safety appliance acts adopted by Congress or by the state.—San Antonio & A. P. Ry. Co. v. Wagner, 166 S. W. 24.

Failure of a railroad company to equip its engines and cars with couplers that will couple automatically by impact, without requiring brakemen to go between the cars to adjust the same, as required by safety appliance acts, is negligence per se.—Id.

§ 118 (Ky.) In an action for injuries to a driver of coal cars in a mine by striking a post set alongside the track while trying to regain his balance after having lost it in endeavoring to adjust a switch while the car was in motion, facts held insufficient to establish negligence on the part of the coal company.—Wallace v. Columbia Coal Co., 166 S. W. 769.

§ 118 (Mo.App.) Rev. St. 1909, § 8456, requiring the operator of a coal mine to provide safe means for hoisting the miners, is only a statutory expression of the common-law rule requiring the master to exercise reasonable care to keep the cage in a reasonably safe condition.—Ronchetto v. Northern Cent. Coal Co., 166 S. W. 876.

§ 121 (Mo.App.) Rev. St. 1909, § 7828, relative to guarding machinery, only requires such a guard as within the grounds of reason will protect employes using ordinary care.—Saling v. American Chiclé Co., 166 S. W. 823.

Rolling machine, the rollers of which were covered by a hood to within two inches of a guard about an inch above the feed board, held sufficiently guarded within Rev. St. 1909, § 7828, though an employé's hand in some way was drawn or placed through the opening, and between the rollers.—Id.

§ 125 (Mo.App.) That an interval of time elapsed between an employer's assurance that a place was safe and an injury due to its unsafe condition did not defeat the employer's liability, where the conditions had not changed in the meantime.—Boten v. Sheffield Ice Co., 166 S. W. 883.

§ 125 (Tex.Civ.App.) A master's ignorance of the probable danger from an act or omission is not necessarily an excuse, as it is his duty to know what he could learn by exercising such diligence as the circumstances reasonably demand.—St. Louis Southwestern Ry. Co. of Texas v. Freles, 166 S. W. 91.

Where an employer did not know of a danger and could not reasonably have discovered it by the exercise of such diligence as the circumstances reasonably demanded, he is not liable for an unforeseen injury.—Id.

§ 125 (Tex.Civ.App.) A foreman is charged with constructive notice of what will naturally happen from an order given by him, and, where he saw an employé's position, or, by ordinary care, could have seen it, the employer was liable for a negligent order causing injury to the employé.—Houston & T. C. R. Co. v. Coleman, 166 S. W. 685.

#### (C) Methods of Work, Rules, and Orders.

§ 133 (Ky.) If employé was warned that elevator was about to be started, held, that it was

immaterial whether the warning was given by a person in authority or by a coemployé.—Kentucky Midland Coal Co. v. Vincent, 166 S. W. 815.

§ 137 (Ky.) When a flagman is sent from a point on the track where it is being repaired to stop trains and compel them to detour, he has the right to assume that no trains will come from the rear, and those in charge of a train following him must maintain a lookout for his safety.—Louisville & N. R. Co. v. Taylor's Adm'r, 166 S. W. 199.

§ 137 (Tex.Civ.App.) An instruction that, where persons have a right to be on the track near a train that is standing still, it is the duty of the employés to give a warning before starting the train, and that the failure to do so would be such negligence as would entitle another employé injured as a result thereof to recover, is not erroneous.—Angelina & N. R. R. Co. v. Due, 166 S. W. 918.

§ 139 (Tex.Civ.App.) Where an employé carrying with coemployés a tie, was injured by the coemployés dropping it pursuant to the order of the foreman, the giving of the order was the proximate cause of the injury, authorizing a recovery if the foreman negligently gave it.—Houston & T. C. R. Co. v. Coleman, 166 S. W. 685.

§ 145 (Tex.Civ.App.) Under a rule requiring conductors, with the assistance of the trainmen, to inspect the cars and see that the doors are closed, imposed on the conductor alone the duty of initiating an inspection, and a brakeman who was injured by an open door had no other duty than to assist the conductor when he initiated an inspection.—Kansas City Southern Ry. Co. v. Carter, 166 S. W. 115.

#### (D) Warning and Instructing Servant.

§ 150 (Ky.) Where the master's foreman inspected the place in which plaintiff was at work, and discovered a danger, the master is liable for his failure to report the danger to plaintiff.—Big Branch Coal Co. v. Sanders, 166 S. W. 813.

#### (E) Fellow Servants.

§ 179 (Tex.Civ.App.) Refusal to charge on the issue of negligence of a fellow servant is not erroneous; the common-law rule exempting the master because of such negligence being abrogated.—Houston & T. C. R. Co. v. Coleman, 166 S. W. 685.

§ 180 (Tex.Civ.App.) Railroad company's foreman having authority to direct a boiler maker to assist in moving a boiler in the roundhouse held a vice principal under Rev. St. 1911, art. 6641.—St. Louis Southwestern Ry. Co. of Texas v. Freles, 166 S. W. 91.

§ 180 (Tex.Civ.App.) An employé of a smelting company operating ore cars to haul ores from the roaster to the reverberatory, engaged in sweeping ore from the car track, was not a railway employé; and the common-law rule as to nonliability for the negligence of a fellow servant applied.—Consolidated Kansas City Smelting & Refining Co. v. Lopez, 166 S. W. 498.

§ 185 (Ky.) An employer is not liable for injuries to an employé by a sliver flying from a T-rail cutter used to cut rivets, where the cutter was selected by a fellow servant from among a number of cutters supplied by the employer.—Ohio Valley Ry. Co. v. Copley, 166 S. W. 625.

§ 185 (Ky.) In a minor servant's action for injury, held, that other servants who directed his work as they needed it, and told him what tools they wanted, were not his fellow servants.—Job Iron & Steel Co. v. Layne, 166 S. W. 978.

§ 185 (Tex.Civ.App.) Where plaintiff and his coemployés worked under the direct orders of the foreman, and the coemployés did what the foreman directed them to do, an injury sus-



tained by plaintiff in consequence thereof was caused by an act of the employer who could not escape liability on the ground that the negligence was that of a fellow servant.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

§ 189 (Ky.) Where the foreman of the operator of a mine, who had authority to discharge any one employed therein, was negligent, the operator is liable to servants of contractors who mined the coal under an arrangement whereby they furnished the labor and the operator of the plant, power and machinery.—*Big Branch Coal Co. v. Sanders*, 166 S. W. 813.

§ 198 (Ky.) The engineer and brakeman operating a train are not fellow servants of a car cleaner, whose sole duty is to sweep out passenger coaches on the arrival of the train at destination.—*Louisville, H. & St. L. Ry. Co. v. Armes*, 166 S. W. 190.

§ 198 (Tex.Civ.App.) Employé of smelting company, engaged in sweeping off car track, and motorman in charge of ore cars, charged with no duties making him a vice principal, *held* fellow servants.—*Consolidated Kansas City Smelting & Refining Co. v. Lopez*, 166 S. W. 498.

§ 202 (Ky.) In an action by a servant for injuries caused by the negligence of a servant in a different department, it is not necessary to prove gross negligence.—*Louisville, H. & St. L. Ry. Co. v. Armes*, 166 S. W. 190.

#### (F) Risks Assumed by Servant.

§ 203 (Tex.Civ.App.) When an employé is injured as the result of an assumed risk, it is immaterial what care he exercised.—*Houston & T. C. R. Co. v. Coleman*, 166 S. W. 685.

§ 204 (Tex.Civ.App.) In an action for injuries to a railroad brakeman by reason of defendant's violation of the safety appliance acts, assumed risk constituted no defense.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 210 (Ark.) A railroad mechanic engaged in testing a motor car, which he was repairing, assumed the risk of a collision with a hand car running on the same track, if the hand car operators were not negligent.—*St. Louis, I. M. & S. Ry. Co. v. De Lambert*, 166 S. W. 544.

§ 213 (Mo.App.) A servant engaged in chipping concrete with a file furnished by the master, which was highly tempered on the blunt end, but no more so than a chisel at the point, assumed the risk of flying articles from the concrete, the point of the file, or the hammer.—*Rogers v. Hammond Packing Co.*, 166 S. W. 880.

§ 217 (Tex.Civ.App.) Where an employé of a gin company knew that a ginhouse was so constructed as to cause excessive vibrations of the machinery and gins while in operation, and also knew of the risk incident to such condition, he assumed any risk of injury due to such condition.—*Cisco Oil Mill v. Van Geem*, 166 S. W. 439.

If it was the duty of an employé of a gin company to inspect the machinery and to repair any defects before operating it, he assumed the risk of any defect.—*Id.*

§ 218 (Mo.App.) Inexperienced employé who did not know of condition of plate of building on which rafters rested, and was assured by his employer's president that it was safe, in reliance upon which he went on the plate and was injured when it broke, *held* not to have assumed the risk.—*Boten v. Sheffield Ice Co.*, 166 S. W. 883.

#### (G) Contributory Negligence of Servant.

§ 228 (Mo.App.) An employé guilty of contributory negligence cannot recover for injuries due to an employer's failure to guard machinery as required by Rev. St. 1909, § 7828.—*Saling v. American Chicle Co.*, 166 S. W. 823.

§ 228 (Tex.Civ.App.) In an action for injuries to a railroad brakeman by reason of defendant's violation of the safety appliance acts, contribu-

tory negligence constituted no defense.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 228 (Tex.Civ.App.) Under Rev. St. 1911, art. 6649, providing that contributory negligence of railroad employes shall merely diminish the recovery, the negligence of an engineer co-operating with that of the company was not a complete bar, and an instruction that if he was negligent he could not recover was properly refused.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 228 (Tex.Civ.App.) Acts 31st Leg. (1st Ex. Sess.) c. 10, § 2, which provides that, in actions thereunder by employes of a common carrier or railroad for personal injuries, the contributory negligence of the employé shall not bar recovery, applies to a railroad operated by a lumber company in conducting its own business, as well as to a common carrier.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 235 (Mo.App.) Employé working on building which was being taken down *held* not chargeable with negligence for injuries by the breaking of the plate on which the rafters rested from a hidden defect.—*Boten v. Sheffield Ice Co.*, 166 S. W. 883.

Where an employé who did not know of a dangerous condition was assured by the employer, who did know thereof, that the place was safe, he had a right to rely thereon without making an inspection, such as would have discovered the defective condition.—*Id.*

§ 236 (Ark.) A railroad mechanic, engaged in testing, on the track, a motor car he was repairing, was required to exercise care for his own safety in avoiding trains, etc.—*St. Louis, I. M. & S. Ry. Co. v. De Lambert*, 166 S. W. 544.

§ 236 (Mo.App.) A brakeman on a work train, who goes beneath a car of the train to make slight repairs without giving any of the trainmen notice of his intention so to do, is guilty of contributory negligence, precluding a recovery for injuries caused by a movement of the train, unless the trainmen knew the facts or the circumstances were such as to imply notice to them, or they were charged with the duty of warning the brakeman.—*Harris v. Missouri Pac. Ry. Co.*, 166 S. W. 335.

A conductor in charge of a work train standing on a siding waiting for a passenger train, who directed a brakeman to couple cars separated to permit a crossing, and who stated that on the arrival of the passenger train the work train would shove out, did not thereby assure the brakeman that the train would not be moved without notice to him.—*Id.*

A brakeman who, in the line of his duty to inspect cars while the train was standing, went under a car to make repairs without giving notice to any of the trainmen *held* guilty of contributory negligence as a matter of law.—*Id.*

An employé may not rely entirely on the obligations of others to observe care for his safety, but must use reasonable precautions for his own safety, and then, in the absence of knowledge to the contrary, act on the presumption that others will not be negligent.—*Id.*

#### (H) Actions.

§ 256 (Tex.Civ.App.) In an action for injuries to a brakeman by his foot becoming caught in an automatic coupler, as he was endeavoring to adjust the same, so that it would couple by impact, the petition *held* to sufficiently allege that the defendant was engaged in interstate commerce.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 258 (Tex.Civ.App.) In an action for injuries to a brakeman by his foot becoming caught in an automatic coupler, an allegation of the petition *held* to sufficiently charge that the coupler was defective, and did not comply with the safety appliance acts.—*San Antonio & A. P. Ry. Co. v. Wagner*, 166 S. W. 24.

§ 264 (Ky.) Though a servant suing for a personal injury alleged gross negligence, but proved only ordinary negligence which justified



a recovery, the court properly authorized a recovery for ordinary negligence.—Louisville, H. & St. L. Ry. Co. v. Armes, 166 S. W. 190.

§ 264 (Mo.App.) Where the substantial point of controversy was whether a coal miner was killed at his working place, where he was required to repair the roof, or elsewhere, an allegation that he was killed between 15 and 25 feet from his working place did not require proof that it was within the exact distances specified.—Goode v. Central Coal & Coke Co., 166 S. W. 844.

§ 264 (Mo.App.) In an action for injuries to a servant, assumed risk is an affirmative defense that must be specially pleaded.—McDonald v. Central Illinois Const. Co., 166 S. W. 1037.

In an action for injuries to a servant by the caving in of a ditch in which he was employed, evidence that plaintiff was unaware of the danger by reason of his inexperience, ignorance, or unfamiliarity with the particular line of work, was inadmissible, in the absence of an allegation of such fact in the petition.—Id.

§ 264 (Tex.Civ.App.) In an action for injuries to a brakeman by defendant's violation of the safety appliance acts, evidence that the couplers required adjustment, which could be made with safety when the cars were not in motion, was admissible under defendant's general denial.—San Antonio & A. P. Ry. Co. v. Wagner, 166 S. W. 24.

§ 264 (Tex.Civ.App.) A petition for injuries to a railroad construction employé held sufficient to raise the issue of last clear chance by the engineer and fireman of the work train to avoid the injury.—Angelina & N. R. R. Co. v. Due, 166 S. W. 918.

§ 265 (Ark.) There is no presumption of negligence by an employer, and an employé suing for personal injuries has the burden of showing facts making the employer liable.—St. Louis, I. M. & S. Ry. Co. v. De Lambert, 166 S. W. 544.

In order to make a railroad company liable for injuries to an employé from the operation of a hand car on the tracks by persons not authorized by it to do so, it must be shown that there was a custom of permitting the operation of hand cars on the tracks by persons not specifically authorized, and that such custom was actually or impliedly known to the railroad officials.—Id.

§ 265 (Mo.App.) The mere existence of a defect in the hoisting cage is not sufficient to raise the inference of negligence on the part of a coal mine operator, without a showing of actual or constructive knowledge by the master of the defect.—Ronchetto v. Northern Cent. Coal Co., 166 S. W. 876.

In an action for injuries to a coal miner, evidence held sufficient to warrant an inference that the defect in a hoisting cage had existed for some time, and that the exercise of reasonable care by the master would have led to the discovery of the defect.—Id.

§ 268 (Mo.App.) Where, in an employé's action for injuries, defendant claimed that the work was being done by a third party, evidence that defendant took out liability insurance held admissible to show that it was doing the work.—Boten v. Sheffield Ice Co., 166 S. W. 883.

§ 270 (Mo.App.) A brakeman, suing for injuries caused by a movement of the train while he was under a car repairing defects, may not show that the custom as to starting trains among railroad crews with which he has worked, but may show a universal custom or the custom of the conductor in charge of the train.—Harris v. Missouri Pac. Ry. Co., 166 S. W. 335.

§ 276 (Ark.) The fact that hand cars were frequently operated on railroad tracks to carry passengers would not show a general custom to permit any person who desired to operate a hand car on the track, so as to make the rail-

road company responsible for the negligent acts of one operating a hand car who was not authorized to do so.—St. Louis, I. M. & S. Ry. Co. v. De Lambert, 166 S. W. 544.

§ 276 (Ark.) Evidence held to warrant a finding that plaintiff was engaged in the line of his employment at the time of his injury.—Triangle Lumber Co. v. Acree, 166 S. W. 958.

§ 276 (Ky.) In a personal injury action by a bridge carpenter, hurt while carrying ties to the skids where they were fashioned, evidence held insufficient to show that he was injured while performing services outside of the scope of his employment.—Whitson v. American Bridge Co. of New York, 166 S. W. 603.

§ 276 (Mo.App.) In an action for personal injuries received by a coal miner from a fall from the hoisting cage, evidence held not to show that it was a physical impossibility that plaintiff's fall was due to the partial dumping of the floor of the cage during the ascent, as plaintiff contended, and to support a verdict for the plaintiff.—Ronchetto v. Northern Cent. Coal Co., 166 S. W. 876.

§ 276 (Mo.App.) Evidence, in an action by a servant held insufficient to show that the flying particle which struck his eye came from the head of the file he was using to chip concrete, in which case alone the master was liable, rather than from the concrete, the point of the file, or the hammer.—Rogers v. Hammond Packing Co., 166 S. W. 880.

Where the evidence showed that the flying particles which struck the eye of a servant chipping concrete with a file might reasonably have come from the concrete or even the point of the file or the hammer, as well as the head of the file, in which case alone the master was liable, no recovery could be had.—Id.

§ 276 (Tex.Civ.App.) Evidence in an action by a brakeman held sufficient to support findings that an open car door struck him as claimed.—Kansas City Southern Ry. Co. v. Carter, 166 S. W. 115.

Evidence held insufficient to show that the door came open because of negligence on the part of the railroad.—Id.

§ 278 (Ky.) Evidence, in an action by a 16 year old servant employed in a galvanized sheet metal factory for injury from being caught in a disconnected belt hanging over a moving shaft, held to show defendant's negligence in not furnishing a reasonably safe place for work.—Job Iron & Steel Co. v. Layne, 166 S. W. 978.

§ 278 (Mo.App.) Evidence that a conductor in charge of a work train generally noticed where his men were before he gave signals to start the train, and that it was his duty to know where his men were, did not show a custom of the conductor not to start his train before notice to the crew of his intention to do so.—Harris v. Missouri Pac. Ry. Co., 166 S. W. 335.

Evidence that the engineer in charge of a work train, on receiving a signal from the conductor to start, generally whistled and then looked for a signal from the crew to let him know where they were, and that the conductor was alone authorized to give such signal, did not show a custom of the engineer to wait for a second signal before starting, on receiving a signal from the conductor.—Id.

In an action for injuries to a brakeman going under a car of a train to make slight repairs, caused by a movement of the train, evidence held not to show that the engineer was guilty of negligence in starting the train on a signal from the conductor.—Id.

§ 278 (Mo.App.) Evidence in an action by a servant held to support a finding of negligence of the master in furnishing him a highly tempered file for use as a chisel.—Rogers v. Hammond Packing Co., 166 S. W. 880.

§ 278 (Mo.App.) In an employé's action for injuries from the breaking of the plate upon which the rafters of a building which was be-

ing taken down rested, evidence held to show that the statements of the employer's president as to the safety of the roof were not expressions of a mere opinion, nor so general as not to apply to such plate.—*Boten v. Sheffield Ice Co.*, 166 S. W. 883.

§ 278 (Tex.Civ.App.) In an action for injuries to a section hand while attempting to remove from a track a hand car, evidence held to justify a finding that the accident was caused by the negligence of the foreman in causing the weight of the car to fall on the section hand.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 78.

§ 278 (Tex.Civ.App.) Evidence in an action by a brakeman held sufficient to support findings that defects in a car door which struck plaintiff were due to the railroad's negligence, and that the door was closed shortly before the accident.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 278 (Tex.Civ.App.) In railway engineer's action for injuries caused by slipping on running board, evidence held to support finding of negligence in failing to equip the engine with appliances for operating the blow-off cock from the cab without going on the running board.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 278 (Tex.Civ.App.) In an action for injuries to an employé while assisting in setting an electric light pole, evidence held to support a finding of actionable negligence for the failure of the employer to furnish reasonably safe appliances and a sufficient number of competent employes to do the work.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

§ 278 (Tex.Civ.App.) In an action for injuries received by a railroad construction employé, evidence held sufficient to warrant findings that the engineer and fireman of the work train were negligent in starting the train without warning, and that those operating the train saw him in time to avoid the injury and failed to use proper care to prevent it.—*Angelina & N. R. Co. v. Due*, 166 S. W. 918.

§ 281 (Ark.) In an action for injuries to the fireman of a steam log skidder by being struck by tongs slipping from a log, a request to charge on contributory negligence held properly modified so as to make it conditional on a finding that a person of ordinary prudence would not have acted as plaintiff did under the circumstances.—*Triangle Lumber Co. v. Acree*, 166 S. W. 958.

§ 281 (Ky.) In a servant's action for injury, evidence held not to show that he was guilty of negligence in failing to apprehend that a disconnected belt on a moving shaft would suddenly become caught in the shaft and begin to wind up with it.—*Job Iron & Steel Co. v. Layne*, 166 S. W. 978.

§ 281 (Tex.Civ.App.) In an action for injuries received by a railroad construction employé, evidence held sufficient to warrant a finding that the injured servant was not negligent.—*Angelina & N. R. Co. v. Due*, 166 S. W. 918.

§ 284 (Tex.Civ.App.) Where plaintiff testified at a former trial that, when he passed the engine of a work train which later struck him, the fireman was in the gangway, from which place he could not have seen plaintiff when he stepped upon the track, and at the second trial testified that the fireman was at his window, from which place the plaintiff could have been seen, and his later testimony was corroborated by other witnesses, it was for the jury to say which testimony was true.—*Angelina & N. R. Co. v. Due*, 166 S. W. 918.

§ 285 (Tex.) On evidence in an action for a switchman's death by falling from a car upon its sudden stop to avoid striking an iron pipe, on the issue whether the pipe was placed on the track by the employes of the impleaded defendant, held, that the trial court did not err

in peremptorily instructing a verdict for such defendant.—*Ft. Worth Belt Ry. Co. v. Jones*, 166 S. W. 1130.

§ 286 (Ky.) In an action for the wrongful death of a flagman, run down by a train proceeding over a track supposed to be out of commission, evidence of the negligence of those in charge of the train held sufficient to go to the jury.—*Louisville & N. R. Co. v. Taylor's Adm'r.*, 166 S. W. 199.

§ 286 (Ky.) Employé's testimony that he was driving a mule which was shown to be dangerous and vicious held to make a question for the jury, though three other witnesses testified he was driving a different mule.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 800.

§ 286 (Ky.) In a personal injury action by a coal miner who claimed that defendant's foreman had discovered the danger in the entry in which he was working, but failed to report it, and the evidence on that issue was conflicting, the question is for the jury.—*Big Branch Coal Co. v. Sanders*, 166 S. W. 813.

§ 286 (Ky.) In employé's action for injuries, testimony of plaintiff and others that no warning was given that the elevator was about to be started held to make a question for the jury.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 815.

§ 286 (Ky.) In Kentucky, where there is no statutory requirement that revolving belts and gears be covered, it is not negligence per se for a master to operate such belting and gears without covering, but it is a question of fact in each case whether he exercised ordinary care to provide a reasonably safe place for work.—*Job Iron & Steel Co. v. Layne*, 166 S. W. 978.

§ 286 (Tex.Civ.App.) It could not be said as a matter of law that if a railroad was not negligent in failing to inspect and repair a defective car door, which came open and struck a brakeman, it was negligent in failing to use due care to close and fasten the door when the train started on its trip.—*Kansas City Southern Ry. Co. v. Carter*, 166 S. W. 115.

§ 286 (Tex.Civ.App.) In railway engineer's action for injuries caused by slipping on running board, evidence held to make a question for the jury as to the company's negligence in permitting oil to be on the running board.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 286 (Tex.Civ.App.) In an action for injuries to an employé while assisting in carrying a tie, caused by the coemployés dropping it under orders of the foreman, evidence held that the question of the negligence of the foreman was for the jury.—*Houston & T. C. R. Co. v. Coleman*, 166 S. W. 685.

§ 286 (Tex.Civ.App.) In an action for personal injuries received by a railroad construction employé, the question whether the engineer of the train which struck plaintiff did see him held, under the evidence, to be a question for the jury, notwithstanding the denial of the engineer that he saw the plaintiff.—*Angelina & N. R. Co. v. Due*, 166 S. W. 918.

§ 287 (Tex.Civ.App.) Where, in an action for injuries to a section hand while attempting to remove a hand car from the track, the evidence showed that a car weighed about 300 pounds, and that one person could take a car off the track, and that three men were engaged in removing the car, the issue of the carrier's negligent failure to furnish a sufficient number of men to handle the car with safety was not raised.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 78.

§ 288 (Mo.App.) Where an employer assured an employé that a place was safe, it was a question for the jury whether the employé assumed the risk of injury from the unsafe condition of such place.—*Boten v. Sheffield Ice Co.*, 166 S. W. 883.

§ 289 (Ky.) On evidence in an action by a servant 16 years of age for injury by being

caught in a disconnected belt hanging over a moving shaft while engaged in "drossing" the pots in a galvanized sheet metal factory, *held*, that the question whether he was working within the scope of his employment was for the jury.—*Job Iron & Steel Co. v. Layne*, 166 S. W. 978.

§ 289 (Tex.Civ.App.) Under Rev. St. 1911, art. 6645, whether engineer, who had been promised that equipment for operating blow-off cock from the cab would be installed, assumed the risk of injury in operating it from the running board *held* for the jury as a question of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 289 (Tex.Civ.App.) A railroad construction employé was not negligent, as a matter of law, in stepping upon the track in front of a work train which was standing still at the time, and in proceeding down the track toward the water barrel without looking back.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 291 (Mo.App.) An instruction, in an action for the death of a coal miner, which submitted the issue whether deceased was killed by a fall of rock because of defendant's negligence, without reference to whether it was at his working place, where he was required to repair the roof, which was the main point in controversy, was erroneous.—*Goode v. Central Coal & Coke Co.*, 166 S. W. 844.

§ 291 (Tex.Civ.App.) In railway engineer's action for injuries caused by slipping on running board, evidence *held* to justify submission of issue as to a defect in the air pump permitting oil to escape.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 291 (Tex.Civ.App.) In an action for injuries to an employé from the negligence of the foreman giving an improper order, a charge directing a verdict for the employer if an ordinarily prudent person, under same circumstances, would have given the order, and that, though the foreman gave the order, that fact alone was not negligence, did not shift to the employer the burden of proving freedom from negligence.—*Houston & T. C. R. Co. v. Coleman*, 166 S. W. 685.

§ 293 (Mo.App.) Where an employé suing for a personal injury charged that the employer was negligent in not maintaining a platform, properly guarded, and suitable lights, an instruction requiring a finding that the employer furnished a reasonably safe place to work and available lights to prevent a recovery was erroneous.—*Burrows v. Likes*, 166 S. W. 643.

§ 293 (Mo.App.) In an action for the death of a coal miner, an instruction submitting to the jury the question whether deceased was killed where defendant was required to repair the roof, without defining such duty in that or any other instruction, was erroneous.—*Goode v. Central Coal & Coke Co.*, 166 S. W. 844.

§ 293 (Tex.Civ.App.) Where, in an action for injuries to plaintiff while assisting in setting in place an electric light pole, the court submitted the issue of the employer's negligence in selecting the tools for plaintiff and his coemployés, refusal to direct the jury not to consider as a ground of negligence the failure to select another method of doing the work was not erroneous.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

§ 293 (Tex.Civ.App.) In an action for injuries to a railroad construction employé, a charge that it was the duty of the engineer and fireman in charge of the train, before starting the same, to give warning, such as by ringing the bell or blowing the whistle, is not erroneous, as requiring warning to be given in one of those two ways.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 296 (Tex.Civ.App.) Where an employé, acting under orders of the vice principal who di-

rected the work, neither did nor omitted to do anything which could contribute to an accident causing injury to him, the issue of contributory negligence was not in the case.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

§ 298 (Tex.Civ.App.) An employé, sustaining a personal injury negligently inflicted, cannot recover for injuries sustained in a prior accident, and, unless the jury can determine what portion of the injuries were occasioned by the negligence complained of, and what was occasioned by the prior accident, there can be no recovery.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (A) Acts or Omissions of Servant.

§ 301 (Ark.) Those who let an automobile with a chauffeur to drive the hirer and his guests, he having no authority over the chauffeur, except to direct where the car shall be driven, are liable as master for the negligence of the driver, whereby the occupants are injured; their duty not being limited to care in selection of a car and driver.—*Forbes v. Reinman & Wolfert*, 166 S. W. 563.

§ 301 (Tenn.) A sister owning an automobile jointly with her brother *held* liable for injuries caused by the negligence of the chauffeur jointly employed and paid, though the chauffeur was on his way to take the brother home from work.—*Goodman v. Wilson*, 166 S. W. 752.

The doctrine of respondent superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person shown to be charged with the injury resulting from the wrong, and in respect of the very transaction out of which the injury arose.—*Id.*

§ 302 (Tenn.) That a driver of an automobile was defendant's servant will not make defendant liable, unless it is further shown that at the time of the accident the driver was in the master's business, and acting within the scope of his employment.—*Goodman v. Wilson*, 166 S. W. 752.

§ 302 (Tex.Civ.App.) A master is liable for injuries caused by the negligence of a servant while acting within the scope of his employment, and it is immaterial that the negligence of a volunteer or an unauthorized person co-operated with that of the servant.—*Weinstein v. Acme Laundry*, 166 S. W. 126.

§ 306 (Ky.) The master is liable for the willful and malicious acts of his servants done in the course of the employment and within the scope of the servant's authority, but not where the servant steps aside to accomplish some purpose of his own.—*Chesapeake & O. Ry. Co. v. Ford*, 166 S. W. 605.

#### MATERIALITY.

See Criminal Law, § 396.

#### MEASURE OF DAMAGES.

See Damages, §§ 100-120.

#### MECHANICS' LIENS.

See Appeal and Error, §§ 692, 909; Subrogation, § 1.

#### VII. ENFORCEMENT.

§ 291 (Tex.Civ.App.) Where, in a suit to foreclose a mechanic's lien, it was averred that the land was owned by "A. & L. August, by said A. August and by said L. August," a judgment foreclosing the lien on the land of A. August was proper.—*August v. Gamer Co.*, 166 S. W. 1197.

**VIII. INDEMNITY AGAINST LIENS.**

§ 312 (Mo.App.) Where building contract required contractor to reimburse owner for claims paid by him "after all payments" were made to the contractor, owner held entitled to reimbursement, though he had a small balance due the contractor in his hands when served with notice of a claim.—Hiller v. Daman, 166 S. W. 869.

§ 313 (Mo.App.) A building contractor's bond which binds the contractor and his sureties to pay for all materials used in the building, to preserve the building from liens, is intended for the benefit of the owner of the property, and not for the benefit of materialmen, and the latter cannot sue thereon.—Uhrich v. Globe Surety Co. of Kansas City, 166 S. W. 845.

**MEMORANDA.**

See Appeal and Error, § 1048; Frauds, Statute of, § 110; Witnesses, § 255.

**MENTAL CAPACITY.**

See Wills, § 21.

**MENTAL SUFFERING.**

See Damages, §§ 149, 163.

**MERGER.**

See Contracts, § 245; Estates, § 10.

**MEXICAN GRANTS.**

See Public Lands, §§ 198, 210, 221, 223.

**MINES AND MINERALS**

See Master and Servant, §§ 118, 189, 264, 265, 276, 291, 293; Public Lands, § 173; Quiet-ing Title, § 12.

**MINORS.**

See Infants.

**MISREPRESENTATION.**

See Corporations, § 80; Deeds, § 70; Evidence, § 434; Exchange of Property, § 3; Fraud; Insurance, §§ 236, 723; Release, § 59; Sales, §§ 53, 130; Vendor and Purchaser, §§ 33, 44.

**MISTAKE.**

See Deeds, § 69; Limitation of Actions, § 96.

**MODIFICATION.**

See Vendor and Purchaser, § 82.

**MONEY PAID.**

§ 9 (Tex.Civ.App.) Where an action for money paid for freight, unloading, and demurrage charges was based on defendant's implied promise to reimburse plaintiff, and the undisputed testimony showed that defendant had agreed to pay the same, a judgment for plaintiff was authorized, though a telegram from defendant to plaintiff directed unloading and promised reimbursement for "freight charges."—Menefee v. Bering Mfg. Co., 166 S. W. 365.

**MONOPOLIES.**

See Contracts, § 117.

**II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.**

§ 12 (Tex.Civ.App.) A lessor's agreement that he would not allow any cold drink stands, shows, exhibitions, dance halls, or platforms on the land he owned within 400 yards of the leased land, or allow any use of such contiguous land antagonistic to the purpose and welfare

of the lessee, held not to violate Rev. St. 1911, arts. 7796-7809, defining and prohibiting trusts, monopolies, and conspiracies against trade.—Edwards v. Old Settlers' Ass'n, 166 S. W. 423.

**MORTGAGES.**

See Acknowledgment, § 62; Adverse Possession, § 40; Chattel Mortgages; Descent and Distribution, § 82; Estoppel, § 75; Fraud, § 30; Husband and Wife, § 138; Insurance, § 228, 233; Judgment, § 736; Limitation of Actions, § 167; Principal and Surety, § 194; Wills, § 744.

**IV. RIGHTS AND LIABILITIES OF PARTIES.**

§ 188 (Mo.App.) Where the owner of land placed in possession one who held notes which were valid obligations, and were secured by a deed of trust, such person is entitled to possession as against the owner and all others except a prior lienor.—Hardwicke v. Barnes, 166 S. W. 826.

**VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.**

§ 308 (Mo.App.) Where a mortgage is given to secure the debt of another for which the mortgagor assumes liability as surety, a judgment in an action on the principal obligation which discharged the surety because of an extension of time also discharges the mortgage.—Hardwicke v. Barnes, 166 S. W. 826.

**X. FORECLOSURE BY ACTION.****(B) Right to Foreclose and Defenses.**

§ 414 (Ark.) Kirby's Dig. § 5415, providing that, before any mortgagee shall foreclose a mortgage or deed of trust of personal property, he shall deliver a verified statement of account to the mortgagor, has no application to mortgage or deed of trust of real property.—Blake v. Askew, 166 S. W. 965.

§ 415 (Ark.) Where defendants' debt to B. was assumed by complainants as a part of the consideration for a deed of trust, and defendants were released from liability to B., complainants were entitled to foreclose the deed for an amount including the debt due to B., though it was understood by agreement between complainants and B. that his debt should not be paid until the other indebtedness was satisfied.—Blake v. Askew, 166 S. W. 965.

Where complainants assumed certain indebtedness of defendants to B. and others as a part of the consideration for a deed of trust, it was immaterial to complainants' right to foreclose that B. joined defendants in the note secured by the deed.—Id.

In a suit to foreclose a deed of trust executed in part to secure an account for goods furnished, it was no defense that complainants chartered for the goods a price more than 10 per cent. greater than they usually sold the same goods to others for cash.—Id.

**(K) Deficiency and Personal Liability.**

§ 559 (Ark.) Where complainants assumed a debt from defendants to B. as a part of the consideration for a deed of trust, and B. released defendants from liability, he was required to look alone to complainants and the security for payment, and was not entitled to a personal judgment against defendants in a suit to foreclose the deed.—Blake v. Askew, 166 S. W. 965.

Where complainants assumed a debt owing by defendants to B. as a part of the consideration for a deed of trust, complainants were not entitled to a personal judgment against defendants for such debt in a suit to foreclose the deed.—Id.

**MOTION PICTURES.**

See Exemptions, §§ 13, 45.

MOTIONS.

See Appeal and Error, § 1127; Continuance; Costs, § 273; Criminal Law, §§ 915-971, 1048; Dismissal and Nonsuit, § 81; Highways, § 72; Indictment and Information, § 137; Judgment, §§ 153, 259, 334; Justices of the Peace, § 189; New Trial, § 99; Pleading, §§ 364, 369; Trial, §§ 89, 91, 105, 420; Venue, §§ 46, 75.

MULTIFARIOUSNESS.

See Pleading, § 406.

MUNICIPAL CORPORATIONS.

See Appeal and Error, §§ 171, 999, 1033; Continuance, § 17; Costs, § 96; Counties; Death, § 33; Dedication, § 19; Eminent Domain, §§ 101, 293; Evidence, §§ 83, 536; Gas; Highways, §§ 90, 95; Mandamus, § 115; Pleading, § 36; Schools and School Districts; Street Railroads; Trial, § 280; Waters and Water Courses, §§ 206, 209.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 33 (Ky.) In view of Civ. Code Prac. § 367a, subsec. 5, and of Ky. St. § 3605, requiring the answer in proceedings to remonstrate against annexing territory to a town, etc., to be filed within 20 days after service of summons, the fact that a demurrer to the petition was filed with the answer on September 10th, in an action to remonstrate against annexation of territory to a town, would not postpone the case for trial until the November term.—Preston v. Town of Paintsville, 166 S. W. 188.

It is the policy of the law to dispose of proceedings remonstrating against the annexation of territory to a town, etc., as promptly as the circumstances permit.—Id.

Evidence, in a proceeding to remonstrate against the annexation of territory to a town, held to show that annexation would be for the best interest of the town, and cause no material injury to property owners within the annexed territory.—Id.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 105 (Ky.) That the language of the enacting clauses of certain ordinances did not literally follow Ky. St. § 3638, providing that the form shall be, "The city council of the city of — do ordain as follows," did not invalidate them, where every word of the prescribed form was used, though in a different arrangement; the form adopted being substantially the same as prescribed.—Fowler v. City of Oakdale, 166 S. W. 195.

§ 121 (Ky.) An objection that an ordinance imposing a fine for violations is invalid may be made in a prosecution to enforce it, notwithstanding Ky. St. § 3639, authorizing the trial of the validity or constitutionality of ordinances by prohibition, in view of Const. § 14, guaranteeing a remedy by due course of law.—United Fuel & Gas Co. v. Commonwealth, 166 S. W. 783.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 284 (Mo.App.) A provision in a street improvement ordinance, that a committee of the council might make alterations either before or after the commencement of the work was invalid as a delegation to a committee of the

power conferred by statute on the council.—Gratz v. City of Kirkwood, 166 S. W. 319.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 293 (Mo.) Under Rev. St. 1909, § 9411, providing that, when the board of aldermen shall deem it necessary to improve any street, it shall declare, by resolution published for two weeks, that such work is necessary, a resolution which does not contain information as to the kind of paving contemplated is insufficient.—Phoenix Brick & Construction Co. v. Gentry County, 166 S. W. 1034.

§ 296 (Mo.App.) The mayor of a city when acting as the officer to make and file an estimate of the cost of a street improvement as required by Rev. St. 1909, § 9407, may consult an engineer and adopt as his own an estimate prepared wholly or in part by the engineer, provided he gives the matter such attention that the estimate filed reflects his own judgment.—Gratz v. City of Kirkwood, 166 S. W. 319.

Where a city has no city engineer, the mayor, though not an engineer, may be designated by the council as the officer to make estimates of the cost of street improvements, within Rev. St. 1909, § 9407, providing that estimates shall be made by the city engineer or other proper officer.—Id.

§ 296 (Mo.App.) Under Rev. St. 1909, § 8838, providing for street grading, an accurate estimate of the cost is not a condition precedent to the letting of a contract, and tax bills are not void merely because they exceed the estimated cost.—Kelley v. Morton, 166 S. W. 840.

§ 303 (Mo.App.) The invalidity of a provision in a street improvement ordinance, embodied in the contract for the work, that a committee of the council might make alterations in the work, did not invalidate the entire ordinance or the contract.—Gratz v. City of Kirkwood, 166 S. W. 319.

§ 304 (Mo.App.) A provision in a street improvement ordinance that a committee of the council might make alterations in the grade, plan, or dimensions of the work, either before or after the commencement of the work, was invalid, because violative of the statute, as attempting to authorize changes after the adoption of plans and specifications.—Gratz v. City of Kirkwood, 166 S. W. 319.

§ 314 (Mo.App.) Where a board of public works, after overruling objections to the improvement of a street, directed the refile of a prior petition for the improvement signed by a majority in front feet of the property owners to be assessed, designating the material desired, and from this determined that the property owners had selected the material without waiting the required 15 days for such selection provided by Laws 1903, p. 62, § 8, the proceedings for the improvement were invalid.—Cushing v. Petrie, 166 S. W. 848.

(C) Contracts.

§ 340 (Mo.App.) A contract for a street improvement, which fixed the price as that named in the bid, which in turn named figures on various items at so much per unit, but without fixing the price of various items of the work or the total sum, is not invalid as providing for a contract price in excess of the estimate, contrary to Rev. St. 1909, § 9407, though the price bid per unit on one of the items was greater than the estimate, where the price on other units was lower.—Gratz v. City of Kirkwood, 166 S. W. 319.

§ 359 (Mo.App.) The rule that the mandatory provisions of the statute governing street improvements and the issuance of special tax bills to pay therefor must be fully complied with does not permit the raising of objections of a purely technical character, where the contract-

or did the work in good faith, and where the substantial rights of the citizens were fully safeguarded.—*Gratz v. City of Kirkwood*, 166 S. W. 319.

**(E) Assessments for Benefits, and Special Taxes.**

§ 414 (Ky.) Where a fill to protect a city from overflow and the improvement thereof with macadam were paid for by a bond issue, a subsequent improvement by a granite pavement was an "original construction" within Ky. St. §§ 2833, 2834, so that the cost thereof was properly charged on the abutting property.—*City of Louisville v. Stoll*, 166 S. W. 811.

§ 429 (Mo.App.) Where only a narrow strip of a tract of unplatted land fronted on a street improvement, the whole tract was subject to assessment for the improvement, under Rev. St. 1909, §§ 8709, 8710; but the estimated benefits must be confined to the portion fronting on the improvement.—*Rackliffe-Gibson Const. Co. v. Zelida Forsee Inv. Co.*, 166 S. W. 849.

§ 486 (Tex.Civ.App.) The provision of Rev. St. 1911, art. 1013, that no assessment for the improvement of streets shall be made against any property abutting until a fair hearing shall have first been given does not apply to the property of street railroads, although the provision that the governing body of the city shall by ordinance adopt regulations for hearings and notice is applicable.—*Texas Bitulithic Co. v. Abilene St. Ry. Co.*, 166 S. W. 433.

**X. POLICE POWER AND REGULATIONS.**

**(A) Delegation, Extent, and Exercise of Power.**

§ 590 (Ky.) Ky. St. § 3637, subd. 7, authorizing councils of cities of the fifth class to enact local, police, sanitary, and other regulations not conflicting with general laws, held to embrace only matters as to which the council is authorized to legislate.—*United Fuel & Gas Co. v. Commonwealth*, 166 S. W. 783.

**XII. TORTS.**

**(B) Acts or Omissions of Officers or Agents.**

§ 753 (Tex.Civ.App.) Where the servants of a municipality negligently made an opening in the fence of a railroad company, and a horse which strayed through the opening was killed on the tracks, the municipality is not liable to the railroad company, unless the making of the opening was within the scope of the authority of its agents.—*Chicago, R. I. & G. Ry. Co. v. Porter*, 166 S. W. 37.

**(C) Defects or Obstructions in Streets and Other Public Ways.**

§ 759 (Mo.App.) Where a strip in the center of a platted street had been cut down to the established grade, leaving the remainder thereof about six feet above the grade, the city extended no invitation to use that portion which had not been graded, and was not liable for injuries to one coming down a path from the top of the bank to the graded portion of the street.—*Robinson v. Kansas City*, 166 S. W. 343.

§ 762 (Ky.) A city is not the insurer of the safety of persons who travel its sidewalks, and is not liable in damages for injuries caused by the thoughtlessness or negligence of travelers.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 763 (Ky.) All towns and cities must exercise ordinary care to keep their streets, sidewalks, and public places in a reasonably safe condition for public travel by persons exercising ordinary care for their own safety.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 768 (Ky.) The construction of a sidewalk with its edge about four inches above the surface of the ground at the side of the walk does not render the walk unsafe for travel, so as to make the town liable for injuries received by

one who stepped off the walk.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 796 (Ky.) Neither the fact that a sidewalk was constructed upon an embankment 2 feet high, with a gentle slope of  $3\frac{1}{2}$  feet to the bottom thereof, nor that the walk was about 4 inches above the level of the top of the embankment, make the place a dangerous one so as to require the erection of barriers by the town for the protection of persons using the walk.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 816 (Mo.App.) In an action for injuries to plaintiff by a fall on a sidewalk, an objection that she pleaded a cause of action in that the walk was defective from snow and ice thereon, but was permitted to recover because of defects in the original construction of the walk, held unsustainable.—*Best v. City of St. Joseph*, 166 S. W. 817.

§ 819 (Mo.App.) Evidence in an action against a city for injuries claimed to have been caused by stepping through a rotten crossing board held to sustain a finding that plaintiff was injured as claimed, and not by stepping into a hole on her own premises.—*Willis v. City of Browning*, 166 S. W. 1070.

§ 821 (Ky.) While no hard and fast rule for measuring the duty of a town to keep its sidewalks in reasonably safe condition for travel can be laid down, and the question is ordinarily, therefore, one for the jury, where there can be no reasonable difference of opinion as to the safety of the walk, the court should rule upon the issue as a matter of law.—*Town of Elsmere v. Tanner*, 166 S. W. 220.

§ 821 (Ky.) Where, in an action against a city and its subcontractor for the death of a horse on a defective street, there was evidence of some negligence of the city and its subcontractor, but the driver might have known of the condition of the street, or the horse might have been driven to death, the court properly directed a verdict for defendants.—*Russell v. City of Ashland*, 166 S. W. 971.

§ 822 (Mo.App.) In an action for injuries to a pedestrian by falling on snow and ice on a sidewalk, an instruction, that before plaintiff could recover the jury must find that ridges, knots, and lumps of ice on the sidewalk caused it to be dangerous and unsafe and was the immediate cause of plaintiff's fall, held to include the defense that the defect was not the snow and ice but a defect in the original construction of the walk.—*Best v. City of St. Joseph*, 166 S. W. 817.

**XIII. FISCAL MANAGEMENT. PUBLIC DEBT, SECURITIES, AND TAXATION.**

**(A) Power to Incur Indebtedness and Expenditures.**

§ 867 (Ky.) Ky. St. § 3637, subsec. 3, authorizes the board of councilmen in cities of the fifth class to publish notice of an election to determine whether an indebtedness that cannot be paid by the annual authorized levy shall be incurred, by publication for two weeks in some newspaper in or of general circulation in the city, or by posting in three or more public places therein, in their discretion.—*Fowler v. City of Oakdale*, 166 S. W. 185.

Const. § 157, providing that no city may become indebted beyond the authorized annual levy "without the assent of two-thirds of the voters thereof," and Ky. St. § 3637, subsec. 3, using in the same connection the words "two-thirds of all the qualified electors in such town," mean two-thirds of the electors whose votes are cast on the question.—*Id.*

Where 196 of 228 votes cast at an election under Const. § 157, and Ky. St. § 3637, subsec. 3, to determine whether the city should incur an indebtedness greater than its annual revenue, were for the proposition, it carried by much more than the required two-thirds vote, though

438 votes were cast for mayor and councilmen at the same election.—Id.

§ 868 (Ky.) Under Ky. St. § 3637, subsec. 3, if a city vote to incur a debt beyond its annual revenue, the first levy for payment of interest and creation of a sinking fund may be made any time after the election and before issuance of bonds, and the fact that it could have been, but was not, levied when the other levies were made did not affect its validity.—Fowler v. City of Oakdale, 166 S. W. 195.

Under Const. § 159, a municipality, when creating an authorized "indebtedness," must provide an annual tax for interest and sinking fund, the word "indebtedness," as used in section 157, authorizing creation of an "indebtedness" by a two-thirds vote, meaning a debt created by contract, which is not created until assented to by a two-thirds vote and issuance of bonds, and therefore it was sufficient to provide such tax after election and before issuance of bonds.—Id.

#### (D) Taxes and Other Revenue, and Application Thereof.

§ 978 (Ky.) Under Ky. St. § 3542, authorizing to assessment of unlisted property, section 3544, providing for the collection of city taxes, and section 3546, authorizing suits to collect tax bills uncollected on the first Monday of November, a city could not sue for taxes assessed in September, before the first Monday in November following.—Graves v. City of Georgetown, 166 S. W. 969.

### XV. ACTIONS.

§ 1040 (Ky.) The city not being a party to proceedings to prohibit enforcement of an ordinance, because of its invalidity, costs could not be rendered against it.—Chesapeake & O. Ry. Co. v. Harmon, 166 S. W. 786.

### MURDER.

See Homicide, §§ 284, 309.

### MUTUAL BENEFIT ASSOCIATIONS.

See Insurance, §§ 695-819.

### NAMES.

See Indictment and Information, § 81; Trade-Marks and Trade-Names.

### NAVIGABLE WATERS.

See Waters and Water Courses.

### I. RIGHTS OF PUBLIC.

§ 20 (Tex.Civ.App.) In an action for injury to plaintiff's sailboat by defendants' failure to lift sufficiently high a lift bridge maintained by defendants over a part of Galveston Bay, the state of the wind and tide at the time, as well as the character of the vessel, should be considered in determining the questions of negligence and contributory negligence.—Galveston-Houston Electric Ry. Co. v. Stautz, 166 S. W. 11.

### III. RIPARIAN AND LITTORAL RIGHTS.

§ 44 (Ark.) Land formed by the shifting of a river, the banks caving in on one side, and the receding waters forming land by deposit or sediment on the other, is "accretion," though the greater part was formed during one overflow and the caving in of the opposite bank was perceptible at times.—Yuttermann v. Grier, 166 S. W. 749.

### NEGLIGENCE.

See Appeal and Error, §§ 216, 500, 719, 1001; Attorney and Client, §§ 161, 166, 187; Banks

and Banking, § 171; Carriers, §§ 184, 177, 280-346; Damages, § 100; Death; Estoppel, § 74; Highways, § 181; Master and Servant, §§ 88-306; Municipal Corporations, §§ 753-822; Navigable Waters, § 20; Nuisance, § 5; Pleading, § 93; Railroads, §§ 259-479; Steam; Street Railroads, §§ 90-117; Telegraphs and Telephones; Trial, §§ 191, 251, 252, 296, 356; Waters and Water Courses, §§ 206, 209.

### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

#### (A) Personal Conduct in General.

§ 1 (Tex.Civ.App.) To constitute actionable negligence, the act done or omitted must be one which a person of ordinary prudence would not have done or omitted and from which it ought reasonably to have been anticipated that injury would result.—St. Louis Southwestern Ry. Co. of Texas v. Freles, 166 S. W. 91.

#### (B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 22 (Tenn.) An automobile is not such a dangerous machine as would require it to be put in the category with the locomotive, dangerous animals, explosives, and the like, so as to render the owner liable from its use.—Goodman v. Wilson, 166 S. W. 752.

§ 23 (Ark.) The rule that an owner of premises, who permits to remain thereon a dangerous appliance which is attractive to children, is liable for injuries reasonably to be anticipated has no application, in the absence of negligence in maintaining the appliance on the premises.—St. Louis, I. M. & S. Ry. Co. v. Waggoner, 166 S. W. 948.

§ 24 (Ark.) A railroad company held not negligent in permitting an empty alcohol barrel to remain on a station platform at destination so as to render it liable for injuries to a child, resulting from an explosion caused by his placing a lighted match over the bung-hole after removing the cork; there being nothing to indicate to the carrier's servants that the empty barrel was dangerous.—St. Louis, I. M. & S. Ry. Co. v. Waggoner, 166 S. W. 948.

#### (C) Condition and Use of Land, Buildings, and Other Structures.

§ 32 (Ky.) Where a boy who had brought corn to a mill to be ground was invited by the proprietor to go into the boiler room and warm himself, the proprietor owed him a duty to use reasonable care to keep the premises in a safe condition, but was not an insurer of the boy's safety.—Branham's Adm'r v. Buckley, 166 S. W. 618.

§ 33 (Ark.) Plaintiff, who had no knowledge that he could not be employed as a fireman on account of his minority, and who went into defendant's railroad yard to seek employment of its master mechanic, in view of a proved custom of master mechanics to engage firemen at the yards, held rightly there.—St. Louis, I. M. & S. Ry. Co. v. Wirbel, 166 S. W. 573.

§ 36 (Mo.App.) The owner of an animal which strays upon the common, and is thereby a technical trespasser, cannot recover damages from the owner of the land, where the animal is injured by reason of holes, structures, or anything placed thereon by the landowner, not so closely located to a highway that persons or animals might, by a misstep, be injured.—Teague v. Clemons, 166 S. W. 641.

### II. PROXIMATE CAUSE OF INJURY.

§ 56 (Ark.) Where plaintiff's minor son, while playing about a railroad station, placed a lighted match over or into a hole in the head of an empty alcohol barrel, causing an explosion by which he was injured, the negligence of the rail-



road company in leaving the barrel so exposed, if any, and not the negligence of the child in placing the match over the hole, was the proximate cause of the injury.—*St. Louis, I. M. & S. Ry. Co. v. Waggoner*, 166 S. W. 948.

#### IV. ACTIONS.

##### (B) Evidence.

§ 121 (Ky.) While negligence is not presumed, it may be inferred from the circumstances surrounding an accident.—*Louisville & N. R. Co. v. Taylor's Adm'x*, 166 S. W. 199.

§ 121 (Mo.App.) Where an injury may have resulted from one of several causes, for one of which only the defendant is liable, the plaintiff must prove that it arose from the cause for which defendant is liable.—*Rogers v. Hammond Packing Co.*, 166 S. W. 880.

§ 124 (Ark.) In an action for injury in a railroad yard, where plaintiff had gone to seek employment, evidence of the general custom for master mechanics to hire firemen at the yards and of the local custom at the particular yard held admissible to show that plaintiff was rightly there.—*St. Louis, I. M. & S. Ry. Co. v. Wirbel*, 166 S. W. 573.

§ 134 (Ark.) Evidence held sufficient to show a custom for master mechanics to hire firemen in the yards, which had existed for several years, so that plaintiff going in the yard seeking employment was not a trespasser.—*St. Louis, I. M. & S. Ry. Co. v. Wirbel*, 166 S. W. 573.

##### (C) Trial, Judgment, and Review.

§ 136 (Ky.) When the question is one of negligence vel non, the case should not be submitted to the jury, if the evidence is equally consistent with the existence or nonexistence of negligence.—*Louisville & N. R. Co. v. Taylor's Adm'x*, 166 S. W. 199.

§ 136 (Tex.Civ.App.) The evidence not being such that reasonable minds would necessarily reach but one conclusion, the question of contributory negligence is for the jury.—*Texas Traction Co. v. Sherron*, 166 S. W. 897.

#### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

#### NEWLY DISCOVERED EVIDENCE.

See New Trial, §§ 99-105.

#### NEWSPAPERS.

See Lotteries, § 3.

#### NEW TRIAL.

See Appeal and Error, §§ 282, 301, 345, 500, 671, 722, 854, 877, 933, 977, 978, 981; Criminal Law, §§ 915-971, 1064, 1090, 1124, 1156.

#### II. GROUNDS.

##### (D) Disqualification or Misconduct of or Affecting Jury.

§ 47 (Ark.) That a juror was seen conversing with a party outside the jury room was not ground for a new trial, where it was not shown that the jury were not permitted to separate, or that the conversation pertained to the case, as Kirby's Dig. §§ 6198, 6199, authorize the court to permit the jury to separate, even after submission of the case.—*Williams v. Williams*, 166 S. W. 552.

##### (H) Newly Discovered Evidence.

§ 99 (Mo.App.) Newly discovered evidence, warranting a new trial, is evidence which, by the use of proper diligence, a party could not have discovered prior to trial, and which is material to the issue, and not merely cumulative or impeaching.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

Motions for new trial on the ground of newly discovered evidence should be construed with strictness, and granted only as an exception.—*Id.*

§ 102 (Ark.) Newly discovered evidence held such as should have been discovered by diligence before trial.—*Williams v. Williams*, 166 S. W. 552.

§ 102 (Ky.) An application for new trial for a newly discovered witness was properly denied, where the applicant did not endeavor to ascertain who were present at the time of the accident, or had not sought from people living in the vicinity information as to the circumstances, though 2½ years elapsed before the trial.—*Russell v. City of Ashland*, 166 S. W. 971.

§ 102 (Mo.App.) In an action on an account stated, plaintiff, who was defeated, held not entitled to a new trial on the ground of newly discovered evidence appearing from a deed of trust executed by defendant for the benefit of its creditors some four years before, from the acts of the trustee thereunder, or from entries in defendant's books, which were in the trustee's possession.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

§ 102 (Tex.Civ.App.) The trial court in condemnation proceedings properly refused to grant a new trial on the ground of newly discovered evidence; no legal excuse being presented why such evidence was not offered at the trial.—*City of Ft. Worth v. Charbonneau*, 166 S. W. 887.

§ 103 (Mo.App.) In an action against a street railway for personal injuries, newly discovered evidence that plaintiff had thereafter signed statements in an application for life insurance to the effect that she had never sustained any accidental injury held not so material as to warrant a new trial.—*Stahlman v. United Rys. Co. of St. Louis*, 166 S. W. 312.

§ 104 (Mo.App.) In an action against a street railway for personal injuries, where defendant contended that plaintiff's condition was simulated and her suffering imaginary, newly discovered evidence that she had thereafter signed statements in an application for life insurance to the effect that she had never been accidentally injured held cumulative, and not sufficient to warrant a new trial.—*Stahlman v. United Rys. Co. of St. Louis*, 166 S. W. 312.

§ 104 (Mo.App.) In an action on an account stated, evidence that defendant had named plaintiff as one of its creditors in a deed of trust given for the benefit of creditors, and that the trustee appointed by such deed had approved plaintiff's claim, was merely cumulative, and did not warrant a new trial on the ground of newly discovered evidence.—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 166 S. W. 1125.

§ 105 (Mo.App.) In an action against a street railway for personal injuries, where plaintiff had been examined at length as to the fact of the accident and her subsequent condition, newly discovered evidence of contradictory statements in an application for life insurance to the effect that she had never been accidentally injured held impeaching evidence, not warranting a new trial.—*Stahlman v. United Rys. Co. of St. Louis*, 166 S. W. 312.

#### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 116 (Mo.App.) A motion for new trial must be filed within four days after the trial.—*State ex rel. Lynch v. Taylor*, 166 S. W. 1071.

§ 150 (Ky.) A party, applying for a new trial for newly discovered evidence, must allege facts showing that due diligence was exercised, and a mere allegation that he exercised due diligence is insufficient.—*Russell v. City of Ashland*, 166 S. W. 971.

§ 150 (Mo.App.) Depositions of witnesses, filed with application for new trial on the ground of newly discovered evidence, held competent as affidavits, and that affidavit for new



trial was properly made by the attorney of defendant corporation swearing that he had the entire charge of the case for it.—*Stahman v. United Rys. Co. of St. Louis*, 166 S. W. 312.

Applicant for new trial *held* required to show that newly discovered evidence came to his knowledge after the trial, his due diligence, that the evidence was material and such as to probably produce a different result, that it was not cumulative or impeaching, and to produce the affidavit of the witness or to account for its absence.—*Id.*

§ 165 (Mo.App.) Motions to set aside an order granting or denying the motion may be filed at any time within the term at which the ruling was made.—*State ex rel. Lynch v. Taylor*, 166 S. W. 1071.

## NEXT OF KIN.

See Descent and Distribution.

## NONSUIT.

See Dismissal and Nonsuit.

## NOTARIES.

See Acknowledgment, § 62.

## NOTES.

See Bills and Notes.

## NOTICE.

See Adverse Possession, § 60; Appeal and Error, §§ 345, 622, 628, 794, 927; Carriers, § 337; Constitutional Law, § 290; Corporations, § 428; Criminal Law, §§ 1070½, 1087; Depositaries, § 6; Depositions, § 83; Dismissal and Nonsuit, § 81; Drains, § 76; Eminent Domain, §§ 172, 185; Fraud, §§ 16, 50; Garnishment, § 158; Highways, § 72; Husband and Wife, § 31; Insurance, §§ 536-559, 695; Intoxicating Liquors, § 33; Master and Servant, § 125; Mechanics' Liens, § 312; Municipal Corporations, § 867; Receivers, § 98; Street Railroads, § 37.

## NOVATION.

§ 5 (Mo.App.) To constitute a novation, the creditor, debtor, and third person must all agree that the original debtor be released and the third person substituted in his stead.—*L. & A. Scharff Distilling Co. v. Springfield Coal, Ice & Transfer Co.*, 166 S. W. 654.

§ 6 (Mo.App.) To make defendant, who wrongfully delivered whisky which plaintiff had shipped to a third person, responsible to plaintiff for the value of the whisky, plaintiff must have discharged the third person as its creditor and accepted defendant instead.—*L. & A. Scharff Distilling Co. v. Springfield Coal, Ice & Transfer Co.*, 166 S. W. 654.

§ 12 (Mo.App.) Novation is not presumed, but must be clearly established.—*L. & A. Scharff Distilling Co. v. Springfield Coal, Ice & Transfer Co.*, 166 S. W. 654.

## NUISANCE.

### I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3 (Ky.) The operation of railroad yards is lawful, and the necessary incidents thereto, such as running trains in the yard, the emission of smoke, the ringing of bells, and blowing of whistles, if done in a careful and reasonable manner and without unnecessary noise, are not a nuisance.—*Louisville & N. R. Co. v. Commonwealth*, 166 S. W. 237.

§ 5 (Ky.) The doing of a lawful act in a careful manner is not a nuisance, but the doing of

a lawful thing in a negligent manner may be a nuisance.—*Louisville & N. R. Co. v. Commonwealth*, 166 S. W. 237.

## NUNC PRO TUNC.

See Judgment, § 273.

## OBJECTIONS.

See Appeal and Error, §§ 173, 186-242, 499; Parties, §§ 75, 96; Pleading, §§ 193, 406, 412, 418.

## OBSTRUCTIONS.

See Highways, §§ 163, 164.

## OFFICERS.

See Corporations, §§ 18, 327-368, 426, 428; Costs, § 273; District and Prosecuting Attorneys; Embezzlement; Intoxicating Liquors, § 34; Receivers.

## III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 114 (Tex.Civ.App.) Officers, to whom is committed the power of acting in a judicial or quasi judicial capacity, are not personally liable for an honest, though mistaken, exercise of their powers.—*Comanche County v. Burks*, 166 S. W. 470.

## OPEN AND CLOSE.

See Trial, § 25.

## OPINION EVIDENCE.

See Evidence, §§ 471-568.

## OPINIONS.

See Courts, §§ 89, 91.

## ORDINANCES.

See Municipal Corporations, §§ 105, 121, 284, 303, 304.

## PARDON.

See Constitutional Law, § 274.

§ 9 (Ark.) A pardon is effective upon delivery and acceptance.—*Weigel v. McCloskey*, 166 S. W. 944.

## PARENT AND CHILD.

See Adoption; Bastards; Constitutional Law, § 43; Death, §§ 9, 99, 103; Evidence, § 236; Guardian and Ward; Infants; Tenancy in Common, § 3.

§ 2 (Mo.) While the parent has a natural right of control, it is not inalienable, and, even in absence of statute, courts of equity may place children under guardianship.—*State ex rel. Cave v. Tincher*, 166 S. W. 1028.

§ 17 (Tex.Cr.App.) In a prosecution for the abandonment of defendant's minor son, evidence which does not establish the name of the son as charged in the indictment is insufficient to sustain a conviction.—*Irving v. State*, 166 S. W. 1166.

In an indictment for the abandonment of defendant's minor child, it is necessary to allege the name of the child.—*Id.*

## PAROL EVIDENCE.

See Criminal Law, §§ 429, 444; Evidence, §§ 417-461.

## PARTIES.

See Appeal and Error, § 1036; Contracts, § 187; Corporations, § 357; Criminal Law, § 59; Descent and Distribution, § 82; Insurance, § 813; Interpleader; Partition, § 46; Specific Performance, §§ 106, 121; Wills, § 221; Waters and Water Courses, § 247.

## V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Tex.Civ.App.) In an action by a widow for the wrongful death of her husband, an objection that she was not entitled to sue for any damages sustained by his parents should be raised upon the filing of the petition showing that the suit was on behalf of the parents; it not appearing that they were under any disability whatsoever.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 96 (Mo.App.) A defendant, who answers the petition and goes to trial, thereby waives, as provided by Rev. St. 1909, § 1804, the objection that plaintiffs are improperly joined.—Kansas City Masonic Temple Co. v. Young, 166 S. W. 838.

## PARTITION.

See Dedication, § 19.

### I. BY ACT OF PARTIES.

§ 5 (Tex.Civ.App.) Where land was deeded jointly to two persons upon consideration that each would pay his proportionate part of the purchase price, the subsequent division of the land by such grantees in that proportion, each agreeing to pay his part of the price, which was done, was a valid partition binding upon the parties and their heirs.—Harle v. Harle, 166 S. W. 674.

### II. ACTIONS FOR PARTITION.

#### (B) Proceedings and Relief.

§ 43 (Ky.) An action by some of the devisees of land to have the land sold and the proceeds divided, brought under Civ. Code Prac. § 490, subsec. 2, is an action for partition, and must be brought in the county where the personal representative qualified, under Civ. Code Prac. § 66, prescribing the venue of actions for partition of the real estate of a deceased person.—Boring v. Melcon, 166 S. W. 612.

§ 46 (Tex.Civ.App.) In partition, parties having no interest in the property should not be made parties to the suit.—Perkins v. Perkins, 166 S. W. 915.

§ 74 (Tex.Civ.App.) Though plaintiff failed to establish defendant's abandonment of her homestead right, and hence was not entitled to partition, it was proper for the court to determine the issue of defendant's asserted title to all the property, so that a judgment decreeing title to each of the parties, but denying plaintiff's right to partition so long as defendant might occupy it as a homestead, was proper.—Perkins v. Perkins, 166 S. W. 915.

§ 85 (Tex.Civ.App.) Where plaintiff in partition had no right to possession of his one-half interest, and hence no right to partition, the issue of defendant's improvements in good faith could not be determined in the suit.—Perkins v. Perkins, 166 S. W. 915.

## PARTNERSHIP.

See Appeal and Error, § 1056; Associations.

### I. THE RELATION.

#### (A) Creation and Requisites.

§ 20 (Ky.) A partnership, as between the parties themselves, does not arise by operation of law, but is created only by contract and intent of the parties.—Crawford v. Wiedemann, 166 S. W. 595.

#### (C) Evidence.

§ 53 (Ky.) Evidence held not to show a partnership as between the parties.—Crawford v. Wiedemann, 166 S. W. 595.

## III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

### (B) Individual Transactions.

§ 97 (Ky.) Each partner is bound to act with the utmost good faith towards his copartners, and, each being the confidential agent of the other, one will not be permitted to benefit himself at the expense of the others.—Axton v. Kentucky Bottlers Supply Co., 166 S. W. 776.

Where an agreement for the dissolution of a partnership provided that the withdrawing partner should have the right to secure any contracts that the firm might have, he could not, while yet a member of the firm on behalf of it, rescind firm contracts to obtain them for himself after his withdrawal.—Id.

### (C) Actions Between Partners.

§ 122½ (Ky.) In an action against a withdrawing partner for damages for his cancellation of firm contracts before withdrawal, so as to obtain them for his individual benefit thereafter, an award of \$2,420 held warranted by the evidence.—Axton v. Kentucky Bottlers Supply Co., 166 S. W. 776.

## IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (B) Nature and Extent of Firm Liabilities.

§ 173 (Tex.Civ.App.) Where one, who had a claim against a partnership for goods sold, agreed to accept in full settlement thereof a note signed by only one of the partners, the other partner is not liable on the note.—Switzer Lumber Co. v. Clements, 166 S. W. 438.

### (D) Actions by or Against Firms or Partners.

§ 216 (Mo.App.) In an action against several defendants, plaintiff may prove that they are partners, though he does not allege a partnership.—Smith v. Cain, 166 S. W. 653.

## VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

### (B) Rights, Powers, and Liabilities after Dissolution.

§ 279 (Ky.) A dissolution of a partnership will not abrogate firm contracts, which continue in force and may be enforced against the members of the firm thereafter.—Axton v. Kentucky Bottlers Supply Co., 166 S. W. 776.

## PARTY WALLS.

See Cancellation of Instruments, § 37; Equity, § 89; Limitation of Actions, § 55.

§ 1 (Ark.) A grant of the use of a wall to an adjacent owner for the erection of a building thereon creates an easement.—Evans v. Pettus, 166 S. W. 955.

§ 8 (Ark.) The use of a wall by an adjacent owner on which to erect a building is a permanent encroachment, and the owner, not authorizing the erection, is entitled to equitable relief without showing actual damages.—Evans v. Pettus, 166 S. W. 955.

The wrongful use of a wall by the adjacent owner erecting a building thereon is such a wrong as to justify relief in equity on the ground of inadequacy of any remedy at law for damages.—Id.

## PASSENGERS.

See Carriers, §§ 235-405.

## PATENTS.

See Public Lands, § 61.

## PAWNBROKERS.

See Indictment and Information.

**PAYMENT.**

See Bills and Notes, § 427; Chattel Mortgages, § 240; Compromise and Settlement; Eminent Domain, § 164; Specific Performance, § 110; States, § 171; Subrogation.

**II. APPLICATION.**

§ 42 (Tex.Civ.App.) If there was no appropriation of a payment made upon a promissory note, it would be applied to the interest.—*Wilson v. Ware*, 166 S. W. 705.

**PENALTIES.**

See District and Prosecuting Attorneys, § 9; Drains, § 86; Husband and Wife, § 304; Telegraphs and Telephones, § 78.

**I. NATURE AND GROUNDS, AND EXTENT OF LIABILITY.**

§ 1 (Mo.App.) While the word "fine" implies punishment for a criminal offense, it also implies a penalty sometimes recoverable by civil action, and, while both words are suggestive of punishment, "penalty" is of broader significance, being a generic term which includes both fines and forfeitures.—*State ex rel. Jones v. Howe Scale Co. of Illinois*, 166 S. W. 328.

**II. ACTIONS AND OTHER PROCEEDINGS.**

§ 16 (Mo.App.) Rev. St. 1909, § 3040, providing that foreign corporations failing to comply with the law shall "be subject to a fine" to be recovered in proceedings instituted by the prosecuting attorney, is not strictly criminal in character, but is remedial as well, and, while it may be an information will lie, the penalty may be recovered in a civil action.—*State ex rel. Jones v. Howe Scale Co. of Illinois*, 166 S. W. 328.

**PERJURY.****II. PROSECUTION AND PUNISHMENT.**

§ 26 (Tex.Cr.App.) While the truth of the alleged false statement must be negated in an indictment for perjury, no particular language is required; it being sufficient if the language used in the indictment specifically negatives the truth of the false statement.—*Hart v. State*, 166 S. W. 152.

The indictment in a prosecution for perjury *held* to sufficiently negative the truth of the alleged false statement by accused.—*Id.*

§ 29 (Tex.Cr.App.) In a prosecution for perjury for falsely stating that W. was in a certain house between the hours of 9 and 11 on a certain night, when in truth W. was at that time on a certain street corner and then and there committed the theft, it was not necessary to prove that accused was at the place of the theft, or that W. committed the theft.—*Hart v. State*, 166 S. W. 152.

§ 33 (Tex.Cr.App.) In a prosecution for perjury in a theft case by testifying that the alleged thief was in a certain house at a certain time, when the thief was in fact on a certain street corner where the theft was committed, evidence *held* to sustain a finding that accused's testimony was false.—*Hart v. State*, 166 S. W. 152.

Perjury may be proved by circumstantial evidence.—*Id.*

**PERSONAL INJURIES.**

See Carriers, §§ 280-346; Continuance, § 31; Damages, §§ 100, 132, 134, 143-153, 166; Evidence, §§ 14, 123, 132, 220, 317, 477, 598; Master and Servant, §§ 88-306; Railroads, §§ 259-400; Release, § 59; Street Railroads, §§ 99-117; Trial, §§ 125, 191, 192, 194, 251-253, 255, 295, 296, 350.

**PETITION.**

See Adoption, § 14.

**PHYSICIANS AND SURGEONS.**

See Evidence, § 546; Indictment and Information, §§ 110, 125; Witnesses, § 208.

§ 2 (Tex.Cr.App.) Acts 30th Leg. c. 123, prohibiting the practice of medicine without a proper certificate, is valid.—*Herrington v. State*, 166 S. W. 721.

**PLANTS.**

See Trespass, § 60.

**PLATS.**

See Vendor and Purchaser, § 343.

**PLEADING.**

See Acknowledgment, § 62; Adverse Possession, § 110; Appeal and Error, §§ 179, 197, 219, 500, 544, 750, 959, 1033, 1039-1042; Banks and Banking, § 315; Boundaries, § 32; Cancellation of Instruments, § 37; Continuance, §§ 30, 31, 44; Contracts, § 345; Corporations, §§ 360, 513, 514; Courts, § 170; Damages, §§ 143-153; Death, § 99; Deeds, § 114; Divorce, § 332; Dower, § 69; Easements, §§ 35, 61; Elections, § 288; Equity, §§ 148-297; Evidence, § 445; Fraud, § 41; Frauds, Statute of, §§ 144, 149, 152; Garnishment, § 158; Guaranty, § 78; Habeas Corpus, § 85; Indictment and Information, § 118; Interest, § 66; Interpleader; Judgment, §§ 101, 102, 251, 252; Judicial Sales, § 13; Justices of the Peace, §§ 91, 174; Libel and Slander, §§ 80, 86; Liens, § 22; Limitation of Actions, § 180; Master and Servant, § 256; Municipal Corporations, § 816; Partnership, § 216; Principal and Agent, § 189; Railroads, §§ 344, 479; Reformation of Instruments, § 36; Sales, §§ 130, 411; Specific Performance, § 116; Statutes, §§ 267, 281, 289; Street Railroads, § 37; Trespass, § 44; Trespass to Try Title, § 32; Trial, §§ 189, 251-253; Vendor and Purchaser, §§ 274, 280, 318, 349; Wills, § 272.

**I. FORM AND ALLEGATIONS IN GENERAL.**

§ 8 (Tex.Civ.App.) Allegations in a petition in an action by a carrier for freight *held* mere conclusions.—*St. Louis Southwestern Ry. Co. v. Browne Grain Co.*, 166 S. W. 40.

§ 8 (Tex.Civ.App.) An allegation that a judgment was void because altered by the parties before being recorded is a statement of a conclusion, not sufficient to authorize an injunction.—*Lester v. Gatewood*, 166 S. W. 389.

§ 34 (Ky.) A petition attacked on demurrer must be construed most strongly against the pleader.—*Hall v. Huffman*, 166 S. W. 770.

§ 36 (Mo.) In suit to condemn strip for street, allegation of petition that defendants were owners or claimed some interest in the strip *held* not to estop the city from denying such ownership.—*City of St. Louis v. Barthel*, 166 S. W. 267.

**III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.****(A) Defenses in General.**

§ 93 (Mo.App.) In an action for trespass, there was nothing inconsistent in joining with a general denial defenses of a license from plaintiff and an entry by virtue of lawful condemnation.—*Ewen v. Hart*, 166 S. W. 815.

§ 93 (Mo.App.) Defenses of contributory negligence and assumed risk were not inconsistent

with a general denial, and it was error to compel defendant to elect between the general denial and such special pleas.—*McDonald v. Central Illinois Const. Co.*, 166 S. W. 1087.

#### IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 165 (Ky.) In a broker's action for a commission, a petition alleging that he was employed to sell realty by defendant's husband and agent, with an answer denying that he was so employed, or that defendant's husband was authorized to employ him, *held* sufficient to support a judgment for plaintiff, although the allegation of want of authority was not denied by reply.—*Tyler v. Woerner*, 166 S. W. 178.

§ 182 (Tex.Civ.App.) Under Rev. St. 1911, art. 1829, as amended by Acts 33d Leg. c. 127, providing that any fact pleaded by the defense which is not denied by the plaintiff shall be taken as confessed, it is unnecessary for plaintiff to traverse allegations in the answer which are the mere converse of those in the petition.—*Galveston, H. & S. A. Ry. Co. v. Pennington*, 166 S. W. 464.

#### V. DEMURRER OR EXCEPTION.

§ 193 (Ky.) The objection that the action should have been brought on the equity side of the court, instead of the law side, cannot be raised by demurrer.—*Nuckels v. Robinson-Pettett Co.*, 166 S. W. 972.

§ 214 (Ky.) In determining the propriety of sustaining a demurrer to the petition, the truth of all allegations therein must be admitted.—*Willis v. Lam*, 166 S. W. 251.

§ 216 (Tex.Civ.App.) Matters not alleged in the petition cannot be considered in support of a general demurrer to it.—*Lakeside Irr. Co. v. Kirby*, 166 S. W. 715.

#### VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Ky.) Civ. Code Prac. § 134, gives a trial judge discretion in allowing or rejecting pleadings.—*Aylor v. Aylor*, 166 S. W. 216.

§ 237 (Ky.) Under Civ. Code Prac. § 134, the court properly permitted plaintiff, in an action upon a supersedeas bond, for damages in keeping him out of possession of coal mining property, at the close of his evidence to amend his petition so as to specify the items of damage by showing the amount of coal it could have mined during the period, etc.—*Phoenix-Jellico Coal Co. v. Grant*, 166 S. W. 812.

#### VII. SIGNATURE AND VERIFICATION.

§ 288 (Ky.) The failure of plaintiff or his attorneys to sign the petition as required by Civ. Code Prac. § 115, made it defective but not fatally so, as it could be remedied, and, when remedied, it dated back to the date of filing, so far as concerned the requirement that an answer be filed at that term.—*Baird v. Prewitt*, 166 S. W. 771.

If a petition is not signed, the action is nevertheless pending from the filing thereof and issuance of summons thereon, though an answer is not due until the petition is signed.—*Id.*

§ 290 (Ky.) If a petition is not verified, the action is nevertheless pending from the filing thereof and issuance of summons thereon, though an answer is not due until the petition is signed.—*Baird v. Prewitt*, 166 S. W. 771.

#### XI. MOTIONS.

§ 364 (Ky.) Though plaintiff, in an action to quiet title, was not required to plead the chain of title under which it claimed, and also that of defendant, yet the court did not err in refusing to strike such allegations from the petition.—*Kentonia Corporation v. Boreing Land & Mining Co.*, 166 S. W. 780.

§ 369 (Mo.App.) A petition alleging in one count the invalidity of a will admitted to probate, and seeking in another count to recover under a trust created by the will, contains inconsistent allegations, and plaintiff is properly required to elect.—*Snyder v. Toler*, 166 S. W. 1059.

#### XII. ISSUES, PROOF, AND VARIANCE.

§ 374 (Tex.Civ.App.) Though the pleadings and proof must correspond, only the substance of the pleadings need be proved.—*Stevens v. Crosby*, 166 S. W. 62.

§ 387 (Mo.App.) While one who specializes in his petition should be particular in his proof, the rule refers to the substance of the charge and not to matters of no consequence which could not affect the meaning of what is alleged.—*Goode v. Central Coal & Coke Co.*, 166 S. W. 844.

#### XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 406 (Mo.App.) A defendant, who answers the petition and goes to trial, thereby waives, as provided by Rev. St. 1909, § 1804, the objection that the petition is multifarious.—*Kansas City Masonic Temple Co. v. Young*, 166 S. W. 838.

§ 412 (Tex.Civ.App.) Where defendant proceeded to trial as if issue had been properly joined upon all allegations in the answer, the objection that the defense pleaded was admitted because uncontroverted was waived, and could not be raised after an adverse verdict.—*Galveston, H. & S. A. Ry. Co. v. Pennington*, 166 S. W. 464.

§ 418 (Mo.App.) A defendant, who filed an answer after the overruling of his demurrer to the petition as insufficient to state a cause of action, does not thereby waive the objection.—*Gibson v. Pollock*, 166 S. W. 874.

§ 423 (Ky.) Where defendant made no motion and asked for no rule requiring a statement of account to be filed with the petition, he waived the right to demand that such statement be filed.—*Nuckels v. Robinson-Pettett Co.*, 166 S. W. 972.

§ 426 (Mo.App.) Where defendant was erroneously required to elect between a general denial and pleas of contributory negligence and assumed risk, its act in electing the general denial and going to trial did not waive its exception to the court's ruling in compelling it to elect.—*McDonald v. Central Illinois Const. Co.*, 166 S. W. 1087.

§ 433 (Ky.) A petition so fatally defective as not to support a judgment is not cured by verdict.—*Hall v. Huffman*, 166 S. W. 770.

#### PLEDGES.

See Garnishment, § 29.

#### POLICE POWER.

See Intoxicating Liquors, § 6.

#### POLICY.

See Insurance.

#### POLITICAL RIGHTS.

See Elections.

#### POSSESSION.

See Adverse Possession; Chattel Mortgages, §§ 147, 161; Gifts, § 47; Mortgages, § 182.

#### POST OFFICE.

See Contracts, § 26; Threats, §§ 1, 5.

#### POWERS.

See Principal and Agent, § 34.

**PRACTICE.**

For practice in particular actions and proceedings, see the various specific topics.

**PREMIUMS.**

See Insurance, §§ 183, 187, 654½.

**PRESCRIPTION.**

See Adverse Possession; Waters and Water Courses, § 152.

**PRESUMPTIONS.**

See Evidence, §§ 80, 83.

**PRINCIPAL AND ACCESSORY.**

See Criminal Law, §§ 59, 829.

**PRINCIPAL AND AGENT.**

See Attorney and Client; Brokers; Carriers, § 62; Corporations, §§ 80, 82, 90, 327-368, 426, 428; Evidence, § 237; Frauds, Statute of, § 129; Insurance, §§ 87-109, 559; Partnership, § 97.

**I. THE RELATION.****(A) Creation and Existence.**

§ 8 (Tex.Civ.App.) If the lease provided the landlord was to receive as rent one-fourth of the cotton raised, so that title to one-fourth of the cotton raised and gathered vested in him, then an agreement by him or his successor in title to the land, with the tenant to sell the landlord's part of the cotton, would be merely an appointment to do so as agent of the landlord.—Mason v. Ward, 166 S. W. 456.

**(B) Termination.**

§ 33 (Tex.Civ.App.) Agency of a tenant to sell the landlord's share of the cotton raised, not inuring to the financial benefit of the agent, can be revoked.—Mason v. Ward, 166 S. W. 456.

§ 34 (Tex.Civ.App.) A power of attorney, which merely empowered the agent to sell land and turn over the proceeds, the agent having no interest in the land, was not a power coupled with an interest, and hence was revocable.—Baker v. Heney, 166 S. W. 19.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) Powers of Agent.**

§ 106 (Ark.) If plaintiff authorized another to sell his cotton, the purchaser obtained a good title, though the agent afterwards wrongfully converted the purchase price to his own use.—Valentine v. Edwards, 166 S. W. 531.

§ 136 (Tex.Civ.App.) A seller of horses was not absolved from liability for fraudulent representations made by him, though he was acting as agent for another party.—Underwood v. Jordan, 166 S. W. 88.

§ 137 (Tex.Civ.App.) Plaintiff was not estopped to deny that its agent, a traveling salesman, had authority to allow defendants a discount on goods sold to them when defendant knew nothing of the agent's authority and was in no way misled by any act of plaintiff.—W. D. Cleveland & Sons v. Houston Sporting Goods Store, 166 S. W. 912.

**(D) Ratification.**

§ 169 (Tex.Civ.App.) One who authorized another to make contracts as agent for the sale of corporate stock cannot deny the agent's authority to make the particular contract entered into, where it ratified the form of the contract, and sought to recover on it in a cross-action, when sued for payments made under it.—Amicable Life Ins. Co. v. Kenner, 166 S. W. 462.

**(F) Actions.**

§ 189 (Ky.) In an action to recover a broker's commission, a petition alleging that plaintiff was employed to sell land by defendant through her agent and husband, without separately averring the agent's authority, held to sufficiently allege his authority.—Tyler v. Woerner, 166 S. W. 178.

§ 193 (Tex.Civ.App.) There being testimony of a revocation of an agency, which revocation, if made, would make defendant liable to plaintiff, it was error to instruct peremptorily for defendant.—Mason v. Ward, 166 S. W. 456.

**PRINCIPAL AND SURETY.**

See Appeal and Error, § 231; Assumpsit, Action of, § 26; Bail; Bills and Notes, §§ 92, 245; Bonds; Contracts, § 71; Costs, § 317; Estoppel, § 74; Executors and Administrators, §§ 523, 528, 530; Garnishment, § 29; Guaranty; Husband and Wife, § 133; Judgment, § 678; Mortgages, § 308; Replevin, § 123; Subrogation, §§ 1, 31; Trial, § 252; Trusts, §§ 380, 385.

**III. DISCHARGE OF SURETY.**

§ 100 (Mo.App.) Where a building contract contemplated that, in excavation filled ground might be encountered, and specified the prices for excavating it, such excavation was not an alteration of the contract discharging the contractor's sureties.—Hiller v. Daman, 166 S. W. 869.

Though building contract did not authorize changes in the work, sureties held not discharged by slight changes, where the bond executed by them provided that such changes and alterations might be made, not exceeding a specified cost.—Id.

**IV. REMEDIES OF CREDITORS.**

§ 142 (Mo.App.) A surety who binds himself in terms as a principal in the obligation thereby waives the rights of a surety, and is liable as a principal, and may not set up a defense arising out of the relation of principal and surety.—Minor v. Woodward, 166 S. W. 855.

**V. RIGHTS AND REMEDIES OF SURETY.****(C) As to Cosurety.**

§ 194 (Ky.) A surety who misleads his co-surety, preventing him from taking steps against the principal to protect himself from loss, is estopped to claim contribution, only if the principal was solvent and the cosurety has lost some advantage.—Morgan v. Morgan, 166 S. W. 602.

§ 194 (Ky.) Where sureties, who paid off the obligation of their principal, were given a worthless mortgage, they are entitled to a contribution against a surety who did not pay his share; it appearing that the principal was insolvent.—Hall v. Gleason, 166 S. W. 608.

**PRIORITIES.**

See Chattel Mortgages, §§ 138-153.

**PRISONS.**

See Jury, § 31.

**PRIVATE ROADS.**

See Easements.

**PRIVILEGE.**

See Witnesses, §§ 297, 308.

**PRIVILEGED COMMUNICATIONS.**

See Witnesses, § 208.

## PROBABLE CAUSE.

See Malicious Prosecution, § 21.

## PROBATE.

See Wills, §§ 221-400.

## PROBATE COURTS.

See Courts, § 199.

## PROCESS.

See Appeal and Error, § 909; Depositions, § 83; Eminent Domain, §§ 172, 185; Execution; Garnishment; Injunction.

## PROHIBITION.

See Appeal and Error, § 1221.

## I. NATURE AND GROUNDS.

§ 5 (Mo.App.) The court on application for prohibition cannot compel an inferior court to refrain from taking any particular action in a controversy before it, for the inferior court may act in any way, even erroneously, provided it has jurisdiction to act at all.—State ex rel. Lynch v. Taylor, 166 S. W. 1071.

§ 10 (Ky.) Where the circuit court has no jurisdiction of an appeal from the county court, the Court of Appeals may issue prohibition against the judge of the circuit court to restrain him from hearing and determining the appeal.—Commonwealth v. Yungblut, 166 S. W. 808.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 18 (Mo.App.) The office of prohibition is to prevent a court from assuming jurisdiction where it has none, and an application for the writ is not premature when made before the inferior court has acted.—State ex rel. Lynch v. Taylor, 166 S. W. 1071.

§ 26 (Mo.App.) Where a motion is made for a peremptory writ of prohibition notwithstanding the return, the return must be taken as true.—State ex rel. Lynch v. Taylor, 166 S. W. 1071.

## PROMISSORY NOTES.

See Bills and Notes.

## PROOF.

See Insurance, §§ 536-559.

## PROPERTY.

See Bastards, § 104; Constitutional Law, §§ 272-290; Dedication; Eminent Domain; Estates; Trade-Marks and Trade-Names.

## PROPOSITIONS.

See Appeal and Error, § 742.

## PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

## PROSTITUTION.

See Criminal Law, § 829; Disorderly House.

## PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 741-762; Trial, §§ 191-194.

## PROVOCATION.

See Homicide, §§ 42-52, 295.

## PROXIMATE CAUSE.

See Negligence, § 56; Railroads, § 425.

## PUBLIC DEBT.

See Counties, §§ 155-196; Highways, § 95; Schools and School Districts, § 99.

## PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 284-493.

## PUBLIC LANDS.

See Evidence, § 23.

## II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

### (F) Swamp and Overflowed Lands.

§ 61 (Ark.) A suit to cancel swamp land patents, on the ground that the assignment of the certificates of entry was void, was barred by laches, where the action was not started until about 30 years afterwards, during which time the patentees had paid large sums as taxes, and the evidence which might have cleared up the transaction had been lost.—Board of Levee Inspectors of Chicot County v. Southwestern Land & Timber Co., 166 S. W. 589.

The issuance of swamp land patents created a presumption that the proper state officer duly investigated the facts and issued them to the proper person, and the burden was on the party assailing them to show that the assignment of the certificates on which they were based was void and the patents issued to one not entitled thereto.—Id.

That board of levee inspectors, suing to cancel swamp land patents on the ground that the assignment of the certificates of entry issued to their predecessors was void, only recently learned of their rights, did not excuse their laches in not bringing suit for 30 years, where the transactions were of record and the facts could have been ascertained by diligence.—Id.

That the land covered by patents sought to be canceled by a levee district, on the ground that the assignment of the certificates of entry issued to it was void, was merely held in trust by it to secure a fund to pay subcontractors for levee work, made it inequitable to grant such relief after 30 years had elapsed, during which the evidence had been lost.—Id.

## III. DISPOSAL OF LANDS OF THE STATES.

§ 173 (Tex.Civ.App.) A purchase of school lands while Rev. St. 1895, art. 4218j, prescribing the requisites of an application to purchase, was in force is not invalidated by any mere inaccuracy in describing the classification of the land, as the law then in force did not require any statement of classification; and Acts 30th Leg. (1st Ex. Sess.) c. 20, § 6f, requiring the reservation of mineral rights, does not apply to the purchase.—Camp v. Smith, 166 S. W. 22.

§ 178 (Tex.Civ.App.) Time was necessarily of the essence of a contract to purchase on a certain date a section of the public free school land, the required three years occupancy of which had not been completed by two years, in view of the somewhat onerous conditions of occupancy imposed by law.—Sears v. Ainsworth, 166 S. W. 60.

Where plaintiff agreed to convey a section of public free school land on March 1st, the purchaser's failure to tender performance until July was an unreasonable delay, though he was ill up to about May 1st, in the absence of other circumstances excusing his failure to perform after recovery.—Id.

## V. SPANISH, MEXICAN, FRENCH, AND RUSSIAN GRANTS.

§ 198 (Tex.) In relation to property rights in that part of the Mexican state of Tamaulipas over which the state of Texas extended sovereignty on December 19, 1836, acquired before such sovereignty was extended, the treaty of

Guadalupe Hidalgo has the force of law in Texas.—State v. Gallardo, 166 S. W. 369.

The treaty of Guadalupe Hidalgo protects all titles to lands formerly within the Mexican state of Tamaulipas over which the sovereignty of Texas was extended, which were good against the Mexican government.—Id.

§ 209 (Tex.) Whatever rights were acquired by towns under grants of "ejidos" from the Spanish king, such grants did not convey an indefeasible title, and when the town was removed to another locality, and the public use of the lands was abandoned, the lands reverted to the sovereignty.—State v. Gallardo, 166 S. W. 369.

§ 210 (Tex.) Where land was sold by the governor of a Mexican state, now within the limits of the state of Texas, the approval of the Mexican government, required by its acts and regulations, held to be presumed.—State v. Gallardo, 166 S. W. 369.

§ 221 (Tex.) Act Feb. 10, 1852 (Laws of 1851-52, c. 69), requiring the field notes of surveys made prior to the passage of that act to be returned to the general land office, does not relate to nor affect Mexican titles or surveys, but only refers to surveys made under the laws of the republic or state of Texas.—State v. Gallardo, 166 S. W. 369.

§ 223 (Tex.) Where lands between the Nueces and Rio Grande rivers had been sold, by a description sufficient to identify them, under the authority of the governor of the Mexican state of Tamaulipas, the purchase price paid and a survey ordered, prior to the extension of the sovereignty of Texas over such territory, the purchasers had acquired a perfected right to the legal title, which was good against the Mexican government and will be protected by the Texas court.—State v. Gallardo, 166 S. W. 369.

## PUBLIC SCHOOLS.

See Schools and School Districts.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Gas, § 14; Railroads; Street Railroads; Telegraphs and Telephones.

## PUBLIC USE.

See Dedication; Eminent Domain.

## PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 206-247.

## PUFFING.

See Corporations, § 80.

## PUNISHMENT.

See Criminal Law, §§ 1206, 1208; Rape, § 64.

## PUNITIVE DAMAGES.

See Damages, § 87.

## QUANTUM MERUIT.

See Assumpsit, Action of; Work and Labor.

## QUASHING.

See Indictment and Information, § 187.

## QUESTIONS OF LAW AND FACT.

See Criminal Law, §§ 741-762; Trial, §§ 139-145.

## QUIETING TITLE.

See Appeal and Error, § 1172; Pleading, § 364.

## I. RIGHT OF ACTION AND DEFENSES.

§ 12 (Ky.) Where a common grantor, after conveying to plaintiff the minerals under a

tract of lands, afterwards conveyed the land to defendant, without exception or reservation of the minerals, plaintiff could maintain an action to quiet title without being in actual possession.—Kentonia Corporation v. Boring Land & Mining Co., 166 S. W. 780.

## RAILROADS.

See Appeal and Error, §§ 882, 1040, 1050; Carriers; Commerce, §§ 27, 69; Eminent Domain, §§ 10, 133, 141, 145, 204; Evidence, §§ 20, 471, 507, 589½; Master and Servant; Negligence, §§ 24, 33, 56, 124; Nuisance, § 3; Street Railroads; Trial §§ 124, 125, 191, 252; Waters and Water Courses, § 128.

## VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 95 (Tex.Civ.App.) The contention that where a railroad crosses a public highway it is not required to keep the approaches in repair if properly constructed, unless the approach constitutes a part of the track or crossing proper, is untenable.—Pecos & N. T. Ry. Co. v. Huskey, 166 S. W. 498.

## X. OPERATION.

### (C) Companies and Persons Liable for Injuries.

§ 259 (Tex.Civ.App.) One who leased a portion of a right of way of a railroad company and assumed all damage caused by the negligence of the company is not required to pay to the company damages recovered from it by the owner of a house on the right of way, who was not holding under the lessee, and of which house the company had never put the lessee in possession, for the negligent burning of the house.—Houston & T. C. R. Co. v. Eaves, 166 S. W. 453.

### (F) Accidents at Crossings.

§ 303 (Tex.Civ.App.) The failure of a railroad to construct a temporary crossing, while the regular crossing upon which plaintiff was injured was torn up because of repairs, constituted negligence, if such a temporary crossing might easily have been constructed on either side of the regular crossing.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

§ 326 (Tex.Civ.App.) The issue raised by the action of the driver of a horse and buggy in attempting to cross a railroad, which was torn up because of repairs, at the invitation of the foreman in charge, was one of contributory negligence, and not assumption of risk.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

§ 327 (Mo.App.) A traveler about to cross railroad tracks is bound to stop, look, and listen only when he can neither see nor hear, and where, from a point 40 feet from the crossing, he saw that there was no train within between 700 and 900 feet, he is not bound to stop before proceeding on the tracks.—Lagarce v. Missouri Pac. Ry. Co., 166 S. W. 1063.

§ 327 (Mo.App.) A railroad crossing, being a dangerous place, a person, before venturing upon same, must both look and listen, at a convenient distance from the crossing and where the look will be effective.—Osborn v. Wabash R. Co., 166 S. W. 1118.

§ 330 (Mo.App.) While, under Rev. St. 1909, § 3140, requiring the giving of signals at a crossing, evidence of an injury where such signals are not given makes a prima facie case, yet the rule of contributory negligence is not abrogated.—Osborn v. Wabash R. Co., 166 S. W. 1118.

It is only where a person is paying attention and can neither see nor hear anything indicating that a train is coming that he can pre-

sume, without negligence, that if one were coming, the signals would be given.—Id.

Plaintiff's intestate, a rural mail carrier, being in an inclosed cart with his ears partly muffled, who on a foggy day drove upon a railroad crossing in front of an approaching train, *held* guilty of contributory negligence precluding recovery, though the statutory signals were not given.—Id.

§ 340 (Tex.Civ.App.) A railroad foreman, in charge of repair work at a crossing, was the representative of the company, to give notice of its condition to travelers ignorant thereof, and the company was liable for injuries to a traveler, if due to negligence of the foreman in stating that he could cross over.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

§ 344 (Tex.Civ.App.) Untraversed allegations in the answer, that deceased, run down at a crossing, did not stop, look, and listen, though warned by reflections from the headlight of the approaching train, *held* not to show him to have been guilty of contributory negligence.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 344 (Tex.Civ.App.) Petition, in an action for injuries while riding over a railroad crossing by the horse stumbling and throwing plaintiff to the ground, *held* not objectionable as not alleging in what way plaintiff sustained damages alleged.—Pecos & N. T. Ry. Co. v. Huskey, 166 S. W. 493.

§ 346 (Tex.Civ.App.) In an action for wrongful death of one run down at a crossing, the burden of establishing deceased's contributory negligence is upon the railroad company, and does not shift upon its establishing a prima facie case.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 348 (Ky.) In an action for the death of a pedestrian, struck by a train, evidence *held* to support a finding that decedent was not guilty of contributory negligence.—Chesapeake & O. Ry. Co. v. Warnock's Adm'r, 166 S. W. 179.

§ 348 (Mo.App.) The courts will declare one run down at a railway crossing contributorily negligent only where the testimony is very clear and practically uncontradicted.—Lagarce v. Missouri Pac. Ry. Co., 166 S. W. 1063.

§ 350 (Mo.App.) In an action for the wrongful death of plaintiff's husband, run down at defendant's crossing, the question of his contributory negligence *held* for the jury.—Lagarce v. Missouri Pac. Ry. Co., 166 S. W. 1063.

§ 350 (Tex.Civ.App.) It cannot be said, as matter of law, that one who, at night, saw a passenger train, which was 60 or 70 feet from the crossing, and approaching at a speed two or three times the 6 miles per hour allowed by ordinance, when he was 15 feet from the crossing, was guilty of contributory negligence in increasing his speed and attempting to cross ahead of it.—Gulf, C. & S. F. Ry. Co. v. Gaddis, 166 S. W. 124.

§ 350 (Tex.Civ.App.) In an action for wrongful death of one run down at a railroad crossing, the question of his contributory negligence *held*, under the evidence, for the jury.—Galveston, H. & S. A. Ry. Co. v. Pennington, 166 S. W. 464.

§ 350 (Tex.Civ.App.) Whether a railroad company was guilty of negligence proximately resulting in injuries to the driver of a horse, which ran away at a crossing which was torn up because of repairs, and whether the driver was guilty of contributory negligence or assumed the risk, *held* to be questions for the jury.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

§ 351 (Tex.Civ.App.) A charge permitting recovery for injuries sustained from plaintiff's horse running away at a railroad crossing which was torn up, if plaintiff relied upon the representations of defendant's foreman that

he could cross, was not defective, because not submitting knowledge of facts putting plaintiff on inquiry.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

#### (G) Injuries to Persons on or near Tracks.

§ 355 (Ark.) Where railroad contractors' camp cars were placed close to the tracks with the company's consent, convict hired to such contractors *held* not a trespasser in walking upon the track while going from one car to another, and the railroad employes were bound to keep an efficient lookout.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 367 (Ky.) Operators of trains in yards where the presence of persons on the tracks should reasonably be anticipated must maintain a lookout.—Louisville & N. R. Co. v. Taylor's Adm'r, 166 S. W. 199.

§ 376 (Ark.) Under the law requiring train operatives to keep a lookout for trespassers, they, discovering a light ahead on the track, should use care in approaching it.—Chicago, R. I. & P. Ry. Co. v. Gunn, 166 S. W. 568.

§ 392 (Ky.) A railroad company was not liable for the act of trainmen in maliciously throwing scalding water upon plaintiff from the engine while he was walking along the right of way; the act not having been performed in the discharge of any duty which the trainmen owed to the company.—Chesapeake & O. Ry. Co. v. Ford, 166 S. W. 605.

§ 397 (Ark.) In an action for injuries to convict hired to railroad contractors, evidence concerning a place for washing clothes, across the tracks from the camp cars, *held* competent to show the situation and the custom as to the use of the tracks, though he was not crossing the tracks to go to such place when struck by a train.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 398 (Ark.) Evidence *held* to authorize recovery for death of a trespasser on a speeder, killed by a train without a headlight; there having been no warning, except a crossing signal, and no effort to stop the train, though the light on the speeder was seen when a quarter of a mile away.—Chicago, R. I. & P. Ry. Co. v. Gunn, 166 S. W. 568.

§ 400 (Ark.) Evidence *held* to make questions for the jury as to the negligence of employes in charge of a train and the contributory negligence of a convict hired to railroad contractors in walking on the ends of the ties in going from one of the camp cars to another.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

#### (H) Injuries to Animals on or near Tracks.

§ 411 (Tex.Civ.App.) Where an animal is killed at a point where a railroad company is not required to fence its tracks, the owner must show negligence by the company in order to recover therefor.—International & G. N. Ry. Co. v. Leuschner, 166 S. W. 416.

§ 412 (Tex.Civ.App.) Though a railroad company had fenced its right of way sufficiently to prevent stock from getting upon the track, its duty to keep its right of way sufficiently inclosed was not thereafter discharged by the exercise of ordinary care to maintain the fence.—Chicago, R. I. & G. Ry. Co. v. Porter, 166 S. W. 37.

§ 425 (Tex.Civ.App.) The railroad company's negligence must be the proximate cause of the injury to stock on the track, to entitle the owner to recover therefor.—International & G. N. Ry. Co. v. Leuschner, 166 S. W. 416.

§ 441 (Tex.Civ.App.) Where a horse was killed upon the right of way, it is presumed that defendant's train ran him down, and it has the burden of proving that the train was owned and operated by another company.—Chicago, R. I. & G. Ry. Co. v. Porter, 166 S. W. 37.



§ 441 (Tex.Civ.App.) The burden is on the owner to show negligence by the trainmen resulting in injury to stock on the track, and not on the railroad to show exoneration.—International & G. N. Ry. Co. v. Leuschner, 166 S. W. 416.

§ 443 (Tex.Civ.App.) Evidence in an action against a railroad company for injury to the stock on the track *held* to show that the trainmen were not negligent in failing to blow the whistle or sound the bell or keep a lookout.—International & G. N. Ry. Co. v. Leuschner, 166 S. W. 416.

§ 443 (Tex.Civ.App.) Evidence, in an action for killing a mule on a railroad track, *held* to sustain a finding that the engineer could have seen the mule in time to stop and did not attempt to do so.—Galveston, H. & H. Ry. Co. v. Leggio, 166 S. W. 698.

#### (D) Fires.

§ 479 (Ark.) Under Laws 1907, p. 336, a plaintiff may recover for loss by fire set by locomotive without proof of negligence, even though he alleged negligence in his complaint.—Cairo, T. & S. R. Co. v. Brooks, 166 S. W. 167.

### RAPE.

See Criminal Law, §§ 678, 720, 783½, 829.

## II. PROSECUTION AND PUNISHMENT.

#### (B) Evidence.

§ 38 (Ark.) Testimony that defendant, tried for carnal abuse of a girl, told witnesses his wife was jealous of the girl, is irrelevant and incompetent.—Fakes v. State, 166 S. W. 963.

#### (C) Trial and Review.

§ 59 (Ark.) Requested instructions that, before accused could be convicted of assault with intent to rape, the jury must believe that he assaulted prosecuting witness with intent to use whatever force was necessary for sexual intercourse with her, and also charging the negative of that proposition, *held* correct.—Benson v. State, 166 S. W. 549.

§ 59 (Tex.Cr.App.) In a prosecution for assault with intent to rape a girl under 15 years of age, it was not necessary for the court to define "force" in the charge, since the consent of the girl would be no defense.—Scott v. State, 166 S. W. 729.

Where the court submitted the issue of aggravated assault, such assault should have been defined as being, under the circumstances of the case, the indecent and improper fondling of the person of a female under 15.—*Id.*

#### (D) Sentence and Punishment.

§ 64 (Tex.Cr.App.) Confinement in the penitentiary for nine years, which is within the limits fixed by statute, *held* not excessive for rape on a young girl.—Lafoon v. State, 166 S. W. 1168.

### RATIFICATION.

See Principal and Agent, § 169.

### REAL ACTIONS.

See Partition; Quieting Title; Trespass to Try Title.

### RECEIVERS.

See Account Stated, § 6; Adverse Possession, § 46; Appeal and Error, § 440; Master and Servant, § 59; Stipulations, § 18.

## IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

#### (A) Administration in General.

§ 95 (Mo.App.) Until qualified, a receiver cannot bind the estate, and even thereafter he

cannot do so without an order of court or its approval.—Stone v. St. Louis Union Trust Co., 166 S. W. 1091.

§ 98 (Mo.App.) A receiver holds funds in his hands subject to the orders of the court having supervision over the receivership, and all persons dealing with him are chargeable with knowledge thereof.—Stone v. St. Louis Union Trust Co., 166 S. W. 1091.

§ 101 (Mo.App.) A trust company with whom the receiver of a bank deposited the funds of the bank cannot claim that the deposit was an indemnity against its possible liability on the receiver's bond and defeat payment of interest on the deposit in accordance with Rev. St. 1909, § 1124.—Stone v. St. Louis Union Trust Co., 166 S. W. 1091.

A contract between a receiver and his surety, whereby he agreed to deposit the receivership funds with the surety and to waive payment of interest, would be void.—*Id.*

A contract whereby a receiver agreed to deposit receivership funds with defendant trust company in consideration of its becoming surety on his bond was not a waiver of his right to collect interest thereon, where the contract specially declared that the receiver should be required to do nothing to the disadvantage of the trust.—*Id.*

### RECEIVING STOLEN GOODS.

See Criminal Law, § 742.

### RECEPTION OF EVIDENCE.

See Criminal Law, § 678; Trial, §§ 45-105.

### RECORDS.

See Abatement and Revival, § 75; Appeal and Error, §§ 499-708, 907, 917, 982; Criminal Law, §§ 429, 1087-1124, 1134; Judgment, § 273; Public Lands, § 61.

### RECOUNT.

See Elections, § 299.

## REFORMATION OF INSTRUMENTS.

See Appeal and Error, § 1172; Cancellation of Instruments; Decds, § 114; Limitation of Actions, §§ 19, 170.

## I. RIGHT OF ACTION AND DEFENSES.

§ 16 (Ky.) Where an instrument fails to embody the actual agreement of the parties because of mistake common to both parties, or because of mistake on one side and fraud or inequitable conduct on the other, reformation is the proper remedy.—Lindenberger v. Rowland, 166 S. W. 242.

§ 16 (Tex.Civ.App.) A deed cannot be reformed by the addition of a stipulation therein, unless the stipulation was omitted by fraud, accident, or mistake.—Luckenbach v. Thomas, 166 S. W. 99.

§ 18 (Tex.Civ.App.) Where the parties to a contract discovered before its execution that a stipulation was omitted therefrom, but they believed, on the advice of an attorney, that the stipulation was binding, the contract would not be reformed to include the stipulation, unless either party was misled by the other, or by the intentional misrepresentation of the attorney.—Luckenbach v. Thomas, 166 S. W. 99.

## II. PROCEEDINGS AND RELIEF.

§ 36 (Ky.) A petition for reformation of an instrument must show in clear and concise language the grounds of reformation, the agreement actually made, and the agreement which the

parties intended to make.—*Lindenberg v. Rowland*, 166 S. W. 242.

A petition for the reformation of an instrument on the ground of mutual mistake must clearly allege such mistake or circumstances from which it can be readily inferred.—*Id.*

Petition for the reformation of a covenant of general warranty against incumbrances contained in a deed on the ground of mutual mistake held insufficient.—*Id.*

§ 47 (Ky.) Where an instrument is drawn with intent to execute a definite agreement previously made relating to something within the contemplation of the parties, but which by the mistake of the scrivener, either as to law or fact, does not express such intention, the instrument may be reformed by enforcing specific performance of the agreement according to the real intention of the parties.—*Lindenberg v. Rowland*, 166 S. W. 242.

## REFORMATORIES.

See False Imprisonment.

## REFRESHING MEMORY.

See Witnesses, § 255.

## REHEARING.

See Appeal and Error, §§ 838, 845.

## REINSTATEMENT.

See Insurance, § 365.

## RELEASE.

See Bills and Notes, § 256; Compromise and Settlement; Contracts, § 54; Novation, § 5; Vendor and Purchaser, § 267.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 59 (Mo.) Where, in an action for injuries consisting of the breaking of plaintiff's arm, he sought to set aside a release for misrepresentation of defendant's physician that the bones had united, an instruction authorizing the vacation of the release, in case the physician had falsely represented that plaintiff's arm would be good and strong within six months, held erroneous.—*Wingfield v. Wabash R. Co.*, 166 S. W. 1037.

## RELEVANCY.

See Evidence, §§ 118-142.

## RELIGIOUS SOCIETIES.

See Taxation, § 244.

## REMAINDERS.

§ 14 (Ky.) A contingent remainderman has the right to convey his interest.—*Bank of Taylorsville v. Vandyke*, 166 S. W. 1024.

§ 17 (Ark.) A court of equity will grant relief to protect the interests of remaindermen, whether vested or contingent, against a wrongful permanent encroachment.—*Evans v. Pettus*, 166 S. W. 955.

## REMOVAL OF CAUSES.

See Venue, §§ 46, 75.

## REPAIRS.

See Landlord and Tenant, § 150.

## REPEAL.

See Statutes, §§ 156, 158, 161.

## REPLEVIN.

### IV. PLEADING AND EVIDENCE.

§ 72 (Mo.App.) Evidence held to sustain a finding that defendant wrongfully detained lithographic plates manufactured by him for plaintiff authorizing a recovery by plaintiff of the plates.—*S. Viviano & Bros. v. Columbia Can Co.*, 166 S. W. 1082.

### VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 106 (Mo.App.) One who wrongfully converted personalty of another cannot complain of a judgment for the value of the property instead of a judgment for its return.—*S. Viviano & Bros. v. Columbia Can Co.*, 166 S. W. 1082.

### VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 123 (Mo.App.) Where defendant obtains a judgment in replevin against plaintiff and the sureties on the replevin bond, and accepts in payment a check signed by a corporation by plaintiff as president, and obtains the money thereon, and notifies the sureties that they are released, thereby releases the sureties, though afterwards compelled to refund to the corporation.—*Lewis v. Smith*, 166 S. W. 818.

## REQUESTS.

See Criminal Law, §§ 824-834; Trial, §§ 253-260.

## RESCISSION.

See Cancellation of Instruments; Contracts, § 94; Exchange of Property, §§ 3, 8; Sales, §§ 128, 130; Vendor and Purchaser, §§ 33, 82-127.

## RES GESTÆ.

See Criminal Law, §§ 864-868; Evidence, §§ 118-123.

## RETROSPECTIVE LAWS.

See Statutes, § 267.

## RETURN.

See Elections, § 255; Prohibition, § 26.

## REVENUE.

See Taxation.

## REVIEW.

See Appeal and Error; Criminal Law, §§ 1004-1184.

## REVOCATION.

See Bills and Notes, § 348; Principal and Agent, § 33; Wills, §§ 179, 183.

## RIGHT OF WAY.

See Easements.

## RISKS.

Assumption of, see Master and Servant, §§ 203-218, 264, 288.

## ROAD DISTRICTS.

See Highways, §§ 90, 95.

## ROADS.

See Highways.

## SAFETY APPLIANCE ACT.

See Master and Servant, § 264.

## SALES.

See Appeal and Error, § 1068; Brokers; Deeds; Evidence, § 429; Execution, § 275; Infants, § 37; Judicial Sales; Logs and Logging, § 3; Principal and Agent, §§ 33, 106, 186, 189; Vendor and Purchaser.

## I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1 (Ky.) A contract for the manufacture and sale of ties *held* not objectionable for indefiniteness as to description of the country from which the ties were to come, where plaintiff and defendant understood with reasonable certainty the boundary covered by the contract.—*Mitchell Taylor Tie Co. v. Whitaker*, 166 S. W. 193.

§ 22 (Ark.) There can be no binding contract of sale until the minds of the parties have met, and the meeting of an offer by counter offer will create no such contract.—*Porter v. Gosnell*, 166 S. W. 533.

Where defendant offered to sell a car of oats at 42 cents, if plaintiff would accept the city scale weights, plaintiff's reply, requesting defendant to rush the shipment, but demanding an affidavit attached to the scale weights, would not create a binding contract.—*Id.*

§ 38 (Tex.Civ.App.) A buyer of horses induced to make the contract by reason of false representations, was entitled to recover, in an action for a rescission, irrespective of any effort on his part to ascertain the truth of the representations.—*Underwood v. Jordan*, 166 S. W. 88.

§ 52 (Ky.) In an action for the price of goods which defendant claimed were sold to his son and not himself, evidence *held* to warrant a verdict for plaintiff.—*Keeton v. Smith*, 166 S. W. 610.

§ 53 (Tex.Civ.App.) Evidence *held* insufficient to take to the jury the question of fraudulent misrepresentations by the seller of a stock of jewelry as to the quality.—*Bixler v. Rinn*, 166 S. W. 96.

## III. MODIFICATION OR RESCISSION OF CONTRACT.

## (C) Rescission by Buyer.

§ 126 (Tex.Civ.App.) Where a contract of sale stipulated that, if the buyer was dissatisfied at the expiration of 90 days, the seller would repay the cash and return the notes given in payment, the buyer was not required to call for a repayment and a return of the notes before the expiration of the 90 days.—*Watson v. Rice*, 166 S. W. 106.

Where a contract of sale gave the buyer a specified time in which to express his dissatisfaction, and provided that on so doing the seller would refund the price paid and return the purchase-money notes, the buyer was not required to express his dissatisfaction before the specified time, though he acquired before that time knowledge of the facts entitling him to rescind.—*Id.*

§ 130 (Tex.Civ.App.) In purchaser's action to rescind for false representations, petition *held* to allege sufficiently the purchaser's reliance on the representations, and that they were a material inducement, to admit evidence of the representations.—*Underwood v. Jordan*, 166 S. W. 88.

Instruction to find for buyer for rescission and the amount of purchase price, if false and fraudulent representations were made by the seller, *held* not objectionable, as failing to hypothesize plaintiff's reliance on the representations and damage therefrom.—*Id.*

## IV. PERFORMANCE OF CONTRACT.

## (C) Delivery and Acceptance of Goods.

§ 150 (Ky.) A contract for the manufacture, purchase, and sale of railroad ties by plaintiff

to defendant *held* mutual and to bind plaintiff to exercise reasonable diligence to produce and deliver to defendant all ties manufactured by him in the territory specified, and defendant was bound to receive all ties so delivered.—*Mitchell Taylor Tie Co. v. Whitaker*, 166 S. W. 193.

§ 168 (Tex.Civ.App.) One who ordered an automobile of a certain make and color, with certain equipment and with the buyer's initials thereon, has the right to inspect the car before accepting it, and delivery thereof could not be made until after the buyer or her authorized agent had had reasonable opportunity to make such inspection.—*Lange v. Interstate Sales Co.*, 166 S. W. 900.

## V. OPERATION AND EFFECT.

## (A) Transfer of Title as Between Parties.

§ 202 (Mo.App.) Where a sale of personal property is for cash, the title does not pass if the purchase money is not paid in accordance with the terms of the contract, and in such case the seller may reclaim his property, provided he has not waived cash payment or been guilty of laches or conduct estopping him from so doing.—*Skinner & Kennedy Stationery Co. v. Lammert Furniture Co.*, 166 S. W. 1079.

## VII. REMEDIES OF SELLER.

## (C) Recovery of Goods Delivered or Proceeds Thereof.

§ 301 (Mo.App.) Rev. St. 1909, § 2191, providing that personal property shall be subject to execution on a judgment against the buyer for the purchase price, and shall not be exempt except in the hands of an innocent purchaser for value, merely removes such property from the operation of the exemption law, and does not create a lien in favor of the seller.—*Skinner & Kennedy Stationery Co. v. Lammert Furniture Co.*, 166 S. W. 1079.

§ 316 (Mo.App.) Rev. St. 1909, § 2887, providing that no sale of goods, where possession is delivered, shall be subject to condition as against creditors or subsequent good-faith purchasers of the buyer, unless such condition be evidenced by writing, executed, acknowledged, and recorded, has no application to the avoidance of a cash sale for nonpayment.—*Skinner & Kennedy Stationery Co. v. Lammert Furniture Co.*, 166 S. W. 1079.

## (B) Actions for Price or Value.

§ 356 (Tex.Civ.App.) In an action for the purchase price of an automobile, where the plaintiff claimed delivery to the children of defendant as her agents, testimony as to the anxiety of the children to obtain possession of the car had no probative value and was improperly admitted.—*Lange v. Interstate Sales Co.*, 166 S. W. 900.

## (F) Actions for Damages.

§ 370 (Ky.) Where defendant refused to receive certain ties which it was bound to receive under a contract for the manufacture and sale thereof, and they were afterwards lost by a rise of the river, plaintiff was entitled to recover their value.—*Mitchell Taylor Tie Co. v. Whitaker*, 166 S. W. 193.

§ 384 (Ky.) Where defendant failed to accept such ties as plaintiff could deliver under a contract obligating defendant to take all of such ties from a specified district, plaintiff's measure of damages was the difference between the contract price and the market price at the place of delivery.—*Mitchell Taylor Tie Co. v. Whitaker*, 166 S. W. 193.

## VIII. REMEDIES OF BUYER.

## (A) Recovery of Price.

§ 397 (Mo.App.) In an action upon an account, evidence *held* sufficient to sustain a judg-

ment for plaintiff.—Wittenberg v. Fisher, 166 S. W. 1106.

(C) Actions for Breach of Contract.

§ 411 (Ky.) A petition in an action for breach of contract to sell plaintiff buttermilk from 37 cows from June 1, 1909, until the contract was terminated by 90 days' notice held to allege a good cause of action by alleging defendant's breach thereof by refusing, without notice, to furnish buttermilk after April 1, 1911, resulting in plaintiff losing his customers.—O'Hara v. Graham, 166 S. W. 233.

§ 416 (Ky.) In an action for breach of a contract to deliver wheat at threshing time at 80 cents per bushel, evidence that, several weeks after threshing, the market price was \$1 per bushel was inadmissible.—Troendle v. Steger, 166 S. W. 779.

§ 417 (Ky.) In an action for breach of contract to furnish plaintiff buttermilk, evidence held to show that defendant agreed to furnish buttermilk to plaintiff in 1911, and without notice of his intention to terminate the contract refused in April, 1911, and thereafter to deliver any more buttermilk to plaintiff.—O'Hara v. Graham, 166 S. W. 233.

§ 418 (Ky.) In an action for breach of a contract to deliver wheat at threshing time for 80 cents per bushel, plaintiff was only entitled to recover nominal damages on proof that the market value of wheat at that time was only 78 cents.—Troendle v. Steger, 166 S. W. 779.

(D) Actions and Counterclaims for Breach of Warranty.

§ 441 (Ky.) In an action for the unpaid price of machinery, evidence held not to show a warranty of the machinery by the seller.—Larkin v. Heilman Mach. Co., 166 S. W. 183.

## SATISFACTION.

See Compromise and Settlement; Release.

## SCHOOLS AND SCHOOL DISTRICTS.

See Constitutional Law, § 70; Counties, §§ 155, 161, 183, 195, 213; Evidence, § 23; Public Lands, §§ 173, 178; Statutes, §§ 96, 122.

## II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 22 (Ark.) Acts 1911, p. 81, permitting two or more school districts to be organized into a single consolidated school district, did not repeal Acts 1909, p. 948, section 1 of which permits the people of any given territory in a county to be organized into a single school district, except that Act No. 116 now provides exclusive method for consolidating common school districts as entireties.—Eubanks v. Futrell, 166 S. W. 172.

§ 33 (Ark.) Special school districts may be established by the consolidation of common school districts as entireties, or by taking only parts of common school districts and consolidating such parts.—Eubanks v. Futrell, 166 S. W. 172.

(D) District Property, Contracts, and Liabilities.

§ 72 (Ark.) Kirby's Dig. § 7643, does not invalidate a contract permitting a secret society to use a school building as a lodgeroom, provided the use does not interfere with the school or injure the building.—Cost v. Shinault, 166 S. W. 740.

Kirby's Dig. § 7614, vests in school directors discretion as to arrangements for the interests of the district, and a contract approved by the voters for the use of the school building as a lodgeroom for a secret society is not invalid, where the use will not interfere with the school or injure the building.—Id.

(E) District Debt, Securities, and Taxation.

§ 99 (Tex.) Under the constitutional provision authorizing additional taxes for the erection of free public schools, Rev. St. 1911, art. 2857, authorizing the imposition of such additional taxes for the purchase of sites and the issuance of bonds for that purpose, is valid.—Glass v. Pool, 166 S. W. 375.

(E) Pupils, and Conduct and Discipline of Schools.

§ 167 (Ky.) Text-Book Commission Act 1914, § 14, providing that retail dealers shall receive 15 per cent. of the retail price, held, in view of sections 11 and 18, to merely fix a maximum which the text-book commission may reduce upon proper showing, and so the act is not invalid as unreasonably restricting competition by publishers.—Bowman v. Hamlett, 166 S. W. 1008.

## SECONDARY EVIDENCE.

See Evidence, §§ 157-178.

## SEDUCTION.

See Criminal Law, §§ 361, 419, 420, 595, 780, 811; Witnesses, §§ 337, 340.

## II. CRIMINAL RESPONSIBILITY.

§ 40 (Tex. Cr. App.) In a prosecution for seduction, evidence that prosecutrix's mother was dead was admissible.—Gillespie v. State, 166 S. W. 135.

§ 40 (Tex. Cr. App.) On a trial for seduction, letters written by the prosecutrix long after the offense, and of little importance, were not admissible.—Creacy v. State, 166 S. W. 162.

§ 42 (Tex. Cr. App.) On an issue as to prosecutrix's reputation for chastity at the time of her alleged seduction under promise of marriage, evidence that she had a difficulty with a man and called him a damn son of a bitch was admissible.—Gillespie v. State, 166 S. W. 135.

§ 46 (Tex. Cr. App.) In a prosecution for seduction under promise of marriage, evidence of defendant's conduct toward prosecutrix, both prior and subsequent to the seduction, held sufficient to corroborate her testimony that he seduced her because of his promise to marry her.—Gillespie v. State, 166 S. W. 135.

In a prosecution for seduction under promise of marriage, it is not necessary that the seduced woman be corroborated in each and every particular of the elements necessary to constitute the offense.—Id.

§ 50 (Tex. Cr. App.) Evidence held to require a finding that the promise by which prosecutrix was induced to yield her person on the first occasion was not conditioned on her becoming pregnant from the intercourse, so that the court did not err in refusing to submit the question of such alleged conditional promise.—Gillespie v. State, 166 S. W. 135.

Instructions held to properly state the law with reference to corroboration of prosecutrix as an accomplice, and did not tend to induce the jury to believe that the burden was not on the state to corroborate prosecutrix.—Id.

## SELF-DEFENSE.

See Death, §§ 21, 104; Homicide, § 300.

## SENTENCE.

See Criminal Law, § 1001; Rape, § 64.

## SEPARATE ESTATE.

See Husband and Wife, §§ 119, 133.

## SEPARATION.

See Husband and Wife, §§ 279, 281.

**SERVANTS.**

See Master and Servant.

**SERVICES.**

See Work and Labor.

**SERVITUDE.**

See Easements.

**SET-OFF AND COUNTERCLAIM.****II. SUBJECT-MATTER.**

§ 22 (Tex.Civ.App.) In an action for the wrongful killing of a horse, the defendant cannot set off damages arising from trespass committed by the horse and his keep after former trespass, since the statute relating to set-off does not cover disconnected claims for damages arising in tort.—Dees v. Thompson, 166 S. W. 53.

**SETTING ASIDE.**

See Appeal and Error, § 1221; Judgment, §§ 140, 153, 403.

**SETTLEMENT.**

See Compromise and Settlement; Release.

**SIGNALS.**

See Railroads, § 330.

**SIGNATURES.**

See Appeal and Error, § 560; Banks and Banking, § 148; Pleading, §§ 288, 290.

**SNOW.**

See Municipal Corporations, § 822.

**SOCIETIES.**

See Associations.

**SPANISH GRANTS.**

See Public Lands, § 209.

**SPECIAL LAWS.**

See Statutes, §§ 93, 96.

**SPECIFIC PERFORMANCE.**

See Judgment, § 570; Reformation of Instruments, § 47.

**L. NATURE AND GROUNDS OF REMEDY IN GENERAL.**

§ 6 (Tex.Civ.App.) Under an agreement whereby, in consideration that plaintiff would obtain land at a low price, defendant was to convey an interest to plaintiff and another when a certain amount was paid or sales of land and timber equaled that amount, it was not essential to the validity of the contract or to plaintiff's right to specific performance that there should be reciprocal obligation or mutuality of remedy, where plaintiff had performed his part by procuring the land at the price set.—Johnson v. Mansfield, 166 S. W. 927.

§ 12 (Tex.Civ.App.) Under contract whereby plaintiff and W., upon the happening of certain conditions, were to have a conveyance of a one-half interest in lands, *held*, that plaintiff did not lose his right to specific performance merely because W. by accepting a settlement from the defendants could not be properly joined as a party plaintiff.—Johnson v. Mansfield, 166 S. W. 927.

**II. CONTRACTS ENFORCEABLE.**

§ 29 (Tex.Civ.App.) A contract to sell a place consisting of four lots in a certain town, it appearing that vendor owned only one place in that town which consisted of four lots, describes the property with sufficient certainty to entitle the purchaser to specific performance.—Beaton v. Fussell, 166 S. W. 458.

§ 32 (Ky.) An executory contract, upon which only one of the parties is bound, and under which the party not bound has not acted, is not enforceable in equity by either party.—Volz v. Scully, 166 S. W. 1015.

§ 35 (Tex.Civ.App.) Where the husband of the owner of land contracted for its sale, the purchaser is, not entitled to specific performance, unless he shows that the owner's husband was acting as her agent, or that she knew he was so acting and ratified the contract.—Ross v. Blunt, 166 S. W. 913.

**III. GOOD FAITH AND DILIGENCE.**

§ 97 (Tex.Civ.App.) Purchasers are not entitled to specific performance of a contract for the sale of land, unless they have tendered performance.—Ross v. Blunt, 166 S. W. 913.

§ 97 (Tex.Civ.App.) Under an agreement whereby defendants purchased lands in which plaintiff and W. were to have a one-half interest on payment of \$1,500 or after sales of timber or parts of the land had equaled that amount, *held* that, after a settlement with W. and a sale to him for an amount in excess of \$1,500, plaintiff might maintain an action for specific performance without tender.—Johnson v. Mansfield, 166 S. W. 927.

**IV. PROCEEDINGS AND RELIEF.**

§ 105 (Tex.Civ.App.) Under a contract executed in 1904 giving plaintiff a certain interest in land and providing that he should have a deed therefor when the timber cut or the land sold to others amounted to \$1,500, *held*, that the time required to cut and sell timber or to sell the land excused plaintiff from not seeking specific performance of the contract before 1910.—Johnson v. Mansfield, 166 S. W. 927.

§ 106 (Tex.Civ.App.) The wife of a purchaser is not a necessary party to a suit for specific performance of a contract which did not require the deed to be made to her or the vendor's lien notes to be executed by her, although the purchaser requested the vendor to execute a deed to her.—Beaton v. Fussell, 166 S. W. 458.

§ 110 (Tex.Civ.App.) The cash payment called for by a contract for the sale of land need not be actually paid into court when payment is tendered by the pleadings, in a suit for specific performance.—Beaton v. Fussell, 166 S. W. 458.

§ 116¾ (Tex.Civ.App.) A petition for specific performance and for damages if specific performance was impossible, which showed on its face that the vendor did not own the land at the time he entered into the contract of sale, was subject to general demurrer as to the portion seeking specific performance.—Bird v. Lester, 166 S. W. 112.

§ 121 (Tex.Civ.App.) In a suit for specific performance of a contract for the sale of land, made between plaintiff's guardian and the husband of the owner of the legal title, evidence *held* insufficient to show that the wife was a party to the contract, or that she assented to or ratified her husband's act.—Ross v. Blunt, 166 S. W. 913.

**STATEMENT.**

See Appeal and Error, §§ 544, 547, 562-569, 742; Justices of the Peace, § 91; Witnesses, §§ 380-414.

## STATES.

See Attachment, § 4; Commerce, § 69; Constitutional Law, § 63; Costs, § 294; Courts, §§ 1, 199; Infants, § 12; Intoxicating Liquors, § 6; Public Lands, §§ 173, 178.

### V. CLAIMS AGAINST STATE.

§ 171 (Ky.) Under Acts 1912, c. 136, providing for payment with interest, of the deficit incurred in the operation of the House of Reform up to June 14, 1910, claimants held entitled to interest only from June 14th, and not from the date of the accrual of their claim.—Bosworth v. R. H. Wolfe & Son, 166 S. W. 796.

## STATUTES.

See Constitutional Law, §§ 48, 70; Contracts, § 2; Exemptions, § 4; Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 61 (Ky.) Portions of the act should not be stricken in conflict with the title if the two can be reconciled, since the constitutionality of an act should be sustained if possible.—Bowman v. Hamlett, 166 S. W. 1008.

### II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 93 (Mo.) Laws 1913, pp. 148-154, giving the probate court in counties of less than 50,000 inhabitants jurisdiction to provide for the care and control of delinquent children under 17 years of age, is not special legislation.—State ex rel. Cave v. Tinscher, 166 S. W. 1028.

Laws 1913, pp. 148-154, conferring on probate courts in counties of less than 50,000 inhabitants jurisdiction to provide for the control of delinquent children under 17 years of age, is objectionable as conferring upon probate courts in such counties powers not given alike to all probate courts.—Id.

§ 96 (Tex.) Acts 33d Leg. c. 35, § 7, creating the Clifton independent school district, and providing for the management of the affairs of the district by trustees, is not in violation of Const. art. 3, § 56, prohibiting local or special laws creating offices in school districts.—Glass v. Pool, 166 S. W. 375.

### III. SUBJECTS AND TITLES OF ACTS.

§ 105 (Ky.) The purpose of Const. § 51, is to enable persons reading the title of an act to obtain a general idea of what the act will contain, so that members of the Legislature and the public may assume that the act contains no legislation not embraced in a general way within the subject expressed in the title.—Thompson v. Commonwealth, 166 S. W. 623.

§ 110½ (Ky.) Const. § 51, requiring the title of legislative acts to express the subject legislated upon, does not require the title to state what former acts are repealed.—Bowman v. Hamlett, 166 S. W. 1008.

§ 118 (Ky.) The title of Act March 26, 1908, is not sufficiently broad within Const. § 51, to justify provisions in the body of the act for the confinement of juvenile offenders in the Houses of Reform subject to provisions governing parole of penitentiary inmates.—Thompson v. Commonwealth, 166 S. W. 623.

§ 122 (Ky.) The recital, in the title of the Text-Book Commission Act of 1914, that Acts 1910, c. 13, was repealed held surplusage, in view of sections 7 and 8 of the Text-Book Commission Act, providing that such act shall remain in force as to certain cities, and the variance between the title and the body of the act is immaterial and does not affect its validity

under Const. § 51, requiring the subject of an act to be expressed in its title.—Bowman v. Hamlett, 166 S. W. 1008.

### IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141 (Ky.) Const. § 51, requiring an amended, revised, or extended act to be re-enacted and published at length, should be liberally construed, so as not to hinder or embarrass the Legislature, but not given so loose a construction as virtually to nullify the section.—Board of Penitentiary Com'rs v. Spencer, 166 S. W. 1017.

The act of 1910 (Laws 1910, c. 15) amending the act of March 5, 1898 (Laws 1898, c. 4), by adding thereto a section known as section 1a is contrary to Const. § 51.—Id.

An amendment of one or more sections of the Kentucky Statutes, or of an entire act, should contain the section or sections as they will read, when revised or amended, if any part of the section or sections remain in force, but parts to be repealed need not be set forth.—Id.

A new act which purports to amend an existing act, and not a particular section or part of the existing act, must set forth the whole of the existing act as it will appear when extended, revised, or amended; but, if only a particular section or sections are amended, it is necessary to specify and republish only the section or sections affected.—Id.

When it is desired to confer or carry into a new law provisions of an old law, so much of the old law as is thus conferred or carried into the new law must be published at length.—Id.

### V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 156 (Ky.) It is not necessary, when the body of a new act repeals, expressly or in effect, all or part of an existing act, to republish the parts repealed, although the title of the repealing act may purport to be an amendment of the existing act.—Board of Penitentiary Com'rs v. Spencer, 166 S. W. 1017.

A new act which does not purport to be an amendment to an existing law need not set out or republish any part of any former law that may be changed or repealed by the new law.—Id.

§ 158 (Ark.) Repeals by implication are not favored, and will not be deemed to have been intended, unless that intention is clearly manifest.—Eubanks v. Futrell, 166 S. W. 172.

§ 161 (Ark.) Where a statute covers the entire subject-matter of an existing statute, and it was evidently the legislative intention to enact a substitute therefor, the prior act is impliedly repealed, though some of the provisions of the prior act are not embraced in the subsequent act.—Eubanks v. Futrell, 166 S. W. 172.

### VI. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 178 (Tex.Cr.App.) Rev. St. 1911, art. 5502, prescribing rules for the construction of civil statutory enactments, applies and is of binding force in criminal prosecutions.—Bradfield v. State, 166 S. W. 734.

§ 188 (Tex.Civ.App.) It is a cardinal rule of construction, incorporated into the statute law of the state, that the language of a statute must be given its usual import, unless other language used by the same Legislature indicates that different meaning was intended.—State v. Houston Belt & Terminal Ry. Co., 166 S. W. 83.

§ 205 (Mo.App.) While the court, in interpreting a statute, must ascertain and expound the intention of the Legislature from its words and context, other sections in pari materia, especially when part of the same act, may be looked to for aid in arriving at the true meaning.—State ex rel. Jones v. Howe Scale Co. of Illinois, 166 S. W. 823.

§ 207 (Ky.) Conflicting portions of a legislative enactment should be reconciled, if possible, without disregarding the intent of the Legislature.—Bowman v. Hamlett, 166 S. W. 1008.

§ 211 (Ky.) Where the body of the act clearly shows the legislative intent, the court need not refer to the title to determine such intent.—Bowman v. Hamlett, 166 S. W. 1008.

#### (D) Retroactive Operation.

§ 267 (Tex.Civ.App.) Acts 33d Leg. c. 127, amending Rev. St. 1911, arts. 1827, 1829, 1902, providing for judgment as by confession where a plea in bar alleged in an answer is not excepted to or denied, had no application to an amended answer filed before the act took effect.—Pugh v. Werner, 166 S. W. 698.

### VII. PLEADING AND EVIDENCE.

§ 281 (Mo.App.) Parties relying upon the statutes of another state and the decisions con-

struing them must plead them.—Rialto Co. v. Miner, 166 S. W. 629.

§ 289 (Mo.App.) Parties relying upon the statutes of another state and the decisions construing them must give them in evidence.—Rialto Co. v. Miner, 166 S. W. 629.

By the written law of another state is not meant the statements of text-writers or the decisions of courts, but, when a foreign law has received a local construction, judicial decisions and law writers may be consulted.—Id.

The statement of text-writers and the decisions of courts may be used with the evidence of experts to enlighten the court in ascertaining the meaning of the law of another state.—Id.

§ 289 (Mo.App.) The statutes of a sister state must be proved as prescribed by Rev. St. 1909, §§ 6281, 6282, by the printed statute books of the sister state, and parol proof of such a statute is inadmissible.—Trimble v. Stamper, 166 S. W. 820.

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## STEAM.

§ 6 (Ky.) Where the defendant owed the plaintiff's intestate only the duty to exercise ordinary care to prevent injury, the fact of the explosion of a boiler creates no presumption of negligence.—*Branham's Adm'r v. Buckley*, 166 S. W. 618.

In an action for the death of a boy who was killed by a boiler explosion at a mill where he had gone with corn to be ground, where de-

fendant denied negligence in maintaining and operating the boiler as charged in the complaint, a verdict for defendant held not to be flagrantly against the evidence.—*Id.*

## STIPULATIONS.

See Reformation of Instruments, §§ 16, 18.

§ 18 (Mo.App.) In an action by a receiver against a trust company with whom he deposit-



ed receivership funds, a stipulation that the receiver, if entitled to any interest, should be entitled to a given amount estops the trust company from contending that its practice of allowing 2 per cent. interest compounded monthly was in violation of Rev. St. 1909, § 7185.—*Stone v. St. Louis Union Trust Co.*, 166 S. W. 1091.

## STOCK.

See Corporations, §§ 76-99.

## STOCKHOLDERS.

See Corporations, § 327.

## STREET RAILROADS.

See Carriers; Constitutional Law, § 290; New Trial, §§ 103-105; Trial, § 194.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 37 (Tex.Civ.App.) Where the charter of a street railway company required it, at its own cost, to pave that portion of the street it occupied in the same manner as the city might pave the remainder, the railway company is entitled to reasonable notice of the contemplated improvement, and to either pave the street itself, or itself to contract for the improvement of such street.—*Texas Bitulithic Co. v. Abilene St. Ry. Co.*, 166 S. W. 433.

The petition, in an action by a municipality to recover from a street railway the cost of paving that portion of the street occupied by the railway, should disclose the width of the pavement and the length of the street, so that the court can determine the amount to which the city is entitled, and whether that amount is within its jurisdiction.—*Id.*

## II. REGULATION AND OPERATION.

§ 99 (Mo.App.) Driver held not negligent in attempting to cross in front of approaching street car if he satisfied himself that in the usual course of things, considering the distance and the respective rates of travel, he could cross in safety.—*Criss v. United Rys. Co. of St. Louis*, 166 S. W. 834.

§ 103 (Mo.App.) The negligence of a person struck by a street car does not absolve the motorman from keeping a lookout and endeavoring to avoid injuring him, unless there is no time to avoid a collision after such negligence becomes apparent to the motorman.—*Criss v. United Rys. Co. of St. Louis*, 166 S. W. 834.

§ 117 (Mo.App.) In an action for injuries to the driver of a wagon struck by a street car, evidence held to make questions for the jury as to the motorman's violation of city ordinances requiring the keeping of a vigilant watch and the stopping of the car on the first appearance of danger, and prohibiting a greater rate of speed than ten miles an hour.—*Criss v. United Rys. Co. of St. Louis*, 166 S. W. 834.

## STREETS.

See Highways; Municipal Corporations, §§ 750-822.

## SUBROGATION.

§ 1 (Mo.App.) Materialmen furnishing materials for a building are not entitled to be subrogated to the rights of the owner against the contractor and his sureties on a bond which was intended for the benefit of the owner.—*Uhrich v. Globe Surety Co. of Kansas City*, 166 S. W. 845.

§ 31 (Ky.) A surety on renewal of original purchase-money notes, who is compelled to pay them to the assignee, becomes invested only

with such rights as the assignee had.—*Hicks' Committee v. Smith*, 166 S. W. 248.

## SUBSCRIPTIONS.

See Corporations, §§ 76-90.

## SUICIDE.

See Insurance, §§ 788, 819; Trial, § 25; Witnesses, § 177.

## SUPERSEDEAS.

See Pleading, § 287.

## SUPREME COURTS.

See Courts, §§ 231, 247.

## SURETYSHIP.

See Principal and Surety.

## SURFACE WATERS.

See Waters and Water Courses, § 126.

## SURRENDER.

See Cancellation of Instruments.

## SUSPENDED SENTENCE.

See Criminal Law, §§ 884, 1001.

## SUSPENSION.

See Attorney and Client, §§ 49-59.

## SWAMP LANDS.

See Public Lands, § 61.

## TACKING.

See Adverse Possession, § 43.

## TAXATION.

See Adverse Possession, § 60; Appeal and Error, § 1178; Commerce, § 69; Constitutional Law, §§ 208, 290; Counties, § 190; Drains; Eminent Domain, § 2; Highways, § 122; Mandamus, § 115; Municipal Corporations, §§ 414-486, 867-978; Schools and School Districts, § 99.

## III. LIABILITY OF PERSONS AND PROPERTY.

### (D) Exemptions.

§ 244 (Tex.Civ.App.) Under Rev. St. 1911, art. 7507, § 1, exempting from taxation buildings used by religious societies unless leased or otherwise used with a view to profit, premises used exclusively for religious worship, though not owned by the religious society, but rented by it, are not exempt.—*City of Dallas v. Cochran*, 166 S. W. 32.

## TELEGRAPHS AND TELEPHONES.

See Appeal and Error, § 1061; Contracts, § 26; Evidence, § 178.

## II. REGULATION AND OPERATION.

§ 33 (Mo.App.) The rule that a railroad company is entitled to recover the rate of freight posted with the Interstate Commerce Commission, even though its agent agreed to accept a less rate, does not apply to a charge made by the agent of a telegraph company for a telegram.—*Higbee v. Western Union Telegraph Co.*, 166 S. W. 825.

§ 37 (Tex.Civ.App.) A telegraph company is bound only to exercise ordinary care to transmit and deliver a message within a reasonable time and is not under the absolute duty so do-

ing.—Western Union Telegraph Co. v. Cathey, 166 S. W. 714.

§ 74 (Tex.Civ.App.) Where plaintiff claimed damages for defendant's failure to deliver on the 15th a death message, but asserted no damage for subsequent delay, and the evidence showed that the message did not reach the delivering office until the 16th, a charge to find for plaintiff if defendant was negligent in delivering the message after receipt at destination was erroneous because it might have caused the jury to believe that the court was of the opinion that the message arrived on the 15th and tended to allow a recovery for negligence not counted upon.—Western Union Telegraph Co. v. Cathey, 166 S. W. 714.

§ 78 (Mo.App.) The sender of a telegram is entitled to recover the penalty imposed by Rev. St. 1909, § 3330, for delay in delivering a message, the charges on which had been prepaid, though the message contained the word "alright" written as one word and counted as such by defendant in estimating the charges.—Higbee v. Western Union Telegraph Co., 166 S. W. 825.

## TENANCY IN COMMON.

See Vendor and Purchaser, § 342.

### I. CREATION AND EXISTENCE.

§ 3 (Ark.) A devise to a wife of a half interest in real estate, and a fourth interest to each of two children, subject to the right of the wife to use and control the children's interest during infancy, and then pay the interest to each on his attaining full age, makes the wife and children cotenants, and she has no authority to convey the interest of the children.—Evans v. Pettus, 166 S. W. 955.

### III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 41 (Ark.) A tenant in common cannot create an easement so as to confer any rights which may be asserted against cotenants, who may resort to any remedy to protect their interests against an alleged easement.—Evans v. Pettus, 166 S. W. 955.

## TENDER.

See Specific Performance, § 97.

## TERMINATION.

See Landlord and Tenant, § 95; Principal and Agent, §§ 33, 34.

## TERRITORIES.

See Evidence, § 28.

## TESTAMENTARY CAPACITY.

See Wills, § 21.

## TEXT-BOOKS.

See Schools and School Districts, § 167.

## THEATERS AND SHOWS.

See Exemptions, §§ 13, 45.

## THREATS.

See Homicide, § 158; Witnesses, § 352.

§ 1 (Tex.Cr.App.) Pen. Code 1911, art. 1182, relative to sending anonymous letter reflecting on another's integrity, chastity, etc., held to apply where the writer himself delivers the letter to the addressee, in view of Code Cr. Proc. 1911, art. 25, Rev. St. 1911, art. 5502, subd. 6, and Pen. Code 1911, arts. 9 and 10.—Bradfield v. State, 166 S. W. 734.

§ 5 (Tex.Cr.App.) Under Pen. Code 1911, art. 1182, making it a misdemeanor to send an

anonymous letter "reflecting" on the integrity, chastity, etc., of any person, a complaint and information charging the sending of a letter which "reflects" upon a person named was not defective.—Bradfield v. State, 166 S. W. 734.

A complaint and information for sending an anonymous letter reflecting on a person's integrity, chastity, etc., need not contain the letter, in view of Code Cr. Proc. 1911, arts. 453, 460, 474, relative to the requisites of indictments.—Id.

## TICKETS.

See Carriers, §§ 252, 258.

## TITLE.

See Appeal and Error, §§ 338-356, 387, 395, 504, 622, 628; Bills and Notes, § 155; Carriers, § 247; Contracts, §§ 212, 300, 345; New Trial, §§ 102, 116, 165; Pardon, § 9; Pleading, §§ 288, 290; Public Lands, § 178; Specific Performance, § 105.

§ 4 (Ky.) Under Civ. Code Prac. § 745, requiring an appeal to be taken within two years after the right accrued, and Ky. St. § 452, providing that the word "year" shall mean a calendar year, an appeal may be taken on November 17, 1913, from a judgment rendered on November 18, 1911, notwithstanding the fact that 1912 was leap year.—Rice v. Blair, 166 S. W. 180.

## TITLE.

See Associations, § 24; Guardian and Ward, §§ 62, 130; Homestead, § 119; Husband and Wife, § 119; Sales, § 202; Statutes, §§ 105-122; Trespass to Try Title.

## TOOLS.

See Master and Servant, § 278.

## TORTS.

See Counties, § 141; Death; False Imprisonment; Fraud; Insane Persons, § 80; Libel and Slander, §§ 7-120; Master and Servant, §§ 88-306; Municipal Corporations, §§ 753-822; Negligence; Nuisance; Railroads, §§ 250-479; Trespass; Trover and Conversion.

§ 5 (Mo.App.) That an act complained of may be punished criminally does not exclude the party injured from recovering damages for his own injury.—Fessler v. Gibson, 166 S. W. 1096.

§ 12 (Tex.Civ.App.) One who, with full knowledge of a completed contract for the sale of land, induced the seller to breach the contract by selling the land to him held liable to the purchaser for damages resulting from the breach of the contract of sale.—Bowen v. Speer, 166 S. W. 1183.

## TOWNS.

See Counties; Schools and School Districts.

## TRADE-MARKS AND TRADE-NAMES.

### I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 3 (Mo.App.) Nonexclusive trade-marks or names which are open to use by all because descriptive of the goods, name of the maker, etc., may nevertheless, by long use in connection with the goods, business, etc., of a particular trader, come to have a secondary meaning as designating the goods of that particular trader; and, though the primary meaning of the word is public juris, its secondary meaning is not.—Furniture Hospital v. Dorfman, 166 S. W. 861.

Names which are mere descriptive terms of the business and generic in their nature, and which may be used by every one in an honest and nondescriptive manner, are not capable of

being appropriated, and there can be no unfair competition in the use of such names.—Id.

The name "Furniture Hospital," though descriptive of a business, was yet so odd, unusual, and so likely to catch the public fancy and be retained in the memory, as to be capable of being appropriated as a nonexclusive trade-name with a secondary meaning.—Id.

#### IV. INFRINGEMENT AND UNFAIR COMPETITION.

##### (B) What Competition Unlawful.

§ 71 (Mo.App.) Names which are mere descriptive terms, if they be odd, unusual, fanciful, or striking, may by long use become identified in the minds of the public with the business of a particular trader, and in such case it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other.—*Furniture Hospital v. Dorfman*, 166 S. W. 861.

##### (C) Actions.

§ 88 (Mo.App.) No exclusive proprietary interest in a trade-name is necessary to relief on the ground of unfair competition, while in trade-mark cases an exclusive right is necessary.—*Furniture Hospital v. Dorfman*, 166 S. W. 861.

§ 99 (Mo.App.) Whether a nonexclusive trade-name, by long use by a particular trader, has come to have a secondary meaning as designating the goods of the trader is always a question of fact.—*Furniture Hospital v. Dorfman*, 166 S. W. 861.

It could not be said, as a matter of law, that the addition of the words "New York" to the words "Furniture Hospital" so distinguished it as to remove danger of deception.—Id.

#### TRANSCRIPTS.

See Criminal Law, §§ 1087-1124.

#### TREATIES.

See Public Lands, § 198.

#### TRESPASS.

See Boundaries, § 37; False Imprisonment; Homicide, § 118; Judgment, § 747; Negligence, § 134; Pleading, § 93; Railroads, § 355; Set-Off and Counterclaim, § 22; Trial, §§ 253, 260.

#### II. ACTIONS.

##### (A) Right of Action and Defenses.

§ 31 (Mo.App.) Where parties are present to assist in the commission of a trespass, all who participate therein are liable either jointly or severally.—*Ewen v. Hart*, 166 S. W. 315.

##### (C) Evidence.

§ 44 (Mo.App.) In an action for trespassing on plaintiff's land and constructing a sewer, where defendants pleaded a general denial, further defenses that the sewer was laid with plaintiff's consent and on a right of way condemned for sewer purposes did not relieve plaintiff of the burden of proving that all the defendants participated in the trespass.—*Ewen v. Hart*, 166 S. W. 315.

§ 45 (Mo.App.) In an action for trespassing on plaintiff's land and laying a sewer, in which defendants pleaded plaintiffs' permission, and a condemnation of the land, city records relating to the construction of the sewer and the condemnation of the land were properly admitted.—*Ewen v. Hart*, 166 S. W. 315.

§ 46 (Mo.App.) In an action by a husband and wife for trespass, evidence held insufficient to show that the wife had any interest in the property as tenant by the entirety or otherwise.—*Ewen v. Hart*, 166 S. W. 315.

##### (D) Damages.

§ 60 (Mo.App.) The word "plants," under Rev. St. 1909, § 5448, authorizing the recovery of treble damages for digging up and carrying away roots, fruits, or plants, covers any and all plants and includes an ornamental hedge.—*Fezler v. Gibson*, 166 S. W. 1096.

##### (E) Trial, Judgment, and Review.

§ 68 (Mo.App.) In action for trespassing on plaintiffs' property and laying a sewer, in which defendants pleaded plaintiffs' consent and the condemnation of a right of way, instruction as to plaintiffs' right to recover and the damages recoverable held more favorable to plaintiffs than they were entitled to.—*Ewen v. Hart*, 166 S. W. 315.

In action for trespass, where the court had properly charged that there was no evidence against two of the defendants, an instruction to find for plaintiff under certain circumstances properly directed that such finding should be against the third defendant alone.—Id.

#### TRESPASS TO TRY TITLE.

See Adverse Possession, § 110; Bills and Notes, § 459; Boundaries, §§ 32, 37; Counties, § 196; Deeds, § 114; Evidence, § 353.

#### I. RIGHT OF ACTION AND DEFENSES.

§ 19 (Tex.Civ.App.) An equitable title can be sued upon or set up as a defense in an action of trespass to try title.—*Robson v. Moore*, 166 S. W. 908.

#### II. PROCEEDINGS.

§ 32 (Tex.Civ.App.) Allegations in an answer seeking affirmative relief that plaintiff's grantor held under a deed which included the land in controversy by mistake, of which mistake plaintiff had knowledge, do not support a suit in trespass to try title, since they do not amount to an allegation of title in defendant.—*Hamilton v. Green*, 166 S. W. 97.

§ 44 (Tex.Civ.App.) Where the ownership was not actually involved, a deed from defendant to plaintiff, and defendant's acknowledgment that he leased from plaintiff, held to justify an instruction to find for plaintiff as to the title.—*Wolf v. Lane*, 166 S. W. 72.

§ 46 (Tex.Civ.App.) In trespass to try title, involving a right to damages for pasturing cattle, verdict finding defendants guilty, and assessing the damages, held not insufficient as failing to find as to the ownership, where the petition alleged ownership and an ouster, thereby damaging plaintiff.—*Wolf v. Lane*, 166 S. W. 72.

#### TRIAL.

See Account Stated, § 20; Adverse Possession, § 115; Appeal and Error, §§ 215, 216, 219, 237, 242, 261, 263, 264, 499, 547, 665, 688, 699, 703, 719, 724, 731, 742, 750, 882, 883, 969, 978, 987-1012, 1030, 1033, 1046, 1056-1068, 1170, 1172; Attorney and Client, § 167; Bills and Notes, § 537; Brokers, § 88; Cancellation of Instruments, § 50; Carriers, §§ 230, 320, 321, 346; Corporations, § 519; Costs; Continuance; Contracts, §§ 176, 353; Criminal Law, §§ 14, 678-884, 1059, 1090, 1091, 1165, 1173; Damages, §§ 111, 210, 216; Death, §§ 103, 104; Deeds, § 114; Dismissal and Nonsuit; Disorderly House, § 20; Eminent Domain, § 222; Evidence, § 508; Guaranty, § 26; Homestead, § 216; Homicide, §§ 276-309, 340; Husband and Wife, § 235; Insurance, § 668; Intoxicating Liquors, § 238; Jury; Landlord and Tenant, § 233; Larceny, § 78; Malicious Prosecution, §§ 71, 72; Master and Servant, §§ 44, 284-296; Municipal Corporations, §§ 821, 822; Negligence, § 136; New Trial; Principal and Agent, § 193; Railroads, §§ 350, 351, 400; Rape, § 59; Release,

§ 59; Sales, §§ 53, 130; Seduction, § 50; Stipulations; Street Railroads, § 117; Telegraphs and Telephones, § 74; Trade-Marks and Trade-Names, § 99; Trespass, § 68; Trespass to Try Title; Venue; Vendor and Purchaser, § 284.

## II. DOCKETS, LISTS, AND CALENDARS.

§ 11 (Ky.) The objection that the action should have been brought on the equity side of the court, instead of the law side, cannot be raised by demurrer, but must be taken by motion to transfer.—Nuckels v. Robinson-Pettett Co., 166 S. W. 972.

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25 (Ky.) In an action on a mutual benefit certificate containing a suicide clause, in which the petition alleged that decedent was, when he committed suicide, mentally irresponsible, which the answer denied, plaintiff had the burden of proof, under Civ. Code, § 528, so as to entitle her to the closing argument.—Sovereign Camp Woodmen of the World v. Landrum, 166 S. W. 598.

§ 25 (Tex.Civ.App.) Under district and county court rule 37 (142 S. W. xx), the position in the argument of counsel for an intervener is within the sound discretion of the court.—Cooper v. Marek, 166 S. W. 53.

§ 25 (Tex.Civ.App.) Where, in a suit on purchase-money notes and to foreclose a vendor's lien retained in the deed, the purchaser admitted the execution of the notes and liability thereon, but did not admit the execution and delivery of the deed, the vendor had the right to open and close.—Luckenbach v. Thomas, 166 S. W. 99.

## IV. RECEPTION OF EVIDENCE.

### (A) Introduction, Offer, and Admission of Evidence in General.

§ 45 (Tex.Civ.App.) Where the court asked counsel for defendant whether he had any testimony to offer, and the counsel replied that he rested, an assignment that the court, over the objection of defendant, made defendant rest his case before introducing all his testimony was without merit.—Pope v. Commonwealth Bonding & Casualty Co., 166 S. W. 1195.

### (B) Order of Proof, Rebuttal, and Re-opening Case.

§ 60 (Mo.App.) An objection to a question as to the use of a hoisting cage, since the plaintiff received his injuries in a fall therefrom, held properly sustained, where there was no offer to show that the cage was in the same condition as at the time of the accident.—Ronchetto v. Northern Cent. Coal Co., 166 S. W. 876.

§ 68 (Mo.App.) Allowing plaintiff after he has closed his case to reopen the case and recall a witness for examination on matters not covered when he was first examined is within the discretion of the trial court.—Fezler v. Gibson, 166 S. W. 1096.

### (C) Objections, Motions to Strike Out, and Exceptions.

§ 84 (Ark.) Where a witness was asked if a certain thing could be done in "a reasonable time," but no specific objection was made to the question on that ground, and there was no request that the witness should make the answer more specific, the exclusion of the question and answer could not be sustained on the ground of indefiniteness of answer.—City of Jonesboro v. Pribble, 166 S. W. 576.

§ 85 (Ark.) A general objection to all of a witness' testimony, part of which is competent, is insufficient.—Martin v. Monger, 166 S. W. 566.

§ 85 (Tex.) Where a single declaration of a testator on the issue of undue influence was offered as a whole and was inadmissible in part, it should have been excluded upon objection.—Scott v. Townsend, 166 S. W. 1138.

§ 89 (Tex.Civ.App.) Where evidence when received was admissible under the issues as then disclosed by the pleadings and the proof, but thereafter the evidence became immaterial because of the withdrawal of the issue under which it was admissible, the remedy was by motion to strike out the evidence.—Missouri, O. & G. Ry. Co. v. Boring, 166 S. W. 76.

§ 91 (Tex.Civ.App.) When evidence is not objected to when offered, unless good reason for the delay is shown, the court has a wider discretion in passing upon its admissibility upon motion to strike out.—Sockwell v. Sockwell, 166 S. W. 1188.

§ 105 (Tex.Civ.App.) Where inadmissible testimony was received without objection, and there was no motion to strike it out, the refusal to charge the jury not to consider the testimony was not erroneous.—Texas Power & Light Co. v. Burger, 166 S. W. 880.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 108½ (Mo.App.) Where a surety company was local, and had a large number of stockholders and employees in and about the place where a personal injury action was tried, it was not reversible error to permit plaintiff's counsel to ask the jurors on their examination whether they were interested in the company.—Burrows v. Likes, 166 S. W. 643.

§ 108½ (Mo.App.) Questions asked jurors as to their relations to liability insurance company not in bad faith held not ground for discharging the jury, where such a company was interested, but the particular company was unknown to plaintiff's counsel.—Boten v. Sheffield Ice Co., 166 S. W. 883.

Where evidence that defendant had taken out liability insurance was admissible on one of the issues, asking of questions relative thereto held not ground for discharging the jury, though prejudicial to defendant.—Id.

§ 124 (Ark.) Where evidence showed that railroad contractors' camp cars were placed close to track with company's consent, remark that they placed plaintiff and others where death was liable to come at any minute, and continued and would continue to do so until a jury called a halt, held not improper.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 125 (Ark.) In an action against railroad company for injuries to convict hired to railroad contractors, remarks of plaintiff's attorney concerning the manner in which the contractors treated the convicts held improper and ground for reversal, in the absence of a disapproval and the withdrawal thereof from the jury.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 125 (Tex.Civ.App.) In an action for injuries, argument of plaintiff's counsel that the jury should give plaintiff every cent it possibly could under the pleadings and evidence, because, if they gave too much, the court would cut it down, but could not raise it, held prejudicial error.—San Antonio & A. P. Ry. Co. v. Wagner, 166 S. W. 24.

§ 133 (Ark.) Where the trial court expresses disapproval of counsel's improper remarks and directs the jury not to consider them, it is to some extent in his discretion whether it is necessary to rebuke counsel for making the remarks, and it is not ground for reversal because it appears to the Supreme Court that counsel's conduct deserved harsher treatment.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 133 (Ky.) Where the court sustained an objection to the improper argument of counsel

for plaintiff, suing as administratrix for the death of her husband, that a third of the damages should go to her as compensation for the loss of her husband, and directed the jury to follow the instructions, the improper argument was not reversible error.—*Glasgow Electric Light & Ice Co. v. Clark's Adm'x*, 166 S. W. 214.

Where the court sustained an objection to the argument of counsel for plaintiff, suing as administratrix for the death of her husband, wherein comment was made on plaintiff's personal appearance, and directed the jury to disregard the language used, the argument was not ground for reversal.—Id.

## VI. TAKING CASE OR QUESTION FROM JURY.

### (A) Questions of Law or of Fact in General.

§ 139 (Mo.App.) A demurrer to plaintiff's evidence was properly overruled, where, though the preponderance of the evidence favored defendant, there was sufficient evidence to the contrary to justify submission to the jury.—*Goode v. Central Coal & Coke Co.*, 166 S. W. 844.

§ 139 (Mo.App.) The question of the weight of the evidence is for the jury, unless the evidence is so inherently unreasonable that reasonable minds could not differ as to it.—*Willis v. City of Browning*, 166 S. W. 1070.

§ 139 (Tex.Civ.App.) Where there was evidence to establish one ground of recovery alleged in the petition, a peremptory instruction requested by defendant was properly refused, though plaintiff could not recover on another ground alleged.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 76.

§ 139 (Tex.Civ.App.) Where plaintiff under all the evidence was entitled to a recovery of at least a part of the sum demanded, a peremptory instruction for defendant was properly denied.—*Menefee v. Bering Mfg. Co.*, 166 S. W. 365.

§ 140 (Mo.App.) The question of credibility of witnesses is for the jury, unless the evidence is so inherently unreasonable that reasonable minds could not differ as to it.—*Willis v. City of Browning*, 166 S. W. 1070.

§ 143 (Mo.App.) The testimony of plaintiff makes a case for the jury, however much the testimony has been contradicted by other witnesses.—*Burrows v. Likes*, 166 S. W. 643.

§ 143 (Tex.Civ.App.) Where the evidence as to an issue of fact is sharply conflicting, the question is one for the jury.—*A. J. Birdsong & Son v. Allen*, 166 S. W. 1177.

§ 145 (Tex.Civ.App.) The failure of the court to submit an issue to the jury withdraws the issue from their consideration.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 76.

§ 145 (Tex.Civ.App.) The failure of the court to submit to the jury an issue raised by the pleadings is a withdrawal thereof.—*Texas Power & Light Co. v. Burger*, 166 S. W. 680.

### (B) Demurrer to Evidence.

§ 156 (Mo.App.) While, in passing a demurrer to the evidence plaintiff's evidence must be accepted as true, and he must be given the benefit of every inference fairly deducible therefrom, yet where such evidence does not contradict defendant's and his case rests upon an inference scarcely more than conjecture, or the possibility that the fact might exist, then the court ought to look at the character of the evidence on the other side.—*Osborn v. Wabash R. Co.*, 166 S. W. 1118.

### (D) Direction of Verdict.

§ 178 (Ky.) Upon motion for a peremptory instruction, plaintiff's evidence, as well as every inference fairly deducible therefrom, is taken

to be true.—*Chesapeake & O. Ry. Co. v. Ford*, 166 S. W. 605.

## VII. INSTRUCTIONS TO JURY.

### (A) Province of Court and Jury in General.

§ 191 (Mo.App.) An instruction, in an action for injuries to an employé, which assumes that the employer was negligent in failing to furnish enumerated things to make the place of work reasonably safe, *held* erroneous, as taking from the jury the question of negligence.—*Burrows v. Likes*, 166 S. W. 643.

An instruction, in an action for injuries to the employé, which assumed that it was practical for the employer to have made a platform and to have erected a guard rail thereon was erroneous, where the evidence on the issue was conflicting.—Id.

§ 191 (Mo.App.) In an action for the wrongful death of one run down at a crossing, the refusal of an instruction requested by defendant, which treated the collision as an accident due to the traveler's inadvertent act, and disregarded all claims of defendant's negligence, is proper.—*Lagarce v. Missouri Pac. Ry. Co.*, 166 S. W. 1063.

§ 191 (Tex.Civ.App.) Requested instructions assuming facts not in evidence are properly refused.—*Stevens v. Crosby*, 166 S. W. 62.

§ 191 (Tex.Civ.App.) In an action for injuries to a railroad construction employé, an instruction on the doctrine of last clear chance *held* not erroneous, as assuming that the engineer and fireman of the work train discovered plaintiff's peril in time to have avoided the injury.—*Angelina & N. R. R. Co. v. Due*, 166 S. W. 918.

§ 192 (Mo.App.) Where, in an action for personal injuries, the undisputed evidence showed that plaintiff was injured, an instruction on the measure of damages, which assumed that plaintiff received injuries, was not erroneous.—*Bell v. United Rys. Co. of St. Louis*, 166 S. W. 1100.

The court may in its instructions assume the truth of a proposition established by the undisputed testimony.—Id.

§ 192 (Tex.Civ.App.) The court in its instructions may assume a fact established by uncontradicted evidence.—*Watson v. Rice*, 166 S. W. 106.

§ 192 (Tex.Civ.App.) In an action for an amount due on a contract, where it was liquidated, it is not improper for the charge to assume that any recovery should be for the sum agreed upon.—*Spires v. McElroy*, 166 S. W. 457.

§ 192 (Tex.Civ.App.) In proceedings to condemn land for a right of way of a ditch, an instruction assuming a fact *held* not erroneous under the evidence.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 194 (Ark.) An instruction *held* erroneous, as practically directing a verdict for defendant.—*Valentine v. Edwards*, 166 S. W. 531.

§ 194 (Tex.Civ.App.) In an action for the injury to plaintiff's sailboat by defendants' failure to lift a bridge, which they were operating under a contract with the owner, high enough to permit the vessel to pass, it was error to charge, as a matter of law, that a failure to lift the bridge to a perpendicular position was negligence; that being a jury question.—*Galveston-Houston Electric Ry. Co. v. Stautz*, 166 S. W. 11.

§ 194 (Tex.Civ.App.) An instruction that, "where a broker has the procuring cause of a sale, \* \* \* it is immaterial \* \* \* that he did not personally conduct the negotiations, \* \* \*" was not objectionable as upon the weight of evidence; it being a mere abstract le-

gal proposition not applicable directly to any issue, and whether plaintiffs were the procuring cause having been submitted as a disputed issue.—*McKinney v. Thedford*, 166 S. W. 443.

An instruction that, in an action on implied contract, it is only necessary for the plaintiff to show that he performed acts as the broker of the seller, and that the latter adopted his acts and accepted his agency, was not objectionable as being upon the weight of evidence, being merely an abstract legal proposition not applicable directly to any issue.—*Id.*

§ 194 (Tex.Civ.App.) In action for injuries to shipment of cattle which the shipper accompanied and unloaded and dipped under quarantine regulations, instruction that the carriers owed no duty to deliver them in good condition, but were only responsible for negligence, *held* not on the weight of the evidence.—*Good v. Texas & P. Ry. Co.*, 166 S. W. 670.

§ 194 (Tex.Civ.App.) An instruction, in an action for injuries to a street car passenger, *held* not on the weight of the evidence.—*Dallas Consol. Electric St. Ry. Co. v. Stone*, 166 S. W. 708.

(B) Necessity and Subject-Matter.

§ 202 (Mo.App.) While the trial court in a civil case is not bound to give instructions in the absence of requests to do so, it should nevertheless in the exercise of a sound discretion charge the jury on the law of the case.—*McDonald v. Central Illinois Const. Co.*, 166 S. W. 1087.

§ 203 (Tex.Civ.App.) Ordinarily, where plaintiff presents two causes of action, the withdrawal of one of the causes from the jury eliminates that ground of recovery and the defense set up against it, and defendant may not complain that the defense was not presented in the charge.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 76.

(C) Form, Requisites, and Sufficiency.

§ 235 (Tex.Civ.App.) In action to rescind contract for fraud, instruction that contracts are presumed fair, and not fraudulent, and that the party attacking them had the burden of proving fraud, *held* properly refused, as it was improper to charge as to the effect of such presumption.—*Underwood v. Jordan*, 166 S. W. 88.

§ 240 (Tex.Civ.App.) In action to rescind contract for fraud, instruction that contracts are presumed fair, and that the party attacking them had the burden of proving fraud, *held* properly refused as argumentative.—*Underwood v. Jordan*, 166 S. W. 88.

§ 244 (Tex.Civ.App.) In an action for the purchase price of an automobile, which defendant denied had been delivered, it was improper for the court to single out and weaken or destroy testimony as to the furnishing of a demonstrator to run the car and as to the housing of the car by explaining to the jury the effect of such testimony.—*Lange v. Interstate Sales Co.*, 166 S. W. 900.

(D) Applicability to Pleadings and Evidence.

§ 251 (Mo.App.) Where an employé suing for a personal injury did not claim that it was negligence for the employer to fail to do one of three things specified, provided one or two of the things were supplied, an instruction that a failure to do any one of the things was actionable negligence was erroneous.—*Burrows v. Likes*, 166 S. W. 643.

§ 251 (Tex.Civ.App.) In an action on certain rent notes for a pumping plant and canal, a request to charge that if plaintiff promised to forego rents if salt water appeared in the river at the plant, and salt water did appear, but defendant continued to cultivate the premises without electing to rescind, the jury should find

for plaintiff *held* properly refused as not within the issues.—*Savage v. Mowery*, 166 S. W. 905.

§ 252 (Ky.) An instruction in an action by a surety for contribution, based on the rights of the sureties in case the principal was solvent, is improper where the principal was insolvent.—*Morgan v. Morgan*, 166 S. W. 602.

§ 252 (Mo.App.) An instruction permitting recovery if plaintiff was alighting with the knowledge of the conductor *held* not without evidence to support it.—*Johnston v. United Rys. Co. of City of St. Louis*, 166 S. W. 1103.

§ 252 (Tex.Civ.App.) In an action for injuries to a section hand sustaining a rupture while attempting to remove a hand car from a track, the refusal to submit as an issue of proximate cause his weakness or diseased condition *held* not erroneous under the evidence.—*Missouri, O. & G. Ry. Co. v. Boring*, 166 S. W. 76.

§ 252 (Tex.Civ.App.) In an action for injuries to a passenger where the defendant pleaded contributory negligence, but there was no evidence to support that defense, it was proper to refuse a special charge requested by the defendant on that issue.—*St. Louis Southwestern Ry. Co. of Texas v. McNatt*, 166 S. W. 89.

§ 252 (Tex.Civ.App.) There was no error in refusing an instruction, in an action for brokers' commissions, that any agreement between plaintiffs and the buyer's agent relative to the exchange would not bind defendant without his consent, where there was no evidence of any such agreement to which it could apply.—*McKinney v. Thedford*, 166 S. W. 443.

§ 252 (Tex.Civ.App.) In an action on certain rent notes for a pumping plant and canal, a request to charge that if plaintiff promised to forego rents if salt water appeared in the river at the plant, and salt water did appear, but defendant continued to cultivate the premises without electing to rescind, the jury should find for plaintiff, *held* properly refused as not within the proof.—*Savage v. Mowery*, 166 S. W. 905.

§ 252 (Tex.Civ.App.) A charge presenting an issue not raised by the evidence is erroneous.—*Miller v. Sealy Oil Mill & Mfg. Co.*, 166 S. W. 1182.

§ 253 (Ky.) In employé's action for injuries by starting of elevator, instruction to find for plaintiff if the elevator was started by the boss without warning and refusal to charge to find for defendant if plaintiff was warned by a co-employé *held* error.—*Kentucky Midland Coal Co. v. Vincent*, 166 S. W. 815.

§ 253 (Mo.App.) In an action for trespassing on plaintiffs' premises and constructing a sewer, instruction *held* properly refused, in that it purported to cover the whole case, but ignored the issues that the entry and construction of the sewer were either under a valid ordinance of condemnation or by plaintiffs' permission.—*Ewen v. Hart*, 166 S. W. 315.

In an action against city and others for constructing sewer on plaintiffs' premises, instruction *held* properly refused, in that it ignored the issue, made by the pleading and evidence, that the sewer was constructed with plaintiffs' permission.—*Id.*

§ 253 (Tex.Civ.App.) Instruction that, if railway engineer was negligent in failing to discover oil on the running board before he fell, he could not recover *held* properly refused, where the petition alleged negligence not only in permitting oil on the running board but in failing to equip the engine so as to obviate the necessity of going on the running board.—*Gulf, C. & S. F. Ry. Co. v. Riordan*, 166 S. W. 133.

§ 253 (Tex.Civ.App.) Defendant's requested instruction, in an action by lessors against the lessee for failure to cultivate in a proper manner, as he had agreed, that no damages could be allowed for the part of the crop that died after it came up is erroneous in eliminating the is-

sue of it having died from negligence.—Henson v. Baxter, 166 S. W. 460.

§ 253 (Tex.Civ.App.) Where, in an action for injuries to an employé from the negligence of the foreman in giving an order, the single act of the foreman in giving the order was submitted to the jury, refusal to submit the issue whether the injuries were due to accident was not erroneous.—Houston & T. C. R. Co. v. Coleman, 166 S. W. 685.

#### (E) Requests or Prayers.

§ 255 (Ark.) In an action for personal injuries to plaintiff, operating a hand car on defendant's track, if defendant desired a ruling as to whether its failure to provide a headlight, as required by statute, made it absolutely liable for injury from such failure, it should have made specific objection to instructions on the headlight statute, to the effect that it did not make its liability depend on its failure to provide the statutory headlight and lookout.—Jonesboro, L. C. & E. R. Co. v. Gainer, 166 S. W. 571.

§ 255 (Ark.) Where, upon objection to remarks of counsel, court instructed jury to consider nothing but the evidence, and counsel said he did not want the jury to consider anything not proper under the court's instructions, *held*, that the other party should have asked a more specific withdrawal, if in doubt as to the sufficiency of the court's disapproval.—St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938.

§ 255 (Mo.) Parties at trial are not bound to ask for instructions, nor in the absence of requests is the court bound to charge on the theory of the respective parties.—Wingfield v. Wabash R. Co., 166 S. W. 1037.

§ 256 (Tex.Civ.App.) Where any error in the charge was one of omission and not of commission, a charge correcting the omission should have been requested.—Good v. Texas & P. Ry. Co., 166 S. W. 670.

§ 260 (Mo.App.) In action against a city and others for trespass, instruction that, if trespass was committed, all who encouraged, advised, or assisted were guilty, whether present or not, *held* properly refused, where the court had properly charged that there was no evidence against the city and one of the other defendants.—Ewen v. Hart, 166 S. W. 315.

§ 260 (Mo.App.) It is not error to refuse requests to charge which are covered by instructions given.—Best v. City of St. Joseph, 166 S. W. 817.

§ 260 (Tex.Civ.App.) It is not error to refuse a charge covered by the charge given.—Stevens v. Crosby, 166 S. W. 62; Larabee v. Porter, Id. 395; Good v. Texas & P. Ry. Co., Id. 670; Western Union Telegraph Co. v. Cathcy, Id. 714.

§ 260 (Tex.Civ.App.) It was not error to refuse a special charge which, so far as applicable, was covered by the main charge.—Underwood v. Jordan, 166 S. W. 88.

§ 260 (Tex.Civ.App.) Where the charge given did not clearly present the defense, the denial of two special charges, either of which would have supplied the omission, is erroneous, though only one of them need have been given.—Ft. Worth & R. G. Ry. Co. v. Jonas, 166 S. W. 415.

§ 260 (Tex.Civ.App.) There was no error in refusing an instruction that a broker is not entitled to a commission, where the purchaser bought on his own information after negotiating with the owner, without being influenced by the broker, though the broker made efforts to sell to such purchaser, where the court instructed that the brokers must have been the efficient and procuring cause of the sale.—McKinney v. Thedford, 166 S. W. 443.

There was no error in refusing an instruction that, though a broker brings the parties together, he is not entitled to a commission, in

the absence of a contract of agency, where the same defense was substantially represented in the court's main charge.—Id.

§ 260 (Tex.Civ.App.) A requested instruction substantially covered by the court's charge need not be given.—Henson v. Baxter, 166 S. W. 460.

#### (G) Construction and Operation.

§ 295 (Mo.App.) In a passenger's action for personal injury, where her instructions submitted injury solely from negligence in starting the car, or that, combined with the crowding of other passengers, an instruction that she could not recover if she fell solely because pushed off by other passengers, and not because of any carelessness of those in charge, *held*, in view of the charge as a whole, not erroneous, as allowing recovery for such carelessness.—Stoltze v. United Rys. Co. of St. Louis, 166 S. W. 1102.

§ 296 (Ky.) In an action for death by electric shock by coming in contact with a guy wire, the refusal of a charge authorizing a verdict for defendant *held* not erroneous, in view of the charge given.—Glasgow Electric Light & Ice Co. v. Clark's Adm'x, 166 S. W. 214.

§ 296 (Mo.) Where the other instructions in the series expressly authorized the jury in a condemnation suit to take into consideration the damages to the remainder of defendant's land, an instruction that the only matter for determination was the just compensation for the taking of the land is not erroneous.—Chicago Great Western R. Co. v. Kemper, 166 S. W. 291.

§ 296 (Mo.) In proceedings to condemn land for railroad purposes, the court having directed that the jury should allow any additional damages to defendant's land and improvements which were not taken, an instruction that they should not allow for any supposed damages that defendant would suffer by reason of switching service being withdrawn from its elevator was not error.—Kansas City Southern Ry. Co. v. Second Street Improvement Co., 166 S. W. 296.

§ 296 (Tex.Civ.App.) Where the entire charge fairly submits plaintiff's case and the facts set up in defense, a charge submitting plaintiff's case is not objectionable as taking defendant's contention from the jury and emphasizing the contention of plaintiff.—Watson v. Rice, 166 S. W. 106.

§ 296 (Tex.Civ.App.) Where an instruction was not on the weight of the evidence or misleading when read in connection with the general charge, the giving thereof was not error.—Good v. Texas & P. Ry. Co., 166 S. W. 670.

§ 296 (Tex.Civ.App.) Where the court charged that the burden was on plaintiff to show by a preponderance of the evidence the facts entitling him to recover, a charge that, if an ordinarily prudent person would have done the act complained of, the verdict must be for the employer did not place on the employer the burden of proving freedom from negligence.—Houston & T. C. R. Co. v. Coleman, 166 S. W. 685.

§ 296 (Tex.Civ.App.) A charge that plaintiff could recover for injuries sustained from his horse running away at a railroad crossing which was torn up, if defendant's foreman represented that a wagon had crossed and he could cross over, was not erroneous, because such statements were a mere expression of opinion, where it was further charged that he could not recover if they were expressions of opinion.—St. Louis Southwestern Ry. Co. of Texas v. Evans, 166 S. W. 702.

§ 296 (Tex.Civ.App.) Where the court covered the defense in its charge, a charge calling attention in a brief way to the cause of action, without referring to the defense, was not prejudicial.—Dallas Consol. Electric St. Ry. Co. v. Stone, 166 S. W. 708.



§ 296 (Tex.Civ.App.) Where correct charges do not refer to or modify an erroneous charge, which is in direct contradiction, the two cannot be reconciled and judgment must be reversed.—*Western Union Telegraph Co. v. Cathey*, 166 S. W. 714.

### **IX. VERDICT.**

#### **(A) General Verdict.**

§ 325 (Ark.) The answer of a juror, while the jury were being polled, that he did not believe the verdict right, but agreed to it for the sake of harmony, was not to be considered a negative answer, but as merely meaning that after discussion of the case, in an effort at harmony, he had receded from the position first taken by him.—*Williams v. Williams*, 166 S. W. 552.

§ 343 (Tex.Civ.App.) A verdict is conclusive between the parties until set aside.—*Weinstein v. Acme Laundry*, 166 S. W. 126.

#### **(B) Special Interrogatories and Findings.**

§ 350 (Tex.Civ.App.) In an action for an injury to an employé of a gin company, caused by a defective lever, where the court submitted defendant's negligence in furnishing the gin stand with the lever, it was improper to submit defendant's failure to warn of the defect, that the employé's work had been negligently changed with the assurance that the machinery would be repaired, and that defendant failed to employ a mechanic to keep it in repair; such issues being included in the main issue.—*Cisco Oil Mill v. Van Geem*, 166 S. W. 439.

§ 356 (Tex.Civ.App.) Where, in a negligence case, special issues of negligence, contributory negligence, and assumption of risk were submitted, the failure of the jury to find upon the issues of contributory negligence and assumption of risk, there being evidence to support them, was in direct violation of Rev. St. 1911, art. 1988, and no final judgment could be rendered on such verdict.—*Cisco Oil Mill v. Van Geem*, 166 S. W. 439.

### **X. TRIAL BY COURT.**

#### **(B) Findings of Fact and Conclusions of Law.**

§ 390 (Tex.Civ.App.) Where the judge filed his conclusions of fact and law within ten days after the adjournment of the term as permitted by Vernon's Sayles' Ann. Civ. St. 1914, art. 2075, it was not material that they were not reduced to writing and filed during the term.—*August v. Gamer Co.*, 166 S. W. 1197.

### **XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.**

§ 406 (Tex.Civ.App.) A fundamental error may be waived, unless it is of such a nature as to render the judgment void.—*McKenzie v. Imperial Irr. Co.*, 166 S. W. 495.

§ 420 (Tex.Civ.App.) Where a motion for an instructed verdict is overruled and the moving party thereafter introduced evidence in his own behalf, he waives his right to assign error on denial of the motion.—*Savage v. Mowery*, 166 S. W. 905.

### **TROVER AND CONVERSION.**

See Appeal and Error, § 1050; Carriers, § 94; Chattel Mortgages, §§ 170, 173; Embezzlement, § 5; Evidence, § 230; Principal and Agent, § 106; Replevin, § 106.

### **I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.**

§ 10 (Tex.Civ.App.) An unsecured creditor who seized and sold the debtor's property, without his consent, to discharge his debt is liable for the conversion, though using reasonable care in disposing of the property.—*Jones v. City Nat. Bank*, 166 S. W. 442.

Where a debtor claimed that a creditor seized his property without his consent and did not use reasonable care in its sale, and the creditor claimed that the debtor consented to his acts the debtor is entitled to recover at all events if the creditor did not exercise reasonable care in disposing of the property.—*Id.*

### **II. ACTIONS.**

#### **(A) Right of Action and Defenses.**

§ 22 (Tex.Civ.App.) In a suit for the conversion of property, the proceeds of which plaintiff had agreed to apply to the debt due defendant, plaintiff's right to recover is not dependent upon whether he would have continued to apply the proceeds to the discharge of his debt.—*Jones v. City Nat. Bank*, 166 S. W. 442.

#### **(D) Damages.**

§ 54 (Tex.Civ.App.) Where a landlord converted hay belonging to the tenant, the measure of damages is the market value of the hay converted; hence the expense of hauling the hay to market would be immaterial.—*Jackson v. Taylor*, 166 S. W. 413.

Where a landlord converted hay belonging to her tenant, she cannot recover expenses incurred in baling the hay.—*Id.*

### **TRUST COMPANIES.**

See Banks and Banking, § 315.

### **TRUST DEEDS.**

See Mortgages.

### **TRUSTEE PROCESS.**

See Garnishment.

### **TRUSTS.**

See Attachment, § 4; Bankruptcy, § 303; Frauds, Statute of, § 56; Pleading, § 363; Receivers, § 101; Stipulations, § 18; Trial, § 108½; Trusts; Wills, §§ 675, 731, 744.

### **I. CREATION, EXISTENCE, AND VALIDITY.**

#### **(A) Express Trusts.**

§§ 17, 18 (Ark.) Where one purchased land and caused the deed to be executed to a third person, a parol agreement that the third person should hold the land in trust for the sole use of his wife was unenforceable, under the statute of frauds.—*Ussery v. Ussery*, 166 S. W. 946.

§§ 17, 18 (Tex.Civ.App.) The statute of frauds does not require that trusts shall be evidenced by writing.—*Larrabee v. Porter*, 166 S. W. 395.

§ 44 (Tex.Civ.App.) Evidence held not to sufficiently show that land conveyed was taken under a parol trust.—*Robson v. Moore*, 166 S. W. 908.

Where the trustee is dead, a parol trust should not be ingrafted on a deed to land without clear and satisfactory evidence thereof, and such evidence is not satisfactory where the party suing to establish a trust withholds the best on the question.—*Id.*

#### **(C) Constructive Trusts.**

§ 92½ (Ky.) Constructive trusts are not within the statute of frauds, Ky. St. § 470, because they are bottomed on an estoppel.—*Willis v. Lam*, 166 S. W. 251.

§ 95 (Ark.) Where a purchaser, desiring to contribute to the support of his stepdaughter and her children, procured the conveyance to her husband, and it was understood that he and his wife should move on the land, and he within a year deserted his wife, he did not hold the land in trust *ex maleficio*; there being no



fraud in procuring title.—*Ussery v. Ussery*, 166 S. W. 948.

## II. CONSTRUCTION AND OPERATION.

### (B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 134 (Ky.) Under will leaving real property to testator's son in trust for the support of his wife and children for life, without requiring bond, *held* that, aside from the discretion in the use and management of the property, the trustee had no other interest.—*Bank of Taylorsville v. Vandyke*, 166 S. W. 1024.

§ 147 (Ky.) Beneficiary of a trust for his life, who made an assignment for creditors, and who, upon assignee's sale to the trustee, signed a deed conveying a one-fifth interest, instead of a one-fourth interest, to him known, *held* not to retain any interest subject to claims of creditors.—*Bank of Taylorsville v. Vandyke*, 166 S. W. 1024.

§ 151 (Ky.) Interest of beneficiary under testamentary trust for the support of his mother, brothers, and sisters, *held* not subject to the claims of his creditors, where it was not separable, and where it did not appear that the income was more than adequate for his maintenance.—*Bank of Taylorsville v. Vandyke*, 166 S. W. 1024.

## IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 202 (Tex.Civ.App.) Where a father and children executed a deed and an agreement as to the distribution by the father of the proceeds, and the father, who acted for all, delivered the deed, the grantee was not bound to see that each child received his share under the agreement, and one of them could not object that the delivery was unauthorized because she did not receive her share.—*Cooper v. Marek*, 166 S. W. 58.

## VIII. LIABILITIES ON TRUSTEES' BONDS.

§ 380 (Ky.) Where the bond of a testamentary trustee was conditioned upon the trustee's faithful performance of his duties and his accounting for all moneys belonging to the trust estate, the surety is not liable for attorney's fees expended after the trustee's resignation, to recover amounts defaulted by him.—*United States Fidelity & Guaranty Co. v. Carter*, 166 S. W. 238.

§ 385 (Ky.) A judgment settling the accounts of a defaulting trustee, who was entitled to a part of the trust estate, and to whose rights the surety on his bond had been subrogated, which assessed attorney's fees against the surety, *held* conclusive upon the surety, who did not appeal, as authorized by Civ. Code Prac. § 734.—*United States Fidelity & Guaranty Co. v. Carter*, 166 S. W. 238.

## UNDERTAKINGS.

See Bonds.

## UNDUE INFLUENCE.

See Wills, §§ 155-165.

## UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, §§ 2-99.

## UNITED STATES.

See Public Lands, § 61; Trade-Marks and Trade-Names.

## USURY.

### I. USURIOUS CONTRACTS AND TRANSACTIONS.

#### (C) Rights and Remedies of Third Persons.

§ 130 (Ark.) Where complainants assumed certain indebtedness due from defendants to third persons as a part of the consideration for a deed of trust, it was immaterial that one of such debts was usurious as between defendants and the original creditor.—*Blake v. Askew*, 166 S. W. 965.

## VACATION.

See Highways, §§ 76, 77.

## VAGRANCY.

§ 3 (Tex.Cr.App.) Under an indictment charging vagrancy for loitering in a disorderly house from the 1st of October until the filing of the complaint, evidence that accused was seen in disorderly houses more than a year before is inadmissible, where there was no showing that he was at such places between that time and the time specified in the complaint.—*Martoni v. State*, 166 S. W. 1169.

Evidence in a prosecution for vagrancy for loitering in disorderly houses *held* insufficient to support a conviction.—*Id.*

## VARIANCE.

See Continuance, § 31.

## VENDOR AND PURCHASER.

See Brokers; Contracts, § 10; Covenants, § 130; Deeds; Easements, § 61; Evidence, §§ 444, 460; Exchange of Property; Fraud, §§ 16, 23, 41, 52, 59; Frauds, Statute of, §§ 56, 60; Justices of the Peace, § 36; Logs and Logging, § 3; Public Lands, §§ 173, 178, 223; Sales; Specific Performance, §§ 29, 121; Torts, § 12.

### I. REQUISITES AND VALIDITY OF CONTRACT.

§ 16 (Ark.) Where defendant by letter offered to sell land, plaintiff's reply, which requested defendant to send the abstract and stated that plaintiff would close the matter, constituted an acceptance.—*Bushmeyer v. McGarry*, 166 S. W. 168.

Where defendant offered to sell land, agreeing to make a deed and deliver the abstract upon payment of the purchase price, plaintiff's request that the abstract be furnished immediately did not render his acceptance qualified, for if defendant could not furnish good title plaintiff would be entitled to a return of his money.—*Id.*

Where plaintiff had unqualifiedly accepted defendant's offer to sell land, the acceptance was not nullified by his proposal to change the mode of payment.—*Id.*

§ 16 (Tex.Civ.App.) One receiving by mail a proposition of purchase or sale has the right, within a reasonable time, and before it is withdrawn, to accept by letter, deposited in the post office, duly stamped for delivery, which acceptance is binding from the time it is deposited, whether delivered or not; but, if the offeror limits the time for acceptance, it may be accepted within such time, unless before acceptance the offer is withdrawn and notice thereof given.—*Bowen v. Speer*, 166 S. W. 1183.

Where the owner of a lot offered to take \$500 net cash, provided he could have the money in hand by May 28th, an unconditional acceptance by mail, by which the owner, by simply executing a deed waiting for him at a bank, could have the money in his hands by the 28th, was sufficient.—*Id.*

§ 22 (Ky.) The description of the land, in a contract of sale, as a certain tract in W. county, about one mile northeast of W., with a reference to a certain recorded deed for a full description, was sufficient to uphold the contract.—Baird v. Prewitt, 166 S. W. 771.

§ 33 (Ark.) Misrepresentations which will justify the rescission of a contract for the sale of land must mislead the purchaser and induce him to buy on the faith thereof, and in the absence of means of information to be derived from his own observation, and must injure the party seeking to rescind.—English v. North, 166 S. W. 577.

§ 44 (Ark.) To justify canceling a written contract for the conveyance of land on the ground of misrepresentation, a clear case should be made out by the evidence.—English v. North, 166 S. W. 577.

## II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 50 (Tex.Civ.App.) A provision of a land contract that vendor will not be responsible for statements made regarding its property, except as stated in its printed literature or letters signed by its officers, left its liability for representations not incorporated in the contract the same as if the provision had not been inserted, so that it would not be bound to open and macadamize a street, though its printed advertisement stated that it would do so.—South Texas Mortgage Co. v. Coe, 166 S. W. 419; Same v. Erwin, Id. 422.

## III. MODIFICATION OR RESCISSION OF CONTRACT.

### (A) By Agreement of Parties.

§ 82 (Ark.) Where defendant offered to sell plaintiff a tract of land which had been platted, plaintiff's demand after his acceptance, that a new bill of assurance be executed, as the one executed when the property was platted as an addition, because of error in drawing, located the addition on the wrong piece of land, did not work a modification of the contract.—Bushmeyer v. McGarry, 166 S. W. 168.

### (C) Rescission by Purchaser.

§ 110 (Tex.Civ.App.) Where there was a breach of warranty in a contract of sale before the delivery of the deed, the purchaser accepting the deed containing the warranty, with knowledge of the breach, could merely recover damages for the breach.—Luckenbach v. Thomas, 166 S. W. 99.

§ 114 (Tex.Civ.App.) Where a purchaser, with knowledge that a well, guaranteed by the vendor to supply the necessary water for irrigation, flowed so poorly that irrigation on all but a small part of the land had to be abandoned, made improvements on the premises and partial payments of the price and interest without objections, he could not compel a rescission.—Luckenbach v. Thomas, 166 S. W. 99.

§ 127 (Tex.Civ.App.) A purchaser cannot, after repudiating the purchase on the ground of the fraud of the vendor, continue to make improvements and recover therefor in a suit to rescind the purchase.—Luckenbach v. Thomas, 166 S. W. 99.

## IV. PERFORMANCE OF CONTRACT.

### (D) Payment of Purchase Money.

§ 176 (Ky.) Where a tract of land, conveyed as 60 acres more or less, contained only 41½ acres, the grantee was entitled to relief to the extent of the value of the deficit, whether the sale was in gross or by the acre, and whether the grantor was guilty of fraud or was ignorant of the deficiency.—Rust v. Carpenter, 166 S. W. 180.

§ 180 (Tex.Civ.App.) The vendors of land could not be required to accept purchase-money notes executed by one who had guaranteed per-

formance by the purchaser instead of notes executed by the purchaser.—Sears v. Ainsworth, 166 S. W. 60.

## V. RIGHTS AND LIABILITIES OF PARTIES.

### (B) As to Third Persons in General.

§ 214 (Tex.Civ.App.) The assignee of a land contract is not responsible for the promises of the vendor to the purchaser, unless it contracted to become so.—South Texas Mortgage Co. v. Coe, 166 S. W. 419; Same v. Erwin, Id. 422.

## VI. REMEDIES OF VENDOR.

### (A) Lien and Recovery of Land.

§ 261 (Ky.) An assignment of vendor's lien notes is a sufficient assignment of the lien to that extent, and as between the parties vests the assignee with all the rights and remedies of the vendor under the lien in the deed retained.—Hicks' Committee v. Smith, 166 S. W. 248.

§ 267 (Ky.) Under Ky. St. §§ 498a, 499, providing for the release of vendor's liens by release over the holder's own hand, attested by the clerk, or by release under power of attorney, held, that an attempted release by a mere note to the clerk and his entry thereof on the record was ineffectual.—Hicks' Committee v. Smith, 166 S. W. 248.

§ 274 (Tex.Civ.App.) A grantee resisting the payment of notes for the price and the foreclosure of a vendor's lien retained in the deed cannot go back of the notes and deed; and a pleading directed to the contract of sale is insufficient.—Luckenbach v. Thomas, 166 S. W. 99.

§ 280 (Ky.) The petition, in an action to enforce a vendor's lien, must set forth the terms of the contract in full or in substance; if conveyance has been made in accordance with the contract, that fact must be stated; and, if conveyance has not been made, the plaintiff must allege his ability and readiness to so convey.—Baird v. Prewitt, 166 S. W. 771.

The description of the land, in a petition to enforce a vendor's lien, as a tract in W. county, near W., being the tract conveyed by a certain recorded deed, except two acres thereof, was insufficient to uphold a judgment subjecting the land to the satisfaction of the lien.—Id.

§ 284 (Tex.Civ.App.) In an action on purchase-money notes and for the foreclosure of a vendor's lien, instructions held objectionable, for failing to make the jury understand that unreasonable delay on the part of the purchaser in complaining of fraud was an absolute defense to his demand for rescission.—Luckenbach v. Thomas, 166 S. W. 99.

§ 285 (Tex.Civ.App.) Where defendant guaranteed part of a series of vendor's lien notes, the whole of which plaintiff declared due upon nonpayment of the second, the judgment foreclosing the lien and finding against defendant on his guaranty need not prorate the proceeds of the sale of the land between the notes guaranteed and the others.—Borschow v. Stephenson, 166 S. W. 121.

### (B) Actions for Purchase Money.

§ 318 (Ky.) In action on note given in part payment for land in which defendant alleged deficiency in the acreage, held, that the court erred in rescinding the sale and should have canceled the note and given defendant judgment for the excess of the value of the deficiency.—Rust v. Carpenter, 166 S. W. 180.

## VII. REMEDIES OF PURCHASER.

### (B) Actions for Breach of Contract.

§ 342 (Tex.Civ.App.) Where a tenant in common contracts to convey a designated portion of an undivided tract of land, and is unable to do so by reason of such portion falling to another in partition, the remedy of the purchaser

is a suit for damages.—*Baker v. Heney*, 166 S. W. 19.

§ 343 (Mo.App.) A purchaser of a lot from a vendor who made and recorded a plat, as required by Rev. St. 1909, § 10290, may rely on the recorded plat, and may recover for a shortage.—*Lindsay v. Smith*, 166 S. W. 820.

§ 343 (Tex.Civ.App.) A vendor who, after the acceptance of his offer to sell, sold the land to others, thereby placing it out of the purchaser's power to enforce specific performance, was liable to the purchaser for damages sustained by such a breach of the contract.—*Bowen v. Speer*, 166 S. W. 1183.

§ 349 (Tex.Civ.App.) A petition seeking damages to the amount of the difference between the contract price and market value, for failure to convey land that defendant did not own when he contracted to sell it, which did not allege fraud or a willful refusal to convey, was subject to general demurrer, as plaintiff was not entitled to recover such damages.—*Bird v. Lester*, 166 S. W. 112.

§ 351 (Tex.Civ.App.) Contract by vendor also owning water power and milldam to erect pump and piping and furnish water for irrigating the land held to contemplate a permanent and extensive improvement of the land, and for a breach thereof the difference in the value of the property was recoverable.—*Abney v. Roberts*, 166 S. W. 408.

§ 351 (Tex.Civ.App.) The measure of damages for the vendor's breach of his accepted offer to sell is the difference between the market value of the property at the time of the breach and the price at which it was offered.—*Bowen v. Speer*, 166 S. W. 1183.

## VENUE.

See Appeal and Error, § 186; Criminal Law, §§ 134, 1092, 1150; Exceptions, Bill of, § 32; Judgment, § 455; Partition, § 43.

## I. NATURE OR SUBJECT OF ACTION.

§ 5 (Ky.) An action under Civ. Code Prac. § 490, subsec. 2, for the sale of lands and a division of the proceeds among the joint owners, where the owners derive title in some manner other than as heirs of the devisee of a deceased person, is governed by Civ. Code Prac. § 62, subsec. 3, which provides that actions for the sale of real property, brought under sections 489-498 of the Civil Code of Practice must be brought in the county in which the subject of the action is situated.—*Boreing v. Melcon*, 166 S. W. 612.

§ 17 (Tex.Civ.App.) A defendant who invokes the jurisdiction of the trial court by a cross-action thereby waives his plea of privilege to be sued in the county and precinct of his residence.—*Barnard & Moran v. Williams*, 166 S. W. 910.

## II. DOMICILE OR RESIDENCE OF PARTIES.

§ 22 (Tex.Civ.App.) Where an action was brought in the county of the residence of one of the defendants, the other defendants' plea of privilege to be sued in the county of their residence was properly overruled.—*Abney v. Roberts*, 166 S. W. 408.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 46 (Tex.Civ.App.) A suit to enjoin a judgment alleged to be void for alteration and to remove the cloud cast by a record of such judgment upon plaintiff's land should be removed in its entirety to the county where the judgment was rendered, under Rev. St. 1911, art. 4653, and article 1830, subd. 17, fixing the venue of suits to enjoin execution upon judgment, and

not retained as to the removal of the cloud in the county where the land was situated, under Rev. St. 1911, art. 1830, subd. 14, fixing the venue of suits to remove clouds upon title.—*Lester v. Gatewood*, 166 S. W. 389.

§ 75 (Mo.) Where a change of venue from one circuit court to another is awarded, the second court is not without jurisdiction because the order reciting that the venue was changed used the word "court" instead of "cause"; that being a mere clerical mistake.—*Chicago Great Western R. Co. v. Kemper*, 166 S. W. 291.

## VERDICT.

See Criminal Law, §§ 875, 884, 957; Trial, §§ 178, 325-356.

## VERIFICATION.

See Pleading, § 290.

## VESTED REMAINDERS.

See Wills, § 684.

## VOTERS.

See Elections.

## WAGES.

See Master and Servant, §§ 73-82.

## WAIVER.

See Appeal and Error, §§ 215, 882, 917; Estoppel; Insurance, §§ 141, 228, 245, 559, 668, 695, 724, 755; Parties, § 96; Pleading, §§ 406, 412, 418, 423, 426; Principal and Surety, § 142; Receivers, § 101; Sales, § 202; Trial, §§ 406, 420; Venue, § 17; Wills, § 731.

## WARDEN.

See False Imprisonment.

## WARDS.

See Guardian and Ward.

## WARNING.

See Master and Servant, §§ 183, 150.

## WARRANTY.

See Sales, § 441; Vendor and Purchaser, § 110.

## WATERS AND WATER COURSES.

See Drains; Eminent Domain, § 169; Navigable Waters.

## IV. NATURAL LAKES AND PONDS.

§ 109 (Tex.Civ.App.) A person owning part of the bed of a natural lake worthless without the water on it has a right to have the water maintained at its natural level, so that the owner of another part of the bed may not divert the water to irrigate nonriparian lands, when this injuriously affects the rights of the first owner.—*Lakeside Irr. Co. v. Kirby*, 166 S. W. 715.

§ 114 (Tex.Civ.App.) The remedy by action for damages for diversion of waters of a lake, not being as practical and efficient to the ends of justice and its prompt administration as that of injunction, is inadequate.—*Lakeside Irr. Co. v. Kirby*, 166 S. W. 715.

Under the statute an injunction is authorized though there be an adequate remedy at law.—*Id.*

## V. SURFACE WATERS.

§ 126 (Ky.) Evidence, in an action against a railroad for negligent obstruction of the outlets through its road at a fill for the natural flow of water accumulating on plaintiff's land,

held to sustain a finding of temporary damage.—Illinois Cent. R. Co. v. Doss, 166 S. W. 785.

Defendant, in an action for obstruction of outlets for natural flow of water accumulating on plaintiff's land, may not go into collateral issues by showing that crops on other lands in the immediate vicinity were destroyed by water during the year for which plaintiff claims damages, and that this was not caused by any act of defendant.—Id.

## VI. APPROPRIATION AND PRESCRIPTION.

§ 152 (Tex.Civ.App.) The issue of prescriptive right to take all the water of a lake for irrigation purposes is not raised, the answer alleging merely that defendant, incorporated three years before commencement of suit, claimed and exercised the sole right to pump water out of the lake.—Lakeside Irr. Co. v. Kirby, 166 S. W. 715.

Evidence held insufficient to show a prescriptive right, by exercise thereof for ten years, by defendant and its predecessor, prior to the suit, to take all the water from a lake for irrigation.—Id.

## IX. PUBLIC WATER SUPPLY.

### (A) Domestic and Municipal Purposes.

§ 206 (Ark.) A property owner and taxpayer in a city has no right of action against a water company, on its contract to furnish water to a city at public hydrants sufficient for fire purposes, for damage to his property by fire, occasioned by its failure to so furnish water, since there was no privity of contract between such owner and the company.—Jones House Furnishing Co. v. Arkansas Water Co., 166 S. W. 557.

A water company, contracting with a private owner to furnish water for a specific purpose or in a specific quantity, is liable for all damage proximately caused by the breach of such contract; but its liability is only such as is created by the contract.—Id.

Under a water company's contract to furnish water for a sprinkling system in a warehouse, exempting it from claims for injury to property of the customer by fire, failure to supply water, or any cause whatsoever, held, that the company was not liable for damage from a fire which a compliance with the contract would have prevented.—Id.

§ 206 (Tex.Civ.App.) An individual or company authorized to do so may so contract as to incur a liability for damages proximately resulting from a failure to furnish water sufficient to extinguish fires.—Dublin Electric & Gas Co. v. Thompson, 166 S. W. 113.

§ 209 (Tex.Civ.App.) Evidence held to show that neither party contemplated that a water company promising to furnish consumer water for all purposes should furnish water for fire protection.—Dublin Electric & Gas Co. v. Thompson, 166 S. W. 113.

### (B) Irrigation and Other Agricultural Purposes.

§ 240 (Tex.Civ.App.) An irrigation company was not a statutory appropriator of waters from a lake, though it pumped water from a river into a canal leading into a lake, and then pumped from the lake; its irrigation affidavit stating the water was to be appropriated from the river.—Lakeside Irr. Co. v. Kirby, 166 S. W. 715.

§ 247 (Tex.Civ.App.) Persons whom defendant has contracted to furnish with water without any provision as to the source thereof, are not necessary parties to a suit to enjoin it from pumping from a lake more water than it pumps into it; an injunction not preventing it from fulfilling the contracts or prejudicing their rights thereunder.—Lakeside Irr. Co. v. Kirby, 166 S. W. 715.

## WAYS.

See Easements; Highways.

## WEAPONS.

See Criminal Law, § 730; Indictment and Information, § 72; Witnesses, § 344.

§ 8 (Tex.Cr.App.) Under the statute denouncing the carrying of a pistol on the person, it is immaterial whether the pistol is new or old, in good condition or bad, or loaded or unloaded.—Steele v. State, 166 S. W. 511.

§ 9 (Tex.Cr.App.) A farm to which accused goes to forcibly take some corn claimed by his employer is not the "place of business" of accused within the statute so as to entitle him to carry a pistol.—Guthrie v. State, 166 S. W. 730.

§ 9 (Tex.Cr.App.) An owner who lives on his premises, and who has rented a part thereof on shares, and who with his tenant jointly cultivates the crops, is on his own premises, and his act in carrying a pistol while there is not punishable.—Fields v. State, 166 S. W. 1168.

§ 13 (Tex.Cr.App.) Where a husband sold his crop and separated from his wife, who remained on the farm and resisted efforts of the purchaser to gather the crop, accused, hired by the purchaser to gather the crop, both knowing of the wife's claim and her intention to resist, is not authorized to carry a pistol.—Guthrie v. State, 166 S. W. 730.

No one can give to another permission to carry arms on his premises in violation of law.—Id.

§ 17 (Ark.) Evidence held sufficient to warrant a conviction of carrying a pistol as a weapon.—Lemuels v. State, 166 S. W. 741.

§ 17 (Tex.Cr.App.) The burden was upon one charged with unlawfully carrying a pistol to establish the defense that he was at the time a civil officer engaged in the discharge of his duty, and had a reasonable fear of an unlawful attack upon his person, and the danger was so imminent as not to permit the arrest of the threatening party, under Pen. Code 1911, art. 476, especially in view of article 52.—Hunter v. State, 166 S. W. 164.

## WIDOWS.

See Dower.

## WILLS.

See Appeal and Error, § 1033; Descent and Distribution; Executors and Administrators; Frauds, Statute of, § 129; Husband and Wife, § 31; Infants, § 37; Pleading, § 369; Tenancy in Common, § 8; Trial, § 85; Trusts, §§ 134, 380.

## II. TESTAMENTARY CAPACITY.

§ 21 (Tex.) Testamentary incapacity implies the want of intelligent mental power.—Scott v. Townsend, 166 S. W. 1138.

## IV. REQUISITES AND VALIDITY.

### (A) Nature and Essentials of Testamentary Dispositions.

§ 87 (Tex.Civ.App.) A paper asking B. and A. to accept this, and a note payable to them "15 after date," both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and B.'s name, did not show an intent to make a testamentary disposition, the criterion of which is whether by intentment it takes effect at the maker's death, vesting no earlier interest in the beneficiary.—Maris v. Adams, 166 S. W. 475.

### (B) Form and Contents of Instruments.

§ 100 (Tex.Civ.App.) A husband and wife may make a joint and mutual will containing recip-

recal obligations.—*Larrabee v. Porter*, 166 S. W. 395.

A joint and mutual will executed by a husband and wife in consummation of an oral agreement between them for the equitable disposition of their property, which gives to the survivor their property for life with remainder to their daughters, is not void if regarded as a contract between husband and wife, but is enforceable after the death of the wife acquiescing therein, on principles of equity.—*Id.*

Where a joint and mutual will executed by husband and wife, which gave to the survivor all their property for life with remainder to their daughters, was executed in consummation of a parol agreement between them to make an equitable disposition of their property, and the husband on the death of the wife probated the will and took possession of the property devised thereby, he was estopped from thereafter disavowing the will.—*Id.*

#### (C) Execution.

§ 108 (Tex.Civ.App.) A joint and mutual will executed by husband and wife pursuant to a contract between them, which gives to the survivor a life estate in their property with remainder to their daughters, need not be separately acknowledged by the wife, but declares a trust in favor of the children to become effective after the death of the survivor.—*Larrabee v. Porter*, 166 S. W. 395.

§ 114 (Tex.Civ.App.) Papers alleged to constitute a testamentary disposition of property, which were not attested as required by Rev. St. 1911, art. 7857, were insufficient as a formal will under that article.—*Maris v. Adams*, 166 S. W. 475.

#### (D) Holographic Wills.

§ 132 (Tex.Civ.App.) An envelope on which was written "Notes" and B.'s name, a paper inclosed asking B. and A. to accept this, and a note to A. and B. also inclosed, both signed by V., in whose handwriting all was written, except the printed portion of the note, did not constitute a holographic will, because not "wholly written by the testator," as required by Rev. St. 1911, art. 7858.—*Maris v. Adams*, 166 S. W. 475.

Where a printed form is used in writing a will, so that it consists partly of the printing and partly of the clauses written by the testator, no part of it can be admitted to probate as his holographic will under Rev. St. 1911, art. 7858, dispensing with the necessity of attestation "where the will is wholly written by the testator."—*Id.*

§ 134 (Tex.Civ.App.) If parol evidence was admissible to show that a writing asking B. and A. to accept this, and a note to them both signed by V. were found together in a sealed envelope, and if the note was properly incorporated into the writing by reference, then all three were to be considered and construed together in determining whether they could be probated as a will.—*Maris v. Adams*, 166 S. W. 475.

#### (F) Mistake, Undue Influence, and Fraud.

§ 155 (Tex.) Undue influence held of itself to imply the existence of a mind strong enough to make a valid will, if unhindered by dominant influence, and, although the mind is not reduced to a state of incapacity, to be shown if as a result of its exertion independence of will and action are subjected and surrendered.—*Scott v. Townsend*, 166 S. W. 1138.

§ 164 (Tex.) In a will contest on the ground of the undue influence of contestee, the wife of testator, to the exclusion of contestant, a stepdaughter, evidence that contestee was urging the execution of some important paper by the testator, which he was reluctant to execute, though such paper was not identified as his will, and that she had several times threatened to take their minor son from him unless he signed

such paper, held admissible.—*Scott v. Townsend*, 166 S. W. 1138.

In a will contest on the ground of undue influence by the contestee, testator's wife, to the exclusion of a daughter, held that the fact of the contestee's hostility toward the daughter, and her design to exclude her from benefits under the will, was admissible.—*Id.*

In a will contest on the ground of undue influence whereby the contestee, testator's wife, sought to obtain benefits for herself and her son, innocent of any collusion, to the exclusion of her stepdaughter, held that the contestee's declarations of hostility toward the stepdaughter were admissible, even though they would inevitably affect the interest of the son.—*Id.*

§ 164 (Tex.Civ.App.) In a will contest, where the issue was whether the proponent procured it by fraud and deception, a letter written by proponent to his uncle, seeking to borrow money, and stating, "if you could know what I know which is coming to you and your family through my work I think you would remember me," was properly admitted.—*Sockwell v. Sockwell*, 166 S. W. 1188.

§ 165 (Tex.) Where undue influence, as distinguished from mental incapacity, is in issue and is independently proved, testator's declarations, expressive of a mental state produced by such influence, whether made contemporaneously with the execution of the will or within a reasonable time before or after its execution, are admissible on the question of his free agency in executing it.—*Scott v. Townsend*, 166 S. W. 1138.

Declarations of a testator that the will was produced by undue influence, or that it is not his will or his statement of like nature, held incompetent to prove the fact of undue influence or as direct evidence that it produced the will.—*Id.*

In a will contest on the ground of undue influence by contestee, the wife of testator, held that his declaration that she had been after him to make a will was only a narrative statement, not tending to show its effective operation on his mind when he executed the will, and hence within the hearsay rule and inadmissible.—*Id.*

In a will contest on the ground of undue influence by the contestee, the wife of testator, to the exclusion of a daughter, testator's declaration that his wife had always wanted him to make his will and had always manifested a hostile or unfriendly attitude toward his daughter, held hearsay in character and inadmissible to show the effect of such influence on testator's mind.—*Id.*

In a will contest on the ground of undue influence exercised by the contestee, the wife of testator, to the exclusion of a daughter, testator's declaration, expressive of affection for his daughter and her son, and an intention to provide for both of them in his will, held admissible.—*Id.*

§ 165 (Tex.Civ.App.) Declarations made by testatrix at or about the time of the alleged execution of a will offered for probate, disclosing unfriendly feeling towards persons who were beneficiaries under the will, were relevant and material in a contest charging fraud, as tending to show that testatrix did not knowingly and willingly make the bequest.—*Sockwell v. Sockwell*, 166 S. W. 1188.

#### (G) Revocation and Revival.

§ 179 (Tex.Civ.App.) If a will leaving a certain sum to G. and the rest to testator's heirs was executed after the execution of an alleged will, consisting of a letter and a note to B. and A., both signed by testator, it had the effect of revoking such alleged will, if any there was, though it was claimed that such was not testator's intention.—*Maris v. Adams*, 166 S. W. 475.

§ 188 (Tex.Civ.App.) A joint will executed by husband and wife, which gives to the survivor

a life estate in the entire property, is executed on a valid consideration, and the husband probating it on the death of the wife acquiescing in its provisions and taking possession of the property cannot revoke it.—*Larrabee v. Porter*, 166 S. W. 385.

## V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

### (A) Probate and Revocation in General.

§ 221 (Ky.) Civ. Code Prac. § 518, subsec. 5, does not authorize an action in the county court to set aside an order rejecting a will by infants not parties to the proceedings, and not necessary parties within Ky. St. § 4860.—*Patton v. Sallee*, 166 S. W. 1004.

Civ. Code Prac. § 518, subsec. 4, refers only to an action wherein complainant is the unsuccessful party, and does not authorize an action in the county court by infants to set aside an order rejecting a will in proceedings in which they were not parties.—*Id.*

### (G) Petitions, Objections, and Pleadings.

§ 272 (Tex.Civ.App.) Where the replication of the proponent asked that a subsequent will be admitted to probate in connection with proponent's alleged will, the pleadings were sufficient to authorize probate of the subsequent will.—*Maris v. Adams*, 166 S. W. 475.

### (H) Evidence.

§ 293 (Tex.Civ.App.) Whenever a person deceased has executed a paper which does not upon its face clearly evidence a testamentary character, the courts cannot transform it into a will by the aid of parol evidence, in violation of Rev. St. 1911, art. 7857, declaring that every will, except as otherwise provided, shall be in writing.—*Maris v. Adams*, 166 S. W. 475.

Under Rev. St. 1911, art. 7857, providing that all wills, except as otherwise provided, shall be in writing, parol evidence as to the testator's intent is not admissible, except to explain a latent ambiguity, which can never arise as to the question of testamentary intent.—*Id.*

Parol evidence showing the situation of the testator or the surrounding circumstances at the time of executing the will is admissible only after the court has decided that the instrument was executed with a testamentary intent, and therefore constitutes a will, and is not admissible to show the character of the instrument.—*Id.*

§ 297 (Tex.Civ.App.) Declarations of the testator made before or after the date of the will, and relating to its execution, but not a part of the res gesta, are not admissible.—*Maris v. Adams*, 166 S. W. 475.

Declarations of a testator at the time of executing a will that he "already had Adams and Henry fixed" were not admissible to establish the execution of a prior will, nor to identify a note claimed to have been found with a letter asking the payees to accept "this," in a sealed envelope, indorsed "Notes," as one of the notes referred to on the envelope.—*Id.*

### (K) Review.

§ 356 (Ky.) The Statute of Wills is a complete statute on the subject, and the sole remedy for an erroneous rejection or probate of a will is by appeal to the circuit court.—*Patton v. Sallee*, 166 S. W. 1004.

§ 399 (Tex.) Where a bill of exceptions to the admission of evidence did not show that declarations of the testator, including an inadmissible statement subject to a distinct objection, were separately objected to, but merely disclosed an objection to the entire declarations, there was no reversible error in receiving the inadmissible testimony; but such rule did not apply to entire declarations, subject only to single objection.—*Scott v. Townsend*, 166 S. W. 1138.

§ 400 (Tex.) In a will contest, erroneous admission of testator's incompetent declaration that the contestee, his wife, had been after him

to make a will held prejudicial.—*Scott v. Townsend*, 166 S. W. 1138.

## VI. CONSTRUCTION.

### (A) General Rules.

§ 439 (Mo.App.) The court in construing a will must ascertain the intention of the testator and give effect thereto.—*Snyder v. Toler*, 166 S. W. 1059.

§ 464 (Tex.Civ.App.) In construing an alleged will, consisting of a writing asking B. and A. to "please except this," and a note to them, both signed by V., and inclosed in a sealed envelope, the word "except" will be treated as meaning "accept."—*Maris v. Adams*, 166 S. W. 475.

§ 477 (Tex.Civ.App.) A note which was found with a letter asking the payees to accept "this," in a sealed envelope, indorsed "Notes," was not incorporated into the letter by reference, so as to constitute a will, as the reference was too indefinite and ambiguous, and required parol evidence to explain it.—*Maris v. Adams*, 166 S. W. 475.

In order to incorporate a separate instrument into a will by reference, it must be in existence at the time of the execution of the will, which fact must appear upon its face, and the instrument intended must be described in clear and definite terms.—*Id.*

§ 487 (Mo.App.) In a suit to construe a will, declarations of testator as to the meaning of the will are inadmissible.—*Snyder v. Toler*, 166 S. W. 1059.

§ 488 (Mo.App.) Even where a will is ambiguous, parol evidence must be limited to the condition of testator's feelings towards the persons affected by the will, so as to thereby place the court in the possession of the facts as testator viewed them.—*Snyder v. Toler*, 166 S. W. 1059.

§ 488 (Tex.Civ.App.) If an alleged will, consisting of a writing asking B. and A. to accept "this," and a note to them, both signed by V., and inclosed in a sealed envelope, indorsed "Notes," was ambiguous on account of the use of the words "Notes" and "this," it was a patent ambiguity, which could not be explained by parol evidence.—*Maris v. Adams*, 166 S. W. 475.

### (B) Designation of Devisees and Legatees and Their Respective Shares.

§ 496 (Ky.) Where testator devised real estate to his daughter for life, with remainder to her descendants, and she left two sons and three grandchildren, children of one of such sons, held that the entire estate passed to the sons, and the grandchildren took no interest.—*Smith v. Thom*, 166 S. W. 182.

### (F) Vested or Contingent Estates and Interests.

§ 634 (Ky.) A devise to devisees for life, with gift over of the share of a devisee on his death to his children, vests in the children of a devisee a vested estate in remainder, and, on the death of a child without issue during the life of the devisee, the estate in remainder passes under the will of the child or as intestate property.—*Jones v. Thomasson*, 166 S. W. 1001.

Where a devise over is to the children of a life tenant not named or to children named, the children take a vested estate in remainder, while, if the devise over is to the heirs of the life tenant, the heirs take only a contingent remainder, subject to be defeated by their death before the death of the life tenant, unless the word "heirs" means "children."—*Id.*

§ 634 (Ky.) Will construed, and held that the beneficiary of a trust thereunder took a contingent remainder, subject to be defeated only by his death before that of the trustee, and that, on his surviving the trustee, the remainder was converted into a fee.—*Bank of Taylorsville v. Vandyke*, 166 S. W. 1024.

**(H) Estates in Trust and Powers.**

§ 675 (Mo.App.) A will, which gives to testator's wife all his property "knowing she will deal properly with," his grandchild and his son, does not create a precatory trust in favor of the grandchild or son.—*Snyder v. Toler*, 166 S. W. 1059.

Where a testamentary gift is absolute, it will not be lessened by mere words of recommendation, unless the will clearly shows that testator had in mind the creation of the trust, and not a mere appeal to the discretion of the beneficiary.—*Id.*

**VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.****(A) Nature of Title and Rights in General.**

§ 731 (Ky.) A testamentary trustee who takes additional security for a debt due from a legatee by taking a mortgage on other property of the legatee is not thereby deprived of his right to rely on the lien created by law on the interest of the legatee to secure his indebtedness.—*Rice v. Bradley's Trustee*, 166 S. W. 1013.

That money advanced by a creditor of a legatee was applied in payment of his debt to the estate of testator did not postpone the right of the testamentary trustee to assert his lien on the interest of the legatee in the estate until the debt of the creditor was paid.—*Id.*

A testamentary trustee has no authority to waive his lien on the interest of a legatee indebted to the estate to the prejudice of the estate, for the benefit of a subsequent creditor of the legatee.—*Id.*

§ 744 (Ky.) A testamentary trustee entitled to a lien on the interest of a legatee in the estate to secure the debt due from the legatee to the state, who consented that a creditor of the legatee might take a mortgage on the interest of the legatee, did not thereby make the mortgage a superior lien on the legatee's interest.—*Rice v. Bradley's Trustee*, 166 S. W. 1013.

**WITNESSES.**

See Appeal and Error, §§ 882, 1048, 1056; Criminal Law, §§ 507-511, 598, 603, 825; Depositions; Evidence; Trial, § 140.

**II. COMPETENCY.****(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 161 (Ky.) In an action upon a note defendants could testify as to an agreement between them, plaintiff, and her deceased husband, whereby the note was to be paid in legal services; Civ. Code Prac. § 606, subsec. 2, not rendering it incompetent, as plaintiff herself was present and a party to the agreement.—*Bennett v. Miller*, 166 S. W. 805.

§ 163 (Tex.Civ.App.) In a lessee's action for an injunction, declarations against the deceased lessor's interest *held* not objectionable as declarations of a decedent, where neither his heirs nor executors nor any of the witnesses were parties to the suit.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

§ 177 (Ky.) Where it was claimed that decedent committed suicide, and defendant introduced evidence that one of the beneficiaries had stated that decedent said at the time of his death that he was going to kill himself, such beneficiary could testify that no such conversation took place, and that decedent made no articulate statements at the time.—*Sovereign Camp Woodmen of the World v. Landrum*, 166 S. W. 598.

**(D) Confidential Relations and Privileged Communications.**

§ 208 (Ark.) A physician who has treated plaintiff professionally is not for that reason disqualified to testify as an expert concerning plaintiff's physical condition based on facts observed at the trial and not depending on the previous relation of physician and patient.—*Triangle Lumber Co. v. Acree*, 166 S. W. 958.

**III. EXAMINATION.****(A) Taking Testimony in General.**

§ 255 (Mo.) A report of condemnation commissioners cannot be used to refresh the recollection of one of the commissioners, testifying in the proceeding as an expert as to the value of the property.—*Kansas City Southern Ry. Co. v. Second Street Improvement Co.*, 166 S. W. 296.

§ 255 (Tex.Civ.App.) In an action for an injunction by a lessee under a verbal lease, the lessor's written promise to make a written lease *held* admissible as a memorandum to refresh the memory of the witness who had drawn it.—*Edwards v. Old Settlers' Ass'n*, 166 S. W. 423.

**(B) Cross-Examination and Re-examination.**

§ 268 (Tex.Cr.App.) Where a witness for the defense was not interrogated on cross-examination about any matter not brought out by accused, it was not error to permit the state, on the cross-examination, to ask the witness about a written statement she had made, though the statement was not introduced nor offered in evidence.—*Lopez v. State*, 166 S. W. 154.

§ 268 (Tex.Cr.App.) Cross-examination of a witness for defendant in bigamy, his alleged second wife, *held* legitimate on the issue of whether or not she was married to defendant by a certain person on a certain date.—*Edwards v. State*, 166 S. W. 517.

**(C) Privilege of Witness.**

§ 297 (Tex.Cr.App.) Sustaining the claim of privilege of one indicted for the same offense as defendant, when called as a witness for the state, was not error.—*Wyres v. State*, 166 S. W. 1150.

§ 303 (Tex.Cr.App.) Where, on the refusal of a witness summoned before the grand jury to be sworn on the ground that she presumed she would be questioned concerning a crime committed by her and another, the district attorney with the sanction and approval of the district judge, tendered her immunity from prosecution, she could be compelled to testify.—*Ex parte Barnes*, 166 S. W. 728.

**IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.****(A) In General.**

§ 317 (Mo.App.) Statements by a witness irreconcilable with the remainder of his testimony cannot be taken as substantial evidence of the facts testified to.—*Speaks v. Metropolitan St. Ry. Co.*, 166 S. W. 864.

§ 321 (Tex.Cr.App.) The court properly refused to permit accused to impeach her own witness as to the man whom he saw in bed with accused, especially as it was immaterial; it appearing without question that two men were caught in bed with accused and another woman.—*Unningham v. State*, 166 S. W. 519.

§ 331½ (Tex.Cr.App.) Where the defendant had made an affidavit as to the testimony that would be given by three absent witnesses, *held* error to compel him to testify on cross-examination as to what he had heard those witnesses testify at the inquest, and at a hearing on habeas corpus.—*Swilley v. State*, 166 S. W. 733.



**(B) Character and Conduct of Witness.**

§ 337 (Mo.App.) Where accused, charged with violating the local option law, testified in his own behalf, evidence of his reputation for violating the local option law was admissible and inquiries as to his reputation to a time shortly prior to the date of the offense charged were proper.—State v. Fitch, 166 S. W. 639.

§ 337 (Tex.Cr.App.) The court should not have permitted the district attorney to ask defendant, in a prosecution for seduction, if he had not left another county because indicted for rape on a certain girl, when the attorney at the time was aware that no such indictment had ever been presented, or arrest made.—Capshaw v. State, 166 S. W. 737.

§ 340 (Tex.Cr.App.) Where, in a prosecution for seduction, the district attorney asked one of defendant's witnesses if he had not left another county because he carried a pistol, and if he had not so stated to a third party, it was error to permit the attorney to call such third party to contradict the witness; such evidence not being admissible for impeachment.—Capshaw v. State, 166 S. W. 737.

§ 344 (Tex.Cr.App.) Proof that a witness had left another county because he had carried a pistol was not admissible for the purpose of impeachment.—Capshaw v. State, 166 S. W. 737.

§ 352 (Tex.Cr.App.) On trial for delivering an anonymous letter reflecting on a girl's integrity, chastity, etc., evidence that on the night before the delivery accused was seen hugging and kissing her held properly excluded, in the absence of any showing that this was with her consent or permission.—Bradfield v. State, 166 S. W. 734.

**(C) Interest and Bias of Witness.**

§ 373 (Tex.Civ.App.) Where an expert witness was not interrogated as to what he was to be paid for attending court, evidence could not be introduced, after he had testified and left the county, that he was paid in connection with his testimony.—Good v. Texas & P. Ry. Co., 166 S. W. 670.

**(D) Inconsistent Statements by Witness.**

§ 380 (Ark.) Plaintiff, upon surprise at the testimony of his witness and proper predicate therefor, held entitled to introduce evidence of statements contradictory to the testimony of such witness.—Jonesboro, L. C. & E. R. Co. v. Gainer, 166 S. W. 571.

§ 380 (Ark.) A test of competency of evidence, contradicting a denial of a witness on cross-examination that he made a certain statement, is whether accused was entitled to prove the statement as a part of his case, independently of the denial of the witness.—Tillman v. State, 166 S. W. 582.

**(E) Contradiction and Corroboration of Witness.**

§ 410 (Tex.Cr.App.) That two witnesses contradicted each other, in that one testified that he was in an office at the time of the shooting, which another witness denied, would not entitle the witness stating the affirmative to show that he had made statements which corroborated his evidence, though he could show by other evidence that he was at the office at the time testified.—Bain v. State, 166 S. W. 505.

§ 414 (Tex.) Where the defendant introduced evidence that plaintiff's wife made no complaint of the injuries for which recovery was sought, to show that her claim was a recent fabrication, plaintiff can introduce statements by his wife at the same time as to the occurrence of the accident and the injury.—Houston & T. C. Ry. Co. v. Fox, 166 S. W. 693.

Statements by the injured person in rebuttal of defendant's contention that plaintiff's claim is a recent fabrication should be confined to statements as to the occurrence of the accident and the resulting injuries.—Id.

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